

# Zoning for Family Day Care:

## TRANSFORMING A STUMBLING BLOCK INTO A BUILDING BLOCK

by Abby J. Cohen, Esq.

Consider the latest statistics:

- In the 1990's, 75% of women with school-aged children will be in the labor force.

- Since 1970, the proportion of working mothers with young infants has doubled.

- In 1988, 72% of the total number of employed mothers with children under age 13 worked full-time.

- Fewer than 7% of American families include a husband as breadwinner and wife as homemaker.

- In the 1990's, 60% of the nation's children will spend some part of their childhood in a single-parent family.

It is not then surprising that the need for quality, affordable, conveniently located child care has become one of the most pressing concerns of modern life. As a result, child care has moved permanently into the domain of public planning. Increasingly, planners and elected officials are being asked to determine where child care ought to be located in their communities. With an understanding of the needs of working families and the child care system, those involved in planning can play a major role in alleviating our current child care crisis.

### THE CHILD CARE SYSTEM

The child care delivery system in the United States is characterized by tremendous diversity. It includes many program types, many program sponsors, and — in the absence of uniform federal regulation — a patchwork of varied state requirements. The most common components of state child care delivery systems are resource and referral agencies ("R & Rs"), child care centers, family day care homes, and care in the parents' home (referred to as "in-home care").

Currently, the most widely used form of out-of-home care is family day care. Many parents prefer the home-like setting, convenience, flexibility and cost-effectiveness that family day care homes can offer. It is called "family day care" because it is provided in a family home — that of the provider's.

Family day care is regulated at the state level. In virtually all states, family day care is defined as the care and supervision of children for less than twenty-four hours. Additionally, state family day care definitions generally include provisions dealing with the minimum number of children triggering licensing requirements and the maximum number of children allowed in care.

Twenty-nine states maintain two categories of family day care homes. The categories are generally distinguished by numbers of children cared for, numbers of required providers and often, training and qualifications of providers. Typically, the smaller home serves one to six children, while the larger or "group" home serves seven to twelve children.

Despite the increasing demand for family day care homes, they remain in short supply. The reason for this, in all too many communities, is because of barriers found in the local zoning ordinance.

### HOW ZONING LIMITS FAMILY DAY CARE

Local zoning ordinances can limit the supply of licensed family day care homes in several ways: (1) by prohibiting family day care in residential areas; (2) by failing to define family day care in the local zoning ordinance; and (3) by failing to draft local ordinances that are consistent with state licensing laws and regulations.

*Prohibition in Residential Areas.* Zoning ordinances often explicitly exclude family day care homes from residential zones, despite the fact that, according to most states' definitions, this is where they are required to operate. In at least one case, a court found that a township ordinance which effectively prohibited family day care homes was exclusionary and invalid in the absence of extraordinary justification.

*Lack of Definition.* Many zoning ordinances fail to define family day care, or fail to distinguish between family day care and other forms of out-of-home care. As a result, family day care providers may have to meet standards more appropriate to child care centers or residential care, and which may in fact be impossible for family day care providers to meet. Most local ordinances were drafted long before child care became a pressing need for working parents. Consequently, many ordinances don't mention child care at all. This gives too much discretion to local officials in deciding which can operate.

*Lack of Consistency With State Licensing.* The zoning ordinance may lack consistency with state licensing programs. For example, many ordinances drafted decades ago use outmoded terms such as "day nurseries" or "nursery schools" which generally have no counterparts in modern state licensing laws. Problems have also arisen when a locality regulates issues that are subject to state licensing laws, or are beyond appropriate zoning control. The zoning ordinance may inappropriately regulate numbers of children, numbers of employees, or required square footage, when such concerns are already regulated by the state. One California city was successfully sued for limiting large family day care homes to ten children when the state allowed twelve to be cared for.

In September 1987, the American Planning Association ratified a policy statement on the provision of child care. One of the policy implementation principles proposed that "APA chapters encourage communities to consider amending local zoning ordinances to remove obstacles to the provision of regulated group and family child care in all zoning districts." To assist readers in implementing this policy, the material which follows provides an overview of some of the issues to consider.

