OPINION NO. 83-005

Syllabus:

If [1980-1981 Monthly Record] Ohio Admin. Code 5123:2-3-07(V) were appropriately amended or rescinded, the Director of the Department of Mental Retardation and Developmental Disabilities could, pursuant to R.C. 5123.19, issue, renew, or transfer a license to an otherwise qualified residential facility, even though all zoning objections had not been resolved.

To: Minnie Fells Johnson, Ph.D., Director, Department of Mental Retardation and Developmental Disabilities, Columbus, Ohio
By: Anthony J. Celebrezze, Jr., Attorney General, March 10, 1983

I have before me your predecessor's request for an opinion concerning whether the Department of Mental Retardation and Developmental Disabilities may "legally issue a license to operate an otherwise fully qualified residential facility prior to final resolution of local zoning objections and appeals." [1980-1981 Monthly Record] Ohio Admin. Code 5123:2-3-07(V)(1) at 937 specifically states that "[a] new license shall not be issued until the operator [of the residential facility] has resolved all zoning problems." If zoning objections are raised against the renewal of a license, rule 5123:2-3-07(V)(2) provides that the operator is encouraged to resolve the problems prior to renewal of his license. The rule further provides that, if a resolution cannot be reached, and action is taken by local authorities against the facility, the Department may assist the operator in various ways. If no action is taken by the local authorities within the requisite time frame, the Department may proceed to issue a license. Because this rule seems to adequately answer your predecessor's question, a member of your staff was contacted, and I learned that the Department wished to know whether the above outlined rule could be amended or rescinded so that a license could be issued or renewed even though local zoning problems were not finally resolved.[1] In other words, your predecessor's question is whether, if rule 5123:2-3-07(V) were appropriately amended or rescinded, the Department could issue a license to operate an otherwise qualified residential facility prior to the final resolution of local zoning objections and appeals. From your predecessor's letter, I understand that the question has arisen in light of recent case law concerning the zoning of residential facilities.

R.C. 5123.19 deals with the licensure of a residential facility, which is defined as "a home or facility in which a person with a developmental disability resides, except a home subject to Chapter 3721. of the Revised Code [rest homes and nursing homes] or the home of a relative or legal guardian in which a person with a developmental disability resides." R.C. 5123.19(A)(1). Every person who wishes to operate a residential facility must have the facility licensed by the Department of Mental Retardation and Developmental Disabilities. R.C. 5123.19(B); R.C. 5123.20. Division (C) of R.C. 5123.19 provides for the inspection and licensure of such facilities by the Director, and also sets out detailed procedures which the Director must follow in dealing with possible zoning problems which licensure of a facility could create. R.C. 5123.19(C) reads in part:

> No license for a residential facility shall be issued or renewed nor the location of a license be transferred by the director until he

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[1] A rule, validly adopted by an administrative agency, has the force and effect of law unless it is unreasonable or in conflict with a statute governing the same matter. Kroger Grocery and Baking Co. v. Glander, 149 Ohio St. 120, 77 N.E.2d 921 (1948). Pursuant to R.C. 5123.19(C), the Director of the Department of Mental Retardation and Developmental Disabilities has the mandatory duty to adopt rules governing the issuance and renewal of licenses for residential facilities. The Director also has the authority pursuant to R.C. 5123.19(C) to amend and rescind these rules. See R.C. 119.02-.04 (setting forth the procedures for the adoption, amendment, and rescission of administrative rules).

