COMMUNITY-BASED RESIDENTIAL CARE FACILITIES
IN FAMILY NEIGHBOURHOODS:
A Problem of Land-use Control & Equity

by

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ABSTRACT

Community-based residential care facilities are defined in terms of the following characteristics: (1) they provide a service to persons afflicted by a particular social, psychological or physical dysfunction, (2) the method of treatment includes a requirement that the persons being treated live together, at least temporarily, at the place where the service is provided, and (3) the method of treatment requires or is facilitated by a location in which the neighbours and community facilities of a normal residential area are accessible to those receiving the service or treatment. Examples include half-way houses for convicts released from jail, rehabilitation facilities for ex-addicts, homes for the physically and mentally handicapped, shelters for victims of family violence, and foster homes.

To the extent that the defining characteristics of the group to be served is perceived as something threatening and that the residents are seen as something other than a "family", there is conflict between the objective of helping those being treated by locating the facility in a typical, family neighbourhood and the desire of the other residents of the local community to restrict land use within their area to homes for "normal" families and single individuals. Depending on the attributes of the group to be served, this
desire for normalcy is often expressed in fears about declining property values, personal injury and property damage caused by the users of the facility, corruption of the morals or encouragement of deviant behaviour among others in the neighbourhood, and general incompatibility of values and behaviour.

Academic literature and local experiences with attempts to establish community-based residential care facilities are used to explore the sources and justification for neighbourhood opposition to such facilities. Examples of zoning legislation from the North Shore of Greater Vancouver reveal the variations in land-use policy. Case law and 'representative statute law show that discriminatory zoning by-laws can be considered *ultra vires* if they "land zone by people zoning". Also, establishment of residential care facilities is examined from a human rights point of view as they pertain to discrimination in housing.

The conclusions suggest possible programmes and strategies for facilitating the establishment of community-based residential care facilities including possible change to legislation and regulation and the amelioration of conflict between opposing interest groups.
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CHAPTER 1
INTRODUCTION

1.1 Background

Since the mid-1960's, the delivery of social services for persons requiring rehabilitation for a variety of problems has been moving away from large institutions. The number of patients in B.C. psychiatric institutions (Riverview; Valleyview) has been in steady decline and such decline has increased sharply since 1972. (Lioy, M., 1975, page 153.) A study conducted in 1972 by the provincial Mental Health Branch (Patient Resident Survey) indicated that 5.4% of Riverview patients and 21% of Valleyview residents did not require institutional psychiatric care. (Ibid.)

Increase in the number of individuals released on parole has occurred as well since 1965-1966 (Ibid, page 134), and most revocations of parole (27.3% in 1971-1972) "take place in the first few months after release, when the parolee has the most difficulty re-adapting to the community. (Ibid.)

The provincial government of British Columbia has promoted a policy of deinstitutionalization and has encouraged respective social agencies to implement such
community-based residential programmes where needed. The acceptance of such public facilities by local communities has been less than encouraging and has, in fact, produced much controversy and conflict.

1.2 The Problem

The task of this study will be to address the major issues involved in establishing community-based residential care facilities. This term, used throughout the thesis, includes the full range of services known as group homes, halfway houses, hostels and other special residences.

The problem is that of conflict between present zoning practice and social change. The major issues of conflict may be generally identified as follows:

- The issue of discrimination of disadvantaged persons in housing. This necessarily includes exclusionary zoning regulations; "fair-share" housing policies; and licencing of facilities.

- The issue of fair legislation as a means of providing stability and of reflecting public attitudes. This includes discussions of sovereignty of
power, delegation of power, and the conflicting attitudes of diverse interest groups.

1.3 Purpose and Scope of the Study

Much research on the need for residential care facilities has been conducted with little attention given to the problems of their establishment. The purpose of this study therefore will not be concerned with restating the need of facilities to locate in single-family neighbourhoods but with their establishment in the community. The North Shore municipalities of West Vancouver, City, and District of North Vancouver have been chosen as the spatial unit of study. Information on particular aspects of residential care facilities have been gathered from sources outside the study unit as well as from within it.

For the purpose of this study, the term "community-based residential care facility" shall mean a facility provided by a social agency which provides a residential base for those persons requiring special social care. The terms "handicapped" and "disadvantaged" are used to identify those persons requiring social care insofar as they are distinguished by a group characteristic which separates them from others in society. The terms are purposefully broad. The scope of this study deals not with
a specific facility but with facilities in a generic sense.

The scope of the study is to identify those values and assumptions inherent to establishment of residential care facilities in family neighbourhoods and to develop a social policy which attempts to resolve the dilemma of conflict and order from a planning point of view.

1.4 Methodology

The methodology used in this study falls within four classes of enquiry. The study begins in Chapter 2 with a brief review of planning theory related to conflict in land-use control. The chapter continues with considerations of present zoning legislation as insufficient and often irrelevant as a tool in dealing with some aspects of planning theory and the notion of equity or fairness in location of public facilities. The question of a proper institutional setting for resolution of conflict is also discussed with reference to residential care facilities.

Chapter 3 examines the role and effect of public attitudes in the controversy of establishing community-based residential care facilities in single-family neighbourhoods. The primary issues here are those of labelling, the relationship of values to land use, and the impact of
attitudes on zoning control of residential care facilities as found in North Shore legislation.

Chapter 4 examines the control of land use as a discriminatory practice. Enquiries here relate to delegation of power, interpretation of criteria of land use, the concept of reasonableness and, finally, the kind and degree of discrimination found in land-use regulation.

Chapter 5 concludes with a formulation of possible approaches and programmes which could be employed to resolve the inequities found in some present land-use control practices.

The analysis of this study is primarily descriptive, drawing on documentation both in related literature and in case study.
CHAPTER 2
THEORETICAL ENQUIRIES ON THE NATURE
OF CONFLICT IN LAND-USE PLANNING

The debate over the quality of the physical and social environment, together with questions concerning the distribution of societal power and wealth, whether justice is possible for all, and how our values develop, all challenge the basic processes of decision-making. The growth of citizen and neighbourhood groups demanding a place in the urban decision-making structure, allocation of infrastructure such as public facilities, the choice between the extension of the urban form upward and outward, the debate on urban renewal or the fiscal structure of the city, have each confronted planners and municipal governments with a battery of issues. As a consequence, urban policy-making has become bedevilled with contradictions and uncertainty, with conflict that as Seley (1973) notes, can find no institutional setting. Boulding (1962) views conflict as:

...a situation of competition in which parties are aware of the incompatibility of potential future positions and in which each party wishes to occupy a position that is incompatible with the wishes of the other.

(At page 21.)
The issue of residential care facilities which establish in single-family neighbourhoods fits this definition. Traditional views of the concept of family demand that such facilities be seen as institutions to be located beyond the sphere of residentially-defined neighbourhoods. To this extent the issue becomes spatial in context and has led planners to implement various kinds of land-use control. In theory, the differentiation of space has been bound up in the concept of space as an impure public good (Buchanan, 1968). That is, space and the use that occupies it will always create external effects through differential costs and benefits, since by definition location implies unequal accessibility to some public facility (defined as a point in space). This concern has been the main thrust behind the location-allocation school which has sought normative solutions to the location of public facilities. It is the spatial effect of conflict that has led to the analysis of conflict-generating forces. Normative approaches formulate the problem as a mathematical programming solution such that some aggregate social welfare surrogate can be satisfied in which efficiency (least social cost) and equity (fair aggregate distribution, equalling - for example - Pareto-optimality) are synonymous.

Alternatively, the Wolpert school approaches the location of public facilities as follows: Given the
general urban structure, it is possible to locate public facilities so that micro-level externalities (i.e. localized effects) are created. This is typified by the "noxious" facility which no community wants (Mumphrey and Wolpert, 1973). The Wolpert school considers both the accessibility question (distance/cost minimum) which is regarded as "neutral" (a cookbook approach) and also derivative effects such as impacts on land values, property rights and social group displacement.

First, there is the question of users versus non-users of a facility. Normative theory makes little attempt to consider this, whereas Wolpert et al stress the locational consequences where a noxious facility has to be located. Hence, distinguishing users from non-users implies a trade-off between them in space where proximity, not accessibility, can be a cost. Clearly, this becomes an important issue in any community-based programme of residential care facilities.

Second, the extent of the external effects (i.e. as a function of distance) is also of concern. This has led to the concept of "impact field" (Dear, 1974b) which is assumed to diminish with distance from the facility site. However, this depends entirely on the type of facility and, intuitively, we might expect the existence of both positive
(e.g. a park) or negative (e.g. an incinerator) kinds of externality.

While zoning and other discriminatory land-use measures may be used favourably to plan for highly undesirable facilities, such as an oil refinery, clearly the problem arises where a certain level of reasonable accessibility is desired. Conflict will ensue because other residents of the community would also insist on a distance "filter" on the externality effect. A struggle over the siting question is inevitable. Community-based residential care facilities fit into this category and therefore the effectiveness of land-use control to ameliorate conflict is questionable.

Any model designed to deal with such situations of accessibility and distancing must include the notions of "efficiency" and "equity". These principles become important to understanding the general focus of the Wolpert effort. It will be recalled that in the normative approach these principles are considered as synomonomous and in no way contradictory in aim (as a social welfare/cost function). This assumption seems dubious. Morrill (1974) is extremely critical of the most general application of these concepts in "optimum" facility location. Analyzing various distance minimization criteria, he concludes that
these can only equate efficiency and equity in an "ideal" society with uniform population density in which minimum aggregate costs would then be acceptable (i.e. in a Christaller-like environment, with Pareto-optimality). Given any other distribution extreme, location must result in an inequitable situation. Morrill's arguments are valid for both noxious and non-noxious facilities. They do not, however, go far enough into the problem of whether spatial, rather than social, accessibility is the most useful surrogate of equity. They imply that conflict stems from notions of general accessibility, not from the specific decision-making environment of the Wolpert school.

For Wolpert et al the terms "efficiency" and "equity" have taken on very precise meanings. They have argued for a model of "conflict resolution" in the siting of noxious facilities. Given that there is likely to be opposition to the location of noxious facilities, one must minimize the effects by providing positive externalities to the afflicted group. This occurs through concessions in the form of auxiliary "desirable" facilities, or side-payments (i.e. compensation) and, at the same time, minimizing the location costs plus the concessionary costs to achieve efficiency. Hence, "equity" refers to the provision of side-payments to the afflicted group to gain a reduction in controversy.
The rationale for this model lies in the political processes underlying the decision to locate, as well as the notions of power and its distribution. A method is sought to placate the most powerful groups in those locations where facilities are most likely to be sited. As such, it can be regarded as highly controversial, falling within the "manipulative" section of Arnstein's "Ladder of Citizen Participation" (1969). It is also a highly pragmatic approach based on various assumptions; for example, that bargaining power is proportional to the adverse effects of the facility. At the same time, however, its implementation would tend to follow the line of least resistance, locating facilities where there is least power to oppose (Hinman, 1970); where investment costs and side-payments are likely to be at a minimum.

The emphasis on the locational decision and impacts of facility implementation of the Wolpert school is superior in my view in its consideration of conflict rather than the normative approach, even if the model for resolution is controversial. In the normative approach, the postulate of space as an impure public good, generating conflict is by definition a circular argument that could easily be abandoned. It simply reflects a truism. Space, by definition, differentiates costs and benefits through locational accessibility since no matter where a public
facility is located such differentiation must remain true. In addition, Dear (1974b) and Teitz (1968) have found that where need (rather than demand) is concerned, accessibility is almost valueless as a concept. For example, in cases like hospitals and drug centres, opening times are a much more crucial consideration.

The importance of the emergence of community power and questions of the control of local planning raise aspects of community discretion that can be employed in terms of planned or unplanned change in a neighbourhood. Wolpert, Mumphrey and Seley (1973) have considered such aspects and outline various scenarios (both optimistic and pessimistic) of possible future neighbourhood/community situations. To this end, they note the apparent high flexibility of the low-income neighbourhood where discretionary powers, such as rezoning, are available as opposed to high-income groups. This consideration is closely linked to community control of property values.

In an important contribution to the notion of conflict, Seley (1973) tries to link urban conflict explicitly with social theory. The attempt is to mould Dahrendorf's middle-range theory of conflict (1968) with urban patterns of conflict (i.e. the empirical base), the aim being to formulate a general paradigm of community-
based planning that specifically incorporates conflict as a fundamental factor.

It is worthwhile reflecting on Dahrendorf's schema of conflict, one which may be regarded as neo-Marxist (Applebaum, 1970). As Seley points out, Dahrendorf's main concern is to show that class conflict occurs through authority relationships, or simply the "rulers versus the ruled". It is through these relationships that social change occurs. Seley argues that this does not seem to be entirely appropriate because if Dahrendorf criticizes previous "models of man" as too much "one class" (e.g. Marx stressing the role of the proletariat; Parsons, the bourgeoisie), he falls into the same trap by looking at a "one issue" model, namely, authority relationships (also, Applebaum, 1970.). Seley believes that while the analysis of authority relationships is necessary to understand urban conflict, it is not of itself sufficient, as many urban issues do not fit into authority relationships. He cites ethnicity and cultural issues in neighbourhood change as being outside Dahrendorf's schema of authority relationships. Seley concludes that the schema is not subtle enough to incorporate the issues cited.
A most interesting aspect of Seley's use of Dahrendorf's theory, however, is his translation of the latter's list of needs for a theory of social conflict to the case of urban conflict.

Figure 1:

**SELEY'S SCHEMA OF SOCIAL AND LOCATIONAL CONFLICT**


<table>
<thead>
<tr>
<th>DAHRENDORF'S LIST OF NEEDS FOR A THEORY OF SOCIAL CONFLICT</th>
<th>EXAMPLES TRANSLATED INTO A THEORY OF LOCATIONAL CONFLICT</th>
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<tr>
<td>1. What is an appropriate conception of the phenomenon and how are its main types distinguished?</td>
<td>The need for an open-ended paradigm allowing for several potential paths of conflict; i.e. different types of participation and change. Distinguished – levels of impact and opposition.</td>
</tr>
<tr>
<td>2. What conception of society is compatible with the study of conflict?</td>
<td>The planning process as a microcosm.</td>
</tr>
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<td>3. What are the structural conditions which give rise to different forms of conflict?</td>
<td>Policy regulations and practice as well as the role of technology in society, and the relative position of particularly disadvantaged groups in society.</td>
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Figure 1 (Cont'd.)

DAHRENDORF'S LIST OF NEEDS FOR A THEORY OF SOCIAL CONFLICT

EXAMPLES TRANSLATED INTO A THEORY OF LOCATIONAL CONFLICT

4. How does conflict evolve from these structural conditions?

a) The inequitability of impacts;
b) The inability of normal grievance procedures to satisfy communities; i.e. a failure of governmental responsibility.

5. What are the dimensions of each kind of conflict and under what conditions does the form of conflict vary in these dimensions?

a) Demands, strategies of participants;
b) Setting - including tangible and decision-making circumstances of a plan, as well as characteristics of the participants; previous relationships in society.

6. How can conflict be regulated?

Implications for the policy process of controversy relative to different "paths" of conflict.

Seley sets out the above schema of social and locational conflict within the context of planning, with implications for conflict emergence and resolution. (See Figure 1, item 2.) Seley clearly considers that it is the equity question (see Figure 1, item 4) in the impacts of facility location which is important, as well as the failure of decision-making to deal with community dissatisfaction. Seley regards the analysis of different "paths" of conflict
"as part of the planning process" and as the key concern if conflict is to be regulated (see Figure 1, item 6).

Seley's paradigm of community-based planning represents a useful step in providing a clear and concise procedure for a chain of events in the location of facilities and their impacts. Figure 2 illustrates the paradigm:

Figure 2:

SELEY'S PARADIGM OF COMMUNITY-BASED PLANNING
(Seley, 1973, Ibid.)
Figure 2
Continued

-Context Variables (Planners)

General Goals (Planners):

Specific Planning Processes, Goals/Action (Planners):

(X Antecedent = = (XI Intervening Variables)

XII Socialization
Adaptation
Integration

XII Goal Attainment

XIV Objective/Tangible

XV Subjective (Arnsstein)
- Manipulation
- Education/Therapy
- Behaviour Change
- Informing
- Consultation
- Placation/Cooperation
- Partnership
- Delegated Power
- Citizen Control

LEGEND
NOTE:

DECISION PATHS =

CAUSAL LINKS =
Seley's paradigm outlined in Figure 2 may be neatly translated as a shorthand scaling method of dealing with scenarios of the planning process and of dealing with such methodology as "interaction cycles" which trace the temporal swings of community gains and losses in power. Seemingly, all important considerations are included in the paradigm (e.g. antecedent variables that predate the facility's location; reactive versus initiative types of community action where the planning "push" comes alternately from within or without the local group).

Unfortunately, Seley's viewpoint stems from only a partial examination of the contribution of social theory. At various stages Seley points out that the paradigm needs to be "open-ended", since the process of facility impact does not show sufficient consistency from case to case. Such flexibility may, however, simply detract from its usefulness and it may be necessary to supplement such theory with an additional construct.

A major failing of the Wolpert school (as demonstrated by Seley) is that they begin with a one-sided approach and work this through, without considering that concepts of reciprocity and autonomy in social systems could be of more value if included in such approaches. (Gouldner, 1959.) Whatever the difference between the various theories
of social conflict that have been developed, they implicitly accept that to varying degrees reciprocal effects are a major factor.

To the extent that locational issues are social, they are also human. There exists a dependence upon fellow human beings in terms of human relations that are necessary for survival and for the fulfillment of needs. The necessary conflict between freedom and constraint which is expressed in the exercise of community power produces one of the crucial problems of human existence - the problem of social order. Regardless of their particular methods, societies have found social and human relations a necessary component in any successful attempt to order relations beyond immediate situations. At their most general level, social rules are the abstract, symbolic criteria by which members of a society deal with conflict.

