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ZONING ORDINANCE — ESTABLISHED AREA CALLED DWELLING-HOUSE DISTRICT — SINGLE-FAMILY DWELLINGS — FAMILY — "ANY NUMBER OF INDIVIDUALS LIVING TOGETHER AS SINGLE HOUSEKEEPING UNIT AND DOING THEIR COOKING ON THE PREMISES" — ACCESSORY USE — "DWELLING OR APARTMENT OCCUPIED AS PRIVATE RESIDENCE" — "ONE OR MORE ROOMS MAY BE RENTED OR TABLE-BOARD FURNISHED" — JUVENILE COURT — NOT A VIOLATION OF SECTION 1639-22 G. C. TO PLACE FOUR OR FEWER CHILDREN FOR CARE IN PRIVATE HOME, SINGLE RESIDENCE.

SYLLABUS:

Where a zoning ordinance establishes an area called a dwelling-house district in which are authorized single-family dwellings and defines a family as "any number of individuals living together as a single housekeeping unit and doing their cooking on the premises" and further provides as an accessory use in such dwelling-house district that "in a dwelling or apartment occupied as a private residence one or more rooms may be rented or table-board furnished", the temporary placing by the Juvenile Court of four or fewer children for care in a private home in a single residence in said district as provided by Section 1639-22 of the General Code, is not a violation of the provisions aforesaid of such zoning ordinance.

Columbus, Ohio, June 30, 1944

Hon. Theodore Tilden, Prosecuting Attorney
Ravenna, Ohio

Dear Sir

Your request for my opinion reads as follows:

"The Juvenile Court of this county has requested that I secure your opinion based upon the following facts:

March 1. 1944, the Portage County Commissioners entered into a contract with Mr. and Mrs. E. I. B., owners of a private residence at 726 East Spruce Street, Ravenna, providing for the temporary care in the B. home of alleged or adjudicated dependent, neglected and delinquent girls placed there by the Juvenile Court pending final disposition of their cases before that court. Under the contract the B.'s are paid a monthly subsidy for keeping their home available for this use and a per diem rate for the children actually kept there. The arrangement was made under the authority of G. C. 1639-22— 'The Court may arrange for the boarding of such children temporarily in private homes . . . subject to the supervision of the court . . . In case the Court shall arrange for the boarding of children temporarily detained in private homes or institutions. a reasonable sum to be fixed by the Court for the board of such children shall be paid by the county. In order to have such private homes available for service an agreed monthly subsidy may be paid and a fixed rate per day for care of children actually residing therein. Such private homes shall have the same legal status under the laws of the state as private residences.'

The B. home is licensed as a family boarding home by the Department of Public Welfare under the provisions of G. C. 1352-1 - 1352-6 for the boarding of not more than four children. The Ravenna City Zoning Ordinance adopted August, 1942, establishes the area in which the B. home is situated as a dwelling-house district. Permitted use in such a district under the ordinance includes that of a single-family dwelling. A family is defined by the ordinance as 'any number of individuals living together as a single housekeeping unit and doing their cooking on the premises.' The ordinance also provides as an accessory use in a dwelling house district that 'in a dwelling or apartment occupied as a private residence one or more rooms may be rented or table-board furnished.' The ordinance further provides that after public notice and hearing in specific cases 'where there are practical difficulties or unnecessary hardships in the way of carrying out the strict letter of the provisions of this ordinance, the Board of Zoning Appeals may vary the application of any provision in harmony with the

general purpose and intent of this ordinance, so that public health, safety and general welfare may be secured and substantial justice done.'

The Juvenile Court is in doubt as to whether the use of the B. residence as a girl's receiving home is within the permitted use or accessory use allowed in a dwelling house district under the provisions of the zoning ordinance above stated, and whether or not the Juvenile Court must appeal to the zoning board for a variation of the use on the grounds of practical difficulty or unnecessary hardships. They are also in doubt as to the legal effect of the next to last sentence in G. C. 1639-22. The questions may be put as follows:

1. Is a private residence, licensed by the Bureau of Charities, Department of Public Welfare, under the provisions of G. C. 1352-1 and 1352-6 as a family boarding home for a maximum of four children and used by the Juvenile Court under the provisions of 1639-22 for the temporary detention of alleged and adjudicated neglected, dependent, and delinquent children, pending final disposition of their cases, and located in a single family dwelling use zone established under a municipal zoning ordinance, in violation of such zoning ordinance defining a family as 'any number of individuals living together as a single housekeeping unit and doing their cooking on the premises' and permitting, as an accessory use, that 'in a single family dwelling occupied as a private residence, one or more rooms may be rented or table board furnished?'