> notifies, by certified mail, return receipt requested, or by personal service, the clerk of the legislative authority of the municipal corporation if the location of the residential facility is within a municipal corporation, or the clerk of the board of county commissioners and clerk of the board of township trustees if the residential facility is located in unincorporated territory and any local zoning or planning board having jurisdiction within the territory in which the residential facility is located; and an opportunity is provided to the general public, officials or employees of the municipal corporation or county and township and the appropriate local zoning or planning board, which officials and employees shall be designated by the chief executive officer or legislative authority of the municipal corporation, the board of county commissioners or township trustees or the appropriate local zoning or planning board, to object or to comment upon the advisability of the issuance, renewal or transfer of location of the license in writing. With respect to an application for issuance of a license or transfer of the location of a license, notice to the general public of such opportunity to object or to comment in writing shall be given by the chief by one publication in one or more newspapers of general circulation in the municipal corporation or township in which the residential facility is proposed to be located. Such notice shall be given within seven days after notification of the clerk of such municipal corporation or township in accordance with this section. The notice shall indicate at least the following: the address of the proposed facility; the number of residents with developmental disabilities which the facility is proposed to accommodate; the opportunity and deadline for written public comment and the address of the person to whom such comment is to be directed.
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> The written objections or comments shall be made to the director not later than forty-five days after the director notifies the appropriate local governmental officials or bodies. At the time of the issuance or renewal of the license the director shall make written findings concerning the objections or comments and his decision on the issuance or renewal of the license. Within five days after issuing a license for a residential facility, the director shall send a written notice of the issuance by certified mail, return receipt requested, to the legislative authority of the political subdivision where the facility is located. Each notice from the director shall specify the address and location of the facility and whether it is a family home, group home, or other type of facility. Failure of the director to send the required notice after the issuance of the license or failure to receive the notice does not invalidate a license. (Emphasis added.)

In sum, the Director may not issue or renew the license of a residential facility, nor transfer the location of a license, until he notifies the municipal corporation or township in which the facility is located, the appropriate local zoning or planning board, and the general public, all of whom may submit objections and comments to the Director within a specified time. "At the time of the issuance or renewal of the license the director shall make written findings concerning the objections or comments and his decision on the issuance or renewal of the license," and within five days after issuing a license he must notify the legislative authority of the municipality or township where the facility is located of the issuance.

Under R.C. 5123.19, the Director does have certain mandatory duties with regard to zoning issues. He must provide the requisite notice to the specified parties and provide them with an opportunity to object or comment prior to issuance, renewal, or transfer of a license. At the time of issuance or renewal, he has a mandatory duty to make written findings concerning the objections or comments and his decision on the issuance or renewal. The Director must then notify the appropriate authorities of the issuance of a license within five days of the issuance. See Dorrian v. Scioto Conservancy District, 27 Ohio St. 2d 102, 271 N.E.2d 834 (1971) (the statutory use of the word "shall" indicates the provision in which it is contained is mandatory).

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There is no language in R.C. 5123.19, however, which indicates that the Director must refrain from issuing, renewing, or transferring a license until all zoning objections and appeals are finally resolved. Indeed, the language found in R.C. 5123.19 that "[a]t the time of the issuance or renewal of the license the director shall make written findings concerning the objections or comments and his decision on the issuance or renewal of the license,"[2] indicates that the Director may issue a license even though there are outstanding objections. Although the Director must consider objections, there is no express or implied statutory mandate that he reject an application if objections have been submitted and remain unresolved at the time the facility becomes otherwise qualified for licensure. The fact that he must make findings indicates that he may determine that the objections do not warrant the rejection or postponement of a license.

Objections to a residential facility may range from citizens voicing their disapproval of the proposed facility to notification from the local zoning authority that the proposed use would violate zoning restrictions. The Director must use his discretion in evaluating these objections. If he feels the objections are factually or legally groundless or unwarranted, he may proceed to issue, renew, or transfer the license. For example, the Director may disagree with the zoning authority's assertion that the facility would not be a conforming use under the local zoning laws. In that situation, the Director may proceed to approve a license, even though the local authority may decide to attempt to enforce its position through further action.[3]

In light of the foregoing I believe that the Director's authority under R.C. 5123.19 is not limited to approving licenses for residential facilities only in the absence of unresolved zoning objections. This is not to say, however, that licensure of a residential facility prior to resolution of zoning objections could not create substantial problems for the Department as well as for the facility's operator. See, e.g., Brownfield v. State, 63 Ohio St. 2d 282, 407 N.E.2d 1365 (1980); Garcia v. Siffrin Residential Association, 63 Ohio St. 2d 259, 407 N.E.2d 1369 (1980), cert. denied, 450 U.S. 911 (1981). The enactment of divisions (D), (E) and (G) of R.C. 5123.19 was an attempt on the part of the General Assembly to overcome potential local zoning obstacles to residential facilities, by expressly permitting such facilities to exist in residential districts (with some qualifications) despite local restrictions. These provisions read as follows:

> (D) Any person may operate a licensed family home as a permitted use in any residential district or zone, including any single-family residential district or zone, of any political subdivision. Family homes may be required to comply with area, height, yard, and architectural compatibility requirements that are uniformly imposed upon all single-family residences within the district or zone.

