REPORT OF THE
JOINT SUBCOMMITTEE STUDYING

SITE SELECTION OF RESIDENTIAL FACILITIES FOR MENTALLY DISABLED

TO THE GOVERNOR AND
THE GENERAL ASSEMBLY OF VIRGINIA

SENATE DOCUMENT NO. 36

COMMONWEALTH OF VIRGINIA
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The Honorable Mitchell Van Yahres, Vice-Chairman
The Honorable E. Hatcher Crenshaw, Jr.
The Honorable Mary A. Marshall
The Honorable Kenneth R. Melvin
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Joint Subcommittee Studying
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For Mentally Disabled
To
The Governor and the General Assembly of Virginia
Richmond, Virginia
March, 1990

TO: Honorable L. Douglas Wilder, Governor of Virginia,
and
The General Assembly of Virginia

I. INTRODUCTION

The Joint Subcommittee was established by Senate Joint Resolution 220 of the 1989 General Assembly. At the initial meeting Senator Joseph V. Gartlan, Jr., of Fairfax was elected chairman and Delegate Mitchell Van Yahres of Charlottesville was elected vice-chairman. Other legislative members of the Joint Subcommittee included Senators Yvonne B. Miller of Norfolk and Emilie Miller of Fairfax and Delegates Mary A. Marshall of Arlington, Kenneth R. Melvin of Portsmouth, and E. Hatcher Crenshaw, Jr., of Richmond. Four citizen members were appointed by the Governor. Locally elected officials were represented by Aubrey E. Brown of Abingdon, a member of the Washington County Board of Supervisors, and Patricia R. Lovern of Lynchburg, a member of the Lynchburg City Council. Citizen members were Janet C. Alley of Chesterfield County and Barbara J. Fried of Fairfax County.

Senate Joint Resolution 220 gave the Joint Subcommittee a broad charge to "study methods of site selection of community residences for the mentally disabled, juveniles, substance abusers and others who require treatment which includes assimilation into the community." At the initial meeting the Joint Subcommittee determined that the clear intent of SJR 220 was that the study focus primarily upon the siting of group homes and other residential facilities for the mentally disabled.

The Joint Subcommittee also agreed that it would accept evidence and testimony, if offered, relating to the siting of community group homes or other residential care facilities which are part of correctional programs and facilities for juveniles under the Division of Youth Services of the Department of Corrections. The Joint Subcommittee would not initially focus on these programs, however. No presentations were offered on these topics

during the hearings, thereby suggesting that the panel need not address this area. Neither the residential community diversion programs for adult offenders nor the system of half-way houses for parolees and probationers under the Department of Corrections was deemed within the scope of the resolution.

Following its initial meeting on July 27, the Joint Subcommittee held public hearings in Fairfax on August 25 and Norfolk on October 2. The Subcommittee also received testimony at a final meeting held in Richmond on October 30.

II. IDENTIFYING THE PROBLEM

A shortage of available spaces for the mentally disabled who are in need of residential facilities has been documented by the Department of Mental Health, Mental Retardation, and Substance Abuse Services (MHMRSAS) and other sources. The General Assembly's own Commission on Deinstitutionalization, supported by a study and analysis by the Joint Legislative Audit and Review Commission, documented at mid-decade a shortage of housing but primarily addressed funding issues and the sorting out and coordination of activities by involved state and local agencies (Senate Document No. 22, 1986). Problems attendant to site selection of facilities have not been the subject of legislative study in Virginia.

National surveys, studies conducted in other states, and the general literature suggested an initial list of factors which might serve as barriers to the siting of group homes and residential facilities. Since data on Virginia were not available, the Joint Subcommittee took steps to identify the major problems faced across the Commonwealth.

Public hearings were held in Northern Virginia (Fairfax) and Tidewater (Norfolk), and a public comment opportunity was offered at a session in Richmond. Approximately three dozen individuals representing a mix of Community Service Boards, other mental disability services professionals, and concerned families and citizens addressed the Joint Subcommittee.

