

**STATEMENT OF APPELLEE'S POSITION AS TO WHETHER A SUBSTANTIAL
CONSTITUTIONAL QUESTION IS INVOLVED OR WHETHER THE CASE IS OF
PUBLIC OR GREAT GENERAL INTEREST**

It is the position of the Appellee, the Zoning Board of Appeals, Ellsworth Township, Ohio, that the present case does not involve a substantial constitutional question, nor is it a case of public or great general interest. It is solely a matter in which the Appellant disagrees with the decision of the lower court finding that the Appellant failed to present any evidence to support its claim. Appellant is attempting to engage this Honorable Court as an additional court of appeal.

ARGUMENT IN SUPPORT OF THE APPELLEE'S POSITION THAT THIS CASE DOES NOT INVOLVE A SUBSTANTIAL CONSTITUTIONAL QUESTION NOR A MATTER OF PUBLIC OR GREAT GENERAL INTEREST

Article IV, Section 2 of the Ohio Constitution states:

(B)(2) The Supreme Court shall have appellate jurisdiction as follows:...

(a) In appeals from the court of appeals as a matter of right in...

(iii) Cases involving questions arising under the constitution of the United States or of this state...

(e) In cases of public or great general interest, the supreme court may direct any court of appeals to certify its record to the supreme court, and may review and affirm, modify, or reverse the judgment of the court of appeals...

Ohio Const., Art. IV, §2.

An appeal that claims a substantial constitutional question...may invoke the appellate jurisdiction of the Supreme Court and shall be designated a claimed appeal of right. S. Ct. Prac. R. 2.1(A)(2). The Supreme Court will determine whether to accept the appeal. *Id.* An appeal that involves a question of public or great general interest invokes the discretionary jurisdiction of the Supreme Court and shall be designated a discretionary appeal. S. Ct. Prac. R. 2.1(A)(3). Again, the Supreme Court will determine whether to accept the appeal. *Id.*

The sole issue for determination by the Supreme Court at this juncture is whether it has a claimed appeal of right jurisdiction (appellate jurisdiction) or discretionary jurisdiction. See, Williamson v. Rubich, 171 Ohio St. 253 (1960). For a matter to be of public or great general interest, it must be distinguished from questions of interest primarily to the parties. *Id.* It is one with statewide concern. See, West Unity ex rel. Beltz v. Merillat, 2004-Ohio-2682 (2004, 6th Dist. Court of Appeals). It is not a controversy purely local in its nature, with no important principle of state-wide application. State v. Noctor, 106 Ohio St. 516 (1922). Further, this honorable Court is not to serve as an additional court of appeal on review. State v. Bartrum,

2009-Ohio-355 (2009).

The Appellant, in its Memorandum in Support of Jurisdiction, argues that this case is a matter of public or great general interest, alleging that the Seventh District Court of Appeals improperly applied Saunders v. Clark County Zoning Dept. Due to its incorrect interpretation, per the Appellant, the Seventh District has created its own interpretation of zoning regulations inconsistent with Ohio case law and has “encrust(ed) the definitions of ‘family,’ and ‘single-family dwelling’ with the barnacles of their own notions and prejudices of what kind of ‘family’ should live in an R-1 district.” As its sole argument in support of its proposition of law, the Appellant states that “Zoning Regulations are to be strictly construed against the authority or persons seeking to prohibit the proposed use as a violation of the zoning code.”

All zoning ordinances are presumed to be constitutional. State ex rel. Republic Serv. Of Ohio II, LLC v. Pike Twp. Bd. Of Zoning Appeals, 2005-Ohio-7119 (2005); citing, Century Motors Corp. v. Pepper Pike, 73 Ohio St.3d 581 (1995). However, as zoning ordinances are in derogation of the common law and tend to deprive land owners of the lawful use of their land, they must be strictly construed and their scope not extended to include limitations not clearly prescribed. Saunders v. Clark Cty. Zoning Dept., 66 Ohio St.2d 259 (1981). Further, if the ordinance language is unambiguous, the court must apply the plain and ordinary meaning of the words. Roxane Laboratories, Inc. v. Tracy, 75 Ohio St.3d 125 (1996).

