OPINION NO. 89-097

Syllabus:

R.C. 5104.054 permits a county department of human services, pursuant to R.C. 5104.11 and R.C. 5107.28, to develop, certify and purchase child day-care services from certified type B family day-care homes in any municipal zoning district in which residential uses are permitted, irrespective of a municipal zoning law precluding the establishment or operation of such homes.

To: John T. Corrigan, Cuyahoga County Prosecuting Attorney, Cleveland, Ohio
By: Anthony J. Celebrezze, Jr., Attorney General, December 20, 1989

I have before me your request for my opinion regarding the authority of the county department of human services to establish certain day-care facilities in municipalities. R.C. 5104.054 states.

> Any type B family day-care home, whether certified or not certified by the county director of human services, shall be considered to be a residential use of property for purposes of municipal, county, and township zoning and shall be a permitted use in all zoning districts in which residential uses are permitted. No municipal, county, or township zoning regulations shall require a conditional use permit or

any other special exception certification for any such type B family day-care home.

You ask whether, in light of R.C. 5104.054, a county department of human services can establish and operate type B family day-care homes, as defined in R.C. 5104.01(E), in municipalities which have enacted local zoning laws precluding the establishment or operation of such homes.

In order to answer your question, it will be helpful first to outline how type B family day-care homes fit into the overall state regulatory scheme governing day-care. The provisions of R.C. Chapter 5104 govern the licensure and certification of various types of day-care facilities, while R.C. 5107.25-.30 govern the administration of public funds to such licensed and certified facilities for the purpose of purchasing day-care services for low-income families. R.C. 5104.01 defines three categories of day-care facilities, differentiated primarily on the basis of the number of children served and the residential or non-residential character of the structure itself. A type B family day-care home is defined at R.C. 5104.01(E), which states, in pertinent part, that a type B home is "a permanent residence of the provider in which child day-care or child day-care services[1] are provided for one to six children at one time and in which no more than three children may be under two years of age at one time." (Footnote added.) A child day-care center provides day-care to thirteen or more children or, if the building is not the residence of the licensee or administrator, seven to twelve children. R.C. 5104.01(C). A type A family day-care home provides day-care for seven to twelve children in a building which is the permanent residence of the administrator. R.C. 5104.01(D). Pursuant to R.C. 5107.25(D), these definitions are also incorporated into R.C. 5107.25-.30[2]

Day-care centers and type A homes must be licensed both as a condition of operation, R.C. 5104.02(A), and as a condition of receiving public funds, R.C. 5107.27(B). Licensure and ongoing inspections are performed by the state department of human services, R.C. 5104.02; R.C. 5104.03, in accordance with standards set pursuant to R.C. 5104.011(A)-(E) (day-care centers), R.C. 5104.011(F) (type A family day-care homes), and department rules promulgated thereunder. *See* 8 Ohio Admin. Code 5101:2-12, 2-13, 2-16. The state department of human services also promulgates rules for the certification of type B homes. R.C. 5104.011(G); 8 Ohio Admin. Code 5101:2-14, 2-16. The county department of human services is responsible for certification and ongoing inspection of type B homes. R.C. 5104.11. A type B home must be certified in order to receive public funds under R.C. 5107.25-.30. R.C. 5107.27(B). Certification is not, however, a condition of operation.

Viewing your request in the context of the above statutory framework, I note that the words "establish and operate" which appear in your question, might be construed overbroadly, to the extent that "establish and operate" imply a type of proprietary involvement in type B homes. As indicated by the definition at R.C. 5104.01(E), which requires that a type B home be the residence of the provider, a county department of human service does not directly establish and operate such homes. The county department of human services, however, does directly participate in the development of certified type B homes, R.C. 5107.28(A) and (B), in the initial and on-going inspection and certification of such homes, R.C. 5104.11, and in the purchase of child day-care services from certified homes. R.C. 5107.28(D). I note, additionally, that I find no provisions in R.C. Chapter 5104 or

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1 *See* R.C. 5104.01(A) (defining child day-care); R.C. 5104.01(B) and R.C. 5107.25(A) (together defining child day-care services, in essence, as child day-care purchased wholly or in part with public funds).