In addition, through and with the assistance of the Virginia Association of Community Service Boards, a questionnaire was sent to each of the forty CSB's in the state. The questionnaire gave those with the most direct experience in the field an opportunity to identify in detail the specific problems which need to be addressed in Virginia in order to simplify the site selection process and enhance the availability of housing for the mentally disabled.

Public testimony and the results of the CSB survey were mutually reinforcing and were also consistent with the problems commonly found in other states. In broad terms, problems were identified in the following areas.

Zoning laws and related requirements. Zoning ordinances across the state continue to exclude facilities for the mentally disabled from some zoning districts or to set aside certain areas as "appropriate" or "inappropriate" for such facilities. More pervasive, however, are practices such as the

imposition of special conditions, requirements for special use permits, and public hearing requirements. According to the testimony and CSB survey returns, these conditions (a) at times are a direct barrier to access to certain areas; (b) contribute to the related problem of community misunderstanding and opposition; (c) act as a serious detriment to financing of facilities because, by delaying the process of acquisition, they place facility providers at a disadvantage in competing for sales in the open market and increase the costs of acquiring property; and (d) consume much of the time and effort of the CSB staffs in paperwork rather than in more direct and productive service activities.

Restrictive covenants. Several CSB's indicated that restrictive covenants continue to be a barrier. The 1986 General Assembly did address the restrictive covenant problem to an extent through subsection C of § 36-91 of the Code of Virginia, declaring group homes of six or fewer residents to be residential occupancy by a single family for purposes of interpreting restrictive covenants. However, the 1986 legislation only applied to covenants executed after July 1, 1986. Covenants executed prior to that date, which often will involve the stock of housing coming on the market for residential facility purchase, are not affected, nor is the larger residential facility which might be an option in at least some localities addressed.

Community opposition. Senate Joint Resolution 220 emphasizes community opposition as a problem to be overcome and it is clear from the testimony and surveys that misunderstanding of the mentally disabled and apprehension concerning safety, property values, and the like in neighborhoods in which group facilities are proposed to be located continue to exist. Zoning procedures such as permit and hearing requirements, it would appear, exacerbate the problem and increase the influence of community opposition in decisions not to permit the siting of group homes.

Reputable studies and personal testimony show such concerns to be unfounded. See a summary of major recent studies on this point in Martin Jaffe and Thomas P. Smith, Siting Group Homes for Developmentally Disabled Persons (Chicago: American Planning Association, Planning Advisory Service Report Number 397, October 1986), Chapter 5. On property values in particular, see There Goes the Neighborhood (White Plains, N.Y.: Community Residences Information Program, March 1986).

Financing. The need for greater funding for facilities and related activities which promote housing for the mentally disabled is little doubted. On balance, however, the evidence given to the Joint Subcommittee reveals that the difficulties in zoning practices and community opposition create barriers to housing even when funding is available. There were some CSB's, nevertheless, that did identify the lack of funding for facilities as a prime concern.

The Joint Subcommittee felt that the adequacy of funding and other direct financial concerns were beyond the scope of the charge to consider the "methods of site selection" and were better addressed through agency budgetary efforts. Nevertheless, the Subcommittee endorses all efforts to provide increased funding.

"Transfer" of service responsibility. The cumulative effect of zoning, community opposition, and related factors on site selection in urban areas for other parts of the state is a significant concern which came to the attention of the Joint Subcommittee. The inability of urban areas, particularly Northern Virginia, to house its mentally disabled population means that these people are being shifted to rural parts of the state to find housing either in licensed residential facilities or in other facilities such as homes for the aging. The financial burden of providing a range of services in turn is shifted to these rural counties and small cities.

III. THE FEDERAL FAIR HOUSING ACT AMENDMENTS OF 1988

Central to the issues under study by the Joint Subcommittee was federal legislation which has, within the last year, significantly altered the legal basis upon which both state laws and local ordinances and customary practices have dealt with the mentally disabled.

