

**UTILITY RATE CLASSIFICATIONS AND
GROUP HOMES AS "RESIDENTIAL" CUSTOMERS**

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Advocates for individuals living in non-traditional housing may wish to consider the way in which public utilities classify group homes as customers. Utility consumers are generally classified as residential, commercial or industrial. While traditional living situations involving families or households will easily be viewed as fitting into those definitions, many non-traditional housing situations may not. Failing (or refusing) to recognize non-traditional living situations as "residential" in character may deny important bill payment assistance to those denied. Given the demographics of many consumers living in group homes, it is possible, if not likely, that payment troubles will extend to these non-traditional living situations which can and should be addressed through such assistance.

Low-income persons need not live in their own homes to face energy affordability problems. Many persons do not live by themselves, but instead live in group homes or transitional living facilities. The energy bills facing such housing units may directly affect the pocket books of the residents. On the one hand, bills may be passed through on a dollar-for-dollar basis. On the other hand, even if absorbed by the facility, the level and quality of services offered to residents may be directly affected by the level of home energy bills paid.

This article considers the rate classification to be assigned to group living quarters.^{/1/} For ease of analysis, the article will refer to group homes for the disabled.^{/2/} The question posed is whether such facilities should be considered "residential" (with the rates, services and consumer protections appertaining thereto) or whether such facilities are instead "commercial" (thus receiving the rates,

^{/1/} These are sometimes referred to as group homes, community living arrangements, community residences, and the like.

^{/2/} The case law addresses a variety of group living situations including: mentally ill, developmentally disabled, elderly foster homes, foster homes for children without parents, and the like. No case law appears to turn on what type of population is served by the group home, and no distinction is made below between populations.

services and consumer protections made available to commercial customers).^{/3/} The discussion is presented in three parts. Part 1 introduces group homes and briefly discusses the demographics of group home residents. Part 2 considers the significance from a utility regulatory perspective of whether a group home is considered "residential" or "commercial." Part 3 analyzes whether group homes for the disabled should be considered "residential" uses for utility rate classification purposes.

AN INTRODUCTION TO GROUP HOMES

Group homes have become an important source of housing for the disabled, mentally retarded, and others in recent years.^{/4/} The group home is considered "a middle ground between institutionalization and homelessness" for the affected populations.^{/5/} They usually are operated by not-for-profit organizations. They provide housing and support services for a number of unrelated adults and are staffed by live-in "house parents" or 24-hour professional staff working eight-hour shifts.^{/6/} One analyst notes that "many persons who might previously have been institutionalized because of mental retardation are capable of living in a deinstitutionalized setting provided they have adequate counseling

^{/3/} While the article will talk about electric bills, the analysis would apply with equal force to natural gas, water/sewer, and other public utilities.

^{/4/} See generally, Peter Salsich, Jr., "Group Homes for the Mentally Retarded Raise Difficult Land Use Control Questions," 13 *Property and Probate* 50 (Spring 1995); see also, Penelope Boyd, "Strategies in Zoning and Community Living Arrangements for Retarded Citizens: *Parens Patriae* Meets Police Power," 25 *Villanova L.Rev.* 274 (1980); Note, "Group House of Port Washington v. Board of Zoning and Appeals: Encroachment of Community Residences into Single-Family Districts," 43 *Albany L.Rev.* 539 (1979).

^{/5/} *Id.*

^{/6/} *Id.*

support as well as decent shelter and health care."^{7/} The goal of group living is to advance the concept of "normalization." Normalization involves "providing people with mental disabilities with the patterns of life and conditions of everyday living which are as close as possible to the regular circumstances and ways of life of society."^{8/} The philosophy of a group home is that "although handicapped persons may not fall within the traditional concept of family, they nevertheless deserve a family-like environment."^{9/}

While most are operated by not-for-profit agencies, group homes can be operated by proprietorships and public agencies as well.^{10/} A 1983 study of group homes by the U.S. General Accounting Office (GAO) found that "more than half" were sponsored by not-for-profit agencies, with the balance split between the public sector and proprietorships.^{11/} GAO found that group homes tend to be "single-family, detached houses located in residential neighborhoods where the estimated household incomes approached the national median level."^{12/}

^{7/} *Id.*

^{8/} Arlene Kanter, "The Fair Housing Amendments of 1988 and Housing Discrimination Against People with Mental Disabilities," 43 *Am. Univ. L. Rev.* 925, 961 (1994), *quoting*, Bengt Nirje (1976). *The Normalization Principle, in Changing Patterns in Residential Services for the Mentally Retarded* 231, 231; *see also*, Bruce Baker, et al. (1977). *As Close as Possible: Community Residences for Retarded Adults*, 39.

^{9/} Michelle Todus, "City of Edmonds v. Oxford House Inc: Opening Doors to Housing for Handicapped Persons," 26 *Golden Gate Univ. L.Rev.* 737, 738 - 739 (1996).

^{10/} Peter Salsich, "Group Homes, Shelters and Congregate Housing: Deinstitutionalization Policies and the NIMBY Syndrome," 21 *Real Property, Probate and Trust Journal* 413, 418 (1986). (hereinafter *Deinstitutionalization Policies*).

^{11/} *Id.*, at 418, *quoting*, General Accounting Office, GAO-HRD-83-14, *An Analysis of Zoning and Other Problems Affecting the Establishment of Group Homes for the Mentally Disabled* 1 (1983).

^{12/} *GAO Study, supra*, at 1 - 2.

