

cretion to the trial court. To do otherwise, the court seemed to hint, would upset the difficult process of impaneling an impartial jury. This decision was made easier by the absence of any clear signs of impartiality, and by the fact that the jury, after long and thoughtful deliberations, rendered a verdict for a lesser charge.

Charles F. Storrow

ZONING-RIGHT OF TOWN TO DENY STATE AGENCY A ZONING PERMIT-  
*Vermont Division of State Buildings v. Town of Castleton Board of Adjustment*, 138 Vt. 250, 415 A.2d 188 (1980).

#### STATEMENT OF THE CASE

The appellee, Vermont Division of State Buildings, was granted a zoning permit by the Castleton administrative officer to convert a former college dormitory into a residence for eight or more juveniles who had been housed at the Weeks School.<sup>1</sup> Responding to neighborhood complaints, the Town of Castleton Board of Adjustment, appellants, rescinded the permit and ruled that the proposed use of the eight bedroom house on Seminary Street was non-residential.<sup>2</sup> As a result of the classification, the building could not be used for a group home<sup>3</sup> since it could not

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1. Until 1979, the Weeks School in Vergennes was the primary secure detention facility in the state for juveniles. Under authority of Vt. STAT. ANN. tit. 33, § 632(b) (1980), the Department of Corrections closed the Weeks School on April 1, 1979 and transferred the responsibility for the youths to the Department of Social and Rehabilitation Services (SRS). SRS then stepped up their efforts to deinstitutionalize as many of their charges as possible under a program entitled "Housing for Model Youth Service Program Including Instructional Facilities." See generally, Brief of Appellee at Statement of Facts; Brief of Appellants at 10, Vermont Div. of State Bldgs. v. Castleton Bd. of Adjustment, 138 Vt. 250, 415 A.2d 188 (1980).

2. 138 Vt. 250, 253, 415 A.2d 188, 191 (1980).

3. The group home held not to qualify under Castleton's zoning regulations would have been "staffed by approximately ten persons . . . [and] . . . would provide housing and instructional areas for juvenile delinquents and serve as a screening and temporary detention center for other juveniles." *Id.* According to Deputy Commissioner of SRS Marian M. Cummings, the facts as argued were based on a preliminary plan not reflective of the final proposal for the Wright House in Castleton. The group home as finally proposed would have been

meet the non-residential minimum side yard requirements.<sup>4</sup> The Rutland Superior Court reversed the Board of Adjustment, declared the proposed use to be residential according to the dictionary definition, and granted declaratory and injunctive relief to the appellee.<sup>5</sup> The Vermont Supreme Court reversed the superior court and reinstated the decision of the Board of Adjustment.<sup>6</sup> The supreme court held that denial of the zoning permit was consistent with Castleton's zoning power as enunciated in title 24, section 4409(a) of Vermont Statutes Annotated.<sup>7</sup>

This case presents four issues. The first two are procedural: (1) whether the Division of State Buildings properly filed its appeal to the superior court under Rule 74(a) of the Vermont Rules of Civil Procedure<sup>8</sup> by filing its notice of appeal with the court instead of with appellants, the Castleton Board of Adjustment; and (2) whether title 24, section 4472(a) of Vermont Statutes Annotated,<sup>9</sup>

staffed by only four persons. Telephone interview with Marian M. Cummings (April 13, 1981).

4. The minimum side yard requirements applicable are found in § 630 of the Castleton Zoning Regulations, as follows:

Side Yard Minimum	<i>Residential Uses</i>	<i>Non-Residential Uses</i>
	Total 40 feet	50 feet each side
	Minimum 15 feet	

5. 138 Vt. 250, 253, 415 A.2d 188, 191 (1980).

6. *Id.* at 259, 415 A.2d at 194.

7. *Id.* at 258, 415 A.2d at 193. VT. STAT. ANN. tit. 24, § 4409(a) and (a)(1) (1975) provide that a municipality may regulate "state or community owned and operated institutions and facilities . . . with respect to size, height, bulk, yards, courts, setbacks, density of buildings, off-street parking and loading facilities and landscaping or screening."

8. VT. R. CIV. P. 74(a) (1971) provides, in relevant part, that an appeal shall be taken by filing with the clerk or other appropriate officer of the agency a notice of appeal in the manner and within the time provided in Rules 3 and 4 of the Rules of Appellate Procedure. Upon the filing thereof, the clerk or officer shall serve notice upon all interested parties and transmit a copy of the notice to the clerk of the county court to which the appeal is taken.