The Fair Housing Amendments Act of 1988, effective March 12, 1989, extends the 1968 Federal Fair Housing Act to include persons with disabilities, including mental disabilities. The Amendments do not address in specific statutory terms most of the issues which the Joint Subcommittee faced. However, the Act clearly intends to include zoning practices and the like in its coverage. In the words of the Report of the House Committee on the Judiciary which accompanied the Act:

> The Committee intends that the prohibition against discrimination against those with handicaps apply to zoning decisions and practices. The Act is intended to prohibit the application of special requirements through land-use regulations, restrictive covenants, and conditional or special use permits that have the effect of limiting the ability of such individuals to live in the residence of their choice in the community.

The Act does not spell out expressly how to implement this general policy. The Joint Subcommittee found that the precise scope and requirements of the Act still are being debated and will not be fully determined until a body of case law has developed.

The Joint Subcommittee consequently sought guidance from experts in this area of the law. The Attorney General of Virginia shared with the Joint Subcommittee at its request a memorandum prepared by that office for the Director of the Department of Mental Health, Mental Retardation, and Substance Abuse Services which analyzed the import of the federal statutes for several provisions of state law. R. Claire Guthrie, deputy attorney general, and Gregory J. Haley, assistant attorney general, also testified before the Joint Subcommittee. The Joint Subcommittee in addition benefitted from a presentation by Mr. Leonard Rubenstein, legal director of the Mental Health Law Project in Washington, D.C., one of the best known and respected mental health legal advocacy groups.

A consensus already has emerged that the new federal law invalidates local zoning ordinances and related requirements containing the following types of provisions:

1. Zoning provisions which specifically exclude the mentally disabled from housing areas.

2. Dispersion requirements, such as a limitation on the number of facilities within an area or minimum distance requirements between facilities for the mentally disabled.

3. Concentration requirements which set aside only certain areas as appropriate for housing the mentally disabled.

4. Conditional or special use permits, building code requirements, and similar provisions which apply specifically and exclusively to the mentally disabled.

5. Special hearing requirements, review panels, neighborhood advisory groups, and the like as a condition of or adjunct to group home siting specifically for the mentally disabled. (Representatives of the Attorney General's Office warned that, even if provided for in an ordinance fashioned to fit a neutrality standard, public comments might risk creating a record which would be evidence of discriminatory intent. The FHAA means that public comments and attitudes may not influence a siting decision.)

6. Special use permit requirements based on the need for medical or psychiatric care.

On the other hand, even the experts have differing interpretations as to the rationale and requirements of major points of the Act.

One disagreement arises over the proper reference group or classification to be used in judging state and local provisions regarding the mentally disabled. One view is that the family is the proper basis of comparison, leading to the conclusion that no restriction can be imposed on group homes for the mentally disabled, for example, which does not apply equally to single family residences. An alternative reading is that unrelated individuals who share living arrangements are the proper reference class. Distinctions between family and unrelated-individual living arrangements are valid so long as the mentally disabled are not singled out from other groups of unrelated individuals in a discriminatory fashion in drawing or applying ordinances.

Another unsettled question focuses on the posture which state and local governments must take under the Act. One contention is that the Act obligates state and local governments not only to repeal any overtly discriminatory provisions and practices but to take steps that promote the availability of housing to the mentally disabled. It imposes an affirmative obligation to remove even facially neutral rules which have the effect of denying housing opportunities to the mentally disabled. For instance, a limit on the number of unrelated persons living together could have the effect of denying housing opportunities to the mentally disabled.

Others maintain that the FHAA does no more than require a standard of neutrality. State and local governments cannot require or endorse practices which discriminate against the mentally disabled. However, rules which apply

equally to all members of a classification (e.g., unrelated individuals living together) are not facially invalid. The FHAA does not require that the mentally disabled be established as a "preferred class," although the state is not prohibited by the Act from doing so.

To illustrate, no consensus exists as to the validity of classifications, restrictions, and limitations based on the number of unrelated individuals living together, such as an ordinance which imposes a limitation or additional requirement on groups of five or more. An expansive interpretation asserts that such provisions are invalid for the mentally disabled because they treat that group differently from the defined group of "family" and have the effect of denying housing opportunities. A more restrictive position asserts that such facially neutral rules are valid, although a requirement might be overturned if in practice it was applied only to the mentally disabled.