Despite the average incomes in neighborhoods where group homes are located, group homes for the disabled tend to serve a disproportionately low-income population. Consumers with disabilities are substantially over-represented in the low-income population. While 12% of all non-disabled persons live at or below 100 percent of the federal Poverty Level, and 20% live at or below 150% of the Poverty Level, 19% of all disabled persons live at or below 100% of Poverty and 34% live at or below 150%. As can be seen from the table below, disabled persons generally are more than 1.5x likely to be poor than a non-disabled person. Persons with "severe" disabilities are twice as likely to be poor.^{/13/}

	Population (000s)	Pct of Population by Percent of Poverty Level		
		100% and Below	101 - 150%	151 - 200%
Non-disabled	149,706	12.2%	8.3%	9.5%
All disabled	46,023	19.3%	14.5%	12.3%
Severely disabled	23,588	24.3%	17.5%	13.4%
Source: U.S. Census Bureau, <i>Americans with Disabilities: 1991 - 1992: Data from the Survey of Income and Program Participation</i> , Table 8, page 30, Current Population Report, Household Economic Studies, P70-33 (December 1993).				

Disabilities are often classified as relating to activities of daily living (ADL)^{/14/} or instrumental

^{/13/} As a rule of thumb, 200% of the federal Poverty Level is roughly equal to 50% of median income.

^{/14/} ADLs included in the Survey of Income and Program Participation (SIPP) are getting around inside the home, getting in or out of a bed or chair, bathing, dressing, eating, and toileting.

activities of daily living (IADL).^{/15/} Individuals with ADL or IADL limitations are not only more likely to be poor, but are more likely to fall into the lower ranges of poverty as well.

Population	Population (000s)	Pct of Population by Percent of Poverty Level		
		100% and Below	101 - 150%	151 - 200%
Non-disabled	149,706	12.2%	8.3%	9.5%
ADL limitation	7,919	23.2%	17.4%	14.0%
IADL limitation	11,694	22.4%	19.0%	13.8%

Source:
 U.S. Census Bureau, *Americans with Disabilities: 1991 - 1992: Data from the Survey of Income and Program Participation*, Table 8, pages 30 - 31, Current Population Report, Household Economic Studies, P70-33 (December 1993).

WHAT'S AT STAKE?

Discrimination against the disabled is not limited to an explicit refusal to rent or sell homes to disabled persons. As one commentator notes, "one of the two primary situations in which handicapped persons experience discrimination is `excluding congregate living arrangements of person with handicaps.'"^{/16/} Moreover, it is not merely the siting of living facilities which is protected by the Fair Housing Amendments Act. The House Report accompanying the Fair Housing Amendments Act of 1988 makes clear that the FHA applies "to facilities *and services* other than basic housing, like parking,

^{/15/} IADLs included in the Survey of Income and Program Participation (SIPP) are going outside the home, keeping track of money or bills, preparing meals, doing light housework, and using the telephone.

^{/16/} *Todus, supra*, 26 *Golden State Univ. L.Rev.* at 745, *citing*, H.Rep. No. 711, 100 Cong., 2d Sess. (1988), reprinted *1988 U.S. Code Cong. & Admin. News* 2173 (1988).

cleaning services and other benefits made available to the non-handicapped tenants, residents, and owners."^{17/} Others, too, have noted that "the Fair Housing Amendments Act prohibits discrimination in *all transactions related to housing*."^{18/}

Rates

Within the utility industry, classification of group homes as a residential customer can be beneficial in several ways. Utility rates will likely differ depending on whether a customer is considered to be "residential" or "commercial." While per kilowatthour (kWh) charges for commercial customers will often be lower than residential rates, a higher monthly fixed "customer charge" for commercial customers will tend to offset that advantage. While it may seem beneficial to have a commercial price of five cents per kilowatt hour (kWh) rather than the residential rate of eight cents per kWh, if the fixed monthly customer charge for commercial is \$60 while the residential customer charge is \$6, it is unlikely that the higher fixed monthly charge will be offset by lower unit prices.

For these purposes, is a group home residential or commercial? In a utility context, a customer need not be exclusively, or even predominantly, a commercial activity to be a commercial customer. A Missouri utility, for example, said in its tariff that the "residential service rate [is] not applicable to . . . a residence or dwelling unit when any portion of such service is used in a commercial venture."^{19/} The term "commercial venture" was not defined.

^{17/} *Id.*, at 745, n.53. (emphasis added).

^{18/} *Kanter, supra*, 43 *Am. Univ. L.Rev.* at 958.

^{19/} *Friendship Village of South County v. Public Service Commission of Missouri*, 907 S.W.2d 339, 347 (Mo.App. 1995).

This provision is not uncommon. Florida Power and Light defined "residential" as "service supplied exclusively for domestic purposes in individually metered dwelling units. . ."^{/20/} In this case, Ms. Newman operated a day care service out of her home for roughly 50 to 60 hours a week. Since the day care was a commercial operation, the Florida commission said the company's application of a commercial rate to the entire service at the address was appropriate. In addition, Ms. Newman was required to post a security deposit, an action mandated for commercial (but not for residential) customers.^{/21/} Finally, the state Department of Revenue stated that while residential utility sales were exempt from the state sales tax,^{/22/} if any part of the sale was used for non-exempt purposes, the entire sale was taxable.^{/23/} In its subsequent generic investigation, the PSC affirmed its finding that residential units housing a home-based businesses should be charged a commercial rate.^{/24/} This commercial classification applies despite the fact that "a home-based business consumes electricity for both

^{/20/} *In Re. Complaint of Kathleen Newman Against Florida Power and Light Company Regarding Rates for Home Day Care Providers* 1994 WL 161883 (Fla. PSC 1994). This practice was consistent with the practice of other investor-owned, municipal, and cooperative utilities in Florida. *Id.*

^{/21/} *Id.*

^{/22/} Whether a group home is a residential customer for utility purposes will often have tax implications. For those facilities that are not otherwise tax exempt non-profit operations, the customer classification will determine whether state sales taxes apply to utility consumption. In 27 states, residential customers are exempt from sales taxes applied to home utility use. Roger Colton (1996). *Funding Fuel Assistance: State and Local Strategies to Help Pay Low-Income Home Energy Bills*, at 111 - 119, Flying Pencil Publications: Portland, OR. These taxes may well represent four to eight percent of the overall home energy bill.