This matter arose from the Appellant’s request for a zoning permit and certificate of occupancy in order to make renovations to a structure for use as a group home. The property in question is located in a R-1 residential district, which, pursuant to Ellsworth Township Zoning, does not permit a group home. It does permit single family dwellings and the Appellant has

attempted to argue, unsuccessfully, that its use meets Ellsworth Township Zoning's definition of "family" which is "one or more persons occupying a dwelling unit and living as a single housekeeping unit." Ellsworth Township Zoning Resolution, Definitions.

The Appellant argues that the Seventh District failed to follow this Court's decision in Saunders, and that it narrowly defined the term "family" and unconstitutionally intruded upon an individual's right to choose family living arrangements best suited to him and his loved ones.

The Appellant is wrong. The Seventh District Court of Appeals fully reviewed Saunders and determined that the Appellant did not meet the criteria established in Saunders which would have permitted the group home in an R-1 District. The Seventh District did not narrowly define the term "family" nor did it unconstitutionally intrude upon an individual's right to choose its own living arrangements. The Seventh District took instruction from this Honorable Court and correctly applied the Saunders decision to the matter before it.

Saunders involved foster parents operating a foster care facility in their own residence. Saunders v. Zoning Dept., 66 Ohio St.2d 259 (1981). In correctly holding that the Saunders were not in violation of zoning and were a family unit, this Court stated:

The definition of family in this resolution is a broad one. In our view, any resolution seeking to define this term narrowly would unconstitutionally intrude upon an individual's right to choose the family living arrangements best suited to him and his loved ones (citation omitted). Those loved ones can just as easily be foster children as natural children **for parents with compassion**...Therefore, based on the above principles and language of the zoning resolution, we hold a family based group foster home for delinquent boys, who are unrelated by affinity or consanguinity **to the foster parents**, is a permitted use in an R-1 suburban residence district, where the zoning resolution defines the term 'family' as 'two or more persons living together as a single family housekeeping unit, in a dwelling unit. (emphasis added). Id., at 264.

The Appellant argues that its case is "indistinguishable from *Saunders*." As noted by the

Seventh District Court of Appeals, this case is distinguishable. The Seventh District correctly noted that Saunders involved foster parents who were “the main unifying factors creating a single housekeeping unit.” The Appellant does not have this factor. Instead, the Appellant has a staff of employees who will rotate shifts in order to provide twenty-four (24) hour coverage.

Further, Saunders demonstrated that the foster children would interact with the parents in a communal fashion, living as a single housekeeping unit. The Appellant again did not demonstrate any evidence of these factors. Instead, as the Seventh District properly noted, the Appellant will be providing children placed at its facility with room, board and a variety of educational and mental health services, reflecting the use of the structure as merely institutional.

Simply put, the Appellant has no constitutional issue nor issue of public or great general interest. The Seventh District Court of Appeals did not narrow the definition of “family” to create a constitutional issue. Nor did the Appellant demonstrate that this issue is of public or great general interest. Instead, it is asking this Honorable Court to serve as an additional court of appeal, due to its displeasure with the decisions of the Ellsworth Township Zoning Board and the prior lower courts. It is a controversy that is purely local in nature, as it only affects the Appellant. The Seventh District correctly applied Saunders in determining that the Appellant’s proposed use of the property as a group home did not comply with zoning and did not create any discord with this Court’s precedent.

The instant appeal was originally decided narrowly on the finding by the zoning appeals board that there was no evidence presented at the zoning appeals hearing to support the Appellant’s contention that the operation of a group home met the Ellsworth Township Zoning Resolution’s definition fo a single family dwelling. The case was primarily decided on the

finding that the group home did not fall within the confines of the resolution's definition of a single family dwelling.

CONCLUSION:

As there is no Constitutional issue nor an issue of public or great general interest, the Appellee respectfully requests this Court deny the Appellant's Appeal as it has no jurisdiction.

Respectfully submitted,



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CERTIFICATE OF SERVICE

A copy of the foregoing was sent by regular mail this 21 day of January, 2010, to David J. Betras, Attorney for Appellant, 6630 Seville Drive, Canfield, OH 44406.



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