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# FAMILY DAY-CARE HOMES: LOCAL BARRIERS DEMONSTRATE NEEDED CHANGE

## I. INTRODUCTION

Today family day care constitutes a basic need of American families. Until recently, society has failed to treat child care as a significant social problem.<sup>1</sup> The problem is profound when considered in light of the fact that five million children under the age of ten have no one to look after them when they come home from school.<sup>2</sup>

With the tremendous increase of women in the workforce,<sup>3</sup> the question of how to care for children during the day has become a serious issue. While most people think of day-care centers when considering this problem, nearly half of all children in care for ten hours a week or more use family day-care homes.<sup>4</sup> By definition, these homes are occupied residences in which a small number of children are cared for in a relatively unstructured setting.<sup>5</sup>

Until recently, family day-care providers have faced many ob-

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1. For a general discussion of the day care system, see D. COHEN, *DAY-CARE: SERVING PRESCHOOL CHILDREN* (1974).

2. Watson, *What Price Day Care*, *NEWSWEEK*, Sept. 10, 1984, at 14. Furthermore, approximately 500,000 preschoolers under the age of six are in a similar predicament. *Id.* Congress recognized these findings by declaring a National Latchkey Children Week. *Id.*

3. *Id.* at 16-17. In 1960 only 2.5 million mothers with children under six were in the labor force. By 1984 6.2 million mothers with children under six were in the labor force. *Id.* For a statistical survey on the conditions of children, youth and families, see CALHOUN, *THE STATUS OF CHILDREN, YOUTH AND FAMILIES* (1979).

4. OFFICE OF HUMAN DEVELOPMENT SERVICES, U.S. DEP'T OF HEALTH AND HUMAN SERVICES, *FINAL REPORT OF THE NATIONAL DAY CARE HOME STUDY, FAMILY DAY CARE IN THE UNITED STATES: EXECUTIVE SUMMARY 1* (1981) [hereinafter cited as *SUMMARY*]. Day-care centers, kindergartens, nursery schools, churches and unlicensed babysitting are the alternatives to family day-care homes. Comment, *Zoning for Day Care Facilities*, 1976 ARIZ. ST. L.J. 63, 67. See generally OFFICE OF HUMAN DEV. SERVICES, U.S. DEP'T OF HEALTH AND HUMAN SERVICES, *FINAL REPORT OF THE NATIONAL FAMILY DAY CARE HOME STUDY, FAMILY DAY CARE IN THE UNITED STATES: SUMMARY OF FINDINGS, VOL. 1* (1981) [hereinafter cited as 1 *FINAL REPORT*].

5. Comment, *Zoning for Day Care Facilities*, 1976 ARIZ. ST. L.J. 63, 66-67; 1 P. ROHAN, *ZONING AND LAND USE CONTROLS* § 3.05 [6][c] (1984), citing U.S. OFFICE OF CHILD DEV., BUREAU OF CHILD DEV. SERVICES, DEP'T OF HEALTH, EDUCATION AND WELFARE, *GUIDELINES FOR DAY CARE LICENSING* (undated). For example, a family day-care home has been specifically defined as "a private home in which one to seven minor children are received for care and supervision for periods of less than 24 hours a day." Atkins v. Department of Soc. Serv., 92 Mich. App. 313, 284 N.W.2d 794, 799 (1979).

stacles. Restrictive definitions of "family" in property deeds,<sup>6</sup> mortgages,<sup>7</sup> building codes,<sup>8</sup> and local zoning ordinances<sup>9</sup> created roadblocks to the advance of these much needed day-care facilities.

Finally, in the late 1970s and early 1980s, a number of states began to recognize a legitimate need for family day-care homes.<sup>10</sup> For example, in 1981 the California legislature passed Health and Safety Code sections 1597.30-65<sup>11</sup> which allow family day-care homes to be zoned as single-family residences. Such laws have already been upheld by the California courts in the area of community care facilities for the elderly.<sup>12</sup> This comment will address whether zoning ordinances are the proper vehicle for meeting the demand for adequate family day care.

## II. BACKGROUND

### A. Family Day-Care Crisis

Family day care has become a serious issue in the past two decades due to the tremendous increase in demand for day care.<sup>13</sup> The increase in demand for family day care is a direct result of the en-

6. Weinstein, *Barriers to Home Day Care*, CHILD CARE ACTION NEWS, July-Aug. 1984, at 4, 5. See also L. TREADWELL, FAMILY DAY CARE PROVIDER'S LEGAL HANDBOOK 43, 46 (1980).

7. Weinstein, *supra* note 6, at 4, 5.

8. *Id.* at 5. See also COHEN, *supra* note 1, at 51.

9. Weinstein, *supra* note 6, at 4, 5. See also COHEN, *supra* note 1, at 50.

10. CAL. HEALTH & SAFETY CODE §§ 1597.30-.65 (Deering Supp. 1985). Section 1597.45(a) provides: "[t]he use of [a] single-family residence as a small family day-care home shall be considered a residential use of property for the purposes of all local ordinances." See also WIS. STAT. ANN. § 66.304 (West Supp. 1983) which provides: "[n]o municipality may prevent a family day-care home from being located in a zoned district in which a single-family residence is a permitted use."

11. CAL. HEALTH & SAFETY CODE §§ 1597.30-.65 (Deering Supp. 1985).

12. McCaffrey v. Preston, 154 Cal. 3d 422, 201 Cal. Rptr. 252 (1984), held that a statute treating homes for six or fewer elderly persons as a single-family residence for zoning purposes was valid. See generally CAL. HEALTH & SAFETY CODE §§ 1500-1567.4 (Deering Supp. 1985). Section 1566.3 provides in pertinent part: "Whether or not unrelated persons are living together, a residential facility which serves six or fewer persons shall be considered a residential use of property for the purposes of this article." CAL. HEALTH & SAFETY CODE § 1566.3 (Deering Supp. 1983).

13. SUMMARY, *supra* note 4, at 2. See also CALHOUN, *supra* note 3, at 159. Prior to 1960 the vast majority of women with children were not employed. *Id.* In 1950 only 20% of mothers with children were employed, but by 1979 mothers comprised 50% of the labor force. SUMMARY, *supra* note 4, at 2. Reasons cited for the influx of women into the labor market include: inflation, smaller families, desire to pursue careers, increase of one-parent families, and wider employment opportunities for women. Moore, *Working Mothers and their Children*, 34 YOUNG CHILDREN 77 (1978).

trance of women into the workforce.<sup>14</sup> Furthermore, an increasing number of mothers with very young children are now working: "[m]ore than half of the full-time children in family day-care homes are under six years of age; the greatest proportion of these children are under three; and approximately thirty percent are aged three to five."<sup>15</sup> In addition, two-job couples have become the rule rather than the exception,<sup>16</sup> and the number of single parents has doubled in the past decade.<sup>17</sup> Finally, the decline in the number of nearby neighbors and live-in relatives able to care for children also has contributed to the current need for day care.<sup>18</sup> These changes in our society have caused child day care to become an important need of the American family.

Child day care is important not only for social but for economic reasons as well. The scope of day care use is reaching staggering proportions. Approximately 7.5 million families regularly use care for ten hours a week, and the demand for day care is projected to increase over the next two decades.<sup>19</sup> By 1990, it is estimated that nearly half of all women with children under six will be working<sup>20</sup> and that the number of children under ten will reach thirty-eight million.<sup>21</sup>

Despite the widespread need for day care, working parents with young children face limited options with respect to the types of day care offered.<sup>22</sup> Day-care centers, unlicensed baby sitters and family day-care homes are the primary types of available day care. Day-care centers are formally licensed by the states or are registered with a state regulatory agency.<sup>23</sup> Standards for these centers vary from

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14. U.S. DEP'T OF HEALTH AND HUMAN SERV., OFFICE OF HUMAN DEV. SERV. ADMINISTRATION FOR CHILDREN, YOUTH AND FAMILIES, RESEARCH, DEMONSTRATION AND EVALUATION DIVISION, *THE STATUS OF YOUTH AND FAMILIES* 39, 70 (1979). See also SUMMARY, *supra* note 4, at 2.

15. SUMMARY, *supra* note 4, at 2, 3. See also CALHOUN, *supra* note 3, at 39.

16. See *supra* note 2.

17. *Id.*

18. CALHOUN, *supra* note 3, at 71. Historically, family day care was provided without charge by relatives or as barter between friends and neighbors in an informal exchange of services. 1 FINAL REPORT, *supra* note 4, at 5.

19. Summary, *supra* note 4, at 2.

20. See Watson *supra* note 2, at 15. See also 1 FINAL REPORT, *supra* note 4, at 4. In addition, it is predicted that by 1990 there will be 23.3 million children under six, and 10.4 million children with working mothers who will need child care. Verzaro-Lawrence, Le Blanc & Hennon, *Industry-Related Day Care: Trends and Options*, 37 YOUNG CHILDREN 4 (1982).

21. See *supra* note 2, at 15.

22. See generally SUMMARY, *supra* note 4, at 1-11.

23. *Id.* Comment, *Zoning for Day Care Facilities*, 1976 ARIZ. ST. L.J. 63, 67.

state to state but typically these centers care for large numbers of children in an institution-like setting.<sup>24</sup> Another option is informal babysitting by unlicensed babysitters.<sup>25</sup>

The most widely used form of day care in the United States, however, is the family day-care home.<sup>26</sup> In 1975, an estimated 1.3 million family day-care homes served approximately 3.4 million children for forty hours per week.<sup>27</sup> By 1976, of the 7.5 families who regularly used some form of care for their children for ten hours a week or more, forty-five percent placed their children in family day-care homes.<sup>28</sup> Providers of such homes usually care for a limited number of young school-age children and infants.<sup>29</sup> The preference for family day-care homes can be attributed to a number of factors. First, these homes are usually located in the child's neighborhood which helps to stabilize the child's environment amidst the "unsettling" effects that occur when both parents work.<sup>30</sup> Second, residential areas are seen as preferable over an institutional-type setting because they offer greater personal attention.<sup>31</sup> Finally, family day-care homes may be more favorable to informal, flexible life styles and are usually the least expensive day care available.<sup>32</sup>

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24. Day-care centers look after large numbers of children and frequently have elaborate facilities. Some are commercial operations, whereas other centers are nonprofit operations run by churches, civic groups, employers or labor unions. Watson, *What Price Day Care*, NEWSWEEK, Sept. 10, 1984, at 15.