9. VT. STAT. ANN. tit. 24, § 4472 (1975) provides, in relevant part: the exclusive remedy of an interested person with respect to any decision or act taken, or any failure to act . . . shall be the appeal to the board of adjustment under section 4464 of this title, and the appeal to a superior court from an adverse decision upon such appeal under section 4471 of this title . . . . [S]uch interested person shall be entitled to a de novo trial in the superior

in providing that an appeal to the superior court is the exclusive remedy available to the appellee, prohibits the superior court from granting injunctive and declaratory relief. The remaining issues relate to a conflict of authority between state and local government: (3) whether the state's use of a building for a group home conforms to Castleton's residential zoning plan;<sup>10</sup> and (4) whether state agencies are or should be exempt from municipal zoning regulations.<sup>11</sup> These two issues are closely related and may be joined into the query: when does a state plan supersede a local plan? This question is taking on new significance as the trend toward deinstitutionalization accelerates.<sup>12</sup>

### I. PROCEDURAL ISSUES

The Vermont Supreme Court held that this appeal was properly before the superior court despite a minor technical variance from Rule 74(a) of the Vermont Rules of Civil Procedure.<sup>13</sup> The procedure required under Rule 74(a) is the filing of a notice of appeal with "the clerk or other appropriate officer of the agency."<sup>14</sup> Counsel for the Vermont Division of State Buildings filed his appeal from the Board's decision directly with the superior court clerk. The various documents were then served by a sheriff upon the secretary of the Castleton Board of Adjustment. The appeal was perfected because the secretary was served with the superior court complaint within the requisite thirty day period. The policy

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court.

10. 138 Vt. 250, 258-59, 415 A.2d 188, 194. See generally R. ANDERSON, *AMERICAN LAW OF ZONING* §§ 3.23-.34, 9.24 (2d ed. 1976 and Supp. 1980) for a detailed discussion of the criteria that have been applied.

11. 138 Vt. 250, 257, 415 A.2d 188, 193.

12. See Kressel, *The Community Residence Movement: Land Use Conflicts and Planning Imperatives*, 5 N.Y.U. REV. OF L. AND SOC. CHANGE 137, 138 (1975). Professor Kressel suggests that "right to treatment" litigation has led conceptually to the "least restrictive alternative" doctrine and a consequential demand for treatment "beyond the walls of traditionally isolated and dehumanizing institutions." *Id.* See, e.g., *Donaldson v. O'Connor*, 493 F.2d 507 (5th Cir. 1974), *vacated on other grounds* 422 U.S. 563 (1975) (right to treatment case); *Dixon v. Weinberger*, 405 F. Supp. 974 (D.D.C. 1975) (least restrictive alternative).

13. 138 Vt. 250, 255, 415 A.2d 188, 192.

14. *Id.* at 254, 415 A.2d at 191. Vt. R. Civ. P. 74(a) (1971) provides that the appeal must be filed according to Vt. R. App. P. 4 (Supp. 1980) which states that filing must be made within thirty days of the date of entry of the judgment or order appealed from.

restated by the Vermont Supreme Court is that "a notice of appeal 'must inform the parties and the tribunals concerned that the proceedings are not concluded so they may respond accordingly.'" <sup>15</sup>

The court was not persuaded by two recent cases cited by the appellants. It appeared to the court that appellants in both *Shortle v. Board of Zoning Adjustment*<sup>16</sup> and *Harvey v. Town of Waitfield*<sup>17</sup> failed to win de novo review because the board of adjustment was not notified within the prescribed period.<sup>18</sup> In this case, the Castleton Board of Adjustment was made aware that the dispute continued and notification from the court, rather than directly from the appellee, was not an error fatal to the entire action.<sup>19</sup>

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15. *Elliot v. Department of Employment Security*, 137 Vt. 536, 538, 409 A.2d 563, 565 (1979) (per curiam) (citing *Badger v. Rice*, 124 Vt. 82, 84, 196 A.2d 503, 505 (1963)). In *Elliot*, a claimant of unemployment benefits appealed a ruling of the Vermont Employment Security Board. The court refused to construe as a proper appeal a letter by the claimant to the Department seeking the name of an informant. In *Badger v. Rice*, the court held that a letter to the administrative officer of the Board of Adjustment was sufficient as a notice of appeal. Despite possible procedural irregularities, the court found the legislative purpose of providing an appellate forum "easily accessible to the community at large" is best served by "a liberal construction" of the appeals procedure. 124 Vt. 82, 85, 196 A.2d 503, 505.