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[2] If the Director refuses to issue, renew, or order the transfer of a license, the operator is entitled to an administrative hearing under R.C. Chapter 119, with all of the concomitant rights provided therein. R.C. 5123.19(C). Pursuant to R.C. 119.09, the hearing examiner must submit a written report setting forth his findings of fact and conclusions of law and a recommendation to the Director. A copy must be sent to the operator (or his attorney) who may submit written objections to the report and recommendation. These objections must be considered by the Director, along with the examiner's report and recommendation. The Director may confirm, modify, or disapprove the examiner's recommendation. If the recommendation is modified or disapproved, the Director must indicate the reasons for the modification or disapproval.

[3] Of course, if the local authority, or other interested party, has sought and received an injunction against the licensure of a facility, see R.C. 303.24; R.C. 519.24; R.C. 713.13, the Department must follow the terms of the injunction. See, for example, the factual situation set out in Garcia v. Siffrin Residential Association, 63 Ohio St. 2d 259, 407 N.E.2d 1369 (1980), cert. denied, 450 U.S. 911 (1981), where the Director was enjoined from issuing a license to a proposed residential facility, even though, contrary to the zoning department's position, he had determined the facility would not violate local zoning restrictions.

> (E) Any person may operate a licensed group home as a permitted use in any multiple-family residential district or zone of any political subdivision, except that a political subdivision that has enacted a zoning ordinance or resolution establishing planned unit development districts may exclude group homes from such districts, and a political subdivision that has enacted a zoning ordinance or resolution may regulate group homes in multiple-family residential districts or zones as a conditionally permitted use or special exception, in either case, under reasonable and specific standards and conditions set out in the zoning ordinance or resolution to:
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> (1) Require the architectural design and site layout of the home and the location, nature, and height of any walls, screens, and fences to be compatible with adjoining land uses and the residential character of the neighborhood;
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> (2) Require compliance with yard, parking, and sign regulation;
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> (3) Limit excessive concentration of homes.
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> . . .
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> (G) Divisions (D) and (E) of this section are not applicable to municipal corporations that had in effect on June 15, 1977, an ordinance specifically permitting in residential zones licensed residential facilities by means of permitted uses, conditional uses, or special exception, so long as such ordinance remains in effect without any substantive modification.

In Garcia v. Siffrin Residential Association, it was held that a residential facility housing eight or fewer adults was not a "family" use as defined in the city zoning ordinance, and thus was not a permitted use in the district zoned for one and two family dwellings under the ordinance. The court went on to hold that R.C. 5123.19(D), (E) and (G)[4] were not general laws for purposes of Ohio Const. art. XVIII, §3 and were unconstitutional as "special laws" in violation of Ohio Const. art. II, §26, and thus did not control over conflicting zoning restrictions which would exclude facilities from districts zoned for single-family and multiple-family dwellings.

There has been some doubt thrown on the current validity of Garcia. Some court members feel that Garcia was overruled sub silentio, at least with regard to its discussion of what constitutes a "family" for zoning purposes, in Saunders v. Clark County Zoning Department, 66 Ohio St. 2d 259, 421 N.E.2d 152 (1981), which held that a group home for delinquent boys was a permitted use in a district zoned for single family dwellings.[5] Justice Holmes, the author of Garcia, in his dissent in

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[4] R.C. 5123.19 was numbered R.C. 5123.18 when Garcia was decided. See Am. Sub. H.B. 900, 113th Gen. A. (1980) (eff. July 1, 1980) (renumbering R.C. 5123.18 to R.C. 5123.19).