25. Comment, *supra* note 23, at 67.

26. SUMMARY, *supra* note 4, at 2. While beyond the scope of this comment, there are federal standards which pertain to child day care. For example, there are Federal Interagency Day Care Requirements that govern the day care purchased under Title XX of the Social Security Act. OFFICE OF HUMAN DEV. SERV. U.S. DEP'T OF HEALTH AND HUMAN SERV. FINAL REPORT OF THE NATIONAL FAMILY DAY CARE HOME STUDY, FAMILY DAY CARE IN THE UNITED STATES: RESEARCH REPORT, Vol. 2, 212 (1981) [hereinafter cited as 2 RESEARCH REPORT]. Family day care in the United States exists in three distinct forms, distinguished by their regulatory status and administrative structure. First, a large number of informal, family day-care homes operate without any regulation. A second group of regulated homes are either licensed or registered with state agencies, however, except for minimal ties with the regulatory agency, these homes operate independently in much the same way as unregulated homes. Finally, there are sponsored family day-care homes which are regulated but operate as part of a day-care system under the administrative umbrella of a sponsoring agency. 1 FINAL REPORT, *supra* note 4, at 5. This comment will focus on unregulated family day-care homes and those homes regulated by either a licensing or registration system.

27. SUMMARY, *supra* note 4, at 2.

28. *Id.*

29. See Comment, *supra* note 23, at 67.

30. See generally SUMMARY, *supra* note 4, at 25-41. Family day-care homes are valued for the closeness of family values, lifestyles, and child-rearing patterns which provide stability for young children. 1 FINAL REPORT, *supra* note 4, at 5.

31. See generally SUMMARY, *supra* note 4, at 25-41.

32. *Id.* While the average weekly fee per child for family day care was found to be

On the whole, most home providers do not have any specialized training in child care.<sup>33</sup> Many providers began taking care of other children while raising their own. Common motives cited by providers are that they enjoy working with children, they want to earn extra money or they want something they can do at home.<sup>34</sup> While providers receive compensation, family day care is not a lucrative profession.<sup>35</sup> In 1979, the average weekly net income per home for caregivers was between \$50.27 and \$63.78, a figure well below the poverty level.<sup>36</sup>

The increasing need for day care demonstrates the need for comprehensive and effective regulation. Concern for the child's safety and education, and the overall quality of care given are the primary considerations.<sup>37</sup> Regulation in this area has primarily been accomplished through licensing and local zoning ordinances.<sup>38</sup> However, traditionally, local zoning ordinances have barred the use of single-family residences for family day-care homes,<sup>39</sup> and private covenants in deeds and mortgages have created additional stumbling blocks to the creation of neighborhood family day-care homes.<sup>40</sup>

\$20.85, weekly fees ranged from \$16.54 to \$31.80. Day-care centers, on the other hand, charged parents from \$17.00 to \$32.00 per week. *Id.* at 37, 38.

33. 2 RESEARCH REPORT, *supra* note 26, at 184.

34. SUMMARY, *supra* note 4, at 14.

35. *Id.* at 40.

36. *Id.* The 1977 poverty line was set at wages of \$2.88 per hour and the low income budget line was set at \$4.81 per hour. Relatively few caregivers reach either of these amounts in their earnings from day care. *Id.*

37. See *supra* note 23, at 81. See also Morgan, *Regulation: One Approach to Quality Child Care*, 34 YOUNG CHILDREN 22 (1978).

38. CAL. HEALTH & SAFETY CODE § 1597.45(a) (Deering Supp. 1985) provides: "[t]he use of single-family residence as a small family day care home shall be considered a residential use of property for the purposes of all local ordinances." WIS. STAT. ANN. § 66.304 (West Supp. 1983) provides: "[n]o municipality may prevent a family day-care home from being located in a zoned district in which a single-family residence is a permitted use. No municipality may establish standards or requirements for family day-care homes different from licensing standards established under § 48.65." This subsection does not prevent a municipality from applying to a family day-care home the zoning regulations applicable to other dwellings in a zoning district in which it is located. In Wisconsin, a family day-care home is defined as "a dwelling licensed as a day-care center by the Dep't of Health and Social Services under § 48.65 where care is provided for not more than eight children." WIS. STAT. ANN. § 66.304. In Pennsylvania, a family day-care home is "any home in which child day care is provided at any one time to four to six children who are not relatives of the caregiver." 62 PA. CONS. STAT. § 1070 (1976).

39. See *supra* notes 6-9 and accompanying text. See *infra* notes 87-93 and accompanying text.

40. See *supra* notes 6-9. See *infra* notes 130-41 and accompanying text.

## B. Zoning as a Regulatory Device

A brief historical review of the use of zoning laws and ordinances as regulatory devices is helpful to evaluate their applicability to the regulation of family day-care homes. "Zoning" has been defined as "the legislative division of a community into areas in each of which only certain designated uses of land are permitted so that the community may develop in an orderly manner in accordance with a comprehensive plan."<sup>41</sup>

Zoning is a form of land use control which is derived from public legislative bodies and is contained in ordinances and statutes.<sup>42</sup> It is currently the most important method of land use control.<sup>43</sup> In order to promote the goals of health, safety, and the general welfare of

41. 82 Am. Jur. 2d, *Zoning and Planning* § 2 (1983). See also 1 R. ANDERSON, *AMERICAN LAW OF ZONING* § 1.13 (2d ed. 1977). The California Supreme Court defined zoning as follows:

In its original and primary sense, zoning is simply the division of a city into districts and the prescription and application of different regulations in each district. Roughly stated, these regulations, which may be called "zoning regulations," are divided into two classes: (1) those which regulate the height or bulk of buildings within certain designated districts, in other words, those regulations which have to do with structural and architectural designs of the buildings; and (2) those which prescribe the use to which buildings within certain designated districts may be put.

*Id.*

The New York Court of Appeals spoke of zoning in terms of its basic assumptions. It said:

Zoning is not just an expansion of the common law of nuisance. It seeks to achieve much more than the removal of obnoxious gases and unsightly uses. Underlying the entire concept of zoning is the assumption that zoning can be a vital tool for maintaining a civilized form of existence only if we employ the insights and the learning of the philosopher, the city planner, the economist, the sociologist, the public health expert and all the other professions concerned with urban problems.

*Id.*

42. 1 N. WILLIAMS, *AMERICAN LAND PLANNING LAW* 327-43 (1974).

There are two other types of legal tools that have traditionally been used to regulate the use of land and buildings—these are nuisance lawsuits and restrictive covenants. Nuisance lawsuits arise out of the duties imposed upon every land owner at common law to use his own land so that no harm is done to others. In contrast, restrictive covenants control land use from private agreements, mutually restricting the use of land.

*Id.*

43. *Id.* Zoning decisions represent major decisions in the future of the community; these decisions, in fact, have the greatest effect upon private property rights and the value of land. *Id.* at 337. Some of the conventional and widely accepted goals of land use control are the protection of public safety, the protection of public health, the protection against overcrowding, and the protection of peace and quiet. Some of the more controversial goals include the protection of the "general welfare," the protection against undue traffic, and the protection of aesthetics. *Id.* at 186.

a community, courts have used zoning ordinances to regulate land use between commercial, industrial and residential districts of a community.<sup>44</sup> Therefore, the establishment of industry or places of business is normally prohibited in districts designated as residential.<sup>45</sup>

Most zoning proceeds at the local, usually municipal, level;<sup>46</sup> typically, each municipality operates its own separate zoning system with little coordination among other municipalities.<sup>47</sup> Further, local governments generally derive their broad zoning powers from state enabling acts, state constitutions, and home rule charters.<sup>48</sup> Enabling legislation, which vests in municipalities the power to adopt and enforce zoning ordinances, requires that zoning be done in accordance with a comprehensive plan.<sup>49</sup> However, state zoning regulations preempt any conflicting local zoning ordinances.<sup>50</sup> Therefore, legislative decisions regarding zoning are among the most important decisions affecting the future of a community.<sup>51</sup>

### 1. *Judicial Solutions to Local Zoning Barriers*

In the landmark case of *Euclid v. Ambler Realty Co.*,<sup>52</sup> the United States Supreme Court set the constitutional standard for zoning laws. In *Euclid*, the Court described the comprehensive zoning process and its emphasis on protecting the single-family dwelling. The Court found that a state has the authority to zone to separate commercial and residential areas in order to enhance the safety and security of home life.<sup>53</sup> As long as the state laws and regulations are

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44. 2 R. ANDERSON, *AMERICAN LAW OF ZONING* §§ 9.25-9.26 (2d ed. 1977).

45. *Id.* For example, the courts have approved the exclusion of lumberyards, the storage of motor vehicles on vacant lots, a commercial garage, an automobile sales agency, a dry cleaning depot, retail stores and business buildings. *Id.* § 9.26.

46. 1 N. WILLIAMS, *AMERICAN LAND PLANNING LAW* 327-43 (1974).

47. *Id.*

48. 5 P. ROHAN, *ZONING AND LAND USE CONTROLS* §§ 35.01-35.05 (1981). For an example, see CAL. GOV'T CODE §§ 65800-65912 (Deering 1979), which provides for "the adoption and administration of zoning laws, ordinances, rules and regulations by counties and cities, as well as to implement such general plan as may be in effect in any such county or city."