2. If such use is in violation of the ordinance otherwise, does the provision of G. C. 1639-22, 'that such private homes shall have the same legal status under the laws of the State as private residences' nevertheless require that under the zoning ordinance such a home must be classified as to use as a single family dwelling either with or without the accessory use of a boarding or rooming house, or must an application be made to the Board of Zoning Appeals for a variation of the use in this specific case?"

Section 1352-1 General Code, to which you refer, authorizes the Department of Public Welfare, as successor to the Board of State Charities, to pass upon the fitness of any institution which receives or desires to receive and care for children who may come under the jurisdiction of the juvenile court.

Section 1352-6 General Code defines "institution" in that connection, as including any individual who for hire or reward receives or cares for children, unless he is related to them by blood or marriage.

Section 1639-22 General Code from which you have quoted con-

tains several features which, while possibly not directly relevant to your inquiry, yet are worthy of note as having a possible bearing. That section in its entirety reads as follows:

> "No child under eighteen years of age shall be placed in or committed to any prison, jail or lock-up, nor shall such child be brought into any police station, vehicle or other place where such child can come in contact or communication with any adult convicted of crime or under arrest and charged with crime; provided, that a child fourteen years of age or older, whose habits or conduct are deemed such as to constitute a menace to other children, may, with the consent of the judge or chief probation officer, be placed in a jail or other place of detention for adults, but in a room or ward separate from adults.
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> Upon the advice and recommendation of the judge of the court exercising the powers of jurisdiction conferred in this chapter, the county commissioners shall provide, by purchase or lease, a place to be known as a detention home within a onvenient distance of the court, not used for the confinement of adult persons charged with criminal offenses, where delinquent, dependent or neglected children may be detained until final disposition, which home shall be maintained as provided in this act.
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> The court may arrange for the boarding of such children temporarily in private homes, or to supplement such detention home, subject to the supervision of the court, or may arrange with any incorporated institution or agency, to receive for temporary care children within the jurisdiction of the court.
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> In case a detention home is established as an agency of the court it shall be furnished and carried on, as far as possible, as a family home in charge of a superintendent or matron. The judge may appoint a superintendent, a matron and other necessary employees for such home in the same manner as is provided for the appointment of other employees of the court, their salaries to be fixed and paid in the same manner as the salaries of other employees. The neessary expenses incurred in maintaining such detention home shall be paid by the county.
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> In case the court shall arrange for the board of children temporarily detained in private homes or institutions a reasonable sum to be fixed by the court for the board of such children shall be paid by the county.
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> In order to have such private homes available for service an agreed monthly subsidy may be paid and a fixed rate per day for care of children actually residing therein, Such

> private homes shall have the same legal status under the laws of the state as private residences. The children therein shall be under the supervision of the probation department."

It will be observed that the above section contemplates the establishment of an institution known as a "detention home" and also makes provision for the temporary care of delinquent, dependent or neglected children in private homes. In both cases the legislature has manifested a desire to take away from these homes any of the attributes of a penal institution and has explicitly provided in reference to a dentention home proper, that "it is to be furnished and carried on as far as possible as a family home".

This section is a part of the juvenile court act, so--called, of which it was said by one of the courts: "The juvenile court act is said to be the broadest and most humane act given to the people since the signing of the Magna Charta by King John". State v. Joiner, 20 O. N. P. (N. S.) 313. The proceedings as to a dependent or neglected child certainly have no taint of a criminal character and the law takes pains to provide that even as to a delinquent child who is brought before the court charged with a crime the proceedings shall not partake of the character of criminal proceedings and the child shall not be deemed a criminal nor shall an adjudication be deemed a conviction.

I mention these matters because they appear to me to have a direct bearing upon the question which you submit, which seems to imply that the presence in a private home of children who are under the custody of the juvenile court because they are dependent, neglected or delinquent might so change the character of that home as that it would cease to be an individual dwelling. I do not consider that any such inference can fairly be drawn. Delinquency in children may exist in the best of families and is by no means confined to those children who by reason of parental neglect or bad environment may be under the care of the juvenile court. It seems to be generally conceded by students of social problems that so-called delinquency on the part of children is frequently, if not usually, rather delinquency on the part of their parents or those having them in charge, or is due to bad environment.

It is further worthy of note that the provisions of Section 1639-22 General Code, do not contemplate anything in the nature of an asylum,

or a permanent childrens' home. On the contrary, the purposes of the statute in question are expressly stated to be for temporary care only.