As a first step, every locality should begin by reviewing its existing or proposed zoning ordinance against its state child care licensing law.

**Clear Definitions.** Family day care should be explicitly defined in local zoning ordinances, and should mirror definitions found in state statute or regulations. The local zoning definition should either adopt by reference the definition used by the state, or use the same language.

Care should be taken to distinguish, and give separate definitions to, family day care homes and child care centers. Family day care homes also should be carefully distinguished from residential care, such as group homes or foster care. Planning officials should periodically review the definitions in their ordinances to ensure they remain in conformity with state law. Many aspects of state licensing statutes and regulations are frequently being revised.

**Clear Treatment.** Each community should affirmatively determine how it wants to deal with family day care. Once this is decided, and any necessary zoning ordinance changes are made, the community should prepare easily understandable written information explaining the local requirements. This material should be readily available to prospective family day care providers. In this way, potential providers will know what to expect. At the same time, the planning department will have some assurance that consistent information is being given out. Written information also has the advantage of saving staff time by eliminating the need for them to respond individually to routine questions.

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## Figuring Out the Child Care System

**Family Day Care Homes** involve the care and supervision of children for less than twenty-four hours in the provider's own home. While the definition usually includes the word "day," this is not meant to preclude night care, as long as the care provided to any one child is for less than twenty-four hours (some are beginning to use the terminology "family child care home" to avoid this confusion).

**Child Care Centers** usually are any place, including a residence, that provides care for thirteen or more children. The number of children triggering the term "child care center," however, varies from state to state. The care and supervision provided to any one child must be of less than twenty-four hours duration, but in some cases the center itself may be open twenty-four hours.

**Residential Care** is a substitute for parental care, rather than a supplement to it. Group homes and foster care are forms of residential care. The child care is on a twenty-four hour per day basis.

**Resource and Referral Agencies** are organizations that provide three basic services: help and referral for parents seeking child care; technical assistance to providers seeking to establish and maintain child care programs; and advocacy on behalf of the child care system.



## State Zoning Solutions for Family Day Care

The decision as to whether or not the locality should permit small family day care by right may no longer be in the hands of the locality. As this article went to press, fourteen states had enacted statewide zoning preemption statutes for family day care. These statutes typically declare that the small family day care home may not be prohibited in residential zones.

## Family Day Care As A Conditional Use

While treating larger family day care homes as a conditional use may seem like a reasonable approach, it can end up posing an unreasonable barrier to the establishment of such homes. For providers, the cost of the permit process may be prohibitive, particularly in light of the small income most caregivers earn. Moreover, the complexity of the proceedings can prove intimidating to providers, many of whom began providing child care casually, and have little experience either representing themselves or being represented by counsel.

At first blush, noticed hearings seem desirable as an opportunity for review and discussion. Unfortunately, all too often notice to neighbors creates misunderstandings and problems where none existed previously. Often this is because the notice inaccurately describes the family day care home as a child care center, or implies that a commercial venture is being established in a residential neighborhood. Family day care has also become part of the NIMBY (not-in-my-backyard) syndrome, with little attention being focused on the issues actually raised by the operation of a family day care home.

## Another Viewpoint...

*by Ken Lerner, Assistant Editor*

Abby Cohen argues against conditional use review for larger family day care homes. On this point I disagree. A public hearing not only gives people an opportunity to know what is planned, but also provides a forum for them to express any concerns — and to be reassured that potential problems are resolved. If these concerns are not aired, there is a greater likelihood of problems and neighborhood tension later on. To minimize impacts on neighboring properties, I would also recommend that permit conditions provide for: setbacks for outdoor play equipment; fencing of play areas; verification that the home is properly licensed; and adequate parking for day care workers and for drop-offs and pick-ups of children.