49. 1 R. ANDERSON, *AMERICAN LAW OF ZONING* § 1.73 (2d ed. 1977). "Comprehensive zoning consists of the division of the whole territory of a municipality into districts, and the imposition of restrictions upon the use of land in such districts." *Id.* at 20.

50. 5 P. ROHAN, *ZONING AND LAND USE CONTROLS* §§ 35.01-35.05 (1981).

51. 1 N. WILLIAMS, *AMERICAN LAND PLANNING LAW* 327-43 (1974).

52. 272 U.S. 365 (1926). Pertinent parts of the Village of Euclid ordinance excluded from residential districts business any trade of every sort, including hotels and apartment houses. *Id.* at 390.

53. *Id.* at 394. The Court found:

[T]hat the segregation of residential, business and industrial buildings will make



enacted in the exercise of the state's police powers, the Court concluded that a state has the authority to zone under the Constitution.<sup>54</sup> For a zoning ordinance to be unconstitutional, it must be "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals or general welfare."<sup>55</sup> With such a test, therefore, the *Euclid* Court basically assured states that their zoning ordinances would be upheld.

Another important Supreme Court decision respecting state zoning rights was *Village of Belle Terre v. Boraas*.<sup>56</sup> In *Belle Terre*, the Court addressed a New York statute containing a restrictive definition of "family." "Family" was defined as: "one or more persons related by blood, adoption, or marriage, as a single housekeeping unit . . . . A number of persons, but not exceeding two (2) living and cooking together as a single housekeeping unit though not related by blood, adoption, or marriage shall be deemed to constitute a family."<sup>57</sup> The United States Supreme Court upheld the right of the local government to prohibit an unrelated group of more than two persons from living together in an area zoned for single-family residences.<sup>58</sup> The Court found that the "police power. . . is ample to lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for

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it easier to provide fire apparatus suitable for the character and intensity of the development in each section; that it will increase the safety and security of home life; greatly tend to prevent street accidents, especially to children, by reducing the traffic and resulting confusion in residential sections; decrease noise and other conditions which produce or intensify nervous disorders; preserve a more favorable environment in which to rear children, etc.

*Id.*

54. *Id.* at 387. Relying on the due process clause of the Fourteenth Amendment, the U.S. Supreme Court failed to find the *Euclid* ordinance violative of the Constitution. *Id.* at 384, 386, 395.

55. *Id.* at 395. Giving wide discretion to the states, the U.S. Supreme Court stated that "[i]f the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgement must be allowed to control." *Id.* at 388. See also *Nectow v. City of Cambridge*, 277 U.S. 183 (1928) in which the U.S. Supreme Court dealt with an ordinance similar to the one addressed in *Euclid*. The *Nectow* Court held that zoning ordinances, to be constitutional, must bear a substantial relation to the public health, safety, morals or general welfare. *Id.* at 188.

56. 416 U.S. 1 (1974).

57. *Id.* at 2. The ordinance also expressly excluded lodging, boarding, fraternity, and multiple-dwelling houses from the definition of "family." *Id.* In *Belle Terre*, six unrelated college students shared a leased home. The owners of the home were cited for violating the *Village* ordinance, and they subsequently brought this action to have the ordinance declared unconstitutional as violative of equal protection and the rights of association, travel, and privacy. *Id.*

58. *Id.* at 9-10.

people."<sup>59</sup>

However, in *Moore v. City of East Cleveland, Ohio*,<sup>60</sup> the United States Supreme Court created an exception to the *Belle Terre* fact situation. In *Moore*, an ordinance of the City of East Cleveland defined "family" in such a way that a household comprised of a woman, her sons and two grandsons did not qualify as a single-family residence.<sup>61</sup> The Court distinguished *Moore* from *Belle Terre*, noting that while the ordinance in *Belle Terre* only affected unrelated individuals, the ordinance in *Moore* expressly selected certain categories of relatives who may live together and others who may not. The Court concluded that when the government intrudes on choices concerning family living arrangements, "the usual deference to the legislature is inappropriate."<sup>62</sup>

59. *Id.* at 9. As the *Belle Terre* Court noted, "the police power is not confined to the elimination of filth, stench, and unhealthy places." *Id.*

60. 431 U.S. 494 (1977).

61. *Id.* The Housing Code of the City of East Cleveland, Ohio, provided that:

"Family" means a number of individuals related to the nominal head of the household or to the spouse of the nominal head of the household living as a single housekeeping unit in a single dwelling unit, but limited to the following:

(a) Husband or wife of the nominal head of the household.

(b) Unmarried children of the nominal head of the household or of the spouse of the nominal head of the household, provided, however, that such unmarried children have no children residing with them.

(c) Father or mother of the nominal head of the household or of the spouse of the nominal head of the household.

(d) Notwithstanding the provisions of subsection (b) hereof, a family may include not more than one dependent married or unmarried child of the nominal head of the household or of the spouse of the nominal head of the household and the spouse and dependent children of such dependent child. For the purpose of this subsection, a dependent person is one who has more than fifty percent of his total support furnished for him by the nominal head of the household and the spouse of the nominal head of the household.

(e) A family may consist of one individual.

*Id.* at 496 (quoting EAST CLEVELAND OHIO HOUSING CODE §§ 1341.08 (1966)). Upon examination of the ordinance, the U.S. Supreme Court stated that:

Even if conditions of modern society have brought about a decline in extended family households, they have not erased the accumulated wisdom of civilization, gained over the centuries and honored throughout our history, that supports a larger conception of the family. Out of choice, necessity, or a sense of family responsibility, it has been common for close relatives to draw together and participate in the duties and the satisfaction . . . of a common home.

By the same token the Constitution prevents East Cleveland from standardizing its children—and its adults—by forcing all to live in certain narrowly defined family patterns.

431 U.S. at 505-06.

62. *Id.* at 499. According to *Moore*, when the government intrudes on choices concerning family living arrangements, the court must carefully examine the governmental interests advanced and the extent to which they are served by the challenged regulation. *Id.*

The effect of *Belle Terre* and *Moore* is that definitions of a "single-family" in local zoning ordinances may prohibit some unrelated individuals from occupying a single residence; however, this does not extend to related individuals even if the related individuals are not part of the nuclear family.<sup>63</sup> Courts have read these decisions narrowly with respect to ordinances restricting group care homes.<sup>64</sup> For example, in *City of White Plains v. Ferraioli*,<sup>65</sup> the New York Court of Appeals held that a state cannot limit a residential zone to a biologically unitary family.<sup>66</sup> In *Ferraioli*, the home in question consisted of a couple, their two children and ten foster children, seven of whom were siblings.<sup>67</sup> The court concluded that the purpose of group homes is to emulate the traditional family.<sup>68</sup> The court stressed that the group home is a permanent arrangement akin to a traditional family and that the purpose of the home is for the children to remain and develop ties in the community.<sup>69</sup> The court distinguished *Belle Terre* as an arrangement lacking the permanency characteristic of a residential neighborhood, while a group home was a permanent relationship emulating the traditional family and not introducing a new "life style."<sup>70</sup>

In states which have avoided the constitutional issues in *Belle Terre*,<sup>71</sup> the trend when addressing restrictive definitions of "family" in local zoning ordinances is to focus on the "life style" of the residents and the goal of emulating a natural family.<sup>72</sup> Such an ap-

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63. Scott, *Restricting the Definitions of "Single Family,"* 36 LAND USE LAW & ZONING DIG. 7, 8 (1982).

64. Comment, *Zoning and Community Group Homes for the Mentally Retarded - Boon or Bust?*, 7 OHIO N.U.L. REV. 64, 73 (1980).

65. 34 N.Y.2d 300, 313 N.E.2d 756, 357 N.Y.S.2d 449 (1974).

66. The ordinance in question defined family as: "A 'family' is one or more persons limited to the spouse, parents, grandparents, grandchildren, sons, daughters, brothers or sisters of the owner or the tenant or of the owner's spouse or tenant's spouse or living together as a single housekeeping unit with kitchen facilities." 313 N.E.2d at 758.

67. *Id.* at 756.

68. *Id.* at 758.

69. *Id.* According to the New York Appellate Court, "[s]o long as the group home bears the generic character of a family unit as a relatively permanent household, and is not a framework for transients or transient living, it conforms to the purpose of the ordinance." *Id.*

70. *Id.*

71. Some states have avoided the constitutional issues involved in *Belle Terre* by considering whether specific ordinances are consistent with legitimate goals of local governments. Comment, *Exclusionary Zoning: An Overview*, 47 TUL. L. REV. 1056, 1061 (1973).

72. Courts look to see whether the zoning ordinance in question is consistent with legitimate state zoning goals instead of focusing solely upon whether the residents of the group home are related by blood, marriage or adoption. See Comment, *supra* note 64, at 72. A typical restrictive definition of family in a local ordinance provides: "An individual or group of two or more persons related by blood, marriage, or adoption, including foster children and

proach was used by the New Jersey Court of Appeals in *State v. Baker*,<sup>73</sup> wherein the court explicitly rejected the decision in *Belle Terre* by invalidating an ordinance which prohibited more than four unrelated persons from living together.<sup>74</sup> The court held that restrictive family definitions must bear a substantial relation to a city's objectives in zoning.<sup>75</sup>

Similarly, the California Supreme Court in *City of Santa Barbara v. Adamson*<sup>76</sup> invalidated an ordinance restricting the ability of groups of five or more persons unrelated by blood, marriage or adoption to live in certain residential zones.<sup>77</sup> In this case, twelve adults lived in a twenty-four room, ten-bedroom, six-bathroom house owned by the appellant.<sup>78</sup> The court held that the distinction between groups of unrelated people and groups of related people was invalid because it did not legitimately further the goal of maintaining a quiet residential environment.<sup>79</sup> According to *Adamson*, the basis for police power in land use regulation looks at the use to which the home is being put rather than the identities and relationship of the users.<sup>80</sup> Thus, California departed from the trend of basing zoning

servants, together with not more than one additional person not related by blood, marriage, or adoption, living together as a single housekeeping unit in a dwelling unit." Scott, *supra* note 63, at 7.