2 With respect to type B homes, R.C. 5107.25(D) technically only incorporates the definition of "certified type B family day-care home," which appears at R.C. 5104.01(F). Since R.C. 5104.01(F) defines a certified type B home as a type B home which has been certified for receipt of public funds under R.C. 5107.25-.30, R.C. 5104.01(F) necessarily incorporates the provisions of R.C. 5104.01(E) that define a type B home.

R.C. 5107.25-.30 which vest a county department of human services with authority over type B family day-care homes unless such homes receive or seek to receive the public funds for day-care services to low-income families available pursuant to R.C. 5107.25-.30. Thus, the county department of human services deals only with certified type B homes. Your question does not require me, therefore, to consider the effect of local zoning restrictions on uncertified type B homes, even though R.C. 5104.054 refers to both certified and uncertified homes. In order to reflect this statutory framework and to clarify the scope of my opinion, I have rephrased your question as follows: May a county department of human services develop, certify and purchase child day-care services from certified type B family day-care homes in a municipal zoning district in which residential uses are permitted, when the municipality has enacted a local zoning law precluding the establishment or operation of such homes?

Because R.C. 5104.054 expressly permits certified type B family day-care homes "in all zoning districts in which residential uses are permitted," any municipal zoning ordinance which prohibits certified type B homes in such districts is clearly in conflict with R.C. 5104.054. *See Village of Struthers v. Sokol*, 108 Ohio St. 263, 140 N.E. 519 (1923) (syllabus, paragraph two) ("[i]n determining whether an ordinance is in 'conflict' with general laws, the test is whether the ordinance permits or licenses that which the statute forbids and prohibits, and vice versa"); *accord Fondessy Enterprises, Inc. v. City of Oregon*, 23 Ohio St. 3d 213, 492 N.E.2d 797 (1986) (syllabus, paragraph two). Municipal corporations in Ohio have the authority "to exercise all powers of local self-government and to adopt and enforce within their limits *such local police*, sanitary and other similar *regulations, as are not in conflict with general laws*." Ohio Const. art XVIII, §3 (emphasis added). "It is virtually axiomatic that the enactment of zoning laws by a municipality is an exercise of the police power...." *Negin v. Board of Bldg. and Zoning Appeals*, 69 Ohio St. 2d 492, 495, 433 N.E.2d 165, 168 (1982). When a conflict exists between an otherwise legitimate exercise of municipal home rule authority and a state statute, the statute will prevail only if it is a general law within the meaning of Ohio Const. art. XVIII, §3. The Ohio Supreme Court has held that:

> Police and similar regulations adopted under the powers of local self-government established by the Constitution of Ohio must yield to general laws of statewide scope and application, and statutory enactments representing the general exercise of police power by the state prevail over police and similar regulations of a municipality....

City of Canton v. Whitman, 44 Ohio St. 2d 62, 337 N.E.2d 766 (1975) (syllabus, paragraph two); *see also City of Rocky River v. State Employment Relations Bd.*, 43 Ohio St. 3d 1, 12-13, 539 N.E.2d 103, 113 (1989) ("the power of home rule is constitutionally limited to powers not in conflict with 'general laws'").

In *Clermont Environmental Reclamation Co. v. Wiederhold*, 2 Ohio St. 3d 44, 442 N.E.2d 1278 (1982), the court explained in detail how to determine whether a statute that purports to override municipal home rule authority is a general law for purposes of Ohio Const. art. XVIII, §3. The *Clermont* court held that R.C. 3734.05(D)(3) [now (E)(3)], which prohibits any political subdivision of the state from requiring additional zoning or other approval for the construction and operation of a hazardous waste facility authorized by the state, is such a general law. In doing so, the court reaffirmed and explained the definition of "general laws" which was first articulated in *Village of West Jefferson v. Robinson*, 1 Ohio St. 2d 113, 205 N.E.2d 382 (1965):

> In defining "general laws," it was set forth in paragraph three of the syllabus in *West Jefferson v. Robinson, supra*:
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> "The words 'general laws' as set forth in Section 3 of Article XVIII of the Ohio Constitution mean statutes setting forth police, sanitary or similar regulations and *not statutes which purport only to grant or to limit the legislative powers of a municipal corporation to adopt or enforce police, sanitary or other similar regulations*."
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> The meaning of this syllabus principle of law is that a statute which prohibits the exercise by a municipality of its home rule powers *without such statute serving an overriding statewide interest* would directly contravene the constitutional grant of municipal power.