IV. THE STATUS OF CURRENT VIRGINIA STATUTORY PROVISIONS

While some of the finer points of the recent federal legislation remain to be legally refined, there is sufficient consensus on major points to indicate that state law and local zoning ordinances need to change. The FHAA applies directly to two sections of the Code of Virginia, and both are suspect under the new law. In addition, a third provision may slow the process of site approval and acquisition.

Zoning Ordinances (§ 15.1-486.2)

State Policy. Subsection A of this section states that the policy of the Commonwealth is "that the number of such group homes and their location throughout the Commonwealth and within any given political subdivision shall be proportional, insofar as possible, to the population and population density within the Commonwealth and local political subdivisions."

Representatives of the Attorney General's Office took the position that the FHAA probably invalidates the provisions of subsection A since the language appears to encourage dispersion practices.

Zoning Regulations. Subsection B requires locally adopted zoning regulations to provide for the mentally disabled "in an appropriate zoning district or districts."

Likewise, the Attorney General's Office was of the opinion that this subsection probably is invalid because it seems to permit concentration of the mentally disabled in certain zoning districts within a locality.

Special Conditions. Subsection C provides that conditions not required of other dwellings in the same zone may be imposed on homes for the mentally disabled "only when such additional conditions are related to the physical or mental handicap of the residents and are necessary to protect the health and safety of the residents of such homes." Further, "(r)easonable conditions may also be imposed on such homes to assure their compatibility with other permitted uses in the area."

The Attorney General's Office Memorandum to the Commissioner of Mental Health, Mental Retardation, and Substance Abuse Services stated that the subsection likely was invalid. Representatives of the Attorney General's Office testified that even if these provisions were not necessarily invalid they smacked of the paternalistic attitude which the Report accompanying the FHAA characterized as leading to rules and regulations which would be prohibited under the Act. Any local provisions adopted pursuant to the subsection would be scrutinized carefully.

Restrictive Covenants (§ 36-91)

Subsection C of this section declares that group homes of six or fewer residents shall be deemed residential occupancy by a single family for the purposes of restrictive covenants but specifically states that the provision does not apply to zoning and land use distinctions. Further, the subsection applies only to restrictive covenants executed after July 1, 1986.

The Attorney General's Office took the position that the subsection may be read to encourage passive discrimination because it fails to address covenants executed prior to July 1, 1986. Likewise, the subsection runs into difficulty because it draws distinctions based on handicap and invalidates living arrangements where the occupants are handicapped (i.e., homes of seven or more) but allows the same arrangement when the occupants are not handicapped.

Public Facility Siting Review (§ 15.1-456)

This section deals with the legal status of local comprehensive plans and on its face does not appear to address the siting of group homes. However, it provides that any public facility, including a "public building or structure" or "public service corporation facility... whether publicly or privately owned" not shown on the original plan may not be constructed, established, or authorized until approved by the planning commission. The commission is authorized to hold a public hearing in connection with such approval, and is required to do so at the direction of the local governing body.

At least some localities require group home facilities to go through the process, and several speakers and CSB questionnaire respondents identified the "456" review as a deterrent to group home siting because of the delay involved.

The Attorney General's Memorandum concluded that local ordinances adopted to carry out this statutory provision were valid. The rationale of the requirement is to ascertain whether public facilities in general should be leased or purchased and the review procedure does not single out the handicapped.

V. RECOMMENDATIONS

The Joint Subcommittee determined that the most advisable approach to the conflicts between state statutory provisions and the Fair Housing Amendments Act is to repeal the suspect Code provisions. In this fashion the mentally

disabled and physically handicapped citizens of the Commonwealth unequivocally will enjoy the full protection of the federal law. Local governments are controlled in their zoning ordinances and related actions by the FHAA and there is little justification in setting out the same requirements in the Code or of attempting to guide the localities in some of the areas in which case law is still developing. Local government attorneys need to be aware of the requirements of the Act, and their state professional association is urged to include a program of continuing information and education in this regard.