73. 81 N.J. 99, 405 A.2d 368 (1979).

74. *Id.* at 371. The court in *Baker* stated:

The fatal flaw in attempting to maintain a stable residential neighborhood through the use of criteria based upon biological or legal relationships is that such classifications operate to prohibit a plethora of uses which pose no threat to the accomplishment of the end sought to be achieved. Moreover, such a classification system legitimizes many uses which defeat that goal. Plainfield's ordinance, for example, would prohibit a group of five unrelated "widows, widowers, older spinsters or bachelors or even of judges" from residing in a single unit within the municipality.

*Id.*

75. *Id.* at 370-71.

76. 27 Cal. 3d 123, 610 P.2d 436, 164 Cal. Rptr. 539 (1980).

77. *Id.* The Santa Barbara ordinance at issue defined "family" as:

1. An individual, or two (2) or more persons related by blood, marriage or legal adoption living together as a single housekeeping unit in a dwelling unit.
2. A group of not to exceed five (5) persons, excluding servants, living together as a single housekeeping unit in a dwelling unit.

*Id.* at 127, 610 P.2d at 437-38, 164 Cal. Rptr. at 540-41.

78. *Id.* at 127, 610 P.2d 438, 164 Cal. Rptr. 541.

79. *Id.* at 134, 610 P.2d 442, 164 Cal. Rptr. 545. The court stated that the city of Santa Barbara failed to advance compelling state interests to justify infringement on individual privacy. Moreover, the court used privacy provisions in the California Constitution to include the right to privacy in the choice of household companions. Distinguishing *Baker*, 81 N.J. 99, 405 A.2d 368 (1979), the *Adamson* court stated it was not addressing the question of what group bears the "generic character of a family unit as a relatively permanent household." *Id.*

80. See Scott, *supra* note 63, at 10.

policy on social concerns and focused instead on the more traditional physical aspect of zoning.

*Charter Township of Delta v. Dinolfo*,<sup>81</sup> is a recent case in which the Michigan Supreme Court struck down a restrictive definition of "single-family." The ordinance which was addressed limited the number of unrelated persons who may occupy a single-family dwelling.<sup>82</sup> The court concluded that although the ordinance's goals of preserving family values and maintaining property values were rational and laudable, the classification created by the ordinance was arbitrary and capricious.<sup>83</sup> The court found no support in the argument that unrelated persons will manifest a behavior pattern different from the biological family.<sup>84</sup> The court concluded that if an ordinance works to exclude groups from a residential neighborhood, it must be supportive of family values in order to be a lawful classification.<sup>85</sup>

To summarize, New Jersey, California and Michigan courts have all evaluated the efficacy of zoning regulations adopted by municipalities, and each has found that limiting definitions of "family" solely to biological families is unrelated to lawful police power concerns. These courts have scrutinized such definitions only slightly more attentively than the Supreme Court did in *Belle Terre*.<sup>86</sup> Therefore, state courts which follow this trend, will closely scrutinize local zoning ordinances which tend to ban or exclude family day-care homes.

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81. 419 Mich. 253, 351 N.W.2d 831 (1984).

82. *Id.* at 255, 351 N.W.2d at 831. The Delta Township zoning ordinance § 2.20(28) provides: "Family: An individual or a group of two or more persons related by blood, marriage, or adoption, including foster children and servants, together with not more than one additional person not related by blood, marriage, or adoption, living together as a single house-keeping unit in a dwelling unit."

83. 351 N.W.2d at 840. According to the court:

There has been no evidence presented nor do we know of any that unrelated persons, as such, have any less a need for the advantages of residential living or that they have as a group behavior patterns that are more opprobrious than the population at large. In the absence of such demonstration to justify this kind of classification, the ordinance can only be termed arbitrary and capricious under the Due Process Clause of the Michigan Constitution.

351 N.W.2d 842-43. The court failed to see how the city's ordinance furthered the legitimate state goals enunciated in *Belle Terre*. 351 N.W.2d at 841.

84. 351 N.W.2d 840.

85. 351 N.W.2d 843.

86. See Scott, *supra* note 63, at 10.

### III. LOCAL BARRIERS TO FAMILY DAY-CARE HOMES

#### A. Zoning Ordinances

In most communities, zoning continues to be one of the most serious factors inhibiting the growth of family day care.<sup>87</sup> Local ordinances often either do not list family day-care homes as a permitted use, or force them to conform to the next closest category listed.<sup>88</sup> Other significant barriers prevent the operation of family day-care homes in areas zoned for single-family use as well.<sup>89</sup> For example, local ordinances pertaining to single-family dwellings often include limiting definitions of "family."<sup>90</sup> The effect of such definitions has

87. D. COHEN, *supra* note 1, at 51. "With increasing frequency, the operation of family day-care homes in communities throughout the country is being jeopardized by restrictive local zoning requirements." Weinstein, *supra* note 6, at 4.

88. Morgan, *supra* note 37, at 25. While zoning was designed for the protection of property values and the preservation of space, it has sometimes been misused as a tool to keep needed services out of the community. *Id.* In Arizona, for example, a city ordinance prohibits both day-care centers and family day-care homes from single-family residential districts. *See* Comment, *supra* note 23, at 71. Similarly, in Maricopa County, Arizona, a local ordinance prohibited day-care centers and homes from any residential or agricultural district. *Id.* *See also* WHITPAIN TOWNSHIP, PA., ORDINANCES, art. XV, §1506 (1975) which provides: "Unless otherwise specified by the Board, a special exception or a variance shall expire if the applicant fails to obtain a building permit, as the case may be, within (6) months from the date of authorization thereof." *Id.* Moreover, in Arizona there is currently no comprehensive statute which prohibits such local ordinances from operating to exclude family day-care homes. *See* Comment, *supra* note 23, at 69. The Arizona statute, ARIZ. REV. STAT. ANN. § 36-881 (1974), only provides for day-care centers caring for five or more children.

89. Weinstein, *supra* note 6, at 4 (citing a survey conducted by The Children's Foundation in 1980). The most common problems cited were:

1. No use other than residential occupancy is permitted,
2. A variance is required and is difficult to get due to:
  - a. high permit fee, site plan fee or hearing transcript fee,
  - b. a requirement that a lawyer be involved in the hearing process,
  - c. fire, landscaping or parking space requirements which are difficult to meet; and/or
  - d. a requirement that all neighbors agree to the variance,
3. The community has developed child care standards that are difficult to meet or that conflict with state requirements.

*Id.*

90. *See supra* notes 52-86 and accompanying text. *See also* Brussack, *Group Homes, Families, and Meaning in the Law of Subdivision Covenants*, 16 GA. L. REV. 33 (1981). An example of a restrictive definition of family was found in a Brewer, Maine ordinance cited in *Penobscot Area Hous. Dev. Corp. v. City of Brewer*, 434 A.2d 14 (Me. 1981), which defined "family" as:

[A] single individual doing his own cooking, and living on the premises as a separate housekeeping unit, or a collective body of persons doing their own cooking and living together upon the premises as a separate housekeeping unit in a domestic relationship based upon birth, marriage or other domestic bond as distinguished from a club, fraternity or hotel.

*Id.*

been to force the family day-care provider to operate illegally.<sup>91</sup>

Recently, however, a few progressive states have recognized the demand for family day care by allowing family day-care homes to be treated as single-family residences for zoning purposes.<sup>92</sup> In Pennsylvania, a recent case held that a township ordinance which effectively prohibited family day-care homes and facially excluded group day care homes was exclusionary and invalid in the absence of extraordinary justification.<sup>93</sup> Also, California recently enacted Health and Safety Code sections 1597.30-.65<sup>94</sup> which allow family day-care homes to be zoned as single-family residences.<sup>95</sup> A significant feature of the California legislation is the distinction made between small and large family day-care homes.<sup>96</sup> Small family day-care homes, with six or fewer children, are to be considered single-family residences for zoning purposes.<sup>97</sup> No city or county may impose a busi-

91. See *infra* notes 104-07.

92. See *supra* note 38.

93. Board of Comm'rs of Ross Township v. Harsh, 78 Pa. Commw. 355, 467 A.2d 1183 (1983). The court found that the Township's ordinance effectively excluded family day-care homes in residential areas because it banned all day-care facilities from residential areas. Finding such a restriction exclusionary, the court held the ordinance invalid absent an extraordinary justification. *Id.* at 358, 467 A.2d 1186 (1983). See also Christ United Methodist Church v. Municipality of Bethel Park, 58 Pa. Commw. 610, 428 A.2d 745 (1981).

94. CAL. HEALTH & SAFETY CODE §§ 1597.30-.65 (Deering Supp. 1985). Section 1597.45 (a) provides: "[t]he use of [a] single family residence as a small family day-care home shall be considered a residential use of property for the purposes of all local ordinances."

95. CAL. HEALTH & SAFETY CODE § 1597.30 (Deering Supp. 1985). These legislative findings demonstrate an awareness by the legislature of the significance of the day care issue. The legislature finds and declares:

- (a) It has a responsibility to ensure the health and safety of children in family homes that provide day care.
- (b) That there are insufficient numbers of regulated family day care homes in California.
- (c) There will be a growing need for child day care facilities due to the increase in working parents.
- (d) Many parents prefer child day care located in their neighborhoods in family homes.
- (e) There should be a variety of child care settings, including regulated family day care homes, as suitable alternatives for parents.
- (f) That the program to be operated by the state should be cost effective, streamlined, and simple to administer in order to ensure adequate care for children placed in family day care homes, while not placing undue burdens on the providers.
- (g) That the state should maintain an efficient program of regulating family day care homes that ensures the provision of adequate protection, supervision, and guidance to children in their homes.