^{/23/} *Re. Generic Investigation into Appropriate Rate Schedule for Home-Based Business*, 1994 WL 661045 (Fla. PSC 1994).

^{/24/} *Id.*; but see, *Utah Power and Light Company*,. 1992 WL 15996 (Wyo PSC 1992) (if 50 percent or more of electrical energy used is for business, professional or other gainful purposes, will be classified as non-residential); accord, *Pennsylvania Public Utility Commission v. Enterprise Telephone Co.*, 1994 WL 712480 (Penn.PUC 1994) (business phone rates applicable in any place where the service is used primarily or dominantly for business, professional or institutional purposes).

residential and commercial purposes behind a single meter."^{25/}

In addition to base rates, whether a customer is "commercial" or "residential" affects the charges as well. In Wisconsin, for example, redefining customers in buildings with more than four units as commercial allowed the utility to increase its reconnection fees to those customers and to institute a charge for checks returned to the utility for insufficient funds.^{26/}

Customer Service

Customer service protections, particularly for payment-troubled customers, often extend only to residential customers.^{27/} Customer service protections can be either procedural or substantive. Procedural protections might include minimum written notice prior to the termination of service for nonpayment; freedom from service terminations on weekends, holidays, or other days on which service cannot be restored; receipt of information about fuel assistance or other public or private emergency aid before a service disconnection; and the like. Substantive protections might include the right to enter into deferred payment plans of minimum periods for arrears; protections against an unreasonable reliance on estimated billings; the right to be free from service terminations during cold weather months; and the like.

In this respect, the Florida commission, in its decisions regarding home-based businesses

^{25/} *Id.*; see also, ***Re. Rate Classification for Multi-Family Dwellings with Master-Metered Service***, 1993 WL 340005 (MO PSC 1993) (rejecting state Department of Revenue assertion that master-metered multi-family dwellings are commercial not residential service).

^{26/} ***Application of Madison Gas and Electric Company for Authority to Increase its Electric and Natural Gas Rates***, 66 Wisc. PSC 204 (1982)

^{27/} See generally, Robert Burns, *et al.*, ***Alternatives to Utility Service Disconnection***, National Regulatory Research Institute: Columbus, OH (May 1995).

discussed above, misses one of the most significant implications of its decision. While it may be true that as the commission observes, "the primary *dollar* difference between a monthly [residential] electric bill and the [commercial] bill is the state sales tax that is applied to the [commercial] bill,"^{/28/} more than rates are at risk. In Pennsylvania, for example, the entire set of customer service protections, involving billing, metering, deposits, payment plans, service disconnections, and the like "apply only to residential utility service. . ."^{/29/}

The customer service dangers of defining group homes not to be "residential" are illustrated in the Pennsylvania case *Sisco v. Luppert*.^{/30/} In *Sisco*, a municipal water authority terminated service to a boarding house. Under state law, if a utility terminates service due to a landlord's failure to pay a bill, the tenants may request that service be restored in their own name irrespective of the landlord's arrears. In this case, however, the Williamsport Water Authority refused to restore service, arguing that the boarding house "is not a traditional apartment dwelling" and thus is not a "residential unit" to which the state law applied.^{/31/} While the *Sisco* court noted that the statutory term "residential building" does not "specifically include rooming houses," the court found that such housing was nonetheless residential in nature.^{/32/}

This determination of whether a home is a residential unit or a business for purposes of

^{/28/} *Home-Based Business*, *supra*. (emphasis added).

^{/29/} *Cefalo v. Pennsylvania Gas and Water Company*, 69 Pa. PUC 265 (Pa. PUC 1989).

^{/30/} 658 A.2d 886 (Pa. Commwlth 1995).

^{/31/} *Id.*, at 889.

^{/32/} The court found that the tenants considered their room as their permanent home and not just a transient location as a hotel or motel. Moreover, they have their mail delivered to the building and "keep all of their possessions there." *Id.*

applying customer service protections can generate substantial dispute. In 1980, the Alaska public utilities commission considered a proposal by a rural electric cooperative to define any customer as a commercial customer if the customer had a "business license."^{33/} The utility sought to treat the customer as commercial if "activity of a commercial nature" was taking place on the premises or at the residence."^{34/}

In contrast to the one dimensional "business license" proposal in Alaska, the Maryland public service commission considered a range of factors in deciding whether a 275 unit "sheltered housing project" was residential or commercial.^{35/} If residential, each unit in the building would be required to be individually metered. According to the Maryland commission, "granted, a 'residential' building, by universal definition, means a dwelling place, and the project undoubtedly meets that broad definition. The broad definition of a word, however, is not necessarily the meaning the word ordinarily and customarily conveys. There are many places in which people dwell that are commonly characterized as something other than, and more than, a residential building."^{36/} Noting that an orphanage or college dormitory can be institutional, the PSC further said ". . .an apartment house may be used for residential

^{33/} ***Re. Matanoska Electric Association***, 3 APUC 254 (Alaska PUC 1980); *see also, Re. Chesapeake and Potomac Telephone Company of West Virginia*, 1992 WL 205346 (WV PSC 1992) (where place of business is located on same premises as a residence and no separate line for business, telephone service billed at business rate is person operating business requires a business registration certificate).