## Planning Boards & Changing Land Use Needs

by Perry Norton

In casual, social, conversation with a couple of our local planning board members, I raised a variety of questions about changes in land use needs, brought about by major socio-economic changes of the sort noted by Abby Cohen. Empty nesters, rattling around in a house too big, but which they cannot convert to a two-family. I could bring some personal fervor to this problem. Homeless. In suburbia we don't like to think about it, but it happens. Child care during the days when both parents work. I suggested to my planning board friends that the Board ought to be out front, working on these things, developing some solutions. They nodded, in agreement, and sighed, rather deeply. Our Board doesn't have full time staff. They all have responsible positions with tremendous demands on their time. The Board agenda is a full one every time they meet. It was my suggestion that they could, perhaps, function as if they were a staff on occasion. "Joe, why don't you just spin off and look into this homeless situation for a couple weeks?" Not exactly an earth shaking idea, but changing the pattern of the way the board works might open windows of opportunity. We get set in our ways so easily and sometimes forget that the planning board has a unique responsibility, which no one else in town is going to do — plan.


[Editor's Note: Perry Norton, who authored the "Insights" column in the Journal's November/December 1991, will — from time to time — provide you with his perspectives.]

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### THE SMALL FAMILY DAY CARE HOME


Once the smaller home is defined in conformance with state law, the local ordinance should indicate that small family day care homes are residential uses, permitted in all residential zones. It should further state that these homes are permitted by right, with neither notice or hearings required, nor conditions imposed.

 p. 11, State Zoning

Family day care homes should not be treated as home occupations. This is because the typical home occupation ordinance includes provisions which a family day care provider would find impossible to meet, such as limitations on the percentage of floor space to be used and prohibitions against using outdoor space.

### THE LARGE FAMILY DAY CARE HOME

If your state maintains a separate category for the care of a larger number of children in the provider's home, your city or town may treat them in a variety of ways. Regardless of size, however, these homes should be permitted — not prohibited — even if they are subject to conditions. Drafters of local ordinances should make every effort to ensure that the ordinance is simple, workable, and consistently applied — and that any application fees are reasonable. Cooperation and coordination between the planning department and other relevant local departments, such as the building or fire department, is also important.

Like the smaller home, the larger family day care home can be permitted by right in all residential zones, with no additional conditions imposed. A number of communities have instituted this option with success.  p. 11, ...Conditional Use

Other communities, having experienced the difficulties often resulting from the use of a full blown conditional use permit process, are now using what is called a "non-discretionary permit." Prospective family day care providers are required to satisfy specified and limited conditions set out in the ordinance. Typically, these conditions focus on potential traffic, parking,

and noise impacts. After review by the zoning administrator, the permit is issued if the conditions are met. In developing a non-discretionary permit type of ordinance, planning officials should ensure that local requirements are consistent with state licensing laws, and do not cover items already regulated by the state. [Editor's Note: Also consult your city or county attorney to make sure this kind of permit process is authorized by your state's zoning and planning enabling law].

### SUMMING UP:

Communities around the country are feeling the pressure to respond to the child care crisis. Unfortunately, outmoded local zoning ordinances have created major impediments to the development of an adequate family day care supply. However, with awareness of the problem, and a desire to meet the needs of a growing number of families, planners and planning officials can transform their zoning ordinances from stumbling blocks into building blocks.

Abby Cohen is the Managing Attorney of the Child Care Law Center in San Francisco, California, the only legal services office in the nation devoted exclusively to the legal issues surrounding the provision of child care. She has written and lectured extensively on child care legal issues, recently completing the Local Officials' Guide to Family Day Care Zoning published by the National League of Cities.

### Resources:



*Zoning for Child Care,*  
by Ann Cibulskis and  
Marsha Ritzdorf (American Planning  
Association, 1989). It can be ordered  
from the APA Planners Bookstore,  
(312) 955-9100. The Child Care Law  
Center has on file copies of many local  
zoning ordinances that respond to the  
growing need for child care. Some of  
these ordinances can also be found in  
*The Local Officials' Guide to Family  
Day Care Zoning,* by Abby Cohen  
(National League of Cities, 1989),  
available from the Child Care Law  
Center, 22 Second Street, San Fran-  
cisco, CA 94105; (415) 495-5498.