*Id.*

96. CAL. HEALTH & SAFETY CODE §§ 1597.45 and 1597.46 (Deering Supp. 1985).

97. CAL. HEALTH & SAFETY CODE §§ 1597.30 and 1597.65 (Deering Supp. 1985). Section 1597.45 provides:

ness license, fee or tax or require any form of conditional use permit to limit or to prohibit the operation of small family day-care homes.<sup>98</sup> Large day-care homes with seven to twelve children shall not be prohibited on lots zoned for single-family dwellings. Local jurisdictions may treat large day-care homes in one of three ways: first, they may classify the homes as permitted uses; second, they may grant a nondiscretionary permit to use the property as a large family day-care home; or third, they may require a provider to apply for a conditional use permit.<sup>99</sup> One commentator believes that the

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All of the following shall apply to small family day-care homes:

- (a) The use of single-family residence as a small family day-care home shall be considered a residential use of property for the purposes of all local ordinances.
- (b) No local jurisdiction shall impose any business license, fee, or tax for the privilege of operating a small family day-care home.
- (c) Use of a single-family dwelling for purposes of a small family day-care home shall not constitute a change of occupancy for purposes of Part 1.5 (commencing with Section 17910) of Division 13 (State Housing Law) or for purposes of local building codes.
- (d) A small family day-care home shall not be subject to the provisions of Article 1 (commencing with Section 13100) or Article 2 (commencing with Section 13140) of Chapter 1 of Part 2, except that a small family day-care home shall contain a fire extinguisher or smoke detector device, or both which meets standards established by the State Fire Marshal.

*Id.*

98. *Id.* Stevenson, *Memorandum: Explanation of Provisions of SB 163, Chapter 1233/Statutes of 1983*, March 6, 1984 [hereinafter cited as Stevenson] (available in Santa Clara Law Review Office). CAL. HEALTH & SAFETY CODE §§ 1597.30-65 (Deering Supp. 1985).

99. CAL. HEALTH & SAFETY CODE §§ 1597.30-65 (Deering Supp. 1985). Section 1597.46 provides:

All of the following shall apply to large family day-care homes:

- (a) A city, county or city and county shall not prohibit large family day-care homes on lots zoned for single-family dwellings, but shall do one of the following:
  - (1) Classify these homes as a permitted use of residential property for zoning purposes.
  - (2) Grant a nondiscretionary permit to use a lot zoned for a single-family dwelling to any large family day-care home that complies with local ordinances prescribing reasonable standards, restrictions, and requirements concerning spacing and concentration, traffic control, parking, and noise control relating to such homes, and complies with subdivision (d) and any regulations adopted by the State Fire Marshal pursuant to that subdivision. Any noise standards shall be consistent with local noise ordinances implementing the noise element of the general plan and shall take into consideration the noise level generated by children. The permit issued pursuant to this paragraph shall be granted by the zoning administrator, if any, or if there is no zoning administrator by the person or persons designated by the planning agency to grant such permits, upon the certification without a hearing.
  - (3) Require any large family day-care home to apply for a permit to use a lot zoned for single-family dwellings. The zoning administrator, if any, or if there



zoning provisions of the California legislation "reflect a compromise between those who believe family day care should operate in a residential setting with no zoning requirements and those who feel that the conditional use process is necessary to protect neighbors' interests."<sup>100</sup>

While legislation has addressed most of the problems associated with small day care homes,<sup>101</sup> problems continue to plague large day-care home providers.<sup>102</sup> In California, legislation which allows family day-care homes with fewer than seven children to be zoned as single-family residences has been received positively.<sup>103</sup> The effect of such legislation has been to bring day-care providers and their services to the public's attention.<sup>104</sup> Moreover, legislation of this type is significant because it tends to regulate the homes which in turn assures the quality of care given by the providers.<sup>105</sup> Without such leg-

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is no zoning administrator, the person or persons designated by the planning agency to handle the use permits shall review and decide the applications. The use permit shall be granted if the large family day-care home complies with local ordinances, if any, prescribing reasonable standards, restrictions, and requirements concerning spacing and concentrations, traffic control, parking, and noise control relating to such homes, and complies with subdivision (d) and any regulations adopted by the State Fire Marshal pursuant to that subdivision. Any noise standards shall be consistent with local noise ordinances implementing the noise element of the general plan and shall take into consideration the noise levels generated by children. The local government shall process any required permit as economically as possible, and fees charged for review shall not exceed the costs of the review and permit process. Not less than 10 days prior to the date on which the decision will be made on the application, the zoning administrator or person designated to handle such permits shall give notice of the proposed use by mail or delivery to all owners shown on the last equalized assessment roll as owning real property within a 100 foot radius of the exterior boundaries of the proposed large family day-care home. No hearing on the application for a permit issued pursuant to this paragraph shall be held before a decision is made unless a hearing is requested by the applicant or other affected person. The applicant or other affected person may appeal the decision. The appellant shall pay the cost, if any, of the appeal.

*Id.*

100. Stevenson, *supra* note 98, at 5.

101. See *infra* note 103.

102. TREADWELL, ZONING LAWS AND FAMILY DAY CARE, CHILD CARE LAW CENTER 1 (1981) (available in Santa Clara Law Review Office).

103. OAKLAND, CALIFORNIA, CITY PLANNING DEP'T, DAY-CARE FACILITIES FOR THE CHILDREN OF OAKLAND: A STUDY OF NEIGHBOR'S ATTITUDES (1966). In a survey made of persons living close to day-care facilities in residential areas, the Department found that those living closest to the facility were less likely to be indifferent and more likely to be favorably disposed to the operation of the facility. See also Comment, *supra* note 23, at 85.

104. Unregulated, informal family day care is isolated from the resources available to the rest of the community, and thus lacks visibility to parents outside the immediate neighborhood. 1 FINAL REPORT, *supra* note 4, at 5.

105. See *infra* notes 177-85 and accompanying text.

isolation, day-care homes are unregulated and unlicensed, making it difficult for parents to assess the quality of care.<sup>106</sup> Also, if day-care homes are not recognized as legitimate uses of family residences, providers do not feel free to openly advertise their services, and consequently, many parents searching for suitable day care cannot find it.<sup>107</sup>

Child-care advocates interested in increasing the amount of licensed child-care homes have identified a number of local procedures which they consider to be impediments to the development of large family day-care homes.<sup>108</sup> For example, many localities still have not developed ordinances consistent with California's family day-care statute largely due to ignorance about the existence of the law.<sup>109</sup> Therefore, many local zoning ordinances still require the provider to first obtain a conditional use permit from the appropriate local authority.<sup>110</sup> Many communities also require a use permit to be accompanied by an environmental impact report.<sup>111</sup> Further, the fees charged to process use permits continue to present obstacles for day-care providers; fees for these permits typically range from \$100 to \$1,000.<sup>112</sup> Finally, applicants often must appear before a public decision-making body to formally request the use permit, which can be an intimidating experience.<sup>113</sup>

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106. See *infra* notes 113 and 129. While more than 40 states require some form of regulation, the majority of caregivers are unregulated. "This unlicensed and unregulated day-care accounts for nearly 70% of the profession." Weinstein, *supra* note 6, at 4.

107. SUMMARY, *supra* note 4, at 2. See *supra* note 104. See also Weinstein, *supra* note 6, at 4.

108. See *supra* note 103, at 1.

109. Conference with Abby Cohen, *Child-Care Conference, Zoning: Issues and Strategies*, March 30, 1985.

110. In addition, if a property use requires a "special exception" or "variance" to operate in a particular zone, a hearing is usually required and certain conditions must be met to preserve the desired characteristics of the neighborhood. Weinstein, *supra* note 6, at 4.

111. See TREADWELL, *supra* note 102.

112. *Id.* "Fees for permits to operate a day-care home can be prohibitive for providers, who on the average, make less than minimum wage[;] [s]uch fees may run from \$1,500 to over \$3,000 per year, leaving providers with little choice but to cease operating." Weinstein, *supra* note 6, at 4. See generally SUMMARY, *supra* note 4, at 37-41. CAL. HEALTH & SAFETY CODE § 1597.60(b) (Deering Supp. 1985) provides that "[n]o fee shall be charged by the department for the initial issuance or renewal of a license or for processing any application therefor under this chapter."

113. See TREADWELL, *supra* note 102. While to many, a zoning hearing may appear to be a simple procedure, to most day-care providers unfamiliar with the public hearing process, it can be a very intimidating experience. Many providers prefer to operate in the shadows and take the risk their activities will go unnoticed, rather than appear before a public body. Weinstein, *supra* note 6, at 4. CAL. HEALTH & SAFETY CODE § 1597.46(b) (Deering Supp. 1985) only requires a public hearing if the applicant or another affected person, such as a neighbor, requests it.

Local homeowners oppose large day-care homes because they want to protect the "character" of their neighborhood. Some homeowners believe that large day-care facilities constitute a violation of their property interests.<sup>114</sup> Extra traffic congestion, school-like appearance, noisy children and decreased property values constitute the major complaints raised by homeowners against the operation of large day-care homes in rural neighborhoods.<sup>115</sup>

California, while at the forefront of such legislation, is not the only state that has a zoning classification for day-care homes for more than seven children. Some states categorize large day-care homes as group day-care homes.<sup>116</sup> For example, in Pennsylvania a group day-care home is a facility which contemplates care given by at least two adults, in their residence, for up to eleven children.<sup>117</sup> Several other states which provide for family day care enumerate the maximum number of children allowed per day-care home. While the numbers vary from four to twelve, the average number is six children per single-family home.<sup>118</sup>

The mode of regulation of family day-care homes in most states is through the issuance of licenses to applicants who meet certain standards established by the state.<sup>119</sup> "A licensing worker typically visits the home, certifies that the necessary criteria have been met, and the care giver receives a license."<sup>120</sup> In California, licensing of both small and large family day-care homes is accomplished through California Administrative Code, Title 22.<sup>121</sup> Licensing is required by

114. See TREADWELL, *supra* note 102, at 8. Residents in day care home communities claim that home day care is a commercial business and therefore must be zoned accordingly. Weinstein, *supra* note 6, at 4.