^{34/} *Id.* (the final resolution of the dispute over the proposed co-op tariff language was via an unreported stipulation); *compare, Re. Municipality of Anchorage dba Anchorage Sewer Utility*, 9 APUC 296 (1989) (residential user defined as use who discharges wastewater into sewer system from a premise that is utilized primarily or substantially for residential purposes, that is as for living accommodations for occupants; commercial is premise that is utilized primarily or substantially for business purpose).

^{35/} ***Re. Commercial Contractors, Inc.***, 72 Md. PSC 387 (1981).

^{36/} *Id.*

purposes, but at the same time, it usually constitutes a business enterprise."^{37/} The PSC concluded "accordingly, to say the project is a dwelling place cannot end the inquiry. . .The upshot of this is that no single element is controlling: the essence of `residential' is elusive."

Disturbing from a group home perspective is the dicta in the Maryland decision looking at a distinction between "residential" and "commercial":

A residential lease. . .ordinarily entitles the occupant to have the right of possession, and little else. When numerous personal services are offered in addition to the possessory right, the arrangement smacks of a commercial enterprise.^{38/}

For example, the Maryland commission said, providing nursing care or daily housekeeping service "are distinctions that given an operation a commercial shade."^{39/}

Rate Discounts

Utility-provided bill payment assistance is generally limited to residential customers. "Bill payment assistance" can take several different forms. Many utilities offer low-income discounts through a variety of programs, including percentage of income plans,^{40/} percentage of bill plans,^{41/}

^{37/} *Id.*, quoting ***Jernigan v. Capps***, 45 S.E.2d 886, 891, 892 (Virg. App. 1947) (dissenting opinion).

^{38/} *Id.*

^{39/} *Id.*

^{40/} ***Re. Long-Term Solutions Governing Disconnection of Gas and Electric Service***, 174 P.U.R.4th 115 (Oh. PUC 1996).

^{41/} 52 Pa. Code §69.261, *et seq.*

targeted per unit of energy discounts,^{/42/} across-the-board discounts,^{/43/} and other price breaks to make bills affordable to the poor.^{/44/} In addition, utilities frequently offer energy efficiency programs that reduce consumption (with correspondingly lower bills) and thus make bills more affordable.^{/45/} Finally, a variety of utility-based "fuel funds" exist, where customers and/or shareholders contribute to a crisis fund to be distributed to needy customers in order to prevent a service disconnection.^{/46/}

A danger exists that discount rates would not be available to group homes if these homes are not considered residential. The applicability of discount rates is illustrated by the California Public Utility Commission's (CPUC's) 1978 decisions regarding lifeline rates.^{/47/} The statute requiring lifeline rates defined "residential" largely by exclusion, saying the term "means domestic human needs end use and excludes industrial, commercial and every other category of end use other than wholesale."^{/48/} In explaining the term further, the CPUC cited a Webster's Dictionary definition of "residential" as "used, serving, or designed as a residence or for occupation by residents" and defined "residence" as "a

^{/42/} *In Re. Washington Gas Light Company*, DC-PSC Order 10671 (August 14, 1995) (Order approving Residential Essential Service rate).

^{/43/} See e.g., *Re. Boston Gas Company*, 174 P.U.R.4th 208 (Mass. DPU 1996) (40% discount); *Re. Massachusetts Electric Company*, 164 P.U.R.4th 393 (Mass. DPU 1995) (35% discount).

^{/44/} Roger Colton (1995). *Models of Low-Income Utility Rates*, Fisher, Sheehan and Colton, Public Finance and General Economics: Belmont, MA.

^{/45/} See generally, Barb Hogan and Ten Flanigan (1996). *Duquesne Light Company Smart Comfort Program, Profile #123*, IRT Environment: Boulder, CO; Curtis Battle (1997). *Opportunities for Community Base Low Income Weatherization Providers with Public Service Electric and Gas Company's E-Team Partner's Program*, Honeywell DMC Services: Marlton, NJ.

^{/46/} *Funding Fuel Assistance*, *supra*, at 7 - 26.

^{/47/} *Commission Designated Lifeline Quantities of Electric and Volumes of Gas on an Interim Basis as Required by Section 739 of the Public Utilities Code*, 80 CPUC 182 (CPUC 1976).

^{/48/} *Id.*

temporary or permanent dwelling, place, abode or habitation to which one intends to return, as distinguished from a place of temporary sojourn or transient visit."^{/49/}

The problem then arises because the CPUC then attributes very traditional meanings to these definitions, saying the definitions "mean single family homes, townhouses, and the dwelling units of apartments, condominiums, and mobile homes."^{/50/} It continued that "living units in governmental sponsored or operated housing projects. . .meet the definition but the common areas would not."^{/51/} In addition, some housing is excluded "because of the transient nature of their inhabitants."^{/52/} So, too, did the CPUC hold that whether or not a mobile home and trailer part qualified for a residential rate (including a lifeline rate) depended on whether the mobile homes "are not transient renters, but are permanently located."^{/53/} Leaving open the notion that housing can be excluded from "residential" rates (and thus lifeline rates) by being deemed "transient" could prove problematic for group homes. While the better reasoned decisions are to the contrary, some courts have held that group homes, too, are "transient" in nature and therefore not residential in the land use context.^{/54/}

Access to the low-income bill payment assistance will become more important in the coming

^{/49/} *Id.*

^{/50/} *Id.*

^{/51/} *Id.*

^{/52/} The commission cited college dormitories, fraternities and sororities, student housing, rooming houses, and military barracks as illustrations of such transient housing.