The zoning ordinance of the city of Ravenna so far as you have quoted it deals with the *use* of property in a residence district and certainly does not attempt to deal with the specific personnel of the inhabitants. The right of a municipality to establish regulations effecting the use of property in various portions of its area has been very definitely established both in Ohio and in the nation at large. The broad principle of the validity of such ordinances was laid down by the Supreme Court of the United States in the case of Village of Euclid v. Ambler, 272 U. S. 365, decided in 1926. Prior to that decision, there had been onsiderable contrariety of decision on the part of the courts of the various states, but this case seems to have been adopted quite generally as a correct statement of the police power of the states and of their subdivisions. The syllabus of that case reads in part as follows:

> "The police power supports also, generally speaking, an ordinance forbidding the erection in designated residential districts, of business houses, retail stores and shops, and other like establishments, also of apartment-houses in detached house sections— since such ordinances, apart from special applications, cannot be declared clearly arbitrary and unreasonble, and without substantial relation to the public health, safety, morals, or general welfare."

The Supreme Court of Ohio had, prior to the decision of the Ambler case, laid down an equally clear statement to like effect. In the case of Pritz v. Measer, 112 O. S. 628, decided in 1925, the Supreme Court upheld an ordinance of the city of Cincinnati, dividing the territory of the city into districts and regulating the uses and location of buildings and other structures for specific uses as well as the height of buildings, percentage of lot occupancy, set-back building lines, area of yards, etc. In this case and other cases sustaining such general regulations courts have invariably rested the power upon the proposition that these regulations are designed to promote the public health, morals and safety.

At the same time, the Supreme Court of the United States and the courts of our state and of other states have recognized the principle that regulations of this character, although valid in their general fea-

tures, may in specific cases prove to be unduly burdensome and arbitrary and not essential to the public health, morals or safety, and they have not hesitated to enjoin the application of a zoning ordinance in a particular case. This was the holding in the case of Youngstown v. Kahn, 112 O. S. 654, decided on the same day as the case of Pritz v. Presser, supra, the opinion being written in each case by Judge Allen. There the court found that an ordinance undertaking the establishment of restrictions within a small district in the city of Youngstown and prohibiting the erection of an apartment house in a residential district was under the circumstances invalid in that it worked an undue hardship on the owner and was not essential to the health, morals and safety of the district or of the entire municipality.

The foregoing discussion has proceeded upon the theory that there might be an apparent conflict between the use of the private residence in question as a boarding home for children who are in charge of the juvenile court and the provisions of the zoning ordinance limiting the district where such residence is located to a dwelling house district. However, I see nothing in the portion of the ordinance which is quoted in your letter that appears to me to give any substantial ground to a claim that there would be any such conflict. The ordinance provides as an accessory use in a dwelling house district that "in a dwelling or apartment occupied as a private residence one or more rooms may be rented or table-board furnished". A family is defined as "any numbr of individuals living together as a single housekeeping unit and doing their cooking on the premises". I cannot see that the presence of not more than four children in such family would affect or in any way change the character either of the family or of the dwelling. The fact that they came into the home from the juvenile court rather than by other means would certainly not have that effect.

In the case which you present, the juvenile court, under the authority of the statute, has arranged with the owners of a residence that they shall furnish temporary lodging, together with food and proper care, for not to exceed four children, whose permanent disposition is later to be determined by the court. The fact that the law gives the court the right to arrange for the payment of a fixed subsidy to keep the private home available for service certainly does not change the character of the home or raise any doubt as to its compliance with the zoning or-

dinance. And certainly, the fact that the Department of Public Welfare has put the stamp of approval on the home in question cannot have such effect. Furthermore, the legislature has in the concluding paragraph of Section 1639-22, General Code, undertaken to characterize these private homes as distinguished from a public institution, by declaring that "such private homes shall have the same legal status under the laws of the state as private residences". I do not think it necessary to determine in this connection whether or not that declaration by the legislature would have the effect of overriding the provisions of a municipal zoning ordinance if there was a clear conflict, since I do not consider that there is any conflict. The legislative declaration, however, is entitled to some weight in arriving at a conclusion as to the questions you present.

In specific answer to your first question it is my opinion that where a zoning ordinance establishes an area called a dwelling-house district in which are authorized single-family dwellings and defines a family as "any number of individuals living together as a single housekeeping unit and doing their cooking on the premises" and further provides as an accessory use in such dwelling-house district that "in a dwelling or apartment occupied as a private residence one or more rooms may be rented or table-board furnished", the temporary placing by the Juvenile Court of four or fewer children for care in a private home in a single residence in said district as provided by Section 1639-22 of the General Code, is not a violation of the provisions aforesaid of such zoning ordinance.

In view of the foregoing, it seems unnecessary to answer your second question.

Respectfully,

THOMAS J. HERBERT

Attorney General