OPINION NO. 90-080

Syllabus:

1. The phrase "commonly known as a family unit" in R.C. 3732.01(A)(1)(a) refers to the common definition of family as a group of persons living under one roof as a single household, irrespective of whether they are related by blood or consanguinity.

2. When a residential home for mentally retarded or developmentally disabled persons, which is licensed by the department of mental retardation and developmental disabilities pursuant to R.C. 5123.19, is organized not solely for purposes of individualized treatment, but also for the purpose of sharing a dwelling place as an integrated, single household, the residents of such a home constitute a family for purposes of R.C. 3732.01(A)(1)(a).

3. A residential home, licensed by the department of mental retardation pursuant to R.C. 5123.19, which contains a family is exempt from licensure as a food service operation by the provisions of R.C. 3732.01(A)(1)(a), and is, therefore, not required to be licensed as such under either 10 Ohio Admin. Code 5123:2-3-17(A) or 4 Ohio Admin. Code 3701-21-01(E).

To: Robert E. Brown, Director, Ohio Department of Mental Retardation and Developmental Disabilities, Columbus, Ohio
By: Anthony J. Celebrezze, Jr., Attorney General, November 9, 1990

I have before me your request for my opinion regarding the licensure requirements for residential homes for mentally retarded or developmentally disabled persons which are licensed by the department of mental retardation and developmental disabilities (DMR/DD) pursuant to R.C. 5123.19. DMR/DD requires residential homes to comply with food service licensure requirements, if applicable. *See* 10 Ohio Admin. Code 5123:2-3-17(A); ("[e]ach residential care facility shall meet applicable standards of the Ohio department of health or certified local health departments regarding the proper storage, preparation, and serving of food. Where appropriate, the residential care facility shall obtain a food service license"). Specifically, you ask[1] whether such homes must be licensed as a food service operation pursuant to R.C. Chapter 3732.

R.C. 3732.02 imposes a licensure requirement on all food service operations whether conducted by a person or a governmental agency. Local boards of health are responsible for licensing food service operations,[2] pursuant to regulations promulgated by the public health council, R.C. 3732.02. Food service operation is defined at R.C. 3732.01, which states, in part:

> As used in sections 3732.02 to 3732.08 of the Revised Code:
> (A) A "food service operation" means:
> (1) Any place, including any governmental operation, where meals or lunches, or portions thereof, are prepared or served for a consideration, regardless of whether the meals, lunches, or portions are to be consumed on or off the premises, except:
> (a) Homes containing what is commonly known as the family unit and their nonpaying guests;

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1 Pursuant to discussion between members of our staffs, your question has been rephrased to facilitate analysis.

2 R.C. 3732.01(B) states that "'[l]icensor' means the board of health of any city or general health district, or the authority having the duties of a board of health as authorized by section 3709.05 of the Revised Code."

> (b) Operations serving a meal or a lunch to five or fewer persons;
> (c) Churches, schools, fraternal, or veterans' organizations serving meals or lunches, or portions thereof, on their premises, provided the meals, lunches, or portions, are served on no more than seven consecutive days or on no more than fifty-two separate days in any one calendar year;
> (d) Dining or sleeping cars;
> (e) Food-processing and food-manufacturing establishments;
> (f) Type A and type B family day-care homes, as defined in section 5104.01 of the Revised Code.

R.C. 3732.02 authorizes the public health council to "make regulations of general application throughout the state governing food service operations...." The rules governing the licensure of food service operations appear at 4 Ohio Admin. Code Chapter 3701-21. Food service operation is defined therein as "an operation as defined in section 3732.01 of the Revised Code." Rule 3701-21-01(O). The same rule states that:

> "Community care home" means a facility licensed, certified or otherwise, approved by the Ohio department of human services, the Ohio department of mental retardation and developmental disabilities, the Ohio department of mental health, the Ohio department of youth services, or other government agency which provides room and board, personal care, habilitation services, and supervision in a family setting for more than five and not more than sixteen clients.

Rule 3701-21-01(E).

Throughout 4 Ohio Admin. Code Chapter 3701-21, modifications in the licensure requirements are made for "community care homes." *See, e.g.*, Rule 3701-21-06(B)(5) (food and dishwashing sinks may be used for handwashing); Rule 3701-21-07(C)(5) (sinks may have fewer than three compartments); Rule 3701-21-07-(I)(1) (tableware, kitchenware, and food contact surfaces need not be sanitized); Rule 3701-21-10(A)(5) (utility sink not required); Rule 3701-21-11(B)(2) (common hand towels allowed); Rule 3701-21-13(B) (animals allowed). This regulatory scheme, thus, contemplates that community care homes are a type of food service operation subject to licensure.