^{/53/} *California-Pacific Utilities Company*, 17 P.U.R.4th 256 (1976).

^{/54/} Compare, *City of White Plains v. Ferraioli*, 313 N.E.2d 756, 757 (NY 1974) (one indicia of whether group foster home was residential use is whether foster arrangement was permanent) with *Group House of Port Washington v. Board of Zoning & Appeals*, 280 N.E.2d 207, 210 (1978) (that group home was not intended to be a permanent arrangement for the children did not destroy the overall purpose of a stable family environment since any foster care program is in a very real way temporary).

years. As the electric industry nationwide moves to implement electric "restructuring," virtually every piece of legislation and every regulatory decision has included an explicit "universal service" program.^{/55/} Funded through a "wires charge," these programs collect sums of money to be distributed to low-income customers as bill discounts, crisis assistance, and energy efficiency investments. In California, which began electric "retail choice" on January 1, 1998, the state legislation mandating competition in the electric industry provides that "programs provided to low-income electricity customers, including but not limited to targeted energy efficiency services and the California [rate discount] shall be funded at not less than 1996 authorized levels based on an assessment of customer need."^{/56/} The California legislation provides further that low-income energy efficiency services and the rate discount should be administered separately, but in close coordination with each other. Similarly, in New Hampshire, which has legislation allowing electric retail choice,^{/57/} the regulatory decision implementing the legislation authorizes a "system benefits charge" to accomplish three goals: (1) to bring electric bills into the "range of affordability"; (2) to encourage conservation and the use of energy efficiency mechanisms to make electric bills manageable; and (3) to make the most effective use of limited funding.^{/58/} The state of Pennsylvania has required a continuing reliance on its Customer Assistance Program (which provides steep discounts to low-income customers)^{/59/} as well as its Low-

^{/55/} Roger Colton (1997). *Status of State Electric Restructuring Activities on Low-Income Assistance*, at Table 4, Fisher, Sheehan and Colton, Public Finance and General Economics: Belmont, MA.

^{/56/} West's Ann. Cal. Pub. Util. Code, §382 (1997).

^{/57/} N.H. St. §374-F:3(VI) (1996).

^{/58/} *Re. Restructuring New Hampshire's Electric Utility Industry*, 175 P.U.R.4th 193 (NH Pub. Serv. Comm'n) (Feb. 28, 1997).

^{/59/} See, note **Error! Bookmark not defined.**, *supra*, and accompanying text.

Income Usage Reduction Program (LIURP) as part of the restructuring plans to be pursued by the electric utilities in that state.^{/60/} Massachusetts, too, requires that electric utilities incorporate low-income rate discounts and energy efficiency programs into their electric restructuring implementation plans.^{/61/}

Summary

It is beneficial for low-income consumers living in group homes to be classified as "residential" customers. Such a classification will likely yield greater substantive and procedural shutoff protections, will qualify the group home for utility-provided bill payment assistance, and will yield lower total monthly bills. The residential classification for group homes, however, cannot be taken for granted. A group home may be in danger of losing its residential classification if:

- o The inhabitants of the group home are deemed to be "transient" in nature, as in a fraternity or sorority;
- o The group home is a facility that requires a "business license";
- o The group home is considered to be "institutional," as in an orphanage or college dormitory;
- o The group home provides personal services, such as cooking or housekeeping, that give its operation a "commercial shade"; or
- o If any portion of the group home's activities can be deemed "commercial."

^{/60/} *Re. Guidelines for Universal Service and Energy Conservation Programs*, 178 P.U.R.4th 508 (Penn. Pub. Util. Comm'n) (July 11, 1997).

^{/61/} 1997 Massachusetts HB 5117, §19 (enacted November 25, 1997).

The discussion below considers these same criteria as they have been presented in the land use context to determine whether they have been accepted as demarcating a "commercial use."

GROUP HOMES AS "RESIDENTIAL" USES IN THE HOUSING CONTEXT

The utility industry may glean substantial lessons on application of criteria to designate residential uses through an examination of land use cases involving group homes. The issue of whether a group home is a residential use frequently arises in the context of restrictive covenants^{/62/} and local zoning restrictions.^{/63/} To the extent that these restrictions limit the housing choices of group home residents, they have generally been disapproved. The better-reasoned decisions recognize that, rather than being institutional or commercial in nature, residents of group homes operate as a housekeeping unit and that, accordingly, groups of people with mental disabilities live together as a family in a residential setting. The Indiana Court of Appeals found in *Metropolitan Board of Zoning Appeals v. Gunn*^{/64/} that a group home for developmentally disabled persons was a "stable and permanent household (for) the developmentally disabled."^{/65/} In *Township of Washington v. Central Bergen*

^{/62/} See generally, Annotation, "Restrictive Covenant Limiting Land Use to "Private Residence" or "Private Residential Purpose: Interpretations and Application," 43 *A.L.R.4th* 71, at § 17 (1986).

^{/63/} See generally, Annotation, "What is a Lodginghouse or Boardinghouse within Provisions of Zoning Ordinance or Regulation," 64 *A.L.R.2d* 1167 (1959); Annotation, "What Constitutes a 'Family' within Meaning of Zoning Regulation or Restrictive Covenant," 71 *A.L.R.3d* 693 (1976); Annotation, "Zoning Regulations as Applied to Homes or Housing for the Elderly," 83 *A.L.R.3d* 1103 (1978); Annotation, "Halfway Houses: Facilities for Former Patients of Mental Hospitals as Violating Zoning Restrictions," 100 *A.L.R.3d* 876 (1980).