The use of municipal law (zoning) has not been an adequate tool for dealing with conflicting land-use issues where community accessibility is necessary. Nor has it been an appropriate tool for determining as a social rule that equity prevail when the privilege of certain land uses is in dispute. Clearly required, as noted at the beginning of this chapter, is an "institutional
setting" which can deal effectively with the subtle differentiations of land use and human relations. The following chapters postulate and document a case for the use of human rights legislation to supplement municipal zoning law concerning the symbolization of residential care facilities, their location in a community, and free access for persons who need to reside in such facilities in order to achieve self-actualization in society.
CHAPTER 3
PUBLIC ATTITUDES TOWARD RESIDENTIAL CARE FACILITIES

The establishment of residential care facilities has provoked much community interest and controversy. Attitudes range from those who perceive establishment of care facilities as a threat to single-family neighbourhood amenity, to those who advocate the need for such facilities for persons who require the benefits of such a neighbourhood. The conflict of interest becomes a subject which municipal councils are asked to resolve by implementing laws and regulations which represent each group's interest, but in the guise of the public interest.

3.1 Difference and Normalcy

It is difficult to generalize about the nature of public attitudes. The literature suggests that such factors as social class or status, age, sex, race and education prevent any precise definition of public attitude. (Sabin and Moncuso, 1970, page 162.) Conflict theorists (see Horton, 1966, pages 701-713) have postulated the importance of divergence of values. With an awareness of such differences by member groups, divergence of view may become an organized struggle within society. The tension, mutual distrust, and divergent values of the groups generate conflict which, per se, intensifies the
conflict, as well as becoming problematic in itself.

The term "deviant" is used as a broad term whereby persons are labelled as different from those categorized as normal. Objections can be raised concerning its application to persons served by various types of residential care facilities. However, the term "deviant" does serve the purpose of emphasizing the nature of the labelling phenomenon, which is applicable to all residents of community-based care facilities regardless of their circumstance or condition. Theories of deviance suggest ways of departure by individuals from the norms regulating behaviour. As recognition of the difficulty of understanding the causes of deviance has increased, theoretical interests have shifted. The influence of societal mechanisms for social control of the incidence and nature of its social problems has spawned interest in the role of the state and the formal establishment of order over chaos and conflict. The emphasis upon the latent, deleterious consequences of formal agencies of control (i.e. the police, the courts, corrections or welfare agencies and planning departments) has led to the development of a reaction theory or, as it is commonly termed, labelling.
In his study of the political uses of language in psychiatry, social work, public school education and law enforcement, Edelman documents social control based upon the label "deviant" and our acceptance of this:

The special language of the helping professions merges cognition and affect. The term 'mental illness' and the names for specific deviant behaviours encourage the observer and the actor to condense and confound several facets of his perception: helping the sick person, repressing the dangerous non-conformist, sympathy for the former, fear of the latter, and so on.

(Edelman, 1974, page 299.)

Scott argues that labelling is the function of something quite abstract: the notion that no social order can survive unless it develops mechanisms for protecting its symbolic universe, or system of values, against the perceived threats of chaos and anomaly. (Scott, 1972, page 22.) A system of meaning is created in which everything is put into its proper place by providing a comprehensive integration of all discrete institutional processes in which everything "makes sense". This symbolic universe is regarded as valid and true; indeed, it is seen as being reality itself.
Labelled individuals, who behave differently from one's symbolic universe, will often be seen in a negative way, particularly when such an attitude is reinforced and legitimized by formal agencies and institutions which categorize or classify such individuals. To label a differentiating characteristic, particularly in terms of group norms, is to use a system of segregation. A social institution which advocates a normalization or deinstitutionalization policy suggests that the "different" person be taught to act as "normal" people do, and that society be taught to accommodate deviancy. To achieve such socialization is to acknowledge that a redistribution of rights and privileges is necessary and inevitable if one is truly interested in promoting the "public interest".

3.2 Mechanisms for Maintaining a System of Values

While it may be true that a process of socialization implies change, modification and even redistribution of a society's symbolic universe or system of values, the reality of most societies is that the status quo will strive to maintain its symbolic universe. This is not surprising, for as Scott maintains:
...no social order can survive without developing mechanisms for protecting itself against the chaos that anomaly implies.

(Scott, 1972, page 24.)

The negation of all or even part of that which is valued and prized in one's life is unlikely to be given up without some accommodation, rationale or substitution for the loss; otherwise, individuals would soon lose their grasp on reality and their own self-reality. The same can be said of those who advocate the inclusion of alternate conceptions of individual symbolic universe. The physically handicapped, for example, feel no less the need for self-identity which prompts them to "normalize" their life and the environment in which they live.

Scott suggests several "universe-maintaining mechanisms" (Berger and Luckman, 1966, pages 96-118) commonly found in industrial societies:

a) Misperception - this involves the tendency to mistake as normal and ordinary, phenomena that in reality are anomalous. For example, our conception of 'family' would have us see things in a certain way, leading us to believe that any other conception of 'family', in fact, does not exist despite evidence to the contrary.
(5% of the total private households on the North Shore are non-family households with two or more persons, not including common-law relationships - 1976 Census, Statistics Canada, "Private Households by Type". 100% data base.)

b) **Debunking evidence** - this involves questioning or ignoring phenomena which threaten one's symbolic universe. Individuals may refuse to discuss the compatibility of "different" people living as neighbours by questioning or challenging such an issue on the basis of other extraneous objections such as traffic congestion, sanitation, vandalism, property values, et cetera.

c) **Nihilation** - this involves denying the reality of anything that does not fit into the symbolic universe. For example, "There is no crime in our neighbourhood." There may well exist variations in the rate of crime in various neighbourhoods and clearly the absence of ANY crime is questionable. The statement relegates entire groups of individuals to an inferior ontological status in which they are no longer taken seriously.

d) **Confinement** - this involves the removal of
the symbolically noxious element from the midst of society, demonstrating social order and mastery over "deviant" individuals. The institutional segregation of individuals from mainstream society fits this mechanism.

e) **Normalization** - this involves the effort to force anomalous events to change in such a way as to become more nearly normal. The therapeutic rehabilitative and correctional attempts to integrate individuals into accepted patterns of mainstream society corresponds to this mechanism.

f) **Accommodation** - this involves change in the symbolic universe itself so that the deviant phenomenon is accepted into mainstream society as normal. This becomes an important corollary to normalization where social and societal change occurs to accommodate individuals as part of a shared symbolic universe. It must be remembered, however, that the clear reluctance to modify one's symbolic universe may well mean that only minor anomalies will be assimilated in order to avoid negating the entire system by which reality is patterned and made meaningful. Hence, "the mentally retarded should not be considered in the same light
as those with 'self-inflicted problems'.'"

(North Shore Times, March 2, 1977.)

To contain and control deviance, and thereby to master it, is to supply fresh and dynamic proof of the enormous powers that form the social order. It should be noted, however, that mechanisms for the maintenance of social order also contain within them those properties by which society adjusts and changes in the establishment of new social order.

3.3 Normalization

In recent years, there have been increasing claims for change in the social order to accommodate comprehensive services for those with physical, mental or social disabilities or handicaps. The continuum of services envisioned would engage an individual, in some circumstances from infancy on, through an interrelated series of educational, recreational, vocational and residential programmes. Although it may be difficult to separate the sphere of residential services from the others, it can be argued that where people come from or reside ought to form the basis of any service delivery system. (Kugel and Wolfensberger, 1969, page 82.)

A dominant view today concerning community-
based care facilities is that residential settings should approximate family homes, be integrated in neighbourhoods, and make use of generic community resources. This view reflects the increasing distaste for segregated institutions. The impetus for community-based facilities began during the 1960's in Scandinavian countries. It was there that the principle of normalization was articulated. First proposed by Nirje (1969), and later expanded by Wolfensberger (1972), in relation to the mentally retarded normalization has come to mean "making available to the mentally retarded patterns and conditions of everyday life which are (as) close as possible to the norms and patterns of mainstream society" (Nirje, 1969, page 181). While the notion is not entirely a new one, it has been the model for the community-based residential care facility.

Normalization has often been misinterpreted as meaning that provision of a normative environment will automatically benefit the residents concerned. As pointed out earlier, the success of normalization is closely tied to the degree of community accommodation that is extended to groups seeking residentially-based facilities. There also appears to be an implicit assumption as to the nature of "normal community". "Normal" may, in fact, imply the exclusion of the very group that seeks acceptance. Therefore, it should now
be acknowledged that accommodation, or a change in societal norms, may be as important as the concept of normalization. The latter cannot occur without the former.

Community-based care facilities are part of a large system of health, corrections or social service care which represent a wide diversity of type according to the size and programme provided. They may be used as a point of entry into a care system, as after-care or in rehabilitation. The residents live in these facilities for varying lengths of time (ranging from a few days or weeks to a year or more and, in certain cases, permanently). Whatever the length of time, the fact of residency is an important part of the long-term goal of either returning a person to normal societal living or providing as normal or as reinforcing a living situation as possible.

It has been stated earlier that the classification of deviants through labelling characterizes those who require residential care facilities as "different" from those with "normally"-held societal values. The identification of physical handicaps, mental retardation, age or emotional instability, are characteristics which when used as a descriptive term classify and segregate people from those not so identified. This reinforces the
"difference" and provides the justification for further segregation and confinement. It is argued here that "difference" is not an inherent characteristic of persons behaving inappropriately but, rather, public perception of the behaviour. For example, perpetuation of the difference of, say, the marginally mentally ill or retarded based on group labels seems to be explained primarily as the result of mechanisms of social control based on value bias.

The following section, therefore, is concerned with several categories of a community's system of values (symbolic universe) within the context of those mechanisms employed in an effort to maintain such a system. A further discussion is included of the particular mechanisms of local government used to effect social control - namely, zoning, which is seen to reflect a public attitude or perception of deviancy and difference.

3.4 Public Values and Land Use

The North Shore of metropolitan Vancouver has experienced much public debate concerning the establishment of residential care facilities. The conflicts which appear have provided evidence of public opinion and attitude toward such facilities.
3.4.1 Private Property

Under the conditions of suburban sprawl, social relations are framed by the structure of spaces, where distance is built in to avoid social conflict. Everywhere the size of lots and side-yard requirements meticulously set forth in zoning ordinances are translated as mechanisms for reducing the likelihood of intrusions into each homeowner's personal space. This envelope of private property rights is intended to forestall social boundary violations given the potential for discord between neighbours in proximity.

Property owners perceive the homogeneous nature of classification of land as an all-encompassing means of avoiding any risk of an incompatible use of neighbouring land. By elevating single-family residences to the highest possible status of all land uses, such neighbourhoods can effectively exclude all other uses. As one individual argued:

There is already too much institutional and social housing in what is supposed to be a single-family residential area.

(The Express, January 15, 1979.)
There has been a gradual breakdown in this century in the ranking of individual roles in society and a trend toward an expanded middle class which has extended membership to those previously excluded. Reactionary attitudes which perceive dissolution of a narrowly defined class are often expressed as opposition to residential care facilities and as support for more overtly spatial expressions of differencing to retain the certainty of a division. The privilege of membership is found most strongly in the residential environment - with the clustering of similar individuals and differencing by exclusion of all non-similar groups. The result can be as confining and ghetto-like as any neighbourhood characterized by the disadvantaged, and perhaps just as alienating.

Ensuring that a neighbourhood maintains a homogeneous population entails measuring those norms which make it homogeneous and insisting on their enforcement. Only those people considered homogeneous along such social dimensions as income, education, race or status are taken as barring indicia forecasting an acceptable level of orderliness. Heterogeneous land uses are not only seen as changing a neighbourhood but also as preventing the continued
development of a homogeneous population. For example:

...a boarding home would
discourage young families from
settling in the neighbourhood.

(The Express, January 24, 1979.)

Established residents, on the other hand, may feel
that intrusions have already become commonplace,
indicating misperception of the nature of residential
services as institutions. Residents may express
themselves in this way, claiming:

...general opposition to anything
new for the area until the city
cleans up the illegal institu-
tions there.

(The Express, January 15, 1979.)

or,

Concern about the proliferation
of such institutions in their
neighbourhood.

(The Express, January 15, 1979.)

Property ownership has particular social value
in our society. Owners of single-family housing
believe that the location of neighbouring residential
care facilities (synonymous with lower-income housing since residents of community-based residential care facilities make little or no income) will lower the value of their dwelling because, it is suggested, of fear that the rate of appreciation will be reduced. As one resident opposed to community-based care facilities suggested:

...property values will be adversely affected making resale difficult.

(Correspondence to West Vancouver Municipality, April, 1978.)

Fears of declining appreciation of property values are in part due to the fact that "public" housing is never "tested" in the marketplace to establish that such housing is not deleterious to neighbouring properties. The evidence suggests, however, that adjoining property does not in fact depreciate in value (Hecht, 1970, page 10), and that development of adjoining properties has not been hindered. There remains, in fact, evidence that residents opposed to residential care facilities have misperceived and misrepresented the notion that such facilities cause neighbouring property values to drop. As one social agency for the mentally retarded observed:
Cooinda Residence has not been obtrusive nor has it prevented housing development on adjoining property.

(North Shore Times, March 16, 1977.)

In this latter case, the agency sold the adjoining property to developers who constructed several townhouses, all of which are presently occupied. These land transactions all occurred subsequent to the establishment of the residential care facility.

3.4.2 Change and Fear

Unmistakeably, anxiety and fear are widely associated with anticipated social change and with heterogeneous populations. Given that single-family residential zoning strictly regulates the variety of possible land uses, the threats and dangers are simply that: anticipated. They exist less on the ground than in the mind. Some persons have suggested that residential care facilities:

...force use to face our prejudices and fears and deliver us from the illusion that the quality of life is somehow maintained by keeping our communities "pure" or "homogeneous" in a self-righteous sense.

(The Citizen, May 17, 1978.)
Mary Douglas, in her analysis of a wide range of ethnographic reports, concluded that whatever is unclassifiable or whatever falls outside the boundaries of a category is regarded as socially polluting and dangerous. (Douglas, 1969, page 168.)

Zoning is often used to demarcate such boundaries:

...fear of the unknown might explain the subsequent actions of those signing the petition to have the home disallowed under a technicality of zoning.

(North Shore News, May 3, 1978.)

In this latter context, residents often employ debunking mechanisms to discredit the establishment of residential care facilities. As Mayor Bell of the District of North Vancouver remarked: "There is a built-in bias in most neighbourhoods toward a group home for retarded adults. (The Citizen, March 2, 1977.)

When transitional or socially polluting and dangerous social categories are so identified, then they are subject to a subsidiary axiom: all transitional categories should be collected together, for spreading such anomalies in space, and in social time, will be disturbing to social safety. For
example, a halfway house would:

...bring a lingering type of fear
(that) when you let your children
out of doors you would wonder...
they don't have a right to instill
this fear.

(North Shore News, May 17, 1978.)

The misrepresentation which issues from fear is
prevalent, although as one sympathetic resident
observed, the real problem rests:

...with the fact that residents
of the home are retarded and
with the misconception and
ignorance surrounding retardation.

(North Shore News, March 16, 1978.)

Parents see dangers, nevertheless, associated with
contact between their children and, for example, the
mentally retarded, noting that problems "are created
through other children playing with retarded youngsters"
(North Shore News, May 3, 1978). Such fear of associa-
tion can result in exclusion and confinement of
deviant individuals. As one resident remarked:
"We don't need 8 to 10 drug addicts among children".
(North Shore News, May 3, 1978.) It is clear that such
categories of individuals are suspended from ordinary
space and designated for "transitional neighbourhoods",
"grey areas", or even "rural settings" depending on
the facility.

Fear of violence to persons and property is especially prominent in statements by persons in opposition to community-based care facilities. For example, there is:

...so little faith in (the) penal system that it scares me to death to think what type of criminal element would be foisted upon us.

(North Shore News, May 3, 1978.)

or, the:

...possibility of vandalism and mischief to both private and public property.

(Correspondence to West Vancouver Municipality, April, 1978.)

Strategies that separate land uses minimize risks of social conflict and assume that there will be no deterioration in property investment. However, society, as Erickson suggests, will continue to re-establish its community boundaries as meaningful points of reference as long as there is repeated testing by people who are on the fringes of the community. Repeated testing of boundaries provokes
repeated defenses by those who represent the group's inner morality. (Erickson, 1966, page 13.) While some groups may continue to be categorized as "marginal", it is important, as Perin has stressed, to realize that "each state of transition and marginality exists within, not outside of, the very same social system defining the valued, settled and intact categories". (Perin, 1977, page 125.) What is important here is that public values and attitudes determine the kind of social system. Hence, the related tendency to maintain the status quo is reflected in any restrictive language of zoning legislation.

3.4.3 Individual, Majority and Community Interest

Many social agencies responsible for providing residential services have seen "normalization" as a notion embodied within the concept of human rights. The right to live in the community rather than be excluded and confined to an institution is often viewed in this light:

People have a right to live in the social and cultural mainstream.

(North Shore News, May 3, 1978.)
Some persons argue that the implications of exclusion are much larger:

...if the rights of the retarded are successfully denied, then the rights of all citizens are in danger.

(North Shore News, March 16, 1978.)

and that:

...if council is sincere in the view that those less fortunate citizens be truly a part of the community, then this group cannot be wrong.

(North Shore News, March 16, 1978.)

Some persons have expressed concern that exclusion connotates underlying "prejudice against the unfortunate mentally handicapped citizens of our community (and) is at the root of the protest". (Ibid, March 9, 1977.) Others, in an effort to support the needs and rights of the excluded have suggested that "these people (i.e. the mentally retarded) are less of a problem than many so-called 'normal' people". (The Citizen, March 2, 1977.)

The belief in human "rights" to housing has been challenged by the neighbourhood "right" to control and
decide the character of their neighbourhood. Social agencies are perceived as "riding roughshod over the rights of the majority", employing a "bulldozer approach" and an "arrogant" attitude, and "thereby ignoring the wishes of neighbouring residents". (The Citizen, March 2, 1977.) Given the homogeneity that single-family neighbourhoods seek, it is not surprising that residents would feel that facilities are being "imposed on the neighbourhood". (Ibid.)