16. 136 Vt. 202, 388 A.2d 430 (1978) (per curiam).

17. 137 Vt. 80, 401 A.2d 900 (1979).

18. The court in *Shortle* concluded that the appeal was properly dismissed not only because it was not timely filed, but also because the Rutland Zoning Board, appellants, brought a declaratory judgment action rather than an appeal. *Shortle v. Board of Zoning Adjustment of Rutland*, 136 Vt. 202, 203, 388 A.2d 430, 431 (1978). In *Harvey*, an appeal to the superior court was never taken, and original jurisdiction of that court would be invoked only if the constitutionality of a zoning law was being challenged. *Harvey v. Town of Waitfield*, 137 Vt. 80, 82, 401 A.2d 900, 901 (1979).

19. 138 Vt. 250, 253, 415 A.2d 188, 191 (1980). In the court's words, "[e]ven though an appellant may attempt to invoke the jurisdiction of the superior court by an erroneous procedure, the timely filing of a notice with the board of adjustment gives the appeal validity." *Id.* See *In re Pfeiffer*, 136 Vt. 52, 53, 383 A.2d 633, 633 (1978), where the judge who tried the Castleton case below was reversed for dismissing an appeal because VT. STAT. ANN. tit. 24, § 4471 (1975), which requires "notice of the appeal [be sent] to every interested person appearing and having been heard at the hearing before the board of adjustment," was read too narrowly.

A collateral procedural point, also clarified by the Vermont Supreme Court, was that furnishing fewer copies than required by VT. R. APP. P. 3(d) (1971) and 3(e) (Supp. 1980) (one to each counsel of record, plus one to every party not represented by counsel) "is not fatal to the validity of the appeal." *Vermont Div. of State Bldgs. v. Castleton Bd. of Adjustment*, 138 Vt. 250, 255, 415 A.2d 188, 192.

Having ruled that the appeal was properly before the superior court, the next issue was whether that court was able to grant declaratory and injunctive relief. Appellants asserted that title 24, section 4472 of Vermont Statutes Annotated,<sup>20</sup> which provides that appeal to the superior court is the "exclusive remedy of an interested person," must be and has been read restrictively to limit the remedies which the lower court may grant.<sup>21</sup> Central to this argument as framed by appellants is *Fisher v. Town of Marlboro*.<sup>22</sup> In *Fisher*, the court reluctantly affirmed a lower court order denying declaratory relief to the plaintiff who questioned Marlboro's zoning provisions.<sup>23</sup> The appellants in *Castleton Board of Adjustment* overlooked the fact that the plaintiff Fisher had not exhausted his administrative remedies as required by title 24, section 4464(a) of Vermont Statutes Annotated.<sup>24</sup> Correctly read, the "exclusive remedy" language of section 4464(a) is not a dispositional limitation but a jurisdictional limitation. The appeal here was properly before the lower court. Once an appeal is properly taken, the lower court is free to employ any remedy "within its jurisdiction and consistent with law and equity."<sup>25</sup>

In the instant case, the superior court granted an injunction preventing the town zoning board and the residential neighbors from taking any further action that would interfere with construction and alteration of the property. Although the lower court was acting within its power in granting injunctive relief, it was reversed by the Vermont Supreme Court because the record contained insufficient evidence of obstruction by either the neighbors or the town. The court held that "[t]he issuance of an injunction was unwarranted and error."<sup>26</sup> An injunction is "an extraordinary remedy and will not be granted routinely unless the right to relief is

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20. VT. STAT. ANN. tit. 24, § 4472(a) (1975). See note 9 *supra*.

21. Brief of Appellants at 2 - 7, Vermont Div. of State Bldgs. v. Castleton Bd. of Adjustment, 138 Vt. 250, 415 A.2d 188.

22. 132 Vt. 533, 323 A.2d 577 (1974).

23. *Id.* at 534-35, 323 A.2d at 578.

24. VT. STAT. ANN. tit. 24, § 4464(a) (1975).

25. 138 Vt. 250, 256, 415 A.2d 188, 192.

26. *Id.* at 257, 415 A.2d at 193.

clear.”<sup>27</sup> Vermont Rule of Civil Procedure 65(d) requires that “[e]very . . . order . . . granting a preliminary or permanent injunction . . . shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained.”<sup>28</sup> This standard was not met here.