^{/64/} 477 N.E.2d 289 (Ind. Ct. App. 1985).

^{/65/} *Id.*, at 299.

Community Mental Health Center,^{/66/} the New Jersey courts held that a group home for former mental patients in which residents jointly shared household tasks was similar to a traditional family.^{/67/} In general, the majority opinion today is that group homes "operate like any other home in which a family resides,"^{/68/} and that, as a result, they represent residential uses in areas zoned for use by single family dwellings.^{/69/} Moreover, because group home "residents would function like any other household," restrictive covenants limiting land to residential use do not operate to bar them.^{/70/}

Understanding the principles enunciated for assessing the propriety of group homes in zoning and restrictive covenant litigation should provide helpful insights into the utility counterpart. The issue in each context will be whether the group home is a residential use.^{/71/}

Group Homes as "Institutions"

Some argue in the land use context that a group home is not a "residential" use, but rather an "institutional" use, particularly if there are "counselors" or other supervisors present. In *Omega Corporation of Chesterfield v. Malloy*,^{/72/} the Virginia supreme court said: "we can conceive of nothing

^{/66/} 383 A.2d 1194 (NJ Super. Ct. Law Div. 1978).

^{/67/} *Id.*, at 1209; *see also*, *West Monroe v. Ouachita Ass'n for Retarded Children*, 402 So.2d 259, 265 - 266 (La. Ct. App. 1981); *Philadelphia Center for Development Services v. Zoning Hearing Board*, 492 A.2d 1191, 1992 - 1193 (Pa. Commwlth Ct. 1985); *Collins v. City of El Campo*, 684 S.W.2d 756, 760 - 762 (Tx. Ct. App. 1984).

^{/68/} *Kanter, supra*, 43 *Am. Univ. L.Rev.* at 967.

^{/69/} *Id.*, at n.271 (with citations).

^{/70/} *Id.*, at n.290 (with citations).

^{/71/} Particularly in the utility context, whether it is a residential "structure" should not be at issue.

^{/72/} 319 S.E.2d 728 (Virginia 1984).

more antithetical to the concept of family home life than the constant surveillance of purported family members by government employees assigned to supervise them."^{73/} According to the court, "the presence of the counselors in the homes and their supervision of the occupants would convert what might otherwise have been a single-family use into `a facility.' While the effort to provide `a facility' for the care of the mentally retarded is praiseworthy indeed, the fact remains that the use to which Omega wishes to put its property is institutional in nature and not familial."^{74/} The court effectively held, one commentator later noted, that "the single-family nature ends when the element of supervision is added to the occupancy of unrelated customers."^{75/}

So, too, did a Washington court of appeals in *Culp v. City of Seattle*^{76/} designate a group home for 12 children with mental retardation a "staff operated institution" rather than a family home.^{77/} According to the *Culp* court, a dwelling "which is occupied by children supervised by a staff. . .is compatible with the traditional notion of an institution."^{78/} Courts agreeing with this approach find that group homes are not intended to be dwelling places so much as they are intended to be places where residents are trained and educated, thus casting them as institutions not residences. According to the Ohio courts, for example, in *Garcia v. Siffrin Residential Association*:^{79/}

^{73/} *Id.*, at 732.

^{74/} *Id.*

^{75/} *Salsich, supra*, 13 *Probate and Property* at 51.

^{76/} 590 P.2d 1288 (Wash. Ct. App. 1979).

^{77/} *Id.*, at 1290.

^{78/} *Id.*

^{79/} 407 N.E.2d 1369 (Ohio. 1980) (group home for eight or fewer developmentally disabled women operated by board of directors).

. . .the Siffrin facility would be established not for the prime purpose of eight people sharing a dwelling place, but primarily for the purpose of bringing together a group of developmentally disabled persons for their training and education in life skills, and for the establishment of a professional plan of habilitation for each client developed by the licensed operator and implemented through the director of such facility and his staff of inter-disciplinary personnel trained and equipped for this purpose. The individualized care and training of these clients who are the resident participants of this program would reasonably appear to be the basis of this program sought to be located at this site.^{/80/}

The weight of opinion, however, is to the contrary. The Missouri supreme court has explicitly held that a group home for eight unrelated persons with two house parents "is neither a boarding house nor an institutional facility."^{/81/} In general, courts facing the question of "whether a group home serves a predominantly residential rather than a commercial purpose. . .have had a relatively easy time concluding that a group home has the requisite characteristics of residential use, particularly if the home is operated by a not-for-profit organization."^{/82/} Moreover, "that the defendants are partially compensated for their costs of operation and provide paid employees to supervise the residents of the home does not change the character of the actual use of the home from that of a residence or

^{/80/} *Id.*, at 1376.

^{/81/} *Blevins v. Barry-Lawrence County Association*, 707 S.W.2d 407, 408 (Mo. 1986).