The reification or mental translation of an abstract concept, homogeneity, into a material reality has given some public officials difficulty in defining the public interest. Mayor Bell of the District of North Vancouver concluded that: "The community has a responsibility to take care of certain groups." (The Citizen, March 2, 1977.)

Those concerned with the establishment of community-based residential care facilities readily acknowledge that for the concept of residential care to work "it has to be done with public support from the outset". (Ibid.) The Browndale Care Society, an agency responsible for problem children in Vancouver, has indicated an unwillingness to enter a neighbourhood without an invitation. The single-family residential neighbourhood, however, is still seen as providing the
best physical, if not long-term social environment, for persons leaving institutions. For example:

...parolees (are) significantly more successful in re-adjusting to life in society than those released directly into the community.

(The Citizen, May 17, 1978.)

The willingness of neighbourhood residents to accept land uses which are "different" from those to which they have been accustomed is predicated on their interest and understanding of the characteristics, operation, and intent of programmes for community-based care facilities. Overtures by one social agency to the community were clearly ignored:

...An invitation to see the home and learn about the proposed inhabitants went unattended. A letter (we) sent to the surrounding neighbours informing them of the project...also went unanswered.

(North Shore News, March 16, 1978.)

This incident appears to represent an obvious case of nihilism, where the community's residents do not want to believe that such a facility is possible nor that it deserves the recognition that it requests.
3.4.4 Public Finance

Opponents of residential care facilities, in their efforts to debunk and discredit the evidence for establishment of such facilities, may focus their attention on other related issues of wide community appeal. The allocation of public finances is of particular note and the debate concerning residential care facilities is particularly fierce. As one irate citizen related:

...To generously waste a large portion of it (tax dollars) on a few while running out of funds for many others is not noble or merciful but idiotic and criminal.

(North Shore News, May 3, 1978.)

In a community where property assessments are high, the appeal for fiscal restraint within such a neighbourhood is particularly strong:

Operating costs of group homes in (a) high rent district (is) of concern to those of us who support such programs at all levels of government with our tax dollars. (Emphasis added.)

(Correspondence to West Vancouver Municipality, April, 1978.)

However, other individuals who are strong advocates
for establishment of community-based residential care facilities, argue that:

...retarded persons are maintained there (Cooinda Residence) at much lower cost than at Woodlands.

(North Shore Times, March 16, 1978.)

Despite the fiscal costs of establishing and operating residential care facilities, the net benefits it is argued, come to society in the agency's ability to assist the client to cope with the realities of a normal community (normalization), and the acceptance of such individuals by the community in mainstream society (accommodation). Moreover, evidence suggests that the costs per client served are less in community-based facilities than in large institutions while the standard of care is comparable or improved.

3.5 Zoning Control of Residential Care Facilities: North Shore Examples

When housing is involved, a zoning controversy is not simply one of municipality versus landowner, or a case of people versus property; it is one of people versus people. It is basically a controversy between those who already live in an area and those who would like to live in that or an adjoining area. Zoning allows existing residents of a community to greatly influence or even
determine who can or cannot move into that community.

Zoning regulations give inordinate powers and privileges to existing residents over people outside the community. Those who would benefit from the filtering effect created by new housing, as well as those within the housing market who would benefit from a greater supply of both land and housing suffer restraints on mobility and opportunity. Social agencies interested in establishing residential care facilities require large, usually older, established homes, if they are to avoid the high costs of capital construction and the scarcity of available land near the various social amenities associated with community-based facilities. Restrictive zoning can obviously reduce the opportunities for suitable residential services. One group, those who got there first, effectively exercise considerable restraint over the availability of housing beneficial to many other groups.

It is argued, therefore, that zoning regulations reflect the community's public attitude toward new land uses. It is possible therefore to explain and understand a community's interest in accommodating new land uses by observing their use of zoning.

The following represents a descriptive analysis
of three North Shore municipal zoning by-laws and their respective treatment of residential care facilities.

3.5.1 The District of West Vancouver

The definition of terms within a zoning by-law is of particular importance since such terms make a by-law meaningful in ways that a community desires. The definition of "family" is of importance here as access by residential care facilities to single-family neighbourhoods will depend on it. Advocates for residential care facilities argue that it is their aim to employ a "family"-oriented housing model. The issue is joined around the question: What constitutes a "family"?

The zoning by-law of West Vancouver District defines "family" as follows:

Family - for the purposes of in-law suite occupancy only shall mean one individual or a number of individuals related to and dependent upon the nominal head of a single family dwelling, not including persons other than the following:

- Husband or wife of the nominal head of a single family dwelling.
- Son or daughter or spouse of son or daughter of the nominal head of the single family dwelling, and the dependent children of such son or daughter or spouse of either; this clause includes a stepson and stepdaughter and the spouse of either.

- Father, mother, grandfather or grandmother of the nominal head of the single family dwelling.

- Brother or sister of the nominal head of the single family dwelling or of the spouse of the latter, which brother or sister is not living with his or her spouse; this clause includes the dependent children of such a brother or sister.

(West Vancouver Zoning By-law No. 2200.)

This definition is interested only in "family" as it is known through consanguinity or marriage. The definition effectively excludes unrelated individuals from cohabiting a "single-family dwelling". The definition is specifically directed toward in-law suites, however, and not toward single-family zones. The District of West Vancouver zoning by-law defines the characteristics of single-family zones by reference to the terms "single-family dwelling" and "principal":

Single-family dwelling - shall mean a building designed for use exclusively as a principal dwelling unit.
Principal - shall mean the essential nature or basic and determinant characteristics as applicable to any building, structure or use.

(Emphasis added.)

Advocates of residential care facilities would argue that there is no reason why they should not qualify as occupying "principal single-family dwelling units". However, analysis of the by-law reveals, in fact, that residential care facilities have been classified as a separate and distinct use:

Intermediate care facility - shall mean a building or structure in which food, lodging and care are furnished with or without charge for three or more persons who, on account of age, infirmity, physical or mental defect or other disability require care, excepting a home maintained by a person related by blood or marriage or shall mean a building or structure in which food or lodging are furnished with or without charge, to fifteen or more adult persons in receipt of some form of public or social assistance.

(West Vancouver Zoning By-law No. 2200.)

Intermediate care facilities are a permitted use in the "P.H.1 Private Hospital Zone 1" category. A community-based residential care facility seeking to locate in a single-family neighbourhood would therefore be required to seek rezoning of the property desired
from residential to "private hospital" use.

The Municipal Act of British Columbia, RSBC, 1960, as amended, requires a full public hearing before any amendment can be made to a zoning by-law. The onus is on the social agency applying for rezoning to convince and persuade municipal council and the community at large that such a change in land use is in the public interest. Given the definitions of "family", "single family dwelling", "principal" and "intermediate care facility", the chance of successful amendment of a zoning by-law in favour of residential care facilities is likely to be difficult. The controversy will turn on determining what constitutes "the essential nature or basic and determinate characteristics" of a community-based residential care facility.

In conclusion, West Vancouver's zoning by-law effectively excludes residential care facilities from single-family neighbourhoods despite the claim that facilities of this kind employ a "family"-oriented housing model and are therefore a permitted use. Until By-law No. 2200 is amended to include residential care facilities as a permitted use in single-family residential areas, such facilities will find access a difficult task.
3.5.2 City of North Vancouver

The zoning by-law of the City of North Vancouver defines "family" as follows, but applies the term in determining the character of a single-family zone:

Family - means the persons sharing a household, consisting of a) two or more persons related by blood, marriage, adoption, or foster parenthood, or b) three or fewer unrelated persons; excludes roomers and boarders.

(City of North Vancouver Zoning By-law No. 3778.)

The City's definition is more liberal than that of the District of West Vancouver. However, since most residential care facilities (an exception might be a senior citizen facility) must serve between five and fourteen residents, depending on type, it does not qualify under the definition of "family". Since the City of North Vancouver by-law does not define in any precise manner "residential care facility", it has, as a matter of historical development, included such facilities within the classification of "private hospital":

Private Hospital Use - means a use providing for the care of the sick, injured, or aged, other than in a public hospital; includes private hospitals, convalescent homes, nursing homes and rest homes.
However, in Part 4, "General Regulations", section 401 "Permitted Uses of Land, Buildings and Structures", subsection 3, private hospital uses are a conditional permitted use in ANY zone:

...except as permitted under 'accessory home occupation use', an assembly use, or a private hospital use may be permitted in any zone subject to a resolution of Council permitting the establishment and operation of any one specifically defined use, provided approval in writing shall have been attained from a simple majority of the property owners, any portion of whose lot lies within 200 feet of any portion of the lot to be so used, and provided that lots, buildings and structures so used will be controlled by the regulations provided in Part 4 and Part 8 of this by-law.

(Ibid.)

While the Council for the City of North Vancouver allows community-based residential care facilities as private hospitals to be a permitted use in any zone, the permission to so locate is conditional upon the "approval in writing...from a simple majority of the property owners" surrounding the proposed site. In this, Council has clearly delegated the power of decision-making to a small portion of the population of the City. The consequences for social agencies attempting to establish community-based care facilities is similar to the rezoning requirement in the West
Vancouver by-law described earlier. It is argued in the next chapter that this procedure is not permitted by The Municipal Act.

Social agencies have indicated an unwillingness to lobby neighbouring residents in an attempt to persuade them to accept the value of a community-based care facility because of the problem of exposing potential residents of a facility to the stigmatization that might result. Faced with the problems of approval, and accommodation by neighbourhood residents, social agencies have concentrated on those areas or municipalities where the chances of establishment of a facility are best. The City of North Vancouver will, if it wishes to address the question of residential care facilities directly, need to amend its zoning by-law to accommodate such facilities as a permitted use in residential zones. Definition of such facilities is required in order to avoid the confusion associated with the meaning of "private hospital".

3.5.3 The District of North Vancouver

In 1978, the Council of the District of North Vancouver passed an amending by-law (No. 5045) to its existing Zoning By-law No. 3210. The amendments attempted to address the question of residential care
facilities directly. Their first step was to formulate a more comprehensive definition of "family":

Family - means:

1. one person, or two or more persons, who are interrelated by bonds of consanguinity, marriage, legal adoption or who have a common-law relationship, or;

2. a group of not more than five unrelated persons occupying a dwelling unit on a non-profit basis, or;

3. a group of not more than eight unrelated persons occupying a group home, of whom no more than six can be persons with special needs.

(District of North Vancouver Zoning By-law No. 3210, Amended By-law No. 5045.)

The amendment effectively permits establishment of group homes (residential care facilities) in "family" residential neighbourhoods. The definition of group home is further identified within the by-law as follows:

Group Home - means:

a dwelling unit operated for persons with special needs by either an incorporated non-profit society in good standing or a public body chartered by Federal or Provincial Statute.

(Ibid.)
The important phrase here is "persons with special needs". It is this phrase which defines the scope of group homes in the eyes of the community of North Vancouver. The phrase is defined as:

...either an individual with a physical or mental disability which has been so diagnosed and classified by a qualified medical practitioner, or an individual 65 years of age or older;

(Ibid.)

The definition is carefully phrased to exclude those residential care facilities which provide services to persons with special needs which are social in nature (i.e. emotionally disturbed children, corrections, transition homes). The hostel, transition house or crisis centre facility does not fit even the liberalized definition of "family" given the probable necessity for a size greater than the permitted eight (including staff) residents. Present per diem rates for halfway houses (corrections) demand a size of between 10 to 14 residents to make operation of the facility economical. Increasing operating costs for care facilities may make present definitions of family size uneconomic in the future for all types of facility. Therefore, in the District of North Vancouver it ought to be realized that zoning regulations may require
further amendment and modification if the locational needs of community-based care facilities are to be met.

3.5.4 Alternate Regulation

The Working Committee on Group Homes (Report #3) of the Committee on Buildings and Development for the City of Toronto adopted a definition of residential care facility which is broader in scope than any present North Shore definition. In its recommended definition:

Residential care facility:

a) is any community-based group living arrangement for 6-10 individuals, exclusive of staff, with social, legal, emotional, mental, or physical handicaps or problems that are developed for the well-being of its residents through self-help and/or professional care, guidance, and supervision unavailable in the resident's own family or in an independent living situation;

b) may locate in a single-family dwelling, boarding or lodging house, or converted dwelling house, or any building built for that purpose, but which in all cases must be fully detached and occupied wholly by that use;

c) includes group homes, foster homes, halfway homes, residences for the physically or mentally handicapped or disabled persons and special care boarding or lodging houses, but does not include anything else defined in this By-law.

(Report #3, 1977, page 40.)
The Committee, however, did, as would appear to be the case in the District of North Vancouver By-law, make a distinction between temporary or short-term accommodation and residency of a longer duration. Transitional facilities were classified "Crisis Centre Facilities" and were not zoned for exclusively residential areas (i.e. mixed commercial/residential). They were defined in Report #3 as follows:

Crisis Care Facility -

a) is a facility which houses persons in crises situations and in which it is intended that short-term accommodation of a transient nature be provided;

b) may locate in a single-family dwelling, boarding or lodging house, converted dwelling house, in a mixed-use commercial/residential building, or in any building built for that purpose, but which in all cases must be fully detached.

(Ibid., page 42.)

Present North Shore legislation is particularly restrictive. It ought to be the aim of reformers to find a suitable formula which, at the very least, acknowledges and accommodates the variety and type of facility required in the community. The Toronto experience appears to point in that direction.
3.6 Spatial Allocation of Residential Care Facilities

In choosing a dwelling suitable for a community-based care facility, social agencies must consider a number of factors. Obviously, they require a large dwelling, of at least five bedrooms, in a predominantly residential neighbourhood. The location must be reasonably close to commercial, institutional and community services. The latter requirement can be mitigated to some degree by provision of either private or public transportation. Those facilities which provide a home for the aged or the physically handicapped require fairly level sites which do not restrict mobility. The cost of a building is an additional consideration. However, given the size of a dwelling, social agencies are often prepared to meet such costs in order to obtain the desired accommodation.

The primary concern of this thesis is the substantial influence of zoning legislation upon the location of community-based care facilities, considering both the direct and indirect influence which legislation exerts. As we have seen in earlier discussions, the degree of accommodation of residential care facilities found in zoning by-laws determines both the kind and rate of facility accommodation. For example, the District of West Vancouver has accommodated mostly large institutional uses...
(private hospitals), primarily for the aged. It has excluded facilities of a more controversial nature (disturbed children, mentally handicapped, hostel and correction facilities). The City of North Vancouver has accommodated fewer facilities than either the District of West Vancouver or the District of North Vancouver. The latter district has accepted a wider variety of residential care facilities both in type and size.

Conversation with several real estate firms on the North Shore who have been active in locating suitable housing stock for social agencies, indicated that there existed no shortage of suitable housing which would meet the needs of a residential care facility and no lack of vendors. They implied that community opposition would likely play the more critical role in locating community-based residential care facilities than the supply of housing. This view supports the claim that public attitudes and the legislation which reflects such attitudes are strong influences on the distribution of residential care facilities on a regional basis. The District of North Vancouver has expressed a concern that having liberalized its zoning by-law in comparison with other North Shore municipalities it will therefore accommodate more than its "fair share" of facilities. As a result, the District of North Vancouver would urge other
municipalities to amend their respective zoning by-laws to deal with the existing realities of providing residentially-based social services on a regional basis.

Within each municipality the question of concentration of facilities in one or a few neighbourhoods is an important consideration. When several facilities locate in the same neighbourhood, and indications suggest this is beginning to occur in the Lynn Valley area of North Vancouver, the physical impact is evident in street interactions. More importantly, neighbourhood residents and families are overwhelmed by the rapid change in the neighbourhood. Distancing, through zoning, between facilities can ensure that traditional street lifestyles continue. Every neighbourhood can accommodate a small residential care facility - the question that remains is simply - how many?

House form is important both in terms of visual integration and noise impact. Many complaints related to uncomfortable noise levels occur in attached or semi-detached housing. In addition, it is impossible to fully soundproof a shared wall. A requirement that facilities locate in a fully detached house form is therefore necessary.

The spatial allocation of residential care
facilities will always appear unfair so long as certain municipalities attempt to accommodate facilities while others do not. It seems an important fact that the Provincial government must assume greater responsibility for good management and the fair distribution of services within a region. They would then become the initiator of community-based programmes.

3.7 Conclusions

It must be emphasized that there exists a great deal of myth and misrepresentation concerning the establishment of residential care facilities. Regrettably no comprehensive studies are available of Canadian experiences in this area. The following, however, illustrate the case from studies conducted in the United States.

Results of several studies made of areas which surround residential care facilities indicate that evidence of a negative impact on immediate neighbours or a surrounding community is lacking. The California Department of Health found that negative community attitude toward residential care facilities is the result of "a lack of knowledge concerning the program and its objectives, and fear of the stereotypes of the people being cared for in these facilities". (California State Department of Health, 1974,
Initial opposition to such facilities often changed dramatically when residents were made aware of the programme objectives, the nature of the facility, and the residents themselves. (Ibid., page 5.)

The fear of violence expressed by neighbouring residents also appears to be unfounded in practice. Police records do not indicate an increase in crime or other offences in areas where community-based facilities have located. (Hecht, 1970, page 9.) Records of property sales have not indicated any fluctuation in sales with establishment of residential care facilities in single-family neighbourhoods. The Stockton California Department of Planning indicated in a survey of 200 neighbours of foster homes, for example, that 84% felt that these facilities had no effect on property values. Some 93% of the respondents in the same survey indicated no traffic or parking problems. (Lauber and Bangs, 1974, page 10.) A San Francisco Planning Department survey indicated little interference - unusual for a residential neighbourhood - concerning noise, traffic volume or parking demand of residential neighbourhoods which accommodated community-based care facilities. (Ibid., page 10.)

Permit-granting agencies in several U.S. cities indicate that the most frequent reasons for denial of care
facilities located in residential zones were a "substantial opposition from nearby land owners and community prejudice toward the class or condition of persons who would reside in the proposed facility". (Ibid., page 8.) Those residential care facilities which generated the most opposition were halfway houses and group homes for seven persons or more.