115. See TREADWELL, *supra* note 102, at 8. "Often suits are initiated by disgruntled neighbors who are angered by noise, increased traffic or what they feel to be a disturbing precedent." Weinstein, *supra* note 6, at 5. The main opponents seems to be older people, usually retirees, with their own children grown and gone. *Id.*

116. See generally Board of Commr's of Ross Township v. Harsh, 78 Pa. Commw. 355, 467 A.2d 1183, 1185 (1983). See *supra* note 23 and accompanying text.

117. Board of Commr's of Ross Township v. Harsh, 78 Pa. Commw. 355, 467 A.2d 1183, 1185 (1983).

118. Stevens, *The National Day-Care Home Study: Family Day Care in the U.S.*, 37 YOUNG CHILDREN 59 (1982). The study found that 90% of the day-care homes reviewed had fewer than seven children. *Id.* at 61.

119. See 2 RESEARCH REPORT, *supra* note 26, at 213.

120. *Id.*

121. CAL. ADMIN. CODE tit. 22, R. §§ 88001-88038 (1983). Pertinent provisions provide:

§ 88004. License Exemptions

(a) Licensure or registration is required before Family Day Care is provided except as provided in Sections 1505 and 1597.51(b) of the Health & Safety Code.

the code<sup>122</sup> to ensure that the operation of the facility will not prove dangerous to the health and safety of the children.<sup>123</sup> The code provisions set out requirements pertaining to food, mandatory activities, and other specifics, such as the maximum number of children the licensee may care for.<sup>124</sup> There are no additional requirements for small family day-care homes other than those normally pertaining to a single-family dwelling.<sup>125</sup>

Some states require family day-care homes to be registered as an alternative to licensing them. Under a registration system, care-

§ 88006. License or Registration

- (a) The license or registration shall be available in the facility upon request.
- (b) The license or registration shall not be transferred to other individuals or locations.
- (c) Any person 18 years of age or over may apply for a license or registration regardless of age, sex, race, religion, color, political affiliations, national origin, handicaps, or marital status.

*Id.*

Most of the 50 states have their own laws governing the licensure of family day-care homes, however, the content of these laws differs dramatically among the states. Some states, such as Maine, do not license homes with fewer than three children; others require licensing for even one non-related child. While regulations vary between the states, they may include restrictions in the ages of children, the number of hours the children are in care, or the number of helpers required if more than a certain number of infants are present. 2 RESEARCH REPORT, *supra* note 26, at 212.

122. CAL. ADMIN. CODE tit. 22, R. § 88041(a).

123. CAL. ADMIN. CODE tit. 22, R § 88034 provides:

- (a) If the licensing agency has reason to believe that family day care is being provided without a license or registration, the licensing agency shall:

- (1) Conduct a site visit to:

- (A) Determine whether the home is operating without a license or registration.
- (B) Determine whether continued operation of the facility will be dangerous to the health and safety of the children in care.

- (2) Notify the unlicensed provider in writing of the requirements for such licensure or registration.

- (3) Issue a Notice of Operation in Violation of Law if it is found and documented that continued operation of the facility will be dangerous to the health and safety of the children. Situations endangering the health and safety of the children shall include, but not be limited to:

- (A) Evidence of physical or mental abuse.
- (B) Children left unattended or left with a minor.
- (C) Clear evidence of unsanitary conditions.
- (D) Fire safety/fire hazards.
- (E) Unfenced or accessible pools or other bodies of water.
- (F) Hazardous physical plant.

- (4) Issue a Notice of Operation in Violation of Law if the unlicensed provider does not apply for a license or registration within 15 working days from the date of notification.

*Id.*

124. CAL. ADMIN. CODE tit. 22, R. § 88028 (1983).

125. *Id.*

givers themselves declare that they must meet established standards, and a few homes are spot-checked for compliance.<sup>126</sup> In Texas, for example, family day care takes place in a "registered family home" defined by the Human Resources Code section 42.002(9) as: "a facility that regularly provides care in the caretaker's own residence for not more than six children under 14 years of age, excluding the caretaker's own children . . . ."<sup>127</sup> In Texas, "registration basically involves certification by the provider that her home meets certain minimal health and safety requirements."<sup>128</sup> Even though registration systems are usually less restrictive and less costly than licensing systems, studies of regulatory programs in California and Texas show only an extremely small degree of difference between the quality of care given in licensed and registered homes.<sup>129</sup>

### B. Restrictive Covenants

Zoning laws and ordinances are not the only barriers to the advance of family day-care homes. In many states, private deed restrictions, and covenants in deeds and mortgages are major impediments to establishing day-care homes.<sup>130</sup> These covenants and restrictions restrict the use of residential homes to single-family dwellings only.<sup>131</sup> For example, a typical restriction reads: "[n]o trade or business of any kind or nature shall be permitted to be carried on upon any lot . . . nor shall anything be done thereon which

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126. CAL. HEALTH & SAFETY CODE § 1597.62. provided for a pilot project of registration of family day-care homes. While the project was terminated on January 1, 1984, the intent of this project was to determine whether a simplified registration could expand and improve availability of care while substantial compliance with health and safety regulations was maintained.

127. TEX. HUM. RES. CODE ANN. § 42.002(9) (Vernon 1982).

128. Amicus Curiae Brief for Appellant at 12, *Mills v. Barnes*, Civ. No. 01-84-0516-CV (Tex. Civ. App. 1984) (available in Santa Clara Law Review Office).

129. See generally 2 RESEARCH REPORT, *supra* note 26, at 213-16. Critics of licensure cite the high cost to the state to maintain adequate staff to license and monitor day-care homes as a practical consideration which makes licensure ineffective. Furthermore, insufficient staffing allows large numbers of day-care homes to operate illegally, that is, without regulation. On the other hand, critics of registration point out that the quality of care and the protection of children in family day-care homes are highly variable under registration nationally.

130. One important difference, however, between the covenant cases and the zoning cases is that the single-family use covenants tend not to define "family" and the zoning ordinances often include a definition. *Brussack, Group Homes, Families, and Meaning in the Law of Subdivision Covenants*, 16 GA. L. REV. 33, 48 (1981).

131. *Id.* See also *Matthews v. Olson*, 212 So. 2d 357 (Fla. Dist. Ct. App. 1968) (the Florida District Court of Appeals enjoined a day nursery from operating in violation of a deed restriction); *Berry v. Hemplepp*, 460 S.W.2d 352 (Ky. 1970) (the court held that operation of a day-care center violated a restrictive covenant for a residential lot).

may be or become an annoyance or nuisance to the neighborhood."<sup>132</sup> Only recently have a few progressive states, such as California, specifically prohibited the application of deed restrictions or other written instruments respecting real property, to day-care homes.<sup>133</sup>

Similarly, a Michigan court recently restricted the use of limiting covenants. In *Beverly Island Association v. Zinger*,<sup>134</sup> the Michigan Court of Appeals held that a homeowner's use of her home for family day care did not violate a restrictive covenant which permitted residential uses only. First, the court noted that the covenant permitted residential uses rather than prohibiting business or commercial uses. Next, the court determined that the mere generation of income did not make the day-care home a commercial use. The court focused on the activity involved and how it paralleled the ordinary and common meanings of use for residential purposes.<sup>135</sup> According to

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132. *Crimins v. Simonds*, 545 Utah 2d 745, 636 P.2d 478 (1981).

133. CAL. HEALTH & SAFETY CODE § 1597.40 (Deering Supp. 1985) provides:

(a) It is the intent of the Legislature that family day-care homes for children must be situated in normal residential surroundings so as to give children the home environment which is conducive to healthy and safe development. It is the public policy of this state to provide children in a family day-care home the same home environment as provided in a traditional home setting.

The Legislature declares this policy to be of statewide concern with the purpose of occupying the field to the exclusion of municipal zoning, building and fire codes and regulations governing the use or occupancy of family day-care homes for children, except as specifically provided for in this chapter, and to prohibit any restrictions relating to the use of single-family residences for family day-care homes for children except as provided by this chapter.

(b) Every provision in a written instrument entered into relating to real property which purports to forbid or restrict the conveyance, encumbrance, leasing, or mortgaging of such real property for use or occupancy as a family day-care home for children, is void and every restriction or prohibition in any such written instrument as to the use or occupancy of the property as a family day-care home for children is void.

(c) Every restriction or prohibition entered into, whether by way of covenant, condition upon use or occupancy, or upon transfer of title to real property, which restricts or prohibits directly, or indirectly limits, the acquisition of, or occupancy of such property for a family day-care home for children is void.

*Id.*

134. 113 Mich. App. 322, 317 N.W.2d 611 (1982). The covenant provided in part: "[n]o lot or building plot shall be used except for residential purposes." The court made the distinction that the covenant permitted residential uses rather than prohibiting business or commercial uses. *Id.*

135. *Id.* at 325, 317 N.W.2d at 611 (1982). The *Zinger* court analogized the facts at issue with those involved in *Bellarmino Hills Ass'n v. Residential Systems Co.*, 84 Mich. App. 554, 296 N.W.2d 673 (1978), wherein a restrictive covenant provided:

All lots in said subdivision shall be known and described as residential lots. No structure shall be erected, altered, placed or permitted to remain on any residen-

the court, a homeowner, by state regulation, who cares for no more than seven unrelated, preschool age children at a time qualifies as a residential user.<sup>136</sup> In essence, the court balanced the minimal impact on the neighborhood against the need and public policy favoring family day care, and found that the covenant should not be enforced.<sup>137</sup>

Similarly, Texas courts have long recognized an exception to enforcement of restrictive covenants when the activity conducted is incidental to the primary purpose of residing in the home.<sup>138</sup> In the leading case of *Davis v. Hinton*,<sup>139</sup> the Texas court concluded that the operation of beauty shops and a day nursery were merely incidental to the use as a single-family dwelling or residence and therefore the uses did not violate the restriction.<sup>140</sup> These cases suggest that as long as the court finds the primary use of the home is to house a single-family, a business conducted in the home will not be considered commercial.<sup>141</sup>

### C. Building Codes

Restrictive building codes and fire safety regulations are barriers to family day-care homes in numerous communities.<sup>142</sup> In many states, a family day-care home caring for six children or more must

tial lot other than one single private family dwelling with attached private garage for not less than two (2) cars, except as herein otherwise provided.

