

OPINION NO. 96-009**Syllabus:**

Pursuant to R.C. 2151.418, a home that constitutes a "foster home" or "family foster home," as those terms are defined in R.C. 2151.011(B), is a permitted use in all zoning districts in which residential uses are permitted, and no township zoning regulation may require a conditional permit or any other special exception certification for any such home.

To: Charles F. Kennedy, III, Van Wert County Prosecuting Attorney, Van Wert, Ohio
By: Betty D. Montgomery, Attorney General, January 22, 1996

By letter dated August 8, 1995, you have requested a formal opinion of the Attorney General addressed to a township zoning question. According to your letter, a township has in force a duly enacted zoning code. One type of district created by the code has as its principal permitted uses single family dwellings, multi-family dwellings, and home occupations. Located in one of these districts is a dwelling that is being operated as a foster home under the auspices of the Ohio Youth Advocate Program, Inc., an entity licensed by the Ohio Department of Human Services under Ohio Administrative Code Chapter 5101:2-7. You specifically ask

whether the township may require this dwelling to obtain a conditional use permit, as required of "group homes" by the zoning code.

In order to answer your question, it is first necessary to examine the extent of a township's authority with respect to zoning. As stated in *Bd. of Township Trustees v. Funtime, Inc.*, 55 Ohio St. 3d 106, 563 N.E.2d 717 (1990) (syllabus, paragraph one), "[t]he zoning authority possessed by townships in the state of Ohio is limited to that which is specifically conferred by the General Assembly." Pursuant to R.C. 519.02, a board of township trustees has authority to adopt a comprehensive plan of zoning for the unincorporated areas of the township for the purpose of promoting the public health, safety, and morals. Expressly included within the types of regulations a board of township trustees may adopt are those relating to, among other things, "the density of population, the uses of buildings and other structures..., and the uses of land for trade, industry, residence, recreation, or other purposes." R.C. 519.02. See generally R.C. 519.21 (powers not conferred by R.C. Chapter 519).

The General Assembly has enacted specific legislation, however, limiting the application of local zoning to foster homes. Pursuant to R.C. 2151.418:

Any foster home or family foster home 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 regulation shall require a conditional permit or any other special exception certification for any foster home or family foster home. (Emphasis added.)

See generally R.C. 2151.011(B)(5) (defining "foster home" as meaning "a family home in which any child is received apart from the child's parents for care, supervision, or training"); R.C. 2151.011(B)(48) (defining "family foster home" as meaning, with certain exceptions, "a private residence in which no more than five children, or in which all children in a sibling group, are received apart from their parents, guardian, or legal custodian by an individual for hire, gain, or reward for nonsecure care, supervision, or training twenty-four hours a day"). Thus, R.C. 2151.418 expressly declares that "foster homes" and "family foster homes" are a permitted use in all districts in which residential uses are permitted. Further, R.C. 2151.418 expressly prohibits a municipality, county, or township from requiring either type of home to obtain a conditional permit or other special exception certification. To the extent that a local zoning regulation conflicts with R.C. 2151.418, it must fall. See *Fox v. Johnson*, 28 Ohio App. 2d 175, 275 N.E.2d 637 (Mahoning County 1971).

According to your opinion request, the township zoning code requires a group home, defined in the zoning code as, "[a] residential facility that provides room and board, personal care, habilitation services, and supervision in a family setting for persons with developmental, social, and/or behavioral problems," to obtain a conditional use permit. It is apparent, however, that the definition of "group home" in the township zoning code may, in certain circumstances, encompass a "foster home" or a "family foster home," as the latter are defined in R.C. 2151.011(B). To the extent that a "group home," as defined in the township zoning code, constitutes either a "foster home" or "family foster home," as those terms are defined in R.C. 2151.011(B), however, the township zoning code must yield to the terms of R.C. 2151.418. See *Fox v. Johnson, supra*. Accordingly, such home must be permitted in any zoning district

that permits residential uses, and the township may not require the home to obtain a conditional use permit.

In addition to the potential conflict with R.C. 2151.418, the township zoning code's definition of "group home" raises an additional concern, arising out of a number of cases decided prior to the 1989 enactment of R.C. 2151.418.¹ This rather incongruous line of cases commenced with *Garcia v. Siffrin Residential Ass'n*, 63 Ohio St. 2d 259, 407 N.E.2d 1369 (1980), *cert. denied* 450 U.S. 911 (1981). In *Garcia*, the court struck down various statutory provisions which allowed licensed family homes and licensed group homes to be located in residential districts, regardless of local zoning restrictions. See *Garcia v. Siffrin Residential Ass'n*, 63 Ohio St. 2d at 259-261, 407 N.E.2d at 1371 n.1. The *Garcia* court allowed the municipal zoning code to prevail over the conflicting statutory provisions. On the same day that *Garcia* was announced, the court decided *Carroll v. Washington Township Zoning Comm'n*, 63 Ohio St. 2d 249, 408 N.E.2d 191 (1980), and allowed to stand a township zoning code that excluded foster homes from a district zoned for "one family residential dwelling units."

One year later the court held, on facts similar to those in *Garcia* and *Carroll*, that a foster care facility for delinquent boys qualified as a "dwelling-single family," rather than as a boarding house, as defined in the zoning code. *Saunders v. Clark County Zoning Dep't*, 66 Ohio St.2d 259, 421 N.E.2d 152 (1981). The *Saunders* court broadly interpreted the county zoning code's definition of "family" and concluded that the facility in question was occupied by a "family."² While the *Saunders* court paid little deference to its earlier decisions in *Garcia* and *Carroll*, it did not overrule those cases. As a result, no clear standard exists regarding the extent to which local authorities may use their zoning powers to regulate facilities like those considered in the *Garcia*, *Carroll*, and *Saunders* cases. With the enactment of R.C. 2151.418 in 1989, however, the General Assembly has made clear that in the enactment of zoning codes, local authorities must treat a "foster home" or "family foster home," as those terms are defined in R.C. 2151.011(B), as any other residential use. This enactment of the General Assembly, therefore, represents the last and latest word on the subject of foster homes and must be considered controlling authority on that issue.

I present the discussion of the foregoing cases because the definition of group home appearing in the zoning code you describe appears to be a hybrid of the definitions of "foster home" and "family foster home" contained in R.C. 2151.011(B) and the definition of "group home" appearing in R.C. 5123.19(A)(3).³ The township's definition of a group home arguably

¹ R.C. 2151.418 was enacted in 1987-1988 Ohio Laws, Part I, 198 (Am. Sub. S.B. 89, eff., in part, Jan. 1, 1989).

² The definition of "family" considered in *Saunders v. Clark County Zoning Dep't*, 66 Ohio St.2d 259, 421 N.E.2d 152 (1981), was almost identical to that in the township zoning code you describe, which defines a "family" as "[a] person living alone or two or more persons living together as a single housekeeping unit but not including a group occupying a boarding house, lodging house, or hotel." In the *Saunders* case, the county zoning code defined a "family" as "[a] person living alone, or two or more persons living together as a single housekeeping unit, in a dwelling unit, as distinguished from a group occupying a boarding house, lodging house, motel or hotel, fraternity or sorority house." 66 Ohio St. 2d at 262, 421 N.E.2d at 155.

³ R.C. 5123.19(A)(3) defines a "group home" as "a residential facility that provides room and board, personal care, habilitation services, and supervision in a family setting for at least

could encompass a foster home, a family foster home, or a group home, as the latter terms are defined by statute. The various types of homes, however, are different entities, and the power of local authorities to use their zoning powers to regulate such dwellings appears to be subject to different standards of judicial review. Your opinion request notes that the residence in question has been licensed as a foster home pursuant to 13 Ohio Admin. Code Chapter 5101:2-7 which weighs in favor of classifying it as a foster home. Whether this home falls within the statutory definition of a "foster home" or a "family foster home," however, is a question of fact that cannot be resolved by means of an opinion of the Attorney General. *See* 1993 Op. Att'y Gen. No. 93-033. Rather, after examining the facts concerning the home about which you ask, you must determine whether the home is a "foster home" or "family foster home" for purposes of R.C. 2151.418. If the home is a "foster home" or "family foster home," it is a permitted use in any zoning district in which residential uses are permitted and cannot be required by a township zoning code to obtain a conditional permit or other special exception certification.

In conclusion, it is my opinion, and you are advised that, pursuant to R.C. 2151.418, a home that constitutes a "foster home" or "family foster home," as those terms are defined in R.C. 2151.011(B), is a permitted use in all zoning districts in which residential uses are permitted, and no township zoning regulation may require a conditional permit or any other special exception certification for any such home.

nine but not more than sixteen mentally retarded or developmentally disabled persons."