^{/82/} *Deinstitutionalization Policies*, *supra*, 21 *Real Property, Probate, and Trust Journal*, at 423 - 424, citing, *Blevins v. Barry-Lawrence County Ass'n for Retarded Citizens*, 707 S.W.2d 407 (Mo. 1986) (citing cases).

dwelling."^{83/}

The Nebraska courts extended the analysis even further. Quoting the New Jersey supreme court in *Y.M.C.A. v. Board of Adjustment*,^{84/} the Nebraska court said that "to suggest that `families' composed of residents of group homes are to be distinguished from natural families in determining which single-family districts will be considered open to them is to confuse the power to control physical use of premises with the power to distinguish among occupants making the same physical use of them."^{85/}

Group Homes as "Rooming Houses" or "Boarding Homes"

Others argue in the land use context that a group home is more in the nature of a rooming house or a boarding home. An Alabama appeals court held in *Civitans Care v. Board of Adjustment*^{86/} held that a group home for adults with disabilities in Huntsville (Alabama) was a boarding home rather than a residential dwelling.^{87/} In Huntsville, a "boarding house" was defined to include a building, other than a hotel, cafe or restaurant, where, for compensation, meals are provided for three or more persons. According to the court, the operators of the group home, even though non-profit

^{83/} ***Concord Estates Homeowners Association v. Special Children's Foundation***, 459 So.2d 1242, 1244 (La. App. 1984) (citing cases). (emphasis added).

^{84/} 341 A.2d 356 (NJ 1975).

^{85/} ***Knudtson v. Trainor***, 345 N.W.2d 4, 7 (Neb. 1984).

^{86/} 437 So.2d 540 (Ala. Civ. Ap. 1983)

^{87/} *Id.*, at 543.

corporations, "will receive compensation to support the program."^{88/} In addition, the operators will provide meals to the residents. The definitional components are met, the court held, and "the proposed group homes are either `boarding' or `rooming' houses."^{89/} Similarly, in *Behavioral Health Agency of Central Arizona v. City of Casa Grande*,^{90/} an Arizona court of appeals found that an elderly foster care home, housing up to five elderly residents and two permanent staff members, was a "boarding or rooming house" rather than a group home.^{91/} The residents of the home were not a "family," the court said, but instead "a group of unrelated elderly persons, whose composition will constantly be changing upon the death or serious injury of its members, and their attendants or supervisors, whose composition will also be changed when needed. . ."^{92/} Moreover, the court said, the home "intended to charge the elderly occupants \$825 per month if they were able to do so."^{93/}

The Iowa courts disagree. In *Linn County v. City of Hiawatha*,^{94/} the Iowa supreme court found that a group foster home for up to six disabled children staffed by a trained married couple was a single family home rather than a boarding home.^{95/} The Iowa court found that the preparation of food primarily by the operators of the home, and the payment of compensation, did not change the essence

^{88/} *Id.*

^{89/} *Id.*

^{90/} 708 P.2d 1317 (Ariz. Ct. App. 1985).

^{91/} *Id.*, at 1321.

^{92/} *Id.*, at 1320.

^{93/} *Id.*, at 1321. If the occupant was found to be indigent, the county had agreed to pay \$600 per month.

^{94/} 311 N.W.2d 95 (Iowa 1981).

^{95/} *Id.*, at 99 - 100.

of the home. The court instead emphasized the similarity to traditional families:

the compensation paid by a boarding house resident to the owner constitutes the primary purpose for the operation of a boarding house. By contrast, the primary purpose of the foster home is to provide habilitation for developmentally disabled children, and the Social Security payments are merely a means of making it possible for the home to carry out that purpose. Furthermore, residents of a boarding home normally do not interact as a family, and they contract to receive nothing more than meals and lodging in return for compensation which they themselves pay to the owner.

On the other hand, the residents of the foster home would seek to emulate family life, and through their interaction with the house-parents and with one another, the children would receive benefits beyond mere lodging and meals.^{/96/}

In addition, the "transience" reasoning of the *Casa Grande* court is not generally followed. The relatively transient nature of residents is generally not found to change the residential character of a group home. Indeed, in *Maull v. Community Living for the Handicapped*,^{/97/} a Missouri appellate court found that a group home for eight mentally retarded adults was a residential use, occupied by a family, even though "it is the intention of the (home operator) to prepare the residents to work and live as functioning individuals in the community. It is *expected* that most of the residents *will eventually leave the group home* and relocate to their own residences in the community."^{/98/} In contrast, while reaching the same result, the court in *Blevins* said that "the primary purpose of a residential group

^{/96/} *Id.*, at 100.

^{/97/} 813 S.W.2d 90 (Mo. App. 1991).

home is to provide a living situation as normal as possible for developmentally disabled residents of the community and is ordinarily not a temporary living situation but, depending upon the individual, a resident may remain in the group home months, years or for their entire lifetime."^{99/}

Commercial Nature

Courts have consistently, though not universally, held that group homes are not a business or commercial enterprise, even if operated on a proprietary basis. In *Gregory v. State*,^{100/} the Rhode Island supreme court held that "the trial justice erred as a matter of law in finding that a group home is a business or commercial enterprise."^{101/} So, too, did a Louisiana appellate court hold that "the fact that the residence is part of the business of a corporation for profit does not violate the building restrictions. The fact remains that the house is being used strictly as a residence and not as a place from which a business is being run."^{102/}

In those instances where group homes have been found to be "commercial," it has been the profit-making nature of the corporation owning the home that was determinative.^{103/} Other courts

(. . continued)

^{/98/} *Id.*, at 91. (emphasis added).

^{/99/} *Blevins*, *supra*, 797 S.W.2d at 409.

^{/100/} 495 A.2d 997 (RI 1985).

^{/101/} *Id.*, at 1000.

^{/102/} *Harbour v. Normal Life*, 454 So.2d 1208, 1211 (La. Ct. App. 1984), *citing*, *Tucker v. Special Children's Foundation*, 449 So.2d 45 (La. App. 1984), *writ denied*, 450 So.2d 959 (La. 1984).