It is an accepted principle that "administrative rules enacted pursuant to a specific grant of legislative authority are to be given the force and effect of law." *Doyle v. Ohio Bureau of Motor Vehicles*, 51 Ohio St. 3d 46, 554 N.E.2d 97 (1990) (syllabus, paragraph one); such rules, however, may not be unreasonable or in clear conflict with statutes, *Kroger Grocery & Baking Co. v. Glander*, 149 Ohio St. 120, 125, 77 N.E.2d 921, 924 (1948). *See also* 1982 Op. Att'y Gen. No. 82-044 at 2-125 (authority to adopt rules "does not extend to the making of rules which are contrary to existing laws"). Thus, the regulation of community care homes, as defined in Rule 3701-21-01(E), can only be construed as extending to such facilities when they also fall within the statutory definition of food service operation. Stated alternatively, if a community care home, as defined in Rule 3701-21-01(E), does not also meet the requirements of R.C. 3732.01, it is not required to be licensed as a food service operation. *See generally* 1985 Op. Att'y Gen. No. 85-095 at 2-403 (rules should be construed in a manner consistent with statutes governing the same subject matter, when possible).

The residential homes described in your request are a type of residential facility regulated by DMR/DD under the provisions of R.C. Chapter 5123. A residential facility is "a home or facility in which a mentally retarded or developmentally disabled person resides," except an independent living arrangement, a respite care home, or the home of a relative or legal guardian. R.C. 5123.19(A)(1). The statute establishes several categories of residential homes, classified by the number of individuals residing therein. A family home houses six to eight mentally retarded or developmentally disabled persons, R.C. 5123.19(A)(2), and a group home houses nine to sixteen mentally retarded or developmentally disabled persons, R.C. 5123.19(A)(3). Regardless of the number of persons living there, residential homes provide "room and board, personal care, habilitation services, and supervision in a family setting...." R.C. 5123.19(A)(2), (3). All such residential

homes must be licensed by DMR/DD pursuant to R.C. 5123.19. Thus, such homes fall within the definition of "community care home" in Rule 3701-21-01(E).[3]

I must still determine, however, whether these residential homes are the type of community care homes which must be licensed as food service operations. The definition of food service operation at R.C. 3732.01(A) is comprised of two parts. The first part defines food service operations generally as "[a]ny place...where meals or lunches...are prepared or served for a consideration...." The second part lists specific exceptions, which are excluded from the licensure requirement even though the general definition would otherwise apply.

With respect to the first part of the definition, you note in your request that previous opinions of the Attorney General have held that facilities similar to the homes you have described are not food service operations because the meals are not served for consideration within the meaning of R.C. 3732.01. *See, e.g.*, 1986 Op. Att'y Gen. No. 86-018 (county children's home); 1970 Op. Att'y Gen. No. 70-082 (Ohio Youth Commission group home); 1965 Op. Att'y Gen. No. 65-025 (home for elderly members of a fraternal organization); 1956 Op. Att'y Gen. No. 6401, p. 278 (county home). The reasoning underlying these opinions was that the ordinary meaning of the term compensation "comprehends the usual sale transaction in which payment is made or promised conditioned upon the serving of the food" and that money paid by the residents of such facilities "is not a *quid pro quo* for the food served," but rather a payment dedicated to their overall care and maintenance. 1956 Op. No. 6401 at 281-82.