296 N.W. 2d at 674.

136. 113 Mich. App. 322, 317 N.W.2d 611 (1982).

137. *Id.* To illustrate this point, the court stated "the extra vehicular traffic is minimally obtrusive in light of the overriding public policy in favor of day-care homes." *Id.* at 330, 317 N.W.2d 615.

138. "Merely because one derives some income from the endeavor does not transform the character of the dwelling." *See supra* note 116, at 14. *See also* Grand Prairie v. Finch, 294 S.W.2d 851 (Tex. Civ. App. 1956) (the court held that a nursery or "baby-sitting" business was permissible in a single-family residential district).

139. 374 S.W.2d 723 (Tex. Civ. App. 1964). In this case the defendant contended that his neighbors had waived deed restrictions because of the operation of beauty shops and a day nursery. *Id.* *See also* Grand Prairie v. Finch, 294 S.W.2d 851 (Tex. Civ. App. 1956).

140. 374 S.W.2d 723, 727.

141. *Id.*

142. *See* D. COHEN, *supra* note 1, at 49. To illustrate this problem, one commentator stated:

Family day-care homes would be safer if we could require a certificate from the local building inspectors that they meet requirements for general residential occupancy. We do not have to make such a requirement, but it would be better if we could. However, if we do this, then every building inspector will first investigate to see whether the occupancy type is consistent with local zoning codes, and in almost every case family day care will be found to be illegal.

Comment, *supra* note 23, at 69.

meet strict building standards.<sup>143</sup> The Uniform Building Code, which many states have adopted, classifies a "school" as any building where more than six children are cared for.<sup>144</sup> For example, many fire codes insist that there be two exits from every room occupied by children, separate toilet facilities for boys and girls, flame-proof draperies, and institutional width doorways.<sup>145</sup> Those requirements are expensive and often make it unfeasible for the typical day-care provider to operate.<sup>146</sup> Furthermore, great diversity between the various requirements, statutes, and recommendations in different states add even more confusion.<sup>147</sup>

However, some states such as California, have eliminated those restrictions by legislation.<sup>148</sup> Small family day-care homes need only meet the building requirements of single-family homes.<sup>149</sup> The large family day-care homes, while still considered single-family residences for building code standards, must meet additional standards adopted by the State Fire Marshal.<sup>150</sup> However, these standards are not as

143. See D. COHEN, *supra* note 1, at 49. "In some cases, . . . building safety regulations were written for other institutions and later extended to day care, thus often forcing day-care facilities to meet unnecessarily rigid requirements." *Id.*

144. Stevenson, *supra* note 98, at 7.

145. *Id.*

146. See D. COHEN, *supra* note 1, at 49. Both state and local laws regulate matters of building safety, including sanitation, fire and occupancy. These regulations apply to both public and private day-care homes. *Id.* at 50.

147. *Id.*

148. CAL. HEALTH & SAFETY CODE §§ 1597.40-47 (Deering Supp. 1983).

149. CAL. HEALTH & SAFETY CODE § 1597.45 (Deering Supp. 1985).

150. CAL. HEALTH & SAFETY CODE § 1597.46(d) (Deering Supp. 1985), provides:

Large family day-care homes shall be considered as single-family residences for the purposes of the State Uniform Building Standards Code and local building and fire codes, except with respect to any additional standards specifically designed to promote the fire and life safety of the children in these homes adopted by the State Fire Marshal pursuant to this subdivision. The State Fire Marshal shall adopt separate building standards specifically relating to the subject of fire and life safety in large family day-care homes which shall be published in Title 24 of the California Administrative Code. These standards shall apply uniformly throughout the state and shall include but not be limited to: (1) the requirement that a large family day care home contain a fire extinguisher or smoke detector device, or both, which meets standards established by the State Fire Marshal; (2) specification as to the number of required exits from the home; and (3) specification as to the floor or floors on which day care may be provided. Enforcement of these provisions shall be in accordance with Sections 13145 and 13146. No city, county, city and county, or district shall adopt or enforce any building ordinance or local rule or regulation relating to the subject of fire and life safety in large family day-care homes which is inconsistent with those standards adopted by the State Fire Marshal, except to the extent the building ordinance or local rule or regulation applies to single-family residences in which day care is not provided.



restrictive as the "school-type" requirements insisted upon in other states,<sup>151</sup> and, in fact, are essential to ensure child safety in larger day-care homes.

#### IV. STATUTORY REGULATION IS NEEDED

Local zoning ordinances are legitimate instruments of land use control when they are used to protect property values or to maintain the residential character of the neighborhood. However, when they are applied to family day-care homes, they operate to exclude an important community service. The exclusionary language used in these local zoning ordinances, precludes family day-care homes from existing in residential zones, and thus thwarts the goal of providing a "home-like" environment for children.<sup>152</sup> Given the vast numbers of unregulated day-care homes,<sup>153</sup> and the predicted increase in need for such homes,<sup>154</sup> states have a duty to remedy this inadequacy by instigating change.

Although local zoning ordinances historically have been the primary impediment to family day-care home growth,<sup>155</sup> restrictive covenants and extremely limiting language in real property instruments have also limited the number of family day-care homes.<sup>156</sup> While many family day-care home providers care for six or fewer children, for six or fewer hours of the day, their ability to exist in a residential district often is severely impaired by restrictive covenants, and these covenants are often upheld by courts in favor of the surrounding homeowners' property rights.<sup>157</sup> However, when the policies favoring

*Id.*

151. See *supra* note 144.

152. For example, in *Kirsch Holding Co. v. Boroughs of Manasquan*, 59 N.J. 241, 281 A.2d 513 (1971), the Manasquan ordinance provides:

- a. One or more persons related by blood or marriage occupying a dwelling unit and living as a single, nonprofit housekeeping unit.
- b. A collective number of individuals living together in one house under one head, whose relationship is of a permanent and distinct domestic character, and cooking as a single housekeeping unit. This definition shall not include any society, club, fraternity, sorority, association, law combine, federation, group, coterie, or organization, which is not a recognized religious order, nor include a group of individuals whose association is temporary and resort-seasonal in character or nature.

*Id.*

153. See *supra* notes 106-07 and accompanying text.

154. See *supra* notes 14-21 and accompanying text.

155. See *supra* notes 87-107 and accompanying text.

156. See *supra* notes 130-41 and accompanying text.

157. For example, in *Jayno Heights Landowners Ass'n v. Preston*, 85 Mich. App. 443, 271 N.W.2d 268 (1978), the court upheld the validity of a covenant in favor of the rights of

similar restricted uses, such as homes for mentally retarded children, outweigh the rights of neighboring property owners, courts will invalidate a restrictive covenant.<sup>158</sup> Accordingly, because of the increasing necessity for quality day-care homes, courts must invalidate any covenant or limiting provision in a written instrument relating to real property which operates to limit the use of a residence as a family day-care home. Courts should recognize that the public policy in favor of providing more high quality day care now outweighs the private concerns that were traditionally focused upon. Moreover, as in California, state statutes should specifically prohibit exclusionary practices.<sup>159</sup>

Finally, while building codes and fire safety restrictions have not been the primary sources of exclusion as have zoning ordinances and restrictive covenants, they have created problems for day-care providers.<sup>160</sup> Consequently, unduly burdensome building and fire requirements should be eliminated pursuant to state-wide legislation. Family day-care homes should only be required to meet the building code requirements for general residential occupancy.

While traditional zoning mechanisms have effectively hindered the development of family day-care homes in residential areas, this comment proposes that a properly drafted state zoning law can effectively promote the development of more high quality day-care homes. If a state promotes day-care homes as a state goal, the state can effectively prohibit exclusionary land use techniques which preclude implementation of its goal.<sup>161</sup> While California's recent legislation eliminates many of the problems associated with local zoning ordinances, restrictive covenants, and building codes, this author proposes changes to the California scheme as listed in the appended Model Zoning Law.<sup>162</sup>

This Model Law should help to increase the number and quality of family day-care homes. State legislation is the most effective means of providing needed day-care homes because local jurisdictions

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property owners' of single-family dwellings to use their property as they desire, thereby excluding an adult foster care facility for elderly women. *Id.*

158. *Bellarmino Hills Ass'n v. Residential Systems Co.*, 84 Mich. App. 554, 269 N.W.2d 673 (1978) (the court determined that a foster care facility for four mentally retarded children and one foster parent constituted a "family" within the sense of the restrictive covenant involved).

159. See CAL. HEALTH & SAFETY CODE § 1597.40(b), (c) (Deering Supp. 1985).

160. See *supra* notes 142-51 and accompanying text.

161. See *supra* notes 52-53 and accompanying text.

162. See APPENDIX.

would have no discretion in its implementation.<sup>163</sup> Another advantage of this type of zoning legislation is that it will create uniformity throughout a state, and thereby ensure that families, no matter which county they live in, will have an equal opportunity to quality day-care for their children.<sup>164</sup>

Since the *Euclid* decision, states have the constitutional right to use their inherent police powers to promote state public policy through zoning. Accordingly, the Model Law sets forth that it is the state's policy to promote the development of family day-care homes. California sets forth its public policy in legislative findings<sup>165</sup> which demonstrate the legislature's awareness as to the scope of the day-care problem and how it is to be remedied. In addition, the Model Law provides for notification to local jurisdictions regarding the day-care law in order to publicize the provisions. Finally, legislative changes alone may not be enough; the courts too must recognize that the state's public policy of promoting day care now outweighs the private concerns of homeowners.