## II. CONFLICT OF AUTHORITY ISSUES

The Vermont Supreme Court dealt summarily with the two remaining questions. The court held the meaning of “residential” in the Castleton zoning regulations is clarified by section 630 of those regulations which includes a list of eight conforming uses.<sup>29</sup> A group home is not a residence just by virtue of the fact that people will live there.<sup>30</sup> The court noted that activities at the residence would include education, counseling and some screening of temporary residents. Activities such as these are not considered residential uses under section 630. Therefore, the building must conform to different (non-residential) criteria.<sup>31</sup>

The determination that the Castleton group home did not qualify as a residence was central to the disposition of this case. The house was built too close to the north side property line (thirty-five feet) to meet the mandated fifty foot *non-residential* setback. The court held that Castleton may exclude this project from a residential location since the zoning bylaws are “consistent with an articulated regulatory scheme which minimizes the adverse

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27. *Id.* at 256, 415 A.2d at 193.

28. This rule requiring a court to have good reason before granting an injunction, closely parallels FED. R. CIV. P. 65(d). The Reporters Notes, commenting on the necessity of detail, observe that since the injunctive power is potentially so broad, the specificity requirement was designed as a safeguard against judicial zealotry. *See generally*, WRIGHT AND MILLER, FEDERAL PRACTICE AND PROCEDURE § 2956 (1973).

29. 138 Vt. 250, 258-59, 415 A.2d 188, 194. The uses permitted under Castleton Zoning Regulation § 630 are: (1) One family dwelling (2) Professional residence (3) School (4) Religious institution (5) Public outdoor recreation (6) Enclosed accessory building use (7) Home occupation (8) Community center.

30. *Id.* Reliance on a dictionary definition is misplaced where a valid town regulation “specifies with greater particularity than mere ‘housing’ those uses permitted in the district where the facility is proposed.” *Id.* at 258, 415 A.2d at 194.

31. *Id.* at 259, 415 A.2d at 194.

impact of one land use upon another, 24 V.S.A. § 4302(a)(11), and is consistent with the legislative intent of 24 V.S.A. § 4409(a)."<sup>32</sup>

The final issue was whether state projects should be exempt from local zoning regulation, the thrust of the argument being that such exemption was necessary for the state to fulfill its statutory function. In previous cases where the legislature had not explicitly set the priority of competing statutory schemes, the Vermont Supreme Court employed the difficult distinction between governmental and proprietary functions.<sup>33</sup> The fine lines involved in the governmental-proprietary distinction were avoided here by the enactment of a relevant zoning law, title 24, section 4409(a) of Vermont Statutes Annotated. Municipalities have been limited under that statute to regulating state owned and operated facilities only with regard to: "size, height, bulk, yards, courts, setbacks, density of buildings, off-street parking and loading facilities and landscaping or screening requirements."<sup>34</sup> In other words, the state is not immune from local zoning laws as held in *Kedroff v. Town of Springfield*.<sup>35</sup> The town can closely regulate the location and physical layout of a state project. Since Castleton has several other districts where a group home would be a conforming use, or at least conditionally conforming, the town was not thwarting state purposes. It was consistently applying its articulated regulatory land use scheme which a town may legally do.<sup>36</sup>

### CONCLUSION

The tension between state authority and local autonomy is being felt throughout the country. Zoning has become a popular means of planned development; deinstitutionalization of youthful offenders is heralded as a more humane and therapeutic alterna-

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32. *Id.*, 415 A.2d at 194.

33. Brief of the Appellee at 14-15, *Id.*, (quoting *Kedroff v. Town of Springfield*, 127 Vt. 624, 629, 256 A.2d 457, 461 (1969)). See generally, 84 A.L.R.3d 1187 (1978).

34. VT. STAT. ANN. tit. 24, § 4409(a) (1975) allows local regulation of five use categories only with respect to the physical characteristics listed in the text.

35. 127 Vt. 624, 629, 256 A.2d 457, 461 (1969). The state, or municipality acting in its stead, was considered immune *only* while performing governmental functions.