A long line of opinions is entitled to great deference in the absence of legislative amendment of the statutory language being interpreted therein. 1979 Op. Att'y Gen. No. 79-094 at 2-296; 1979 Op. Att'y Gen. No. 79-025 at 2-88; 1974 Op. Att'y Gen. No. 74-007 at 2-25; 1954 Op. Att'y Gen. No. 3700, p. 181 at 187. *See generally Seeley v. Expert, Inc.*, 26 Ohio St. 2d 61, 72-73, 269 N.E.2d 121, 129 (1971); *State ex rel. Automobile Machine Co. v. Brown*, 121 Ohio St. 73, 75-76, 166 N.E. 903, 904 (1929). The statutory language interpreted in all of the above cited opinions dealing with food service operations, except Op. No. 86-018, was amended prior to the inclusion, in 1986, of "community care homes" at Rule 3701-21-01(E) in the regulatory scheme governing the licensure of food service operations. *See* 1986-87 Ohio Monthly Record 346 (eff. Nov. 1, 1986). Prior to 1984, the statutory definition of food service operation applied to "any place which is kept or maintained for the purpose of preparing meals or lunches for consideration." 1955-56 Ohio Laws 32 (Am. Sub. S.B. 27, eff. Sept. 20, 1955). The current statutory definition, applicable to "[a]ny place...where meals or lunches...are prepared or served for a consideration" was enacted in 1984. 1983-84 Ohio Laws, Part II, 3422, 3423 (Am. Sub. H.B. 311, eff. Apr. 4, 1984).

Although, in Op. No. 86-018, p. 2-92 n.1, I determined that the 1984 change in statutory language had no effect on the analysis of consideration as requiring a *quid pro quo*, that opinion preceded promulgation of Rule 3701-21-01(E). It is not clearly erroneous, however, for the public health council to have viewed this legislative change as broadening the scope of food service operations beyond places with a primary focus on the sale of individual meals, thereby including "community care homes" where payment is made for overall services which include the provision of meals. Even if this was not the specific reasoning behind the change in the rule,

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[3] I note that R.C. 5123.19 identifies three additional types of living arrangements. A foster family home provides the same services as family or group homes but houses five or fewer individuals. R.C. 5123.19(A)(5). A semi-independent living home is a residential facility for a person able to function for specified periods without supervision. R.C. 5123.19(A)(6). An independent living arrangement is a setting chosen by the individual or a guardian which is not dedicated primarily to the provision of residential services and receives no governmental financial support for such services. R.C. 5123.19(A)(7). As these arrangements appear to involve five or fewer persons, they are excluded from both the statutory definition of food service operation, R.C. 3732.01(A)(1)(b), and the administrative definition of community care home, 4 Ohio Admin. Code 3701-21-01(E).

the public health council was not bound by the prior opinions. 1939 Op. Att'y Gen. No. 534, vol. I, p. 670 at 672. *See generally Delmond v. Board Investors Co.*, 35 Ohio Op. 419, 424, 74 N.E.2d 376, 382 (Ct. App. Cuyahoga County 1947).

Whether prompted by the changes in statutory language or by a shift in administrative policy, the inclusion of "community care homes" in the food service operation licensure scheme adopts a broader interpretation of the term "compensation" than do the opinions of the attorney general. In light of the fact that the residential homes you describe are community care homes within the meaning of Rule 3701-21-01(E), I must, therefore, determine whether it is unreasonable to consider that the meals prepared or served in such homes are compensated within the meaning of R.C. 3732.01(A)(1). Pursuant to R.C. 5123.18, the director of DMR/DD may contract with private organizations or nonprofit corporations to provide services to mentally retarded or developmentally disabled persons in residential homes. These private providers are reimbursed for their services in accord with rates established by the director pursuant to R.C. 5123.18 or rates established relative to the administration of the Title XIX program of the "Social Security Act," 42 U.S.C. 301, as amended. The resident of the home or another financially liable individual is required to pay a support charge which is based on a percentage of his or her income in accord with R.C. 5121.03 to R.C. 5121.07. *See* R.C. 5123.18(G). While the determination of the amount actually received by the service provider is calculated by a number of factors, for purposes of this opinion, it is sufficient to note that the system is not one in which either the resident or the government pays the provider for specifically identifiable meals. The provider does, however, receive money for providing services to the residents and some portion of the amount received is attributable to the provision of meals. Accordingly, I find that it is not unreasonable or contrary to law for the public health council to consider that the meals provided in such homes are prepared or served for compensation, notwithstanding the alternative interpretation adopted in Op. No. 86-018, Op. No. 70-082, Op. No. 65-025, and 1956 Op. No. 6401.

The public health council, however, may not pass regulations requiring the licensure of any facility specifically excepted from the definition of R.C. 3732.01, even though that facility meets the general requirement of serving meals for compensation. Rule 3701-21-01(E) expressly recognizes one of these exceptions by excluding facilities which serve five or fewer persons from the definition of "community care home." *See* R.C. 3702.01(A)(1)(b) (food service operation does not include "[o]perations serving a meal or lunch to five or fewer persons"). Review of Ohio case law shows that other types of residential homes may also be excluded from the definition of food service operations by the exception provided in R.C. 3732.01(A)(1)(a).