The basic premise of the Model Law is that day-care homes should be considered single-family residences because their use is essentially the same as that of other homes in the neighborhood. Homes for elderly persons,<sup>166</sup> the developmentally disabled,<sup>167</sup> and households of unrelated adults<sup>168</sup> have been considered "family units" and therefore been allowed in residential areas as permitted uses.<sup>169</sup> Even nursery schools have been considered consistent with the goals of residential neighborhoods and have been zoned accordingly.<sup>170</sup> The rationale allowing nursery schools in residential neighborhoods is analogous to that of day-care homes. Not only do the schools and homes provide a needed community service, but the children are present in these homes for only certain hours of the day.

However, because the goal of a zoning law should be to make

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163. 1 R. ANDERSON, *AMERICAN LAW OF ZONING* §§ 2.02-.20 (2d ed. 1977).

164. *Id.*

165. See APPENDIX § 1597.30.

166. *McCaffrey v. Preston*, 154 Cal. App. 3d 422, 201 Cal. Rptr. 252 (1984).

167. *State ex rel Thelen v. City of Missoula*, 167 Mont. 540, 543 P.2d 173 (1975).

168. *Charter Township of Delta v. Dinolfo*, 351 N.W.2d 831 (Mich. 1984).

169. Comment, *supra* note 64, at 78.

170. Comment, *supra* note 23, at 84, n. 157. In the cases of *Merrick Community Nursery School v. Young*, 11 Misc. 2d 576, 171 N.Y.S. 2d 522 (Sup. Ct. 1958); *Creative Country Day School, Inc. Burns*, 18 App. Div. 2d 938, 238 N.Y.S.2d 348 (Sup. Ct. 1963); and *City of Chicago v. Sachs*, 1 Ill. 2d 342, 345, 115 N.E.2d 762, 764 (1953), each respective court invalidated local zoning ordinances which barred nursery schools in residential districts because the ordinances had no relation to public health, safety, morals or the general welfare of the community. *Id.*

the family day-care home indistinguishable from the rest of the neighborhood, continued regulation of the number of children cared for is essential. Notwithstanding special provisions for large or group day-care homes for seven to twelve children,<sup>171</sup> the trend by states recognizing family day-care homes is to limit the number of children cared for to six or fewer for zoning purposes.<sup>172</sup> As a consequence, availability of day care has decreased. Therefore, state statutes should also provide for the zoning of large family day-care homes in residential neighborhoods. Included in the definitions of small and large day-care homes, the Model Law sets out the maximum number of children each home may care for. Because of the recognized difficulties in caring for more than twelve children in one home,<sup>173</sup> state statutes should limit large day-care homes to twelve or fewer children.

The land use techniques of local zoning ordinances, restrictive covenants and building codes present the greatest problems for large family day-care providers. Therefore, the Model Law requires local jurisdictions to classify large day-care homes as permitted uses of residential property for zoning purposes. The option of requiring permits is thus eliminated.<sup>174</sup> Instead, small and large family day-care homes are treated the same for zoning purposes. Of the jurisdictions which currently treat these large homes as permitted uses, none have encountered difficulties or neighborhood opposition in doing so.<sup>175</sup> The proposed modifications to California's day-care statute will eliminate many of the administrative problems associated with the provisions for large day-care homes.

When comprehensive zoning is implemented, its legislative goals must be enforced and carried out through either a licensing or registration system.<sup>176</sup> Because of the importance of the interest involved—children's welfare—a licensing system which promotes uniformity and quality of care seems the most appropriate mechanism to carry out the state's goals.<sup>177</sup> A licensing system works well with a zoning system because both are implemented by the use of state po-

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171. See APPENDIX § 1597.46

172. See generally D. COHEN, *supra* note 1.

173. See *supra* note 102.

174. See Appendix § 1597.46

175. Stevenson, *supra* note 98, at 4.

176. See *supra* note 129 and accompanying text.

177. Licensing requirements represent a basic floor of protection for all children in day care; this is a level of quality all day-care programs should meet in order to be permitted to operate. D. COHEN, *supra* note 1, at 49.

lice powers.<sup>178</sup>

Essentially, licensing is permission by the state to operate legally, and this permission is given after basic requirements are met.<sup>179</sup> In addition, licensing represents a state-established base line of quality and any program that falls below this line is subject to punishment.<sup>180</sup> According to one commentator, "These requirements are a floor of quality protecting all children."<sup>181</sup> Furthermore, state licensure provides a means whereby the state can periodically check the day-care homes to insure that high quality standards are maintained.<sup>182</sup> However, in order to encourage potential providers to offer needed day care, the Model Law's licensing provisions are limited to health and safety concerns. Critics of licensure focus on the administrative burdens and the inflexibility of licensing laws.<sup>183</sup> Thus, the licensing requirements must be written in a way that makes uniform interpretation possible by avoiding vague words such as "unique" and "appropriate."<sup>184</sup>

Regulation by way of licensing also helps to ensure quality of care by enforcing standards.<sup>185</sup> In addition, because the regulation of day-care homes for children is a legitimate state interest, the states should follow California's lead by not charging fees for a license, so that no financial burdens are placed upon the providers.<sup>186</sup> Included in the licensing provisions should be authority to inspect the potential home in order to ensure the premises are fit for their intended purpose.<sup>187</sup> Furthermore, to increase compliance with the program, statutes should make it illegal to operate family day-care homes without a license.<sup>188</sup>

In addition to requiring licensing of family day-care homes, the state also has a legitimate interest in ensuring that standards for family day-care homes are maintained. While no states currently provide for this, and no one definition of "quality" of family day

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178. Morgan, *supra* note 37, at 25.

179. *Id.* at 24.

180. *Id.*

181. *Id.*

182. Comment, *supra* note 64, at 79.

183. 2 RESEARCH REPORT, *supra* note 27, at 213, 214.

184. Morgan, *supra* note 37, at 23.

185. In support of licensing, one commentator stated: "Those of us who support licensing believe that children and their families have a right not to experience harmful conditions in early childhood programs, and the right to expect that children's developmental needs will be met." Morgan, *supra* note 37, at 23.

186. See, e.g., CAL. HEALTH & SAFETY CODE § 1597.55 (Deering Supp. 1985).

187. See CAL. HEALTH & SAFETY CODE § 1597.55 (Deering Supp. 1985).

188. *Id.*

care has been documented,<sup>189</sup> studies indicate that effective care giving skills can be learned through training.<sup>190</sup> Accordingly, requiring caregivers to have some type of educational training has been shown to make a difference in the kinds of experiences and opportunities available to children in family day-care homes.<sup>191</sup>

Furthermore, this author suggests that states adopt the proposal of the Family Day Care Home Study which recommends a credentialing system to complement the proposed licensing regulations.<sup>192</sup> Credentialing is another form of regulation aimed at achieving quality day care.<sup>193</sup> Under a credential system, day-care providers are certified as being competent to work with children.<sup>194</sup> Such a system would help to emphasize caregiver skills and provide a standard of excellence for parents concerned with the quality of care provided.

## V. CONCLUSION

Family day-care homes provide an essential service to contemporary families. Because of the increased participation of women in the labor force, fundamental changes have occurred within the traditional family structure. Two-job couples are now the norm, and the demand for child care has reached critical proportions. As the demand for day care is projected to increase over the next two decades, society must begin to recognize day care as an important social and economic concern.<sup>195</sup>

While family day-care homes are the most prevalent form of day care, they are often unable to operate openly due to exclusionary land use techniques. Local zoning ordinances that restrict single-family residences to biological families and restrictive covenants in deeds and mortgages have historically prohibited caregivers from operating. Although a few states have begun to recognize the scope of the day-care demand, change has been slow and non-uniform.

Consequently, a comprehensive statutory scheme pertaining to family day-care homes should be enacted under state zoning powers.

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189. See CAL. HEALTH & SAFETY CODE § 1597.61 (Deering Supp. 1985).

190. SUMMARY, *supra* note 4, at 53.

191. *Id.*

192. Collins, *Child Care and the States: The Comparative Licensing Study*, 38 YOUNG CHILDREN 3, 10 (1982-83). See APPENDIX § 1597.57.

193. Morgan, *supra* note 37, at 25. However, for a credentialing system to be effective, methods of measuring competency must be developed. *Id.*

194. SUMMARY, *supra* note 4, at 54-55.

195. Increases in the employment of women will more than offset the reduced number of births. SUMMARY, *supra* note 4 at 3.

Specifically, day-care homes ought to be considered single-family residences for zoning purposes because the use is essentially the same as that of other homes in the neighborhood. The goal of such legislation, "quality of care," may be realized by limiting the number of children cared for and by adopting a licensing system. Additionally, a credentialing program for day-care providers will help to improve and ensure the continued quality of care. Only state statutory recognition can emphasize the importance of family day-care homes and ensure their quality and prosperity.

*Lori E. Pegg*

## APPENDIX

*Model Law**Proposed Changes to California's Health and Safety Code*

## § § 1597.30-1997.63

§ 1597.30 The Legislature finds and declares:

- (a) It has a responsibility to ensure the health and safety of children in family homes that provide day care.
- (b) That there are insufficient numbers of regulated family day care homes in California.
- (c) There will be a growing need for child day care facilities due to the increase in working parents.
- (d) Many parents prefer child day care located in their neighborhoods in family homes.
- (e) There should be a variety of child care settings, including regulated family day care homes, as suitable alternatives for parents.
- (f) That the program to be operated by the state should be cost effective, streamlined, and simple to