Clermont, 2 Ohio St. 3d at 48, 442 N.E.2d at 1281-82 (1982) (emphasis added). The court additionally emphasized that a statute restricting municipal action "should not be read and interpreted in isolation" from other sections of the Revised Code which are part of the same regulatory scheme. *Id.* at 48, 442 N.E.2d at 1282. Review of the syllabus paragraphs of *Clermont* reveals that the court focused on two factors in applying the *West Jefferson* definition of general laws. First, the court held that the statute was "a 'law, of a general nature' of the state having uniform operation throughout the state" as required by Ohio Const. art. II, §26. *Clermont*, (syllabus, paragraph one).[3] Second, the statute was "a reasonable exercise of the state's general police power." *Id.* (syllabus, paragraph two).[4]

Read standing alone, R.C. 5104.054, governing the zoning classification of type B family day-care homes, is a limitation on local zoning authority. I must, therefore, examine whether R.C. 5104.054 is a general law as defined by the court in *West Jefferson* and *Clermont*. R.C. 5104.054 bears a reasonable relationship to the legitimate state interest in providing cost-effective, safe day-care services for low income families "especially in areas with high concentrations of recipients of public assistance." R.C. 5107.26(C) (state department of human services development duties); R.C. 5107.28(B) (county department of human services development duties). R.C. 5104.054 was enacted as part of Sub. H.B. 435 (eff. Sept. 1, 1986), which totally restructured the state regulation of day-care. *See* 1985-86 Ohio Laws, Part II, 4252. The state had not previously regulated the provision of day-care to fewer than six children at a time. Thus, the creation of the type B home category, the setting of certification standards for receipt of public funds, and the definition of type B homes as a residential use represents a legislative policy to provide and actively promote safe day-care services for low-income families in the residential neighborhoods. The objectives promoted by these amendments to R.C. Chapter 5104 and R.C. 5107.25-.30 are within the scope of the state police power and are matters of statewide concern. *See State ex rel. Ranz v. City of Youngstown*, 140 Ohio St. 477, 45 N.E.2d 767 (1942) (syllabus, paragraph two) ("[r]elief of the poor is a state function"); *Ferrie v. Sweeney*, 34 Ohio Op. 272, 274,

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[3] It is on this basis that the *Clermont* court distinguished its holding from the holding in *Garcia v. Siffrin Residential Ass'n*, 63 Ohio St. 2d 259, 407 N.E.2d 1369 (1980). *See Clermont Environmental Reclamation Co. v. Wiederhold*, 2 Ohio St. 3d 44, 50, 442 N.E.2d 1278, 1283 (1982). The *Garcia* court struck down provisions of R.C. 5123.18, which attempted to override municipal zoning laws that excluded residential facilities for persons with mental retardation, on the grounds, *inter alia*, that not all municipalities were affected equally. While it is arguable that other aspects of the reasoning used by the court in *Clermont* might have led to a different result in *Garcia*, *see, e.g., Clermont* (Brown, J., dissenting), the court chose to distinguish rather than overrule *Garcia*. Because of that, I was hesitant, in 1983 Op. Att'y Gen. No. 83-005, to rely on *Clermont* to advise the director of the Department of Mental Retardation and Developmental Disabilities that she could successfully ignore local zoning ordinances when licensing facilities, even though compliance with local zoning was not technically a requirement for licensure. My uncertainty, however, was based on the fact that *Garcia* had invalidated the statute in question. R.C. 5104.054 is similar to the statutes at issue in both *Garcia* and *Clermont*. Since *Clermont* is the more recent case, the analytical structure articulated by the court in *Clermont* should control. I must make the same *caveat* to you, however, as I provided in Op. No. 83-005. If a municipality has sought and received an injunction against certification of a type B home, *see* R.C. 713.13, the county department of human services must abide by the terms of the injunction, and seek further recourse in the courts. *See* Op. No. 83-005, n. 3 at 2-28.

[4] In *Fondessy Enterprises, Inc. v. City of Oregon*, 23 Ohio St. 3d 213, 492 N.E.2d 797 (1986), the court stated by way of clarification that a general law does not totally preempt municipal regulation. Rather, it overrides municipal ordinances only to the extent such ordinances are in actual conflict.