[5] Although Garcia and Saunders addressed the zoning ordinances of different political subdivisions, the definitions of "family" used in these ordinances are indistinguishable for purposes of reconciling the two opinions. In Garcia the ordinance defined "family" as "one or more persons occupying a dwelling unit and living as a single housekeeping unit, whether or not related to each other by birth or marriage, as distinguished from a group occupying a boarding house, lodging house, motel, hotel, fraternity or sorority house." 63 Ohio St. 2d at 261 n. 2, 407 N.E.2d at 1372. In Saunders, the zoning ordinance at issue defined "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. In both cases, the court focused on the "single housekeeping unit" language. However, it should be noted that in Saunders the court gave some weight to the fact that the "housekeeping unit" included children and the operators of the facility were performing the functions of child rearing. The court in Saunders was reluctant to interfere with the constitutionally protected relationship between parents and their children, even though in this case, "foster" children were involved. In Garcia, the facility would have housed eight adults. Perhaps this is a way to distinguish the two cases.

Saunders stated that Saunders "in effect, overrules syllabus law as pronounced by this court only nine months ago, in Garcia v. Siffrin. . . ." 66 Ohio St. 2d at 265, 421 N.E.2d at 157. Justice C. Brown, in his concurring opinion in Shroades v. Rental Homes, Inc., 68 Ohio St. 2d 20, 28, 427 N.E.2d 774, 779 (1981), stated in footnote 6: "Similarly, Garcia v. Siffrin. . .was overruled sub silentio in Saunders v. Zoning Department. . . . Having recognized that Garcia is now a dead letter, it cannot be given precedential value."

It is also uncertain how Garcia is to be treated with regard to its discussion of "general" and "special" laws and its holding that R.C. 5123.19(D), (E) and (G) are unconstitutional. In State ex rel. Evans v. Moore, 69 Ohio St. 2d 88, 94-95, 431 N.E.2d 311, 315 (1982), Justice C. Brown stated in his concurring opinion:

> Appellants, in arguing that the prevailing wage law is not a general law, rely heavily upon the discussion of "general laws" in Garcia v. Siffrin (1980), 63 Ohio St. 2d 259, certiorari denied, 450 U.S. 911. Although Garcia v. Siffrin, supra, was not expressly overruled by this court, it has been overruled sub silentio by our holding in Saunders v. Zoning Dept., supra. The overruling of Garcia was recognized in the dissent of Justice Holmes, the author of Garcia, in Saunders, supra. That case no longer has any viability. Reliance on its discussion and application of "general laws" is misplaced and erroneous.

In the recently decided case of Clermont Environmental Reclamation Co. v. Wiederhold, 2 Ohio St. 3d 44, ___ N.E.2d ___ (1982), the court held that R.C. 3734.05(D)(3), which prohibits any political subdivision from imposing additional zoning requirements upon a licensed hazardous waste facility, was a general law of uniform application and thus was constitutional and prevailed over conflicting local enactments. The court explicitly attempted to distinguish Garcia. This attempt implicitly indicates that the decision is still valid, at least with respect to the specific statute it addresses.[6] Justice C. Brown filed a vigorous concurring opinion in Clermont Environmental Reclamation Co., again urging the express repudiation of Garcia.

In the absence of further guidance from the court, I am hesitant to advise you that divisions (D), (E) and (G) of R.C. 5123.19 are valid. Thus, I am presuming that residential facilities are subject to local zoning restrictions, and may be prevented from operating in various residential zoning districts by local authorities, despite licensure by the Department of Mental Retardation and Developmental Disabilities. For example, pursuant to R.C. 303.24, R.C. 519.24, or R.C. 713.13, various persons and entities may bring an injunction to terminate the use of property in violation of local zoning laws. (Injunctive relief is also available against the Department and operator to prevent, as well as terminate, violations.) Such relief may be utilized in addition to other remedies available under local laws to terminate violations.