R.C. 3732.01(A)(1)(a) provides that the term food service operation does not include "[h]omes containing what is commonly known as the family unit and their nonpaying guests...." The term family, however, has several common meanings dependent upon the field of law in which the term is used.

> "Family" has been variously defined as referring to parents and their children; *a collective body of persons who live under one roof and under one head or management*; as connoting some relationship, blood *or otherwise*; as a household. *See Black's Law Dictionary* (Ed. 1979) 543-544.

Nationwide Mutual Fire Insurance Co. v. Turner, 29 Ohio App. 3d 73, 74-75, 503 N.E.2d 212, 215 (Cuyahoga County 1986) (emphasis added); *see also Wallace v. Executors of McMicken*, 2 Disney 564, 569 (Cincinnati Super. Ct. 1859) (word family is capable of so many meanings in common parlance that its meaning in a will must be determined from the particular circumstances and context); *Webster's New World Dictionary* 505 (2d college ed. 1984) ("family 1. orig., all the people living in the same house; household 2. *a*) a social unit consisting of parents and the children that they rear...3. a group of people related by ancestry or marriage; relatives 4. all those claiming descent from a common ancestor"). Thus, the term family may be commonly understood either as a group of persons related by blood or affinity or as a group of persons living under one roof as a single household, regardless of whether they are related by blood or affinity. *Compare Salisbury v. Frank*, 7 Ohio App. 454

(Richland County 1917) (for purposes of entitlement to compensation, fact that woman lived in man's home and performed nurse and housekeeper services did not establish family relationship in the absence of blood or marital relationship), *with Kraft v. Wolf*, 3 Ohio N.P. (n.s.) 105, 108, 15 Ohio Dec. 554, 557 (C.P. Cuyahoga County 1905) ("a family is a collection of individuals living by one fireside....living under one roof, as one unit in the community").

The R.C. 3732.01 definition of food service operations and the exclusions therefrom focus on the preparation or serving of meals from a single source to various groups of people. When examining whether the preparation and serving of meals in a dwelling place constitutes a food service operation, it is obviously the social organization of the persons living there, rather than their blood or affinity relationships alone, which is relevant to defining what sort of group they are. I note that with respect to zoning regulations, it has been held that when the term family has not been expressly restricted to those related by blood or affinity, the term should be understood as referring to any group organized and functioning as a single family unit. *See, e.g., Carroll v. Washington Township Zoning Commission*, 63 Ohio St. 2d 249, 408 N.E.2d 191 (1980) (examining whether a foster home, licensed by the Ohio Youth Commission [OYC] and housing up to seven foster children, qualified as a single-family residential use of property). Since R.C. 3732.01 does not expressly define family as a group related by blood or affinity, I similarly conclude that the phrase "commonly known as a family unit" in R.C. 3732.01 refers to the common definition of family as a group of persons living under one roof as a single household.

Whether unrelated persons living in governmentally licensed residential homes providing care, including meals, constitute a family within this definition of a unified household is a question of fact. *Compare Saunders v. Clark County Zoning Dep't*, 66 Ohio St. 2d 259, 421 N.E.2d 152 (1981) (stating with respect to OYC licensed home for up to nine foster children, that the fact that compensation is paid to a commercial operation which provides meals and lodging does not make the residents any less a family); *City of Westerville v. Kuehnert*, 50 Ohio App. 3d 77, 81, 553 N.E.2d 1085, 1090 (Franklin County 1988) (finding, with respect to DMR/DD licensed home, that "the evidence is clear that the use of these homes by the residents is for the purpose of occupying a single dwelling unit as a household"); *Beres v. Hope Homes, Inc.*, 6 Ohio App. 3d 71, 453 N.E.2d 1119 (Summit County 1982) (DMR/DD licensed home found to be organized as a single family unit), *cert. denied* 464 U.S. 937 (1983) *with Garcia v. Siffrin Residential Ass'n*, 63 Ohio St. 2d 259, 407 N.E.2d 1369 (1980) (DMR/DD licensed home found to be organized for individualized training, not for sharing and maintenance of household as a single unit); *Carroll*, 63 Ohio St. 2d at 252-53, 408 N.E.2d at 193-94 (foster children in OYS licensed home not functioning as a single family unit).[4] I am unable to use the opinion rendering function of this office to make findings of fact or determinations as to the rights of particular individuals. *See generally* 1986 Op. Att'y Gen. No. 86-039 at 2-198; 1983 Op. Att'y Gen. No. 83-057 at 2-232. I note, however, that the purpose of residential homes for mentally retarded or developmentally disabled persons, is to provide supportive services which will enable