36. 138 Vt. 250, 259, 415 A.2d 188, 194.

tive to institutionalization.<sup>37</sup> Without delving into the merits of less restrictive placement programs, it is sufficient to note that they are upon us. Indeed, it is likely that their time has come.<sup>38</sup>

A survey of the legal literature in this area reveals a near unanimous agreement that community resistance to deinstitutionalization programs stems from a lack of both communication and advance education about the programs. Data from Vermont is scarce, but experiences in other states suggest that neighborhood fears of increased crime, diminution of property values, and fear of exposure to social deviancy are recurring, but ill-founded, objections.<sup>39</sup>

It is suggested that deinstitutionalization requires "a willingness among community members to allow a decrease in their social distance from the mentally ill [and from the juvenile offenders to

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37. This trend, and similar movement in the mental health and adult offender area, has been the subject of a number of comments. See, e.g., Boyd, *Strategies In Zoning and Community Living Arrangements For Retarded Citizens: Parens Patriae Meets Police Power*, 25 VILL. L. REV. 273 (1980); Kressel, *The Community Residence Movement: Land Use Conflicts and Planning Imperatives*, 5 N.Y.U. REV. OF L. AND SOC. CHANGE 137 (1975) [hereinafter cited as Kressel]; Lippincott, "A Sanctuary For People": *Strategies For Overcoming Zoning Restrictions On Community Homes For Retarded Persons*, 31 STAN. L. REV. 767 (1979); Comment, *Exclusion of Community Facilities For Offenders and Mentally Disabled Persons: Questions of Zoning, Home Rule, Nuisance, and Constitutional Law*, 25 DE PAUL L. REV. 918 (1976) [hereinafter cited as *Exclusion of Community Facilities*]; Note, *Zoning For The Mentally Ill: A Legislative Mandate*, 16 HARV. J. LEGIS. 853 (1979) [hereinafter cited as *Zoning*].

38. They seem to offer the threefold advantage of greater success measured in recidivism rates, considerable economic savings, and alignment with federal policy directives. "The correctional strategy with the most promise is reintegration of offenders into the community. Community based programs aid correction's goal of 'restoring family ties; obtaining employment and education; [and] securing in the larger sense, a place for the offender in the routine functioning society.'" *Exclusion of Community Facilities*, *supra* note 37, at 919, n.9 (quoting PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: CORRECTIONS 7, 28 (1967)).

39. Kressel, *supra* note 37, at 145-46. One case involved a juvenile halfway house which actually increased in value as the youths worked to repair it. *Shuman v. Bd. of Aldermen*, 361 Mass. 758, 768, 282 N.E.2d 653, 660 (1972). The limited studies which do exist suggest that there is little correlation between group homes and either decreases in property value or increases in neighborhood crime. Professor Kressel argues that scientific data is sorely needed to assuage community fears. Kressel, *supra* note 37, at 145. See also, *Zoning*, *supra* note 37, at 858-61.

effect] true integration."<sup>40</sup> By allowing communities to place group homes away from the environment the programs require, we exhibit what Judge Bazelon decried as just another standardized response where a "benevolent purpose of deinstitutionalization [becomes] a justification for excessive neglect."<sup>41</sup> If our goal is truly to rehabilitate, argued Judge Eagen in his dissent in *City of Pittsburgh v. Commonwealth*,<sup>42</sup> should not the responsible authorities be able to put people in the environment most conducive to that end? And if we agree that the state, rather than the municipality has the greater expertise, should they not decide what environment is most conducive to rehabilitation?

The political struggle over the use of exclusionary zoning has just begun to be litigated in Vermont. We should endeavor not to lose sight of our primary objective: to find a suitable environment for our troubled youth.

Steven A. Adler

CONSTITUTIONALITY OF VERMONT'S CRIMINAL STATUTE ON IMPRISONMENT FOR DEBT—*State v. Carpenter*, 138 Vt. 140, 412 A.2d 285 (1980).

#### STATEMENT OF THE CASE

The defendant, sole owner and operator of a dress manufacturing business, failed to pay his employees within the period prescribed by state statute.<sup>1</sup> Employers<sup>2</sup> are held strictly liable for the

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40. *Zoning*, *supra* note 37, at 899 (quoting H. Lamb, *COMMUNITY SURVIVAL FOR LONG TERM PATIENTS* (1976)).

41. Bazelon, *Institutionalization, Deinstitutionalization and the Adversary Process*, 75 COLUM. L. REV. 897, 908 (1975).

42. 468 Pa. 174, 360 A.2d 607, 614 (1976) (Eagen, J., Jones, C.J., and Nix, J., dissenting).

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1. VT. STAT. ANN. tit. 21, § 342(a) (1978) provides that "[a]ny person having employees in his service doing and transacting business within the state shall pay each week, in lawful