^{/103/} Thomas Guernsey, "The Mentally Retarded and Private Restrictive Covenants," 25 *William and Mary L.Rev.* 421, 435, n.90 (1984) (citing cases). *See generally*, *Nichols v. Tullahoma Open Door*, 640 S.W.2d 13, 19 (Tenn. App. 1982) (no commercial purpose shown simply because of the receipt of subsidies and rent to repay the mortgage loan and to pay staff members for home not operating for profit); *see also*, *Vienna Bend Subdivision Homeowners Association v. Manning*, 459 So.2d 1345, 1350 - 1351

have held, however, that the commercial nature of the owner or operator of a group home is not determinative at all.^{/104/} The California decision in *Seaton v. Clifford*^{/105/} and the Minnesota decision in *Costley v. Caromin House*^{/106/} present the countering views. In reviewing the group home for a small number of mentally retarded persons, the *Seaton* court said that "providing `residence' to paying customers is not synonymous with `residential purposes' as that latter phrase is commonly used in reference to property use. . . [W]e see little distinction between defendant's business and that of a motel, inn [or] rest home. . ."^{/107/}

In contrast, the Minnesota courts have held that the for-profit nature of a facility does not, unto itself, convert a group home into a commercial enterprise.^{/108/} Stating in *Costley* that "the for-profit status of Caromin House is. . .irrelevant," the court said that "so long as the group home bears the generic character of a family unit as a relatively permanent household, and is not a framework for transients or transient living," it complies with a zoning ordinance restricting uses to those residential in

(. . continued)

(La. App. 1984) (community home operated by non-profit corporation not commercial venture simply because of paid staff whose function is similar to any live-in cook, housekeeper, or nurse that might be hired by anyone to perform household functions that are difficult or inconvenient). *But see, St. Luke Evangelical Lutheran Church v. Zoning Board of Eastertown Township*, 403 A.2d 128, 130 (Pa. Commwlth 1979); *accord, Jayno Heights Landowners Ass'n v. Preston*, 271 N.W.2d 268, 270 (Mich. App. 1978) (adult foster care facility for elderly women was used for commercial purposes since residents pay for various domestic services as well as rent).

^{/104/} *Id.*, at n.93. (citing cases).

^{/105/} 24 Cal.App.3d 46, 100 Cal.Rptr. 779 (1972).

^{/106/} 313 N.W.2d 21 (Minn. 1981).

^{/107/} 100 Cal.Rptr. at 781.

^{/108/} *Costley v. Caromin House*, 313 N.W.2d21, 25 - 26 (Minn. 1981); *see also, Crowley v. Knapp*, 288 N.W.2d 815 (Wis. 1980) (for profit group home for eight unrelated retarded adults does not violate restrictive covenant limiting property use to one single family dwelling for residential purposes only); *Knudtson v. Trainor*, 345 N.W.2d 4, 6 (Neb. 1984).

character.^{/109/} The court continued that "operation of the group home by a for-profit corporation does not change the preceding analysis. . .The residents interact and live as a family whether the management is by a for-profit corporation, a non-profit corporation, a religious group, or a governmental unit."^{/110/}

The North Carolina courts agree.^{/111/} The *JT Hobby* court held that "[i]t is [the] purpose and method of operation which serves to distinguish defendant's usage. . .from that normally incident to a boarding home."^{/112/} According to the North Carolina court, the group home for five mentally retarded adults operated as a traditional family unit would. "That defendant [group home] is compensated for the services it renders does not render its activities at the home commercial in nature. . .That defendant is paid for its efforts does not detract from the essential character of its program of deinstitutionalized living for the retarded. Clearly, the receipt of money to support the care of more or less permanent residents is incidental to the scope of defendant's efforts."^{/113/} Moreover, the court said, "the incidental necessities of a group home, such as maintaining records, filing accounting reports, and managing, supervising, and providing care in exchange for payment, are collateral to the prime purpose and function of a family housekeeping unit."^{/114/}

^{/109/} *Costley, supra*, 313 N.W.2d at 25.

^{/110/} *Id.*

^{/111/} *JT Hobby & Sons v. Family Homes of Wake County*, 274 S.E.2d 174 (NC 1981).

^{/112/} *Id.*, at 180.

^{/113/} *Id.*, at 180.

^{/114/} *Id.*, citing *Beres v. Hope Homes*, 453 N.E.2d 1119, 1122 (Ohio 1982).

SUMMARY AND CONCLUSIONS

The deinstitutionalization of various persons (the aged, persons with physical or development disabilities, children without parents) continues to be a public policy priority today. Given this approach to housing, non-traditional group home situations will continue to proliferate. The residents of these group homes are not only likely to be low-income, but are likely to be in the lower tiers of low-income persons.

If group homes represent residential customers for utility purposes, and if residents of such homes are otherwise eligible, the residents are entitled to a variety of services and benefits, ranging from customer service protections, to bill payment assistance (including rate discounts, low-income energy efficiency investments, and crisis intervention assistance). In addition, they would be entitled to the same sales tax exemption applicable to all residential sales.

Assessing whether a group home represents residential utility service should take into account the fact that such homes seek to provide a family-like environment that mirrors the regular circumstances of society as closely as possible. The presence of paid employees as house-parents, the ownership of a home by a for-profit entity, and the provision of life skills development training does not detract from their essential character.

In applying these principles, the conclusions for disabled consumers are three-fold. First, group homes for disabled persons should be classified as residential customers for purposes of rates and customer service protections. Second, residents of group homes, if otherwise eligible, are entitled to receive (and should seek to obtain) existing low-income bill payment assistance, including low-income rate discounts, crisis intervention assistance, and energy efficiency investments. Third, residents of group homes, if otherwise eligible, are entitled to receive (and should seek to obtain) universal service

assistance made available through electric restructuring decisions and/or legislation.