In conclusion, indications are that opposition to residential care facilities is directed toward those persons who would reside in such facilities rather than those considerations grounded in physical land use.
CHAPTER 4
THE CONTROL OF LAND USE AND EQUITY

Location of community-based care facilities in single-family neighbourhoods is often viewed as an incompatible land use. At issue is the conflict between land-use control and discrimination in housing. The inherent conflict here creates a dilemma for local governments and planners alike. The conflict arises from the use of zoning power to deny access to housing to some individuals and thereby reinforce the character of certain zones, while the privilege of housing as a human rights issue emphasizes the inherently discriminatory nature of zoning legislation.

The practice of land-use control flows from authority in the British North America Act, 1867, as amended, and from The Municipal Act of British Columbia, R.S.B.C. 1960, as amended. The concept of equity is related to exclusionary zoning within the broad meaning of "fairness" but more particularly within the sense associated with jurisprudence - recourse to general principles of justice to correct or supplement the ordinary law. Equity is used in this chapter purposefully to mean a fundamental principle of justice which supersedes common or statute law when they conflict with it.
The privilege of housing residential care facilities in single-family neighbourhoods is a matter involving equity. Resolution of the conflict between opposed interest groups in a land-use dispute is a many-sided issue, and the case study here clearly illustrates this fact. As a result, the concept of land-use control and equity necessarily requires discussion of sovereignty of parliament, delegation of power, material change in land-use, the concept of reasonableness and human rights, and the ways these concepts interrelate.

4.1 The Historical Perspective

The Canadian constitution is contained in certain statutes of the British Parliament, namely, the British North America Act, 1867 as amended. From Section 91 of the Act the sovereignty of parliament is established:

It shall be lawful for the Queen, by and with the advice and consent of the Senate and the House of Commons, to make Laws for the Peace, Order and Good Government of Canada, in relation to matters not coming within Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces.

(A Consolidation of the British North America Acts 1867 to 1975, page 24.)
The omnibus clause found in Article 92 of the Act provides supreme legislative power under the Act to regulate aspects of life within the Provinces:

92. In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subject next herein-after enumerated.

(Ibid., page 27.)

In discussing legislative powers, in 1909 one Court declared:

...the legislature within its jurisdiction can do anything that is not naturally impossible, and it is restrained by no rule human or divine.... The prohibition, 'Thou shalt not steal', has no force upon the sovereign body.... We have no such restriction upon the power of the Legislature as is found in some states.

(Riddell, J. in Florence Mining Co. v. Cobalt Lake Mining Co. (1909) 18 O.L.R. 275, 279 (C.A.).)

As far as any judicial restraint on legislation is concerned, the Privy Council has asserted that it is not concerned with the policy of the legislation, with its wisdom or justice, but merely with its constitutional validity on the basis of jurisdiction. (Laskin, 1966, pages 187-189.) On this point Lord Herschell considered that fear of abuse of such absolute power:
...does not warrant the imposition by the Courts of any limit upon the absolute power of legislation conferred. The supreme legislative power in relation to any subject matter is always capable of abuse, but it is not to be assumed that it will be improperly used; if it is, the only remedy is an appeal to those by whom the Legislature is elected.

(Lord Herschell, Attorney-General for Canada v. Attorneys-General for Ontario, Quebec and Nova Scotia (1898) A.C. 700, 713.)

During the urban reform movement in Canada in the closing decades of the 19th century, a group of urban specialists "imbued with the reforming zeal and a singular sense of mission" while "nonetheless emphatically pragmatic" (Rutherford, 1974, page X) gradually fashioned a concept of the public interest based upon the primacy of social justice combined with good government. In fact, the Canadian Bill of Rights (1960) not only acknowledges the rights of individuals but contains specific restraints on the legislative powers of Federal parliament related to fundamental freedoms and due process of law.

Interest and concern for the protection of certain human rights and fundamental freedoms expanded in Canada during W.W. II, no doubt as part of a world-wide interest in these values. Egalitarian civil liberties or
human rights, however, require positive legislative support for their existence:

The absence of discriminatory laws and administrative practices are not in themselves sufficient to ensure the protection and promotion of human rights, because discrimination may be practised in so many of the daily activities of people.

(Tarnopolsky, 1975, page 66.)

Consolidation of human rights legislation into a code and administration of it by a commission ensures vindication of the person discriminated against. Theoretically, this is justified as being as important to the community itself, because of the broad educational value of equal treatment, as it is to the victim of discrimination:

Modern-day human rights legislation is predicated on the theory that the actions of prejudiced people and their attitudes can be changed and influenced by the processes of verification, discussion, and the presentation of socio-scientific materials that are used to challenge popular myths and stereotypes about people...Human Rights on this continent is a skilful blending of educational and legal techniques in the pursuit of social justice.

(Dr. Daniel Hill, Ontario Human Rights Commission, Human Relations, 1965, June.)
Establishment of residential care facilities in single-family neighbourhoods can be viewed within the imperatives of sovereignty of parliament and the social implications of zoning legislation. Development of community-based care facilities has often been impeded by zoning ordinances which restrict actualization of the needs of a particular interest group. Advocates of community-based care facilities have suggested that the use of single-family zoning ordinances exclude from residential areas those people considered deviant, as this term is defined in the preceding chapter. They therefore seek to amend legislation which is allegedly unreasonable and discriminatory. Property owners opposed to establishment of community-based care facilities in single-family neighbourhoods point out that homes housing a number of unrelated people violates the terms of present zoning ordinances.

4.2 Delegation of Power to Local Government

The British North America Act, 1867 as amended, Section 92, lists the chief provincial powers which are generally intended to cover "essentially local matters" which could best be dealt with by provincial authority. Local zoning and land-use regulation has, therefore, been held almost invariably to fall within the language of s.92(8) - "Municipal institutions in the Province"; s.92(13) - "Property and Civil Rights in the Province"; or s.92(16)
- "Generally all Matters of a Local or Private Nature in the Provinces". While there has been much debate concerning the status of civil liberties or human rights as it pertains to federal-provincial jurisdiction, it can be generally stated that where such jurisdiction lies with the province it would appear within the ambit of "Property and Civil Rights in the Province". The important point here, however, is that provincial legislatures have ultimate jurisdiction over zoning and land-use control.

The Municipal Act of British Columbia, R.S.B.C. 1960 as amended, confers on municipal councils extensive powers to regulate the use of land, buildings and structures. In general, statutory authority to divide the municipality into zones and to prescribe the permitted or prohibited uses is conferred on municipal councils in s.702(1). The legislature of British Columbia gave statutory guidance (the only province to do so) to councils in exercising its zoning powers by directing attention to certain objectives and considerations:

702.(1)

a) The promotion of health, safety convenience and welfare of the public;

b) The prevention of the overcrowding of land, and the preservation of the amenities peculiar to any zone;
c) The securing of adequate light, air and access;

d) The value of the land and the nature of its present and prospective use and occupancy;

e) The character of each zone, the character of the buildings already erected and the peculiar suitability of the zone for particular uses;

f) The conservation of property values.

(S.702(2) Municipal Act of British Columbia, R.S.B.C. 1960 as amended.)

Consideration of these objectives or considerations by municipal councils is mandatory. However, the minutes of council meetings need not show that council in fact gave individual consideration to each objective.

(Watling v. Oak Bay (1969) 70 W.W.R. 534 (B.C.).)

Further statutory direction is offered to council when it considers development proposals:

702.A.(1)

a) the development of areas to promote greater efficiency and quality;

b) the impact of development on present or future public cost;

c) the betterment of the environment;

d) the fulfilment of community goals;

e) the provision of necessary public space;

(S.702A.(1), Ibid.)
Again, there appears to be no requirement that councils give individual attention to each of these considerations. Nevertheless, the impact of such wide and general language in relevant sections of the Municipal Act permits each council to adopt its own subjective interpretation of such general language. For example, subjective interpretation of the phrases "preservation of the amenities peculiar to any zone", "character of each zone", or "fulfilment of community goals" can result in what Rogers describes as "...the status quo that is sought to be maintained in built-up residential areas". (Rogers, 1973, page 120.)

The Courts of Canada do not now exercise the supervisory jurisdiction they once exercised, and now:

...disclaim any jurisdiction...to review the action of a municipal council acting within its powers and in good faith.

(Meredith, C.J.O., Leitch v. Strathroy (1923) 53 O.L.R. 665 at 669.)

There does lie with the Courts, however, the authority to review municipal actions as they pertain to the scope of their delegated powers—hence, the doctrine of ultra vires. The Courts have often applied the rule of strict construction: common-law rights cannot be held to have been
abrogated or affected by statute, or by-law passed under its authority unless it is so expressed in clear language.

(Lennox, J. Coleman v. McCallum (1913) 4 O.W.N. 1127, 24 O.W.R. 470, 11 D.L.R. 138 at 142.) For example, when a person acquires by purchase a right to use his property, that right can only be taken away by express legislation.

(Regina v. Girvin, 1958, O.W.R. 73.)

While the Courts are quick to stop a local authority if it attempts to deal with a matter over which it has no jurisdiction, whatsoever, they are hesitant to apply the doctrine if the municipality has some power over the subject matter.

(Rogers, 1973, page 312. Emphasis added.)

In other words, the doctrine of ultra vires is to be applied reasonably and whatever may be regarded as being incidental to the things which are authorized by the legislature is not, in the absence of an express prohibition, ultra vires. Thus, the rule of implied powers has, to some extent, limited the scope of the doctrine.

However, the weight of several recent court decisions (Bell v. Her Majesty the Queen, 1979 S.C.C. unreported; Gay Alliance Toward Equality v. the Vancouver Sun, B.C. Board of Inquiry, 1977, affd. 1976, unreported
(B.C.S.C.), reversed 1977, unreported (B.C.C.A.), affirmed S.C.C. May, 1979, unreported) adds further information related to the scope of the doctrine of ultra vires and to the jurisdiction of the Courts in ruling on matters involving reasonableness or equity. These decisions will be discussed in the respective sections to which they relate, namely "Material Change in Use", "Reasonableness" and "Human Rights".

In summary, the British North America Act 1867 as amended, established separation of powers between the Federal and Provincial governments. Through delegation of power by the Provincial government, municipal governments have the authority to control the use of land. Where a conflict occurs between Provincial and municipal legislation, Provincial legislation may prevail. Further, municipal government may be found to act ultra vires should a by-law have the effect of dealing with matters beyond the jurisdiction of municipal government. However, zoning by-laws which govern division of the landscape into residential zones, and thereby control housing, are inherently subjective.

With respect to the inherently subjective nature of zoning by-laws, Rogers has identified what he terms the "notional root of zoning":
The notional root of zoning is segregation of people and uses they make of their land. Density and development standards control the cost of the dwelling place on the land and the latter determines the economic (and usually the social) position of those who live in them. Ghettos are created for the rich as well as the poor by walls of exclusionary restrictions. Land values are thus preserved by keeping out undesirable uses and consequently undesirable people. The preservation of property investment is the prime motive underlying many by-laws although they do not always clearly articulate this policy.

(Rogers, 1973, page 121.)

While the exclusionary nature of zoning practice is one accepted as a matter of necessary planning practice, it is also one which is authorized by Provincial statute – The Municipal Act of British Columbia, R.S.B.C. 1960 as amended. On the other hand, discrimination, of the kind described by Rogers, is a matter of human rights and is dealt with by another Provincial statute – the Human Rights Code of British Columbia, S.B.C. 1973, c.119, as amended. Whether or not a municipal government acts ultra vires in providing legislation which has the effect of discrimination in housing is a subject of concern, and shall be dealt with in subsequent sections. Nevertheless, delegation of certain powers to municipal council does not abrogate the responsibility of a Provincial government to provide clear enabling legislation concerning
matters within its jurisdiction.

4.3 Material Change in Use

The Municipal Act of B.C., R.S.B.C. 1960, as amended, authorizes councils to:

...regulate the use of land, buildings and structures, including the surface of water, within such zones, and the regulations may be different for different zones and for different uses within a zone, and for the purposes of this clause the power to regulate includes the power to prohibit any particular use or uses in any specific zone or zones.

(S.702(1)(b), The Municipal Act of British Columbia, R.S.B.C. 1960 as amended.)

In applying cannons of construction to building and zoning by-laws, rather than use the strict construction described in the previous section, Courts have often viewed such legislation as remedial since they are designed to preserve residential districts (Middleton, J. in Toronto v. Williams, (1912), 270 O.L.R. 186 at 191, 8 D.L.R.(2d) 299 (C.A.) and to secure community amenity (Re Esquimalt v. Wood (1964) 40 D.L.R.(2d) 763 (B.C.). Land-use control, a power given expressly to municipal government by the Provincial legislature, clearly allows for discrimination. That is, a choice is permitted the municipality as to the type of use it will allow in certain or all parts of the

In Canadian municipal law, *Bondi* is a keynote case. It is cited as precedent to illustrate that exercise of the common law right of an individual to develop his property as he chooses is superseded by the municipal right to zone land in a discriminatory way. In Canada, there is, however, no statutory definition nor any clear judicial definition of the word "use". It has been said to mean holding or occupying property (*Re Davis & Toronto* (1892) 21 O.R. 243 at 247); or the employment of property for enjoying revenue or profit without in any way diminishing or impairing the property itself (*Pickering v. Godfrey*, (1958) O.R. 429, 14 D.L.R.(2d) 520 (C.A.). Beyond this, the Courts are not instructive on the definition of the term "use". Rather, they have considered whether or not a structure will destroy the residential character of the neighbourhood (*Re Guest v. Weston* (1954) 0.W.N. 271).

While Canadian legal discussion of the term "use" is limited, the *British Town & Country Planning Act*, 1971, (at s.22(1) attempts to distinguish between the use of land and the operations thereon. To aid in this distinc-
tion, British Courts have attempted to apply the concept of "material change in use". As the phrase is not given statutory definition, the Courts have indicated that it is "the character of the use from a planning point of view which must have materially altered". (Purdue, 1977, page 82. Emphasis added.)

The Ministry of Town & Country Planning in its Circular No. 67 advised local government as follows:

...in considering whether a change is a material change, comparison with the previous use of land or building in question is the governing factor and the effect of the proposal on a surrounding neighbourhood is not relevant to the issue.

(Purdue, 1977, page 97.)

In this context, the latter clause concerning the irrelevance of effect on a surrounding neighbourhood is at odds with the words of the Municipal Act of British Columbia where councils are expressly directed to consider the effect of a proposal on property values of a surrounding neighbourhood.

The Ministry of Town & Country Planning further elaborated on the concept of material change in use, saying:
The effect of the new definition is to make it clear that a proposed change of use constitutes development only if the new use is substantially different from the old. A change in kind will always be material - e.g. from house to shop or from shop to factory. A change in the degree of an existing use may be 'material' but only if it is very marked.

(Purdue, 1977, page 97.)

The point at issue, whether the character of a use had changed, has been endorsed by the British Courts. However, they take the view that it is the character of a use "from a planning point of view" that is relevant, and that the consequences of change on the surrounding neighbourhood are relevant only in planning terms.

The notion of material change in use plays a key role in establishment of residential care facilities in Canada. These facilities are commonly discussed in terms of whether or not they constitute a home as opposed to a mini-institutional facility. In Vancouver, premises used as a foster home have not been considered a "private dwelling house" as they are not used as a residence for a single family (Shaughnessy Heights Property Owners' Association v. Children's Aid Society of Catholic Archdiocese of Vancouver (1963) 42 W.W.R. 62 (B.C.). This case focused on the implication of the term "private" dwelling house
and found a foster home to be incompatible with the private character of a dwelling. Subsequent cases have concentrated on the definition of "family" and the operation of a community-based care facility. Kelly, J.A. in Regina v. Brown Camps Ltd. (1969) 2 O.R. 461, where a profit-making organization responsible for emotionally disturbed children sought to locate a care facility in a single-family neighbourhood, considered the term "family" as defined in the Borough of Scarborough Zoning By-law 9510, as critical to his decision. In this by-law, the term "family" is defined as:

Family - shall mean one or more persons living as a single housekeeping unit in a dwelling, and may include domestic servants and not more than two roomers or boarders.

(Borough of Scarborough Zoning By-law No. 9510.)

Kelly, J. concluded that the occupants were not a family as defined by the by-law saying:

I consider that the inmates were not living in the premises as a single housekeeping unit; were such the case the provision of their accommodation and meals would have been their own responsibility, even although they themselves might have contracted to have servants or independent contractors furnish to them these services which were essential to their living.
In his Reasons for Judgement, Mr. Justice Kelly held that although the definition of "family" in the Borough of Scarborough Zoning By-law 9510 was sufficiently wide to include persons who do not have a consanguineous or marital or other relationship save that they resided as a "housekeeping unit", the occupancy of the infant inmates of an institution such as that provided by Brown Camps were only by "the will and at the whim of the Respondent corporation". This fact "lacks the necessary element of active personal election to form a housekeeping unit", and for this reason the facility cannot be considered "within the permissible uses of buildings in a single-family residential zone". (Supra.) Having found the inmates not to be a family, Kelly, J. said, obiter dictum:

The operation was akin to a nursing home for the aged, which is highly desirable from a sociological point of view and of great benefit to those who seek shelter in it, but which, if operated for profit, is nonetheless a business...(D)espite its residential connotation, the whole operation of Respondent was that of a business, the business of providing residential accommodation and special services for the inmates.

(Supra.)
Although this latter quotation appears as an incidental argument to the decision in Regina v. Brown Camps Ltd. (supra), the opinion acknowledges the way in which material change in use may apply to alleged violations of permitted-use clauses in zoning by-laws. An offence might be committed by a profit-making group even when occupancy by residents may come within the meaning of the term "family" in zoning by-laws. A business is a substantially different use than a residential one. However, a question now arises as to whether or not a non-profit organization providing a community-based care facility would constitute a substantially different occupation of premises.