In addition to the general recommendations, the Subcommittee specifically addressed a major problem faced by group homes for the mentally disabled by adding a provision which defines group homes for eight or less as a single family use and requires that they be subject to no special requirements not imposed on single-family uses generally. The practical effect is to ensure that group homes for the mentally disabled will be able to site "by right" without special permits and other requirements since the housing available in those areas where zoning particularly contributes to the siting problem generally will not exceed that capacity. As far as the state is concerned, this statutory provision resolves for local governments the question of whether, for group home purposes, to treat the mentally disabled as a family use or as a group living arrangement among unrelated individuals. It also signals that the state wishes an affirmative effort rather than neutral treatment alone when it comes to the siting of group homes for the mentally disabled.

Subcommittee recommendations are as follows:

A. Zoning and Land Use

1. Repeal § 15.1-486.2 since almost all of its provisions either clearly conflict with federal law or stand a reasonable chance of being overturned by developing case law.

2. Add a section numbered 15.1-486.3 which sets a clear statewide policy that facilities for eight or fewer mentally disabled individuals are to be regarded as single family uses. It was evident to the Joint Subcommittee that group homes falling within this category were the prime focus of concern. The developing policy of the Commonwealth is away from larger institutional and facility care and towards smaller units, supervised apartments, and mainstreaming of the mentally disabled population. Local governments will be required to comply with the new federal law in all aspects of their ordinances relating to the mentally disabled, of course, but the Joint Subcommittee believes that the Commonwealth itself should give direction in this particular case.

3. Make no changes to § 15.1-456. Requiring public facilities which are to be incorporated into the local comprehensive plan to undergo review and a public hearing process serves a rational state purpose. The present statutory provisions do not single out residential facilities for the mentally disabled for special requirements in this instance.

B. Restrictive Covenants

Repeal subdivision C of § 36-91. As explained above, this subsection is suspect because it appears to passively encourage discrimination and does not

apply to covenants executed prior to July 1, 1986. The Joint Subcommittee also notes that the 1989 General Assembly amended subsection A of § 36-91 to provide that "(a)ny restrictive covenant purporting to restrict occupancy or ownership of property on the basis of... familial status or handicap... whether heretofore or hereafter included in an instrument affecting the title to real or leasehold property, is declared to be null, void and of no effect, and contrary to the public policy of the Commonwealth."

C. Informing the Public

The Joint Subcommittee endorses the efforts of the Department of Mental Health, Mental Retardation, and Substance Abuse Services to develop a proposed three-year public education plan.

A common practice has been for local ordinances to require public notice, hearings, and the like for the siting of facilities for the mentally disabled. Some states by law have mandated a local review process with public comment periods. Under new federal law, however, neighborhood opposition cannot affect facility siting, and mandatory hearings in fact run the risk of creating a record which might show a discriminatory intent in siting decisions.

The Joint Subcommittee finds it desirable generally to educate the public regarding the mentally disabled, to allay unfounded fear and prejudice, and to enlist community support for efforts to extend residential facilities and other services; therefore, it endorses the Subcommittee goals of the Plan prepared by the Department and encourage the Board of Mental Health, Mental Retardation, and Substance Abuse Services to give it favorable consideration.

D. "Transfer" of Service Responsibility

The Joint Subcommittee recommends that the Department of Mental Health, Mental Retardation, and Substance Abuse Services, in conjunction with any other agencies with programs affecting the population at issue, review present funding methods to address the problem of rural and small city areas required to fund services for those who have moved from urban areas due to a lack of facilities or services.

Respectfully submitted,

The Honorable Joseph V. Gartlan, Jr., Chairman
The Honorable Mitchell Van Yahres, Vice-Chairman
The Honorable E. Hatcher Crenshaw, Jr.
The Honorable Mary Marshall
The Honorable Kenneth R. Melvin
The Honorable Emilie Miller
The Honorable Yvonne B. Miller
Janet C. Alley
Aubrey E. Brown
Barbara J. Fried
Patricia R. Lovern

1990 SESSION

LD1359118

SENATE BILL NO. 279

Offered January 23, 1990

A BILL to amend the Code of Virginia by adding in Title 15.1 a section numbered 15.1-486.3 and to repeal § 15.1-486.2 of the Code of Virginia, the added and repealed sections relating to local zoning ordinances applicable to residential facilities for the disabled.