72 N.E.2d 128, 130 (C.P. Cuyahoga County 1946) ("[t]hat the granting of relief to the poor and needy, and providing for the care and welfare of children are matters of state wide concern admits of no debate"); 1970 Op. Att'y Gen. No. 70-116 at 2-221 ("[c]hapter 5104, supra, requiring licenses for child day-care centers, is a general law and an exercise of the police power of the state of Ohio and as such may not be controverted by any municipality"). Additionally, the state police power includes the power to adopt state zoning provisions, which will take effect even within municipalities, if reasonably related to legitimate state objectives. *Village of Willoughby Hills v. Corrigan*, 29 Ohio St. 2d 39, 278 N.E.2d 658 (1972) (holding that Ohio Const. art. XVIII, §3 does not give municipalities exclusive authority to zone within their territory and that the state may authorize adoption of airport zoning regulations within municipalities).[5] The overall effect, therefore, of the provisions of R.C. 5104.054, when read *in pari materia* with the other provisions of R.C. Chapter 5104 and R.C. 5107.25-.30 regulating certified type B homes, is not merely to prohibit municipalities from exercising their zoning power. As required by the court in *Clermont*, the statutory scheme "is a comprehensive one enacted to insure that such facilities are designed, sited, and operated in the manner which best serves the statewide interest." 2 Ohio St. 3d at 48, 442 N.E.2d at 1282.[6]

R.C. 5104.054 also clearly meets the requirement of Ohio Const. art. II, §26 in that it has uniform operation throughout the state. *Clermont* (syllabus, paragraph one). By its own terms, R.C. 5104.054 applies equally to municipalities, townships and counties. R.C. 5104.054 does not create any distinctions within any single category of subdivision, as did the statute which was struck down in *Garcia v. Siffrin Residential Ass'n*, 63 Ohio St. 2d 259, 407 N.E.2d 1369 (1980).[7] Based on the above, I conclude that R.C. 5104.054 is a general law within the meaning of Ohio Const. art. II, §26 and art. XVIII, §3 and that its provisions defining certified type B family day-care homes as a permitted use in residentially zoned districts must prevail over municipal ordinances to the contrary.

It is, therefore, my opinion, and you are hereby advised, that R.C. 5104.054 permits a county department of human services, pursuant to R.C. 5104.11 and R.C.

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5 The *Willoughby Hills* decision is also significant in that the court recognized that the state may exercise its zoning power in a limited fashion for limited purposes. Thus regulations imposing only height restrictions for purposes of aircraft safety could be adopted as zoning regulations under the police power of the state, even though such regulations did not serve all of the purposes traditionally involved in community zoning. *Village of Willoughby Hills v. Corrigan*, 29 Ohio St. 2d 39 at 46, 278 N.E.2d 658, 662-63 (1972). R.C. 5104.054 is similarly limited in its scope, but viewed in light of *Willoughby Hills*, constitutes an exercise of the state's zoning power, nonetheless.

6 I note further that the zoning provision of R.C. 5104.054 as adopted in 1986 reflects a balancing of state and local authority. *See* 1985-86 Ohio Laws, Part II, 4252 (Sub. H.B. 435, eff. Sept. 1, 1986). Although Sub. H.B. 435 created three categories of day-care facilities, only the smaller, residential type B home was granted an override over local zoning. The legislature thus made an effort to harmonize its exercise of the state police power with local land use planning. R.C. 5104.054 reflects the balancing of governmental interests approved by the court in *Brownfield v. State*, 63 Ohio St. 2d 282, 407 N.E.2d 1365 (1980). Although the balancing test of *Brownfield*, strictly construed, would appear to apply to conflicts between municipal zoning and exercise of state police powers other than zoning, I believe application of the test provides further indication of the reasonableness of the state action.

7 The *Garcia* court found that R.C. 5123.18(G) impermissibly created arbitrary distinctions between municipalities by allowing certain types of zoning restrictions enacted before the legislation to remain intact but forbidding municipalities from enacting new ordinances creating the same type of restrictions. *See Clermont*, 2 Ohio St. 3d at 50, 442 N.E.2d at 1283; *Garcia*, 63 Ohio St. 2d at 272, 407 N.E.2d at 1378-79.

5107.28, to develop, certify and purchase child day-care services from certified type B family day-care homes in any municipal zoning district in which residential uses are permitted, irrespective of a municipal zoning law precluding the establishment or operation of such homes.