In a subsequent appeal case, City of Barrie v. Brown Camps Residential & Day Schools (1973) 2 O.R.(2d) at 337, appeal of which to the Supreme Court of Canada was denied, the Court came to a different conclusion than that in Regina v. Brown Camps Ltd. (supra). It should be noted that Brown Camps Ltd. had reorganized as a non-profit organization and was now called Brown Camps Residential & Day Schools.

The definition of the term "family" in the City of Barrie Zoning By-law No. 69-33 is broad:
Family - shall mean one or more persons who are interrelated by bonds of consanguinity, marriage or legal adoption, or not more than five unrelated persons, with or without one or more full-time domestic servants, occupying a dwelling unit.

The By-law contains several other provisions related to a determination of what constitutes a violation of zoning regulation. They are:

6.1 GENERAL

No person shall hereafter use any lands nor erect, alter, enlarge or use any buildings or structures in any Residential Zone except in accordance with the provisions of this section and of Sections 5 and 12 of this by-law.

and:

3.26 'DWELLING'

shall mean any building or part thereof used as the home, residence or sleeping place of one or more persons, either continuously, permanently, temporarily or transiently.

(a) ' Dwelling Unit'

shall mean a separate set of living quarters designed for, or used by, an individual or one family alone, which shall include at least one room, a kitchen and a bathroom, and which has a private entrance from the outside or from a common hallway or stairway inside.

(City of Barrie Zoning By-law No. 69-33.)
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In the City of Barrie decision (supra), Dubin, J.A. had this to say of the differences between the case before him and that of Regina v. Brown Camps (supra):

It is to be observed that by a combination of the individual definitions (in City of Barrie Zoning By-Law No. 69-33) the permitted use in this area for a one-family detached dwelling is a very extended one.

It is further apparent that, in determining whether there has been an infraction of this by-law by Brown Camps, it is necessary to direct one's attention to the use to which the premises are being put, and considering the matter in this way, Brown Camps cannot be said to be "occupying a dwelling unit" within the definition of "Family". It is apparent that those words in that section are directed to a consideration of the persons actually using the premises and it does not matter, therefore, whether Brown Camps is a corporate entity carrying on a commercial enterprise. In this respect the by-law is quite unlike the by-law considered in the case of Regina v. Brown Camps Ltd. (1969) 2 O.R. 461, and in my opinion that case is clearly distinguishable from the case at bar.

It remains now to be considered whether on the evidence it can be said that the use to which these premises are being put is other than for one-family detached dwellings.

(City of Barrie v. Brown Camps Residential & Day Schools, (1973) 2 O.R.(2d) 337 at 339.)
(Emphasis added.)
A summary of the evidence drawn from the City of Barrie (supra) hearing was that a) Brown Camps cannot detain children in the premises without their consent; b) in each of the properties there are groups of children, not more than five in number, unrelated by blood, and ranging in age from seven years to seventeen years; c) resource staff are available on an on-call basis; and d) the properties all have physical characteristics both external and internal, of residential family homes. Dubin, J.A. concluded:

It is therefore clear to me that the premises under consideration in this appeal fall squarely within the relevant permitted use in these zones. I agree with the learned trial Judge that the premises are not being used as a clinic or nursing home as defined by the by-law. The premises are being used for the care and upbringing of these children in the same manner as if they were being used by parents with special expertise to deal with their children who had similar emotional problems. The resource group is composed of experts to whom such parents would themselves turn for help when needed. Although the persons on the premises are unrelated, they fall within the definition of "Family" in s.3.28 of the by-law. They accordingly occupy a "dwelling" containing only one "dwelling unit". Each house is a "one-family detached dwelling".

(Supra, at 344.)

For these reasons, the City failed to show that a material change in use had occurred. The character of the residen-
tial care facility was not substantially different from that of other single-family residences, from a planning point of view.

In summary, there are several inferences to be drawn from the foregoing consideration of material change in use. First, social agencies which are non-profit in nature avoid being construed as a business rather than a residential use in single-family neighbourhoods. The Courts may interpret a business as a material change in use.

Secondly, where supervision is provided in a residential care facility which resembles a parental situation, it is likely that the use will be interpreted as residential in character (family-oriented) and not, for example, as a nursing home or a clinic. The distinction here is critical. Where professional resource people, like physiotherapists, doctors or psychiatrists, are resident in the facility, a community-based facility would likely fail as a permitted use in residential zones.

Third, zoning by-law definitions of "family" must be sufficiently broad to permit groups of unrelated individuals to reside in single-family dwellings.
Fourth, the implication of a "family"-like association of persons requires that the element of consent to association be present among the residents of a community-based facility. The voluntary aspect of association is present even where emotionally disturbed children, for example, are put into the care of an agency at the request of their parents or the Children's Aid Society (see City of Barrie, supra, at 342).

From a planning point of view in British Columbia, municipal government is authorized to zone land uses by distinguishing the character of respective zones in s.702(2)(e) of the Municipal Act of British Columbia, supra. From a planning point of view, a material change in use will constitute any new use which is substantially different from the former, i.e. a business as compared to a residence. A change in character of a use may be material only if it is marked. Where the physical characteristics, external and internal, resemble a single-family dwelling, a material change in use will not have occurred. Lacourier, J. at Trial Division in City of Barrie (1973) 2 O.R. 21, 32 D.L.R.(3d) 671 illustrates these points:

I can find in the evidence no serious inconvenience or detriment to the neighbours, and I am quite unable to conclude that the character of the zone is being changed, or that the objective of the by-law is frustrated.
By nature, zoning by-laws are discriminatory and restrictive. There remains a question as to the kind and degree of discrimination which zoning by-laws contain, particularly when that discrimination may be directed toward individual persons or groups of persons of a particular class, rather than toward land uses.

4.4 The Concept of Reasonableness

It is well established that municipal government in British Columbia may enact zoning legislation which is inherently exclusionary. Such exclusion, however, is not unlimited.

The issue of ultra vires is raised when a test of reasonableness is applied to zoning by-laws to ascertain whether or not the by-law exceeds the legislative authority set out in the Municipal Act of British Columbia, supra. The British case of Kruse v. Johnson (1898) 2 Q.B. 91) proves particularly instructive on this point. The principles raised there are those adopted by the Supreme Court of Canada. Lord Russell of Killowen, C.J. held that the consideration of by-laws ought to be supported if possible:
They ought to be, as has been said 'benevolently' interpreted, and credit ought to be given to those who have to administer them that they will be reasonably administered.

(Kruse v. Johnson (1898)
2 Q.B. 91, pages 99-100.)

However, Lord Russell further notes that grounds of reasonableness may be advanced if:

...they (by-laws) are found to be partial and unequal in their operation as between different classes; if they were manifestly unjust; if they disclosed bad faith; if they involved such oppressive or gratuitous interference with the rights of those subject to them as could find no justification in the minds of reasonable men, the Court might well say, 'Parliament never intended to give authority to make such rules; they were unreasonable and ultra vires'. But it is in this sense, and in this sense only, as I conceive, that the question of unreasonableness can properly be regarded. A by-law is not unreasonable merely because particular judges may think that it goes further than is prudent or necessary or convenient, or because it is not accompanied by a qualification or an exception which some judges may think ought to be there.

(Supra, emphasis added.)

The scheme of British Columbia's Municipal Act (supra) is, undoubtedly, to confer upon each local body the right of self-government. The legislative mandate is for "the promotion of health, safety, convenience and
welfare of the public" (s.702(2)(a), *Municipal Act of British Columbia, supra*). In practice, self-government by municipal government must be both reasonable and *intra vires*. The case *Regina v. Bell* (1976) 69 D.L.R.(3d) at 375 is noteworthy. In that case the respondent municipality passed a by-law pursuant to s.35(1), para. 4 of the *Planning Act*, R.S.O. 1970, c.349, (Ontario) limiting the use of certain lands to "dwellings, semi-detached dwellings and duplexes". Under the Borough of North York Zoning By-law No. 7625 a dwelling unit was defined as meaning living quarters designed or intended for use by an individual or one family alone. "Family" was defined as meaning a group of two or more persons living together and interrelated by bonds of consanguinity, marriage, or legal adoption. The Defendant, Douglas Bell, shared premises with two other unrelated adult males and was convicted for a violation of the by-law. The case was heard in a lower court of Ontario, and came on appeal to the Ontario High Court.

In his decision, Estey, J, as he then was, of the Ontario High Court held that where a municipal by-law narrowly defines "family" as in the Borough of North York Zoning By-law No. 7625 then "the effect of such a provision of the by-law is to preclude the sharing of rented accommodation by two adult persons unrelated by blood or
marriage". (Regina v. Bell, supra, at 383.)  Estey, J. concluded:

There are consequences which cannot reasonably be considered to have been in the mind of the enacting Legislature.

(Supra.)

The municipal appeal was thereby dismissed.

The case was then appealed by the Borough of North York to the Ontario Court of Appeal with success. The decision from that Court held that the question of ultra vires had been raised squarely in the case of City of Toronto v. Polai (1969) 1 O.R. 655; 3 D.L.R.(3d) 498; reversed (1970) 1 O.R. 483, 8 D.L.R.(3d) 689; affirmed (1973) S.C.R. 38, D.L.R.(3d) 638), a case accepted as precedent in the mind of MacKinnon, J. and Coram in their Ontario Court of Appeal decision in Regina v. Bell. They allowed the appeal by the Borough of North York, upholding its action as intra vires the Planning Act and The Municipal Act of Ontario.

MacKinnon, J. said as follows:
By-law 7625 (and its sections) enacted under the specific legislative power delegated to the municipality to allow it to control land use for its own proper purposes and policy reasons, applies equally to all citizens within the relevant zones. The by-law was not enacted in bad faith; it was not enacted due to bias; it is not discriminatory in the relevant legal sense; and the municipality has not exceeded the jurisdiction granted to it merely because some results of the by-law, not due to bias or discrimination, could appear to be, as the Divisional Court put it, 'bizarre in the eyes of the Court'.

The respondent submitted there could be no limitation placed by the municipality under its zoning power on the number of people who could reside in any dwelling unit anywhere, the argument being that any limitation would be an arbitrary, discriminatory, unreasonable exercise of power not authorized by the Planning Act. The municipality, in exercising its jurisdiction over residential neighbourhoods in By-law 7625, limited the number of residents of a dwelling unit to a specific number or to a 'family' as commonly understood and defined. The municipality would have been in difficulty if it had sought to limit the size of families as commonly understood, but it is not unreasonable, in the legal sense, for the municipality to limit the number of people who may occupy a dwelling unit in areas it has determined will be residential. The by-law was not 'aimed' at unmarried couples or elderly widows or at any other particular individual, or, indeed at anyone's moral conduct. As has been said in another connection, consequential effects are not the same as legislative subject-matter. In my view, the discrimination line the municipality drew was a competent legislative act.

(Regina v. Bell, (1977) 75 D.L.R.(3d) at 765.)
It is important to note that MacKinnon, J. finds that the by-law "is not discriminatory in the relevant legal sense" since the by-law does apply equally to all residents of the community. Brooke, J., who also presided in the Toronto v. Polai case, finds in Regina v. Bell reason to concur with an opinion of Estey, J. of the Divisional Court, while concurring with MacKinnon, J. that the appeal before them should fail. Brooke, J. filed this opinion:

I question that the use of the definition of 'family' as a method of zoning in municipal by-laws is competent municipal legislation within the scope of the Planning Act, R.S.O. 1970, c.349, or the Municipal Act, R.S.O. 1970, c.284. It is true that under the Planning Act the municipality may pass by-laws which are discriminatory in the sense that they can specify classes of buildings, their density, and control the density of population by limiting building use in terms of minimum areas. But it is quite a different matter to say that the Planning Act authorizes a by-law which discriminates between classes of people that may live in any building based on the relationship of those persons or characteristics personal to them. In this case the word 'family' was not used as a descriptive word to show the nature of buildings or the community as a place where people of all ages reside and related services such as schools, transportation, etc., are provided. Commonly used the word describes people and their relationship as members of a household, descendents of a common ancestor and perhaps brotherhoods of persons related by particular ties. In this case the word 'family' was defined and the elements of the definition became personal qualification
for residence in the zone. The mischief which follows is clear and as set out in the judgement in appeal there may be discrimination against the most innocent people. I do not think personal qualification of this type or other personal characteristics or qualities have ever been suggested as a proper basis for control of density or any issue relevant to land use or land zoning. Such a submission can only be supported on the basis of the statement in the City of Toronto v. Polai to the effect that municipalities are authorized to ensure the preservation of better residential districts by requiring them to be occupied by persons who are related (and not by unrelated people). This is land zoning by people zoning and is not within the scope of the Planning Act.

For the same reason I do not agree that such a by-law is authorized by s.242 of the Municipal Act. It is not passed for the purpose of 'health, safety, or welfare of the inhabitants of the municipality'. Of course it is not suggested that the innocent residence of unrelated adults in the same dwelling is within the scope of 'morality' so that the city may segregate them from the rest of the community.

The judgment of the Divisional Court points out the broad section of the public disqualified from residing with others in the area so zoned if the by-law is valid and enforceable. They held it to be unreasonably beyond the scope of the Planning Act and the Municipal Act and ultra vires the municipality. As I say I doubt that I would have come to the same conclusion that I did in Polai as to the validity of the by-law if it were still open to me to do so.

(Regina v. Bell, (1977) 75 D.L.R.(3d) at 757.)
From the foregoing it can be seen that the above two cases, Toronto v. Polai and Regina v. Bell, are key cases on which the segregation of "families" through zoning turns. It is clear that a fundamental principle of municipal law is that by-laws must affect equally all those who come within the ambit of the enabling legislation. (See Fredericton v. Horizon Realty Ltd. (No. 2), (1973) 6 N.B.R. 846 (C.A.): Bullock v. Scarborough (1959) O.W.N. 297, 19 D.L.R.(2d) 680.) It is also a principle of municipal law that legislation must therefore be impartial in its application and must not discriminate so as to show favouritism to one or more classes of people. (Forst v. Toronto (1923) 54 O.L.R. 256 at 275 (C.A.) It is also recognized that by their very nature zoning by-laws are discriminatory (Sillevy v. Sun Oil Ltd. (1964) S.C.R. 552, 45 D.L.R.(2d) 541; Scarborough v. Bondi (1959) S.C.R. 444, 18 D.L.R.(2d) 161.)

On April 24, 1979, the Supreme Court of Canada rendered Reasons of the Court in the appeal case of Douglas Bell vs. Her Majesty the Queen (1979), Unreported. Reasons of the Court were by Spence, J., concurred in by Laskin, C.J.C. and Dickson, J; dissenting Reasons by Martland, J., concurred in by Ritchie, J. The majority decision upheld the appeal of Douglas Bell. The decision noted that "the factual situation in Polai cannot be
applied to the decision of the present appeal". The Justices were also of the opinion that whether or not the Court of Appeal for Ontario were bound by the decision in *Polai* "upon the issue of the *ultra vires* nature of the provisions of the by-law as distinguished from the discriminatory nature of its enforcement" (*Douglas Bell*, *supra*, page 7) the Supreme Court of Canada was not so bound in *Douglas Bell* (*supra*).

The majority decision in *Douglas Bell* (*supra*) next considered the legislative authority of the municipality under the *Planning Act* of Ontario, finding that the power to enact a zoning by-law flows from section 35(1) of the
Planning Act in parag. (1) "authorizes by-laws for prohibiting the use of the land", in parag. (2) "for prohibiting the erection or use of building" and in parag. (4) "for regulating, inter alia, the character and use of buildings". (In British Columbia, this authority is similarly phrased in s.702 of the Municipal Act, R.S.B.C. 1960, as amended.) In his majority decision in Douglas Bell, Spence, J. declared himself in exact agreement with Hogg, J., Estey, C.J.H.C., as he then was, and Brooke, J.A. in the Court of Appeal of Ontario, who found that the by-law in question restricted the occupation of dwellings to a "family" and then defined "family" by reference to consanguinity, marriage and adoption only and so was not regulating the use of the building but who used it. (Douglas Bell vs. Her Majesty the Queen, (1979), unreported, page 8.)

The Reasons for the Court by Spence, J. in summation state:

In view of the many possible inequit-able applications of the definition of 'family' which I have mentioned above, I am of the opinion that the by-law in its device of adopting 'family' as being the only permitted occupants of a self-contained dwelling unit comes exactly within Lord Russell's words as to be found to be 'such oppressive or gratuitious interference with the rights of those subject to them as could find no justification in the minds of reasonable men'. And, therefore, as
Lord Russell said, the legislature never intended to give authority to make such rules and the device of zoning by reference to the relationship of occupants rather than the use of the building is one which is ultra vires of the municipality under the provisions of the Planning Act.

(Douglas Bell, supra, page 11.)

Although the doctrine of unreasonableness is not sufficient cause to make invalid a municipal by-law by virtue of provisions in a Municipal Act, the doctrine still exists. (Kruse v. Johnson, supra.) As Lord Russell there stated, the question of unreasonableness can properly be regarded within the sense of inequity:

- where by-laws are found to be partial and unequal in their operation as between different classes;

- where by-laws are manifestly unjust;

- where by-laws disclose bad faith;

- where by-laws involve such oppressive or gratuitous interference with the rights of those subject to them as could find no justification in the
minds of reasonable men.

It seems appropriate, therefore, to investigate the kind and degree of discrimination under which zoning practices might fall as they pertain to the Human Rights Code of British Columbia, R.S.B.C. 1973 (2nd Sess.) c.119.

4.5 Human Rights

Discussions of human rights and alleged cases of discrimination as they relate to zoning matters, to the definition of "family" and to residential care facilities must be an academic exercise. To the writer's knowledge, there is no case, either before the Courts or human rights tribunals, in British Columbia where the question of discrimination in land-use control has been raised under human rights legislation. While it is dangerous in law or in academic theses to extrapolate circumstance on the basis of analogy, it is felt that certain principles and law have been raised in cases involving the Human Rights Code of B.C. (supra), which have a significant bearing on the question of discrimination in land-use control.

The Human Rights Code of B.C. (supra), provides protection against several bases of discrimination it
specifically enumerates; race, religion, colour, ancestry, place of origin, sex, marital status, age, political belief and criminal conviction. However, this list of prohibited bases of discrimination set out in the Code is not exhaustive. In recent years, case decisions involving "reasonable grounds for discrimination" indicate that the following classes of characteristics which were not specifically enumerated in the Code are additionally prohibited cause for discrimination: physical disability (Jefferson and Baldwin and B.C. Ferries Authority, B.C. H.R.B.I., 1976; sec.8 complaint); pregnancy (Wilson and Vancouver Vocational Institute, B.C.H.R.B.I., 1976; sec.3 complaint); association with a controversial character (Bremer and Board of School Trustees, Sooke, B.C.H.R.B.I., 1977; sec.8 complaint); alternate lifestyles (Oram and Pho, B.C.H.R.B.I., 1976; sec.3 complaint). In Bremer, a leading decision of human rights tribunals, R. Germaine, Chairman of the Board of Inquiry, had this to say:

...the factors which expressly do not constitute reasonable cause are not a complete definition in a negative fashion of what reasonable cause is.... It is well established that the factors listed in subsection 2 (of section 8) do not represent an exhaustive list. This conclusion was reached in Jefferson and The B.C. Ferries et al (B.C.H.R.B.I. 1976) and in a case under section 3 of the Code, G.A.T.E. and The Sun (B.C.H.R.B.I. 1975). The latter decision has been sustained on appeal in the Supreme Court of British Columbia, (B.C.S.C. August, 1976).
Although the G.A.T.E. (Gay Alliance Toward Equality) case has since been reversed in the B.C. Court of Appeal and sustained in the Supreme Court of Canada, those appeals involved interpretation of the clause "reasonable cause". The issue to which Mr. Germaine refers is that of jurisdiction of a board of inquiry to hear a complaint by a class of persons not specifically enumerated in the respective section of the Code. The jurisdiction of the Board of Inquiry in G.A.T.E. has been upheld through all appeals.

The Human Rights Code of B.C. is unique in Canada in that B.C. is the only province to include the phrase "reasonable cause" as grounds for discrimination. An examination of legal questions concerning human rights and land-use control is therefore unparalleled in Canada and deserves special attention.

The affect of the Human Rights Code of B.C. on other legislation has caused some difficulty. For example, conflicting conclusions have been reached concerning the effect of section 7 of the Innkeeper’s Act, which allows an innkeeper to expel a person whom he "deems undesirable", and section 3 of the Human Rights Code, which prohibits denial of a service customarily available to the public.
(Regina v. Express Holdings Ltd. (1976) unreported; or Oram and Pho, supra.) In the latter decision, the board of inquiry held that the language of the Innkeepers' Act must be interpreted as requiring a reasonable interpretation of undesirability and that section 7, as so interpreted, was inconsistent with section 3 of the Code. The Provincial Court in the former case, ruled that the Innkeepers' Act took precedence over the Code.

In a case involving the Insurance Corporation of British Columbia v. Heerspink (1977) 6 W.W.R. 286; affirmed 1978, 6 W.W.R. 702), it was concluded that a human rights board of inquiry had jurisdiction not only to hear a complaint brought against a provincial corporation under the Code but to consider application of the Insurance Act as contravening the Code.

In this case a complaint was brought by Robert Heerspink to the Human Rights Commission that he had been discriminated against by the Insurance Corporation of British Columbia in violation of section 3 of the Human Rights Code. Mr. Heerspink owned property for which I.C.B.C. had issued a fire insurance policy and under section 208(1) of the Insurance Act, R.S.B.C. 1960, c.197 terminated the policy by appropriate notice. No
reason was given for the cancellation. Mr. Heerspink alleged that the reason for cancellation was that although he had been charged with possession of and trafficking in marijuana, but not convicted of the charges, denial of a service customarily available to the public for these reasons violated section 3 of the Code. At the beginning of the hearing, counsel for I.C.B.C. raised a preliminary objection to the jurisdiction of the Board of Inquiry. Counsel for I.C.B.C. claimed that the action of I.C.B.C. was expressly authorized by provisions in the Insurance Act of British Columbia, supra, and that "the provisions of the Human Rights Code cannot be taken to have been intended to, and do not, override that authorization". (Mr. Leon Getz, Chairman, Heerspink and Insurance Corporation of British Columbia, B.C.H.R.B.I., 1977, page 2.)

In his initial decision of the Board of Inquiry Chairman Getz stated that the Insurance Corporation of British Columbia was not governed by "special legislation" of the kind established in Seward v."Vera Cruz" (1884) 10 A.C. 59 in that it "did not deal with a particular point that is said to be embraced by the general words of the later statute", namely, the Human Rights Code of British Columbia. Mr. Getz found that the issue was one
of the relationship between the Human Rights Code and the common law. A statute cannot be construed as "working any fundamental change in the common law, unless it clearly and unmistakably uses words having this effect". (Getz, 1977, pages 13/14.) Mr. Getz said that "it is difficult to imagine a clearer example of a deliberate use of statutory words having this effect than is provided by section 3 of the Code." (Ibid.) Mr. Getz expanded further on this jurisdictional query finding that a Board of Inquiry could properly hear a matter involving the Insurance Corporation of British Columbia and application of the Insurance Act:

If there is any doubt about this, that doubt should, in my opinion, be resolved in favour of the Code. It must be borne in mind that the Human Rights Code is in some respects legislation of a rather special character. Speaking of analogous legislation in England, the Race Relations Act of 1965 and 1968, Lord Morris recently observed that they introduced into the law of that country 'a new and guiding principle of fundamental and far-reaching importance' (Charter v. Race Relations Board (1973) 1 ALL E.R. 512, 518 (H.C.). It seems to me that the Code, equally, introduced into the law of British Columbia, a similar and guiding principle of fundamental and far-reaching importance. It is of the very nature of the issues with which it deals that it should be expressed in words of general and far-reaching significance. It is concerned not with the specific and isolated abuse that is so characteristic of the concerns of the legislation enacted in an earlier
era, an era in which 'legislatures interfered as little as possible with the fundamental traditions of society, and the courts were but carrying out the legislative purpose when they invoked this presumption (against interference with common-law rights) in order to confine the operation of the Act within narrow bounds' (Willis, "Statutory Interpretations in a Nutshell" (1938) 26 Can. B. Rev. 1,20). It is concerned, rather with broad categories of behaviour, and requires an interpretive approach that is consistent with its character. In my view, it demands that 'fair, large and liberal construction and interpretation as best ensures the attainment of its objects' that is called for by section 8 of the Interpretation Act, S.B.C. 1974, c.42.

(Getz, Heerspink and I.C.B.C. (1977), pages 13 and 14.)

To draw inference on the basis of analogy from Heerspink that the Human Rights Code of B.C. and human rights tribunals are the appropriate institutional setting for review of discriminatory practices in housing as it relates to the Municipal Act, it is necessary to resolve four immediate difficulties:

1. It must be proved that an alleged discriminatory act has occurred under sections 4 or 5 of the Code and receive a hearing before a Board of Inquiry.
2. The jurisdiction of the Board of Inquiry must be affirmed by determining whether or not the Municipal Act and zoning by-laws are special legislation as per Seward v. "Vera Cruz" (1884) 10 A.C. 59 at page 68.

3. It must be shown that the unrestrained general words of sections 4 and 5 of the Human Rights Code of British Columbia, supra, modify the pertinent provisions of the Municipal Act of British Columbia, supra, and zoning legislation, i.e. that municipalities can land zone but shall not by people zoning.

4. It must be proved that the alleged discrimination was unreasonable, given that inclusion of a "reasonable cause" clause is affected in sections 4 or 5 of the Code.

It is characteristic of most municipal statutes that there be a general omnibus or catch-all provision to impart to each local council the right of self-government. For example, the Municipal Act of B.C., R.S.B.C. 1960, as amended, says:
Upon receipt of a petition from the Council of a municipality, the Lieutenant-Governor in Council may, to the extent not inconsistent with the intent of this or any other Act, confer such further powers upon the Council as are necessary to preserve and promote the peace, order, and good government of the municipality and the health, safety, morality, and welfare of the inhabitants of the municipality, and to provide for the protection of persons and property.

(S.218(3), The Municipal Act of British Columbia, R.S.B.C. 1960, as amended.)

Further authority is granted under the zoning provisions of the Act to control the use of land for "the promotion of health, safety, convenience and welfare of the public" in s.702(2)(a). The effect of the inclusion of "general welfare" provisions is intended to circumvent to some extent the doctrine of ultra vires which puts the municipality in the position of having to point to an express grant of authority to justify each corporate act.

The issue of ultra vires has already been discussed in a foregoing section within the context of land zoning by people zoning. There are, however, a number of residential care facilities which need to serve more than the number of persons permitted under a zoning by-law definition of "family" or need to provide "in-house" care services which do not fit a
quasi-parental role. Establishment of these latter kinds of facility would likely fail as a municipality could show that a material change in use — a change in character — would occur. However, discrimination in housing community-based residential care facilities of all kinds as a human rights matter is another way of viewing the kind and degree of discrimination present in exclusionary zoning by-laws.

The Human Rights Code of B.C. legislates on discrimination with respect to housing in the following sections:

4. No person shall
   (a) deny to any person or class of persons the opportunity to purchase any commercial unit or dwelling unit that is advertised or in any way represented as being available for sale; or
   (b) deny to any person or class of persons the opportunity to purchase or otherwise acquire land or an interest in land; or
   (c) discriminate against any person or class of persons with respect to any term or condition of the purchase or other acquisition of any commercial unit, dwelling unit, land, or interest in land, because of the race, religion, colour, sex, ancestry, place of origin, or marital status of that person or class of persons.

and,
5. (1) No person shall

(a) deny to any person or class of persons the right to occupy as a tenant any space that is advertised or otherwise in any way presented as being available for occupancy by a tenant, or

(b) discriminate against any person or class of persons with respect to any term or condition of the tenancy of such space, because of the race, sex, marital status, religion, colour, ancestry, or place of origin of that person or class of persons, or of any other person or class of persons.

(Human Rights Code of British Columbia, (1973), (2nd Sess.) c.119.)

What is important here is the list of classes or subjects for which discrimination in housing is expressly prohibited. Section 4 is the troublesome section with respect to establishment of residential care facilities.

It is well established through Human Rights Boards of Inquiry decisions that such enumerated classes as those in section 4, supra, do not represent an exhaustive list in those sections of the Code which specifically require that reasonable cause be proved for such denial or discrimination. For the purposes of this analysis, it is suggested that a discussion of reasonable cause as it pertains to earlier discussions of kind and degree of discrimination in zoning and housing is relevant in determining the quality of reasonableness.
In order to determine the meaning of "reasonable cause", it is important to see it not simply as a question of fairness, but in light of specific governing principles. The various approaches to determining the meaning of reasonable cause in British Columbia are essentially the same. The principle which emerges in the decision of Mr. Germaine in *Bremer* clearly articulates the notion:

...the reasonable cause concept is intended to protect classes or categories of persons and individual members of such classes or categories from prejudicial conduct related to the differentiating group characteristic which distinguishes the class or category from others in society.

(Germaine, 1977, page 6.)

Mr. Germaine elaborated as follows:

...In every contravention, the respondent's reasons for the prohibited conduct are related to the failure of the respondent to make an individual assessment of the person discriminated against. The reasonable cause standard requires a consideration of the individual in relation to the pertinent employment or other protected opportunity, a consideration free of any reference to the individual's 'differentiating characteristic'. A contravention of the reasonable cause standard will manifest a refusal to engage in such an individual assessment.
In every contravention the respondent's reasons for the prohibited conduct involve a consideration by the respondent of the complainant's group factor or characteristic such as, for example, race or religion. Such group factors are, of course, totally irrelevant and unrelated to the opportunity denied or in respect of which the complainant is treated unequally. All too frequently, a contravention will be recognizable by a quality of preconceived and unreasonable opinion held by the respondent in relation to the irrelevant and unrelated factor.

(Germaine, 1977, page 7.)

...It is worth adding that no amount of statistical analysis suggesting the average female has a lower level of physical strength than the average male will serve to make the sex of a particular person relevant to a decision concerning an employment opportunity requiring a certain level of physical strength. Such statistics would not alter the logical fallacy inherent in an assumption about a particular individual due to the individual's sex. It is to be noted, in describing a statistical analysis of this nature as irrelevant, we are not saying that for other purposes statistical analyses could never be of assistance in human rights proceedings.

(Germaine, 1977, page 8.)

Mr. Germaine in Bremer cites Jefferson and B.C. Ferries et al (B.C.H.R.B.I. 1976) to illustrate that the list of protected persons or class of persons can be further expanded. It was concluded in Jefferson,
In the case of residential care facilities for the physically handicapped, the aged, or the mentally retarded, there is room to argue that they constitute a "class or category" which possess a "differentiating group characteristic which distinguishes the class or category from other members of society". (Ibid.) Moreover, they are a class or group sharing differentiating characteristics over which they may have no control.

In discussing the feature "control", Mr. Germaine says:

This feature may assist in a determination about whether a particular characteristic distinguishes a class of persons protected by the Code but should not be strictly construed or considered necessarily conclusive.

(Ibid. page 6.)
Mr. Germaine draws attention to the decision in *Oram et al and Pho* (B.C.H.R.B.I., 1975) to explain why "control" may only assist in determination about whether a characteristic distinguishes a class of persons protected by the Code. In *Oram and Pho* (*supra*) it was held that there was no reasonable cause for the denial of a public facility due to the personal appearance or lifestyle of the complainant. These are particular characteristics over which the complainant obviously had some measure of control. The characteristic of marital status may be similarly viewed. In this respect, emotionally disturbed children, battered women or paroled persons may also constitute categories of persons protected by the Code, as was the complainant in *Oram and Pho* (*supra*). The issue of reasonable grounds for discrimination in these latter examples would, however, remain properly a moot question if they were admitted to protection of the Code under a reasonable cause standard.

The burden of proof in establishing reasonable cause, once an alleged denial or discriminatory act has been shown, rests with the person or persons who are alleged to have acted in a prohibited way. (See, *Bremer*, *G.A.T.E. and The Sun*, Insurance Corporation of British Columbia *v. Heerspink*.) A municipality which has refused permission to a residential care facility to establish within a single-family neighbourhood, on facing a complaint
of discrimination under section 4 of the Code (if a reasonable cause clause were included), would of necessity need to establish two things to avoid the consequences of a finding that the allegation is justified:

(It) must first establish the cause of the discrimination and secondly must satisfy the Board of Inquiry that the cause was a reasonable one.

(Getz, 1979, page 8.)

The nature of human rights complaints makes the evidence in support of particular argument inherently subtle. In Bremer, Mr. Germaine notes:

Boards of Inquiry will frequently be required to make conclusions of fact based upon circumstantial evidence and, perhaps, with the assistance of evidence which may be inadmissible in a superior court. At the heart of a contravention of the Code is the determination of whether the respondent's conduct was motivated by a consideration which constitutes the absence of reasonable cause; the factual issues of motivation will in most cases not be a matter about which there exists any direct evidence.

(Germaine, 1977, page 6.)

With respect to residential care facilities, evidence as to whether or not they will adversely affect the charac-
ter of a neighbourhood, whether destruction of private property will in fact occur, or whether there exists any evidence of future effects is largely opinion evidence. For example, to suggest that because a particular group of persons intend to reside in a group residence or care facility there will be harmful consequences implies a judgment concerning the group character of such residents. It is an issue where opinion evidence will be crucial. Before a board of inquiry, this hypothetical case would require that evidence show there is a logical connection between a "group character" and "harmful consequences". It seems here that the import of a "harmful consequence", while subjective and for which no direct evidence may exist, nevertheless needs to be shown as grounds for discrimination. Before a board of inquiry such subjective evidence is admissible.

As noted above, however, Mr. Germaine cautioned that the circumstantial nature of evidence submitted to human rights tribunals, notably, "the factual issue of motivation" (Ibid., page 6), may be inadmissible to a superior court. The May 22, 1979 decision of the Supreme Court of Canada, on hearing appeal of The Gay Alliance Toward Equality and The B.C. Human Rights Commission v. The Vancouver Sun (unreported) identifies this dilemma. The decision here dismissed an appeal by
G.A.T.E. from the B.C. Court of Appeal decision which held the Vancouver Sun not to have violated section 3 of the Human Rights Code of British Columbia. This decision is the first occasion on which the Supreme Court of Canada has considered the phrase "reasonable cause" as it appears in the Human Rights Code of British Columbia. The decision therefore is the leading case for those who seek clarification of the meaning of "reasonable cause". The majority decision, unfortunately, provides little instruction. What is important in the decision, however, is the kinds of tests to be applied to determine what is or is not reasonable cause.

The Honourable Mr. Justice Martland, in his majority Reasons for the Court, addressed the question of objective tests of discrimination by quoting excerpts from the judgments of Branca, J. and Robertson, J.A. of the B.C. Court of Appeal. Per Robertson, J.A.:

It is my view that the words in s.3(1) of the Code, "unless reasonable cause exists" require the application of an objective test: does such a cause exist? It is wrong in law to substitute for this the subjective test that the Board applied: what motivated the person who denied or discriminated and was this motivation reasonable cause for the denial or discrimination?
Of course, in applying the Code the 'cause' must be considered in relation to the person and the circumstances. Also, it must be borne in mind that the members of majorities have rights and sensibilities. I do not think that it is the intention of the Code that these are generally to be ignored for the benefit of those who are different. The words 'unless reasonable cause exists' makes this abundantly clear.

If the grounds upon which the Board reached its decision are to be gathered from the stated case alone, it appears from paragraph 12 that the Board went wrong, in that it applied the wrong test, that of motivation, and gave no effect to the evidence referred to in paragraph 10(1), that the advertisement would offend some of the newspaper's subscribers, which in addition would, of course, result in a loss of subscribers and afford a reasonable cause for declining to accept the business.

(G.A.T.E., S.C.C. 1979, unreported, pages 5 and 6.)

In concluding written Reasons, Martland, J. says:

Section 3 of the Act does not purport to dictate the nature and scope of a service which must be offered to the public. In the case of a newspaper, the nature and scope of the service, is determined by the newspaper itself. What s.3 does is to provide that a service which is offered to the public is to be available to all persons seeking to use it and the newspaper cannot deny the service which it offers to any particular member of the public unless reasonable cause exists for so doing.
In my opinion the Board erred in law in considering that s.3 was applicable in the circumstances of this case.

(G.A.T.E., supra, page 9.)

The Dissenting Reasons in G.A.T.E. by the Chief Justice and the Honourable Mr. Justice Dickson, concurred in by the Honourable Mr. Justice Estey, however, pursue the dilemma of objective and subjective tests of reasonable cause more closely. For example, at page 6 of his Reasons, the Chief Justice says:

I agree with MacDonald J., before whom the appeal by way of stated case first came, and with Seaton J.A., who dissented on the British Columbia Court of Appeal, that the board's conclusion that no reasonable cause was shown under s.3 was, in the circumstances, a conclusion of fact. At most, it was a conclusion of mixed fact and law. In my opinion, therefore, the majority judgment of the British Columbia Court of Appeal was not well founded. Indeed, although it was argued strenuously in this Court that 'reasonable cause' involved an objective standard, Branca, J.A. took a different view, one that can only be seen as destructive of the substance of s.3 and of the policy embodied in it. It was his conclusion that a bias against homosexuals, if honestly held by the newspaper, provided reasonable cause under s.3 unless there is bad faith. (Quaere, whether honesty and bad faith can co-exist!)

Chief Justice Laskin continues in his Reasons to address the question of subjective tests, finding that "a person who
operates a service or facility customarily available to the public can destroy the prohibition against denial of its services, save for reasonable cause, by parading his apprehensions that he will lose some business" is the very kind of "subjective analysis which the Court of Appeal majority charged against the board and, wrongly, in my opinion". The Chief Justice then discussed the term "motivation", finding that a lay group like a board of inquiry could properly use the word "motive" as a synonym for "reason" or "ground". He notes that the B.C. Appeal Court's preoccupation with the term "motive" was as if it "was being differentiated from 'intent' for criminal law purposes". He further notes that "Intent is not, however, an issue under s.3 of the Human Rights Code".

For the purposes of discussion of reasonable cause as it may relate to residential care facilities, and as illustrating the reasoning behind the Dissenting Reasons, the following quotation from Laskin, C.J.C. is useful:

I wish to refer to what counsel for the Vancouver Sun put forward as his main argument in this Court. It was not, it seems, an argument addressed to the Courts below. The gist of the argument was that the Human Rights Code proscribes discrimination only on the
basis of an attribute or characteristic of a person or class of person; it does not prohibit all unreasonable denials or discriminations and, hence, as in this case, a denial or discrimination based on a newspaper policy or even on "some personal quirk" (to use counsel's words in his supplementary factum) of the newspaper publishers would be outside the scope of the statute. This is an untenable submission however beguiling it may seem at first blush. It evades the very questions which arise under s.3 or under the comparable s.8 which deals with discrimination in employment.

I confine myself here to s.3. It deals not with all services or facilities but only with those services or facilities which are customarily available to the public. The policy embodied is plain and clear. Every person or class of person is entitled to avail himself or themselves of such services or facilities unless reasonable grounds are shown for denying them or discriminating in respect of them. This Court is obliged to enforce this policy regardless of whether it thinks it ill-advised. There is more, however, that needs to be said. Counsel for the Vancouver Sun would have it that although it could not discriminate against a person on the ground that he had only one eye - that would be a discrimination related to an attribute of the person - it could refuse an advertisement soliciting subscriptions to a periodical for the blind because of newspaper policy against accepting such an advertisement.

The argument is a desperate one, seeking to circumvent the question of reasonable cause, which is the only question to be decided once it is determined that a service or facility customarily available to the public has been denied to a person, whatever be his attributes. The attributes or characteristics may themselves provide reasonable grounds for refusal (so long as they do not fall within
s.3(2) of the **Human Rights Code** and, if not, there may be transcending grounds that may afford reasonable cause, but it is impossible to begin the inquiry into reasonable cause by excluding everything except a consideration of a complainant's characteristics or attributes. That flies in the face of the **Human Rights Code** and in the face of the plain words of s.3. There is no limitation to personal characteristics or attributes.

(G.A.T.E., 1979, unreported, Laskin, C.J.C. at pages 9/10.)

The Honourable Mr. Justice Dickson, addresses the dilemma squarely. He said:

Much was made of the word 'motivation' and 'the real reason behind the policy'. These words do not give any particular trouble. We need not indulge in nice appraisal upon the meaning of 'cause' and 'motive', words which are virtually synonymous.

I have earlier adverted to the matter of reasonable cause. 'Reasonableness' is normally a question of fact. The most recent authoritative affirmation of that statement is from Lord Hailsham L.C. in *In Re W (an Infant)*, (1971) A.C. 682 at page 699:

> And, be it observed, 'reasonableness', or 'unreasonableness', where either word is employed in English law, is normally a question of fact and degree and not a question of law so long as there is evidence to support the finding of the court.

(G.A.T.E., 1979, unreported, Dickson, J. at page 18.)
Dickson, J. continues:

In my view, Mr. Justice MacDonald expressed the legal position correctly when he said:

...Whether particular circumstances amount to reasonable cause for denial or discrimination under s.3 is purely a question of fact. It must be decided as a matter of law, under a proper definition of the phrase 'reasonable cause'. The only restraints which the law places on the triers of fact are the provisions of s.3(2). They may not find the race, religion, colour, ancestry, or place of origin of any person or class of persons reasonable cause unless it relates to the maintenance of public decency or to the determination of premiums or benefits under contracts of insurance. What the appellant's submission does is to take some elements - what it submits are the circumstances of its case - and ask the Court to find that, as a matter of law, they must constitute reasonable cause. But it is really an invasion of fact. If the appellant's submission is sound, how long is the list of different plausible circumstances which the Court would be bound to find constituted reasonable cause?

(G.A.T.E., 1979, unreported, Dickson, J. at pages 18/19.)

Dickson, J. expands further on the notion of reasonableness:

In an alternative argument, counsel submitted that if the board did address itself to whether reasonable cause for the refusal existed on an objective basis, then the board erred in failing to
construe the term 'reasonable cause' solely in relation to the characteristics of the person tendering the advertisement. The argument, as I understand it, would limit the Code to unreasonable refusals based upon the characteristics of the persons seeking the public service. It was said the board erred in considering the text of the advertisement which gave rise to the denial of service. The paper, at most, discriminated against the idea of a thesis of homosexuality, and it is no offence to discriminate against ideas.

(G.A.T.E., supra, pages 19/20.)

In summary, the nature of the Human Rights Code of British Columbia, the substance of decisions from boards of inquiry and related case law provide several necessary principles and issues of law for consideration of discrimination of community-based care facilities as a matter of human rights. First, the present language of section 4 of the Code which deals with housing does not expressly protect the handicapped. Second, where "reasonable cause" clauses form a part of the language of other sections of the Code, the enumerated list of protected classes is not exhaustive. Third, there is room to argue that the handicapped constitute a class of persons possessing a differentiating group characteristic, over which they have no control, and for which they can be discriminated against. Fourth, s.3 of the Human Rights Code
has been found to apply to the Insurance Corporation of British Columbia. As a public corporation, municipal corporations similarly may be in a position to have zoning legislation reviewed as unreasonably discriminatory. The following observation by Rogers confirms the legal status of a municipal corporation:

The modern corporation might be... defined as a legal entity distinct from its composite members, vested with rights, powers, immunities and liabilities as prescribed by law and, depending upon the manner in which it was created, is either limited in its sphere of operation by its incorporating statute or else has most of the rights which a natural person possesses.

(Rogers, The Law of Canadian Municipal Corporations, 1959, page 7.)

Finally, subjective tests of what may constitute the motivation which prompts an act of discrimination are admissible to a board of inquiry but may not be admissible to a Court of law. The trend here in G.A.T.E. (1979), unreported, leaves many questions yet to be resolved in applying the notion of reasonableness and reasonable cause to cases of alleged discrimination in housing of community-based residential care facilities in single-family neighbourhoods. Answers to these questions require analysis of the material facts and of the law.
4.6 Conclusions

This chapter distinguishes those legal concepts involved in locating community-based care facilities in single-family neighbourhoods which are firmly established from those that are application of untested theories.

The power of municipal government to act in matters of land-use control is clearly expressed in Provincial statute and is firmly entrenched in municipal law. As well, it is an accepted principle that municipal by-laws are by nature and scope exclusionary. It is also firmly established that municipal government is authorized to zone land use by distinguishing the character of respective zones. From a planning point of view, these powers are limited in that for a distinction to be made between uses and character of use, a material change in use must have occurred. A further limitation on the power of municipal government in zoning matters occurs when municipal government acts ultra vires in land zoning by people zoning. The restriction here is on the kind and degree of discrimination permitted municipal government in the exercise of its zoning power. The standard of reasonableness applied is within an interpretation of equity. Zoning by-laws, while exclusionary, must apply equally to all persons. On the other hand, municipalities may zone land but not by way of the people who reside in dwellings upon the land.
The untested theories or principles of law in this chapter are those which deal with the Human Rights Code of B.C. (supra). No case exists to the writer's knowledge where discrimination in zoning and housing has been raised as a human rights matter. The present language of section 4 of the Code does not protect specifically those persons who would be resident in community-based residential care facilities. In a hypothetical case, assuming that protection of the Code was extended to the handicapped under the term "reasonable cause", the concepts of reasonableness and grounds for discrimination would apply to s.4 as they do to other sections of the Code which contain the phrase. Decisions from boards of inquiry indicate this trend. A crown corporation, moreover, may be found to act in violation of the Human Rights Code through actions sanctioned by a separate governing provincial statute. Further, where a "reasonable cause" standard is required in sections of the Code, the protection of the Code can be extended to those not specifically enumerated where, as a class, they can show they possess a distinguishing group characteristic, over which they have no control, and for which they may be discriminated against. It is suggested that the handicapped may therefore be brought within the ambit of the Code.
The principle of reasonable grounds for discrimination as a means of determining the kind and degree of discrimination permitted is an unresolved issue. On one hand, subjective tests and the circumstantial nature of evidence admissible to boards of inquiry have been upheld in superior courts. On the other hand, the Supreme Court of Canada in G.A.T.E. (1979), unreported, has ruled that the objective test of evidence shall prevail. The dissenting opinions in that case identify the inherent dilemma of present human rights legislation in British Columbia. Findings in matters of human rights complaints of discrimination necessarily deal with the circumstantial nature and factual issue of motivation. Motivation may not be identified through direct evidence. It is, however, commonly accepted that opinion evidence, say of expert witnesses, is not only admissible but desirable to mitigate the subjective tests which a human rights board of inquiry may apply in reaching its determination of whether or not reasonable grounds exist for discrimination. Therefore, evidence admissible by a complainant on behalf of a home for the handicapped to a board of inquiry could include circumstantial evidence. However, objective evidence like the facts to support, for example, no fluctuation in market values of surrounding properties as a result of a care facility so locating would prevail in a superior court.
With respect to location of community-based care facilities in single-family neighbourhoods, the above established principles and untested theories will be considered in the following chapter as the bases from which social policy can flow.
Establishment of residential care facilities is primarily a question of social policy. Policy of this kind necessarily involves amelioration of the rights of individuals and the power of the state to control the actions of individuals. Moreover, fair representation in social policy is requisite to ensure the rights of both those committed to establishment of residential care facilities and those opposed. Responsibility for fair representation rests with the Provincial government in its power to provide enabling legislation. Through discretionary powers in section 702(1) of the Municipal Act of B.C., R.S.B.C. 1960, as amended, municipal corporations in turn are responsible for the specific regulations which control the use of land and thereby the establishment of residential care facilities in single-family neighbourhoods.

Recent legal history, as documented in Chapter 4, indicates that a distinction ought to be made between the kind of land-use control that is directed toward land and that which is designed solely to control people and their relationship to other people. Analysis of the
power of governments to govern the establishment of community-based care facilities and human rights issues reveals key issues. First, while there exist persuasive arguments for the use of judicial review, such review involves consideration of questions unresolved in the Courts; namely, the specific grounds which constitute reasonable cause and the concept of *ultra vires*. Second, the attitudes of those opposed to residential care facilities present a real problem that needs to be addressed in a specific way. As a result, the approaches which follow for the establishment of community-based care facilities fall into three distinct social policy packages:

5.1.1 Land-use Control Policy  
5.1.2 Public Attitudes Policy  
5.1.3 Human Rights Policy

5.1 **Social Policy**

Social policy can predictably be initiated at two levels of government — provincial and municipal/regional — and at a non-governmental level. Success of these respective plans depends inevitably upon the political climate. For example, fiscal constraints, ideology of government, deinstitutionalization, and decentralization are all factors which influence the kind
of approach employed and its relative success. Nevertheless, the approaches given below address current legislation and planning practices.

5.1.1 Land-use Control Policy

Municipalities in British Columbia have the legislative authority to regulate the use of land. They may regulate the density of neighbourhoods, the character of zones, and the type of structures which are constructed in each zone, and initiate related planning practices as listed in the Municipal Act of British Columbia, R.S.B.C. 1960, as amended. Each of these has proven to be a troublesome subject in the establishment of community-based residential care facilities. As well, in Douglas Bell vs. Her Majesty the Queen, S.C.C. 1979 (unreported), as documented in Chapter 4, one key issue is articulated in land-use control matters. A municipality acts ultra vires when it zones land by people zoning. The decision in Douglas Bell (supra) turned on consideration of the term "family" and upon the notion of material change in use. Establishment of residential care facilities in single-family neighbourhoods can build on these facts, for, in addition, they are interrelated. For example, where a material change in use has occurred, as in the structural
alteration of a dwelling, operation of a business (but excepting home occupations) rather than a residence, or where the physical character of a dwelling changes the character of a neighbourhood, then municipalities have the legislative authority at present to regulate such change. In the case of residential care facilities, however, where the explicit aim is that the dwelling resemble the surrounding single-family dwellings, one can only conclude that exclusion of residential care facilities is based on an attribute of the class of persons who reside in such facilities. Public attitudes indicate that this is so. Therefore, the issue of exclusion of residential care facilities from single-family neighbourhoods is, additionally, one of human rights.

The strategies which follow deal with present land-use control measures and with ancillary planning practices.

1. SEEK REDEFINITION OF THE TERMS "FAMILY" AND "RESIDENTIAL CARE FACILITY" (or similar terms such as "Group Home", "Halfway House", "Community-care facility" et cetera) IN MUNICIPAL BY-LAWS.

Present definitions of "family" in zoning by-laws often prohibit unrelated persons from residing in the
same dwelling and preclude the establishment of residential care facilities. Given recent Canadian legal history, there appear little grounds for discrimination through zoning based on interpretation of the term "family". Therefore, municipalities ought to accommodate broader-based definitions which acknowledge that all persons have an opportunity to reside as a group in a "single-family" dwelling.

The definition of "residential care facility" (and associated terms) in zoning by-laws usually encorporates restrictions on the number of unrelated individuals who may reside in one dwelling. While it is difficult to establish a number acceptable to all groups in need of residential care facilities, it is suggested that the number not exceed 10 people. Municipal by-laws have often been more restrictive making residential care facilities which locate in single-family neighbourhoods uneconomical to operate given present provincial and federal governments per diem rate structures. While redefinition of the terms "family" and "residential care facility" may be under review on the North Shore, a continued lobby for change would be appropriate.

The present Community Care Facilities Licensing Act in Section 8 specifically prohibits the province or a municipality from enacting a by-law to prevent the use of a single-family dwelling for a community-care facility. Section 8 prevents enactment of new legislation but does not prevent restriction by zoning by-laws presently in place. A general prohibition in the Municipal Act of B.C. (supra) against the use of zoning by-laws to restrict the establishment of residential care facilities would effectively centralize the authority for regulating residential care facilities with the provincial government. Given the ubiquitous need for residential care facilities throughout B.C., there is considerable merit in this approach. Provincial governments have been reluctant to withdraw municipal authority in this area as delegation of land-use control to municipalities is well established. Quebec, however, has passed such legislation in the Health and Social Services Act of that province. In B.C., if municipal authority for residential care facilities through zoning were withdrawn, the problem
of concentration of community-based care facilities would have to be regulated by the province.

Alternatively, amendment of the Municipal Act of B.C. to reflect the concepts articulated in Douglas Bell is well within the established sovereignty of the state to act in matters of a local nature. Amendment of this kind to the Municipal Act of B.C. brings conformity to the specific legislation of community care facilities found in the Community Care Facilities Licensing Act.

3. AMEND THE MUNICIPAL ACT OF B.C., R.S.B.C. 1960, AS AMENDED, TO INCLUDE A PHRASE IN SECTION 702(2) STIPULATING THAT COUNCIL HAVE DUE REGARD FOR THE "PROVISION OF SOCIAL HOUSING" WITHIN ITS MUNICIPAL BOUNDARIES.

The amendment to section 702(2) adds to the criteria used in present review by municipalities of matters related to land-use control. Addition of the phrase "provision of social housing" would mean that Council is required to give consideration to the establishment of residential care facilities as one form of social housing.

It should be noted that, in another context, the Courts have ruled that Councils do not need to give explicit recognition to each of the criteria listed
in section 702(2) when preparing minutes of council meetings. However, despite this fact, unless council is expressly directed to consider the question of social housing, it is possible that questions raised concerning residential care facilities could be dismissed as beyond the scope of section 702(2).

4. AMEND MUNICIPAL ZONING BY-LAWS THAT SPECIFICALLY APPROVE OF THE ESTABLISHMENT OF RESIDENTIAL CARE FACILITIES BASED ON THE CONDITIONAL APPROVAL OF A SELECTED GROUP OF MUNICIPAL RESIDENTS.

Municipal councils which delegate decision-making powers through the process of petition by a small number of neighbouring residents in opposition to a proposed care facility act ultra vires. The Municipal Act of B.C. (supra) does not specify that the consent of affected owners be obtained before a rezoning can take place. This is particularly true when council makes a final decision on a proposed residential care facility based on such a petition. Section 401(3) of the Zoning By-law No. 3778 of the City of North Vancouver contains such an offending clause. They are therefore subject to review. Either the Office of the Inspector of Municipalities or the Courts is a suitable institutional setting for a hearing of this complaint.
5. THROUGH THE MINISTRY OF MUNICIPAL AFFAIRS, SOLICIT THE COOPERATION OF MUNICIPALITIES TO PREVENT EXCLUSION OF RESIDENTIAL CARE FACILITIES IN SINGLE-FAMILY NEIGHBOURHOODS.

This low profile, Provincial approach depends upon municipal cooperation. Such cooperation is not likely to be shared by all municipalities. The power of persuasion of the Ministry of Municipal Affairs will, to some extent, mitigate this difficulty.

6. DEVELOP A MODEL ZONING OR LAND-USE CONTROL BY-LAW AS A GUIDE TO MUNICIPAL GOVERNMENTS.

With respect to establishment of residential care facilities, there is merit in a strategy of this kind. A regulating guide to land-use zoning by-laws would provide a consistent regulatory policy across administrative boundaries. On the North Shore, study indicates that inconsistent regulatory policy between neighbouring municipalities is a factor which has led to one municipality accommodating more than its regional fair share of social housing.

An obvious disadvantage to this strategy is that it is a model only and therefore discretionary. On the other hand, a model provides guidance while
allowing flexibility at the local level. Moreover, social agencies can direct the thrust of their lobby toward the Provincial government in formulation of these regulations.

7. AMEND MUNICIPAL ZONING BY-LAWS TO PROVIDE RESIDENTIAL CARE FACILITIES AS A PERMITTED USE IN ALL RESIDENTIAL ZONES.

Residential care facilities provide a supervised family-type home atmosphere in a single-family detached dwelling. At present community-based care facilities are frequently restricted within specific zones of municipalities. The effect is to:

a) limit the selection of suitable housing stock for residential care facilities which do not require structural alteration;

b) concentrate residential care facilities within one zone; and

c) require that social agencies wishing to establish care facilities in single-family neighbourhoods seek rezoning.
An amendment to zoning by-laws initiated at the municipal level rather than the provincial, as described above, addresses the problem of material change in use described in Chapter 4, and ameliorates the concentration of facilities in any one zone. This amendment also avoids the necessity of rezoning and therefore the need for public hearings. As there is an inherent bias in the community against situation of residential care facilities, public hearing on a rezoning application may not be a fair forum. Where there is a question involving land zoning by people zoning, through an unreasonable interpretation of the term "family", public hearings of rezoning applications are no longer the appropriate forum.

8. REGULATE THE CONCENTRATION OF RESIDENTIAL CARE FACILITIES IN ANY ONE ZONE.

With concentration of residential care facilities some measure of the residential character in a neighbourhood is lost. Although this perception may be altered through acceptance of an approach to include residential care facilities as a permitted use in other zones, present public attitudes indicate a genuine concern for loss of the residential character of a neighbourhood. It may be necessary to establish
an interim measure, which complements previous approaches, calculated on the density requirements per block or neighbourhood until such time as residential care facilities are more generally accepted. The suggested regulation might read as follows: "A residential care facility must be spaced at least 'X' meters from another similar facility in any residential zone".

Also, it will be necessary, as a social planning function of municipal government, to document factual information concerning the concentration of facilities and their location in single-family neighbourhoods. If discrimination in housing is to be proved before a human rights tribunal, it must be based on fact. The effect of residential care facilities on property values, crime, vandalism, parking and noise are some of the variables which need to be documented on a local basis.

9. AMEND THE COMMUNITY CARE FACILITIES LICENSING ACT, 1969, TO PROVIDE CONSTRUCTION STANDARDS FOR THE PARTICULAR CASE OF A FACILITY LOCATED IN SINGLE-FAMILY NEIGHBOURHOODS.

A major problem in the establishment of community-based care facilities in single-family neighbourhoods
arises through enforcement of building standards set out in the Community Care Facilities Licensing Act. The Act sets standards which restrict the kinds of housing stock acceptable for residential care facilities. Even if social agencies are able to meet the prohibitive cost of structural alteration required to conform to the Act's standards, in so doing the agency may immediately contravene the implications of a material change in use. Specifically, structural alteration to a building constitutes a material change in use. The amendment above is necessary to avoid contravention of the "character" and "uses" clauses of present municipal zoning by-laws.

Admittedly, the problem here presents an additional dilemma. Suitable standards governing the safe operation of a residential care facility are desirable. However, the present standards described in the Community Care Facilities Licensing Act do not deal in a fair way with the specific requirements of individual facilities as compared to others. It is not argued that the standards be removed but rather that consideration be given to the particular safety standards which different kinds of facility may require.
5.1.2 Public Attitudes

Opposition to residential care facilities in single-family neighbourhoods takes many forms. A social plan based on education is a necessary means of countering opposition motivated by fear or ignorance. On the other hand, opposition may well be based on economic factors or reasonable concerns, and although education may alleviate some of these, economic opposition requires special approaches. The approaches listed below discuss various alternatives within the scope of public attitudes.

1. CONDUCT A PROVINCE-WIDE PUBLIC AWARENESS PROGRAMME JOINTLY BETWEEN PROVINCIAL AND MUNICIPAL GOVERNMENTS, SOCIAL AGENCIES AND ASSOCIATIONS.

There is considerable misinformation at several levels concerning the establishment of residential care facilities. At the provincial level, several ministries are not cognizant of the problems associated with residential care facilities. Their lack of involvement may have a simple cause - they have not been asked directly to become involved. However, given the provincial government's current policy on deinstitutionalization and their active role in the provision of social services and housing, it would seem advantageous that the above approach be initiated.
This approach would require a clear statement of provincial policy communicated in a comprehensive public relations package to municipalities, including financial incentives such as municipal incentive grants, and detailing provincial/municipal responsibilities.

Realistically, cooperation by municipal councils places them in a difficult position. They may wish to cooperate with a provincial programme but may represent a constituency who oppose the establishment of residential care facilities. The strategy has merit nevertheless as a means of enlightening public attitudes through education and through meaningful financial assistance.

At another level, social agencies can contribute valuable, specific knowledge on the operations and programmes associated with residential care facilities. While exposure of persons in need of residential care to public scrutiny and debate is not desirable, it may be necessary to formulate a limited public exposure campaign in order to achieve the public education and response needed for legislative amendment.
2. PROMOTE THE USE OF MUNICIPAL INCENTIVE GRANTS TO ENCOURAGE MUNICIPALITIES TO ACCOMMODATE RESIDENTIAL CARE FACILITIES AND TO DEFRAY MUNICIPAL EXPENDITURES FOR ADDITIONAL SUPPORT SERVICES.

This approach addresses economic opposition to residential care facilities. It attempts to defray the burden of cost placed on local government. Calculations can be made on a per-bed basis. The success of this approach clearly depends on the willingness of senior governments to participate in cost-sharing. As a result, in times of fiscal constraint this strategy is one which may have to be held in abeyance, and clearly depends upon the changing costs of institutional alternatives.

3. ORGANIZE AN INTER-MINISTERIAL WORKING GROUP TO COORDINATE THE LEGISLATIVE MANDATES OF EACH MINISTRY AS THEY PERTAIN TO RESIDENTIAL CARE FACILITIES.

Several ministries of the provincial government have a direct or indirect relationship to the establishment of residential care facilities in family neighbourhoods. Clearly a consistent ministerial policy on these facilities would assist in development of an enlightened public attitude. Since each ministry has a different mandate for taking action, it is suggested that a working group be
established to formulate a coordinated policy concerning residential care facilities. Such a working group might conceivably include the following ministries: Municipal Affairs; Human Resources; Health; Human Rights Branch; Education; Attorney-General (Corrections Branch). If a consistent policy is to be initiated at the provincial level, it seems essential that the various ministries above coordinate their activities.

4. ENCOURAGE REGIONAL HOUSING CORPORATIONS OR FOUNDATIONS TO ESTABLISH A "POOL" OF HOUSING STOCK THEREBY ALLOWING SOCIAL AGENCIES TO CONCENTRATE ON PUBLIC AWARENESS AND FACILITIES PROGRAMMES.

This approach would assist social agencies in acquiring needed housing stock for residential care facilities and would alleviate agencies from the troublesome and time-consuming chore of locating and financing new acquisitions. Agencies would be afforded greater time to devote to programme development for this facilities or in communicating information to an ill-informed public.
5.1.3 Human Rights

As described in Chapter 4, location of residential care facilities in family neighbourhoods is both a zoning and a human rights problem. The Human Rights Code of B.C., S.B.C. 1973 (2nd Sess.) c. 119, in section 4, prohibits discrimination in housing based on "race, religion, colour, sex, ancestry, place of origin or marital status". The language of the Code is insufficient to prevent prejudicial conduct related to differentiating group characteristics which distinguish particular groups or classes of persons from the rest of society, other than those characteristics enumerated.

In order to bring residents of residential care facilities within the protection of the Code in housing, a single-focus strategy is suggested. The human rights issue is critical. Considerable research and a learned legal opinion on related law is imperative. The following approach deals with the material facts of the study at hand as it relates to the Human Rights Code of B.C.
1. AMEND THE HUMAN RIGHTS CODE OF BRITISH COLUMBIA, S.B.C. 1973 (2nd Sess.) c.119, TO PROVIDE PROTECTION FROM DISCRIMINATION IN HOUSING TO THOSE IN NEED OF RESIDENTIAL CARE FACILITIES.

Amendment of the Human Rights Code of B.C. (supra), specifically to include the phrase "reasonable cause" for discrimination, would bring those in need of residential care facilities within the ambit of the Code.

There are several important implications of this approach. First, it brings consideration of residential care facilities in family neighbourhoods within the jurisdiction of the Human Rights Branch of the Ministry of Labour. Secondly, the terms "reasonable cause" or "grounds for discrimination" have opposite results:

a) The concept of "reasonableness" provides a means of extending an otherwise exhaustive list of classes or categories of characteristics prohibited against to include the handicapped; and

b) It opens the present express prohibition against discrimination on the basis of an
enumerated list of characteristics to review as "reasonable" which could not have been in the minds of the Legislature in enacting the Code.

Care, therefore, must be exercised in drafting amending legislation.

It is suggested that a suitable amendment to section 4 would be to incorporate the term "reasonable cause" as it has been done in section 3. In this way protection of the Code is extended to the handicapped without contradicting the intent of the Code.

4. (1) No person shall
(a) deny to any person or class of persons the opportunity to purchase any commercial unit or dwelling unit that is advertised or in any way represented as being available for sale; or
(b) deny to any person or class of persons the opportunity to purchase or otherwise acquire land or an interest in land; or
(c) discriminate against any person or class of persons with respect to any term or condition of the purchase or other acquisition of any commercial unit, dwelling unit, land, or interest in land

unless reasonable cause exists for such refusal or discrimination.
(2) For the purposes of subsection (1) the race, religion, colour, sex, ancestry, place of origin, or marital status of any person or class of persons shall not constitute reasonable cause.

Amendment of section 4 as described above adheres strictly to the thrust of the Code. It will provide the opportunity for those opposed to residential care facilities to show that there are grounds for denial of housing to the handicapped, for example, and that such grounds may be reasonable. Fairly, this opportunity ought to be present under the terms of the Code. On the other hand, discrimination against those possessing the distinguishing characteristics of "race, religion, colour, sex, ancestry, place of original or marital status" would remain closed to review on the grounds of reasonableness.

Through an amendment of the kind described above, a board of inquiry thereby becomes a suitable institutional setting (see Chapter 2) for hearing of cases involving community-based residential care facilities. Moreover, as it was found in Heerspink, and given the requirements for comparison of the respective authorities of the Municipal Act and the Code as described in Chapter 4, public corporations are subject to review
before a board of inquiry. Should a review of municipal zoning practices be found to contravene the Code, then by-laws involving exclusionary zoning of this kind would have to be amended or repealed.

It should be noted that an alternate method of amending the Human Rights Code is available. By including the term "handicapped" as another of the distinguishing attributes already enumerated in section 4, protection of the Code to those in need of residential care facilities is assured. The term "handicapped" is given the same weight as those other distinguishing characteristics already set out. The difficulty with an amendment of this kind, however, is critical:

a) Legislators will need to be convinced that the term "handicapped" or whatever other term is considered in its place is of the same kind of distinguishing group characteristic as those presently enumerated;

b) The term "handicapped" or whatever other term is used in its place will need to be defined in s.1 of the Code. Definition of such a term is a thorny issue.
c) Discrimination against the "handicapped" in housing would in the latter amendment be an absolute prohibition. Since questions of reasonableness or grounds for discrimination cannot be raised because they would not appear in the language of s.4, major issues such as density or concentration — otherwise reasonable issues — are effectively eliminated from consideration. These issues relate to the intrinsic authority granted to municipal governments by the Municipal Act of B.C. in zoning matters.

5.2 Conclusions

In this study concerning location of community-based residential care facilities in family neighbourhoods problems encountered involve situations related to the sovereignty of parliament. They are the notions of individual interest groups versus the power of the state; fair representation; delegation of power; land zoning by people zoning; reasonableness; and ultra vires. In all of these, sovereignty of parliament determines that a proper institutional setting will be provided in which matters of social policy will be heard or reviewed.

The sovereignty of parliament to legislate social
policy is not in dispute. At the municipal level, through delegation of power, councils may act as the institutional setting for three processes of government - legislative, administrative and quasi-judicial. The location of community-based residential care facilities involves all three processes. In the latter process, council is asked to review its own legislative and administrative practices. It is an unenviable position. In the case of resident opposition to the zoning of land for residential care facilities, the position of council may well be untenable. For example, on a rezoning application, councils are required by the Municipal Act to conduct a public hearing. In that capacity, they assume a quasi-judicial role. Their decision will necessarily consider legislative and administrative practices presently in place, practices which they may have initiated in other roles. Moreover, establishment of community-based care facilities is both a question of land-use control and of human rights. Councils may properly consider matters of land-use zoning but not land zoning by people zoning.

To remove council from their untenable position the approaches described in this chapter provide some solutions to the difficulty. If, as it has been argued, establishment of residential care facilities in family neighbourhoods is a human rights matter, municipal council
in its quasi-judicial role is the wrong court in which to decide human rights matters. While councils may be persuaded to enlighten their definition of "family" in zoning by-laws, they may also resist persuasion. The approaches in this chapter therefore address change in social policy at the provincial, municipal and non-governmental levels. If change is to occur, clearly, amended legislation is required. Neither the sovereignty of parliament nor the delegation of power to municipal government is removed.

A challenge of the jurisdiction of municipal councils to land zone by people zoning is untested in B.C. Courts. Should a social agency choose to challenge a municipal decision in the Courts without putting the strategies of this chapter in place, a favourable decision is moot. Present facts are:

- Municipal councils act **ultra vires** if they land zone by people zoning.

- Municipal zoning by-law definitions of "family" are subject to liberal interpretation as per Douglas Bell.
- Municipal councils act *ultra vires* when they delegate power of authority to make decisions to a small group of affected property owners through petition, as per *Davis* (1892) 21 O.R. 243.

However,

- Municipal councils are now the proper forum to hear matters related to land-use control.

- Establishment of residential care facilities has not been considered a matter of human rights *per se*.

- Human rights legislation in s.4 of the *Human Rights Code of B.C.* (supra) does not protect the handicapped from discrimination in housing.

All of these factors need to be addressed before judicial review of exclusionary zoning regulations as a human rights matter can occur. In view of the dilemma involving "reasonable cause" as set out in *G.A.T.E.* (S.C.C. 1979, unreported), further study of a hypothetical case is
mandatory.

The land-use control package of approaches described in this chapter will further the establishment of residential care facilities in family neighbourhoods. It is argued that there exists a strong probability of success, given the particular circumstances described in Chapter 4, for a legal challenge of present municipal zoning practice. A combination of provincial governmental involvement and municipal cooperation would improve the opportunity for locating community-based care facilities in residential zones. Advocates for establishment of community-based residential care facilities should be encouraged to organize a persuasive lobby based on documented evidence of discrimination in housing for residents of residential care facilities based on the term "family" as per Douglas Bell (supra).

The educational package of approaches which aims to modify public opposition could improve the attitude toward accommodation of community-based care facilities. This package is clearly a long-term approach and the probability of success is uncertain. It is argued, however, that this package is essential since discrimination cannot simply be legislated away.
The human rights approach attempts to bring the discriminatory aspect of land-use control within the ambit of the Human Rights Code of B.C. (supra). The probability of success of this strategy is, at present, uncertain. However, there remains sufficient evidence to suggest that this approach would in time produce beneficial results for residents of residential care facilities. At the same time, fair and equal representation before a human rights tribunal is maintained for those who may oppose such facilities. A human rights tribunal is, moreover, an appropriate institutional setting for hearing complaints concerning discrimination in housing. Uncertainty exists related to the unresolved interpretations of "reasonable cause" (notwithstanding Chief Justice Laskin's remarks in G.A.T.E. (supra)), and with the objective versus subjective tests of discrimination. This strategy ought to be pursued with caution for careful documentation of factual evidence of discrimination is essential as well as expert legal advice pertaining to the particular circumstances of a prospective test case.

A programme designed to assist in the establishment of residential care facilities in family neighbourhoods should, at present, concentrate its efforts on the land-use control package. The inequities which result
from the application of the definition of "family" as documented in Chapter 4 need to be addressed in the interest of social justice.

A programme based on the human rights package can strengthen the case for rectifying the inequities embodied in many municipal zoning ordinances.

Failure to address these inequities can only retard the movement towards meaningful social change and social justice.
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