Patrons--Gartlan, Miller, E.F., Andrews and Miller, Y.B.; Delegates: Plum, Van Yahres, Melvin, Glasscock, Cunningham, J.W., Cooper and Marshall

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Referred to the Committee on Local Government

Be it enacted by the General Assembly of Virginia:

1. That the Code of Virginia is amended by adding in Title 15.1 a section numbered 15.1-486.3 as follows:

§ 15.1-486.3. Group homes of eight or less single-family residence.--For the purposes of locally adopted zoning ordinances, a residential facility in which no more than eight mentally ill, mentally retarded, or developmentally disabled persons reside, with one or more resident counselors or other staff persons, shall be considered for all purposes residential occupancy by a single family. No conditions more restrictive than those imposed on residences occupied by persons related by blood, marriage, or adoption shall be imposed on such facility. A residential facility shall be deemed to be any group home or other facility licensed by the Department of Mental Health, Mental Retardation and Substance Abuse Services as a "residential facility" pursuant to its regulations.

2. That § 15.1-486.2 of the Code of Virginia is repealed.

Official Use By Clerks	
Passed By The Senate	**Passed By The House of Delegates**
without amendment ☐	without amendment ☐
with amendment ☐	with amendment ☐
substitute ☐	substitute ☐
substitute w/amdt ☐	substitute w/amdt ☐
Date: _____	Date: _____
Clerk of the Senate	Clerk of the House of Delegates

1990 SESSION

LD1361118

SENATE BILL NO. 280

Offered January 23, 1990

A BILL to amend and reenact § 36-91 of the Code of Virginia, relating to certain restrictive covenants.

Patrons–Gartlan, Miller, E.F., Andrews and Miller, Y.B.; Delegates: Plum, Van Yahres, Melvin, Glasscock, Cunningham, J.W., Cooper and Marshall

Referred to the Committee on General Laws

Be it enacted by the General Assembly of Virginia:

1. That § 36-91 of the Code of Virginia is amended and reenacted as follows:

§ 36-91. Certain restrictive covenants void; instruments containing such covenants.–A. Any restrictive covenant purporting to restrict occupancy or ownership of property on the basis of race, color, religion, national origin, sex, elderliness, familial status or handicap, whether heretofore or hereafter included in an instrument affecting the title to real or leasehold property, is declared to be null, void and of no effect, and contrary to the public policy of this Commonwealth.

B. Any person who is asked to accept a document affecting title to real or leasehold property may decline to accept the same if it includes such a covenant until the covenant has been removed from the document. Refusal to accept delivery of an instrument for this reason shall not be deemed a breach of a contract to purchase, lease, mortgage or otherwise deal with such property.

~~C. Notwithstanding any restrictive covenant executed after July 1, 1986, which restricts occupancy or ownership of real or leasehold property to members of a single family or to residential use or structure, a family care home, foster home or group home in which no more than six physically handicapped, mentally ill, mentally retarded or developmentally disabled persons reside, with one or more resident counselors or other staff persons, shall be considered for all purposes residential occupancy by a single family. Nothing in this subsection C shall restrict or otherwise affect the authority of any county, city or town under Chapter 11 (§ 15.1-427 et seq.) of Title 15.1 of the Code of Virginia or under any other general or special act dealing with zoning, planning or land use.~~

Official Use By Clerks	
Passed By The Senate	**Passed By The House of Delegates**
without amendment ☐	without amendment ☐
with amendment ☐	with amendment ☐
substitute ☐	substitute ☐
substitute w/amdt ☐	substitute w/amdt ☐
Date: _____	Date: _____
Clerk of the Senate	Clerk of the House of Delegates