I note that even residential facilities operated by the state[7] and various local public agencies are not absolutely immune from local zoning laws. City of East Cleveland v. Board of County Commissioners, 69 Ohio St. 2d 23, 430 N.E.2d 456 (1982); Brownfield v. State. The court in Brownfield held that conflicting interests of governmental entities should be resolved by weighing "the general public purposes to be served by the exercise of each power, and to resolve the impasse in favor of that power which will serve the needs of the greater number of our citizens." 63 Ohio St. 2d at 285, 407 N.E.2d at 1367. The court further stated:

[6] I note also that Garcia is still cited by the court for the general proposition that the enactment of zoning laws is an exercise of a municipality's police power and such laws are presumed valid until the contrary is clearly proved. Negin v. Board of Building and Zoning Appeals, 69 Ohio St. 2d 492, 495, 433 N.E.2d 165, 168 (1982); Leslie v. City of Toledo, 66 Ohio St. 2d 488, 490, 423 N.E.2d 123, 124 (1981); Brown v. City of Cleveland, 66 Ohio St. 2d 93, 95, 420 N.E.2d 103, 105 (1981).

[7] A member of your staff has indicated that at this time, the only residential facilities operated by the state are on the grounds of the various state developmental centers. Obviously, zoning will not be an issue in these situations.

> Whenever possible, the divergent interests of governmental entities should be harmonized rather than placed in opposition. . . . Thus, unless there exists a direct statutory grant of immunity in a given instance, the condemning or land-owning authority must make a reasonable attempt to comply with the zoning restrictions of the affected political subdivision. . . .
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> The issue of governmental immunity from zoning arises only after efforts to comply with municipal zoning have failed. Where compliance with zoning regulations would frustrate or significantly hinder the public purpose underlying the acquisition of property, a court should consider, inter alia, the essential nature of the government-owned facility, the impact of the facility upon surrounding property, and the alternative locations available for the facility, in determining whether the proposed use should be immune from zoning laws. . . . (Citations omitted.)

63 Ohio St. 2d at 286-87, 407 N.E.2d at 1368.

As discussed above, the "direct statutory grant of immunity" from local zoning laws provided by R.C. 5123.19(D), (E), and (G) was struck down in Garcia. Thus, the state and the various local public agencies operating residential facilities are subject to the balancing test set forth in Brownfield. This balancing test does not lend itself to a certain and objective determination as to when publicly operated residential facilities will be subject to local zoning laws. The likely result of Brownfield is that whenever the Department or local agency determines that compliance with local zoning laws would "frustrate or significantly hinder the public purpose underlying the acquisition of property," and thus, that noncompliance is indicated, the question will result in litigation in which the courts will apply the balancing test of Brownfield on a case-by-case basis, with unpredictable results. Therefore, I can only recommend that governmental, as well as private, operators be able to show reasonable attempts to comply with local zoning laws, and that the Department consider the foregoing before issuing, renewing, or transferring a license to an operator when zoning objections remain unresolved.

In sum, if rule 5123:2-3-07(V) were appropriately amended or rescinded, the Director of the Department of Mental Retardation and Developmental Disabilities could, pursuant to R.C. 5123.19, issue, renew, or transfer a license to an otherwise qualified residential facility even though all zoning objections had not been finally resolved. However, as a practical matter, the Director should bear in mind that, because the continued vitality of Garcia is unclear at this time, residential facilities may be found to be subject to local zoning restrictions, despite R.C. 5123.19(D), (E), and (G). Under Brownfield and City of East Cleveland, facilities operated by governmental entities, as well as by private entities, may be subject to local zoning laws. Thus, even though a facility is licensed by the Department, it may still be prevented from operating, if the facility is finally determined to be in violation of local zoning laws. Accordingly, it would not appear imprudent for the Department to make every effort to have zoning objections resolved prior to the issuance, renewal, or transfer of a license.

In conclusion, it is my opinion, and you are advised, that if [1980-1981 Monthly Record] Ohio Admin. Code 5123:2-3-07(V) were appropriately amended or rescinded, the Director of the Department of Mental Retardation and Developmental Disabilities could, pursuant to R.C. 5123.19, issue, renew, or transfer a license to an otherwise qualified residential facility, even though all zoning objections had not been resolved.