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[4] The above cited cases examined whether the living arrangements at issue therein could be considered families either when no definition appeared in the local zoning code or when the local zoning code definition included unrelated household members. I have citied them as examples of how to determine when an unrelated group constitutes a family. I do not mean to imply that local zoning code definitions should control whether the residents of a particular residential facility are a family for purposes of R.C. 3732.01(A)(1)(a). Rather, since the term family is undefined in R.C. Chapter 3732, the term family for purposes of food service operation licensure should be construed uniformly throughout the state as any group of individuals functioning as a single household, whether related or not.

such persons to participate in society in the same ways that persons without disabilities can. *See generally* R.C. 5123.67(D)-(E).[5] Thus, the purpose of many, though not necessarily all, DMR/DD licensed residential homes, will be to integrate the persons who live there as a single household unit, i.e. a family.

Although I have drawn from the analysis used in zoning law for guidance in construing the meaning of the word family, I am aware that the purposes of zoning regulation and food service operation licensure differ. Zoning insures land-use patterns consistent with a comprehensive community plan, *Carroll*, while licensure of food service operations insures the health of persons purchasing meals from a common source. I do not view the differing purpose of food service operation licensure, however, as justifying a more restrictive interpretation of the word family for purposes of R.C. 3732.01(A)(1)(a). The legislative exclusion of "homes containing what is commonly known as a family unit" from the definition of food service operation, R.C. 3732.01(A)(1)(a), recognizes that the application of licensure requirements would intrude into the ordinary functioning of a household. Without such an exception, a family would be unable for example, to hire a cook, without subjecting themselves to licensure as a food service operation, because their meals would be prepared and served for compensation under the broad construction of that term adopted by the licensure regulations. I am aware of no justification for distinguishing between households of related persons and households of unrelated persons in applying this family exception from licensure requirements. The fact that the government, through DMR/DD, provides a group of unrelated individuals with supervision and assistance in forming and maintaining their household does not detract from the fact that they function as a single household, i.e., a family. *See Beres*, 6 Ohio App. 3d at 74, 453 N.E.2d at 1122, ("[a]ppellants argue that in spite of the family setting, the operators of this home must...provide supervisors and care paid by the state and federal government. This is all true, but it is collateral to the family housekeeping unit"). While the protection of the health of persons with developmental disabilities living in a residential home licensed by DMR/DD is a legitimate goal of legislation, the authority granted to DMR/DD in R.C. Chapter 5123 provides such protection. Thus, there is no reason to assume that the legislature intended to impose food service operation licensure restrictions on governmentally licensed homes containing a family to any greater extent than on other family homes, particularly since such a construction subverts the purpose for which such licensed homes are maintained.

It is, therefore, my opinion and you are hereby advised that:

1. The phrase "commonly known as a family unit" in R.C. 3732.01(A)(1)(a) refers to the common definition of family as a group of persons living under one roof as a single household, irrespective of whether they are related by blood or consanguinity.

2. When a residential home for mentally retarded or developmentally disabled persons, which is licensed by the department of mental retardation and developmental disabilities

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5 R.C. 5123.67 states:

> This chapter shall be liberally interpreted to accomplish the following purposes:
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> ....
>
> (D) To maximize the assimilation of mentally retarded or developmentally disabled persons into the ordinary life of the communities in which they live;
>
> (E) To recognize the need of mentally retarded or developmentally disabled persons, whenever care in a residential facility is absolutely necessary, to live in surroundings and circumstances as close to normal as possible.

pursuant to R.C. 5123.19, is organized not solely for purposes of individualized treatment, but also for the purpose of sharing a dwelling place as an integrated, single household, the residents of such a home constitute a family for purposes of R.C. 3732.01(A)(1)(a).

3. A residential home, licensed by the department of mental retardation pursuant to R.C. 5123.19, which contains a family is exempt from licensure as a food service operation by the provisions of R.C. 3732.01(A)(1)(a), and is, therefore, not required to be licensed as such under either 10 Ohio Admin. Code 5123:2-3-17(A) or 4 Ohio Admin. Code 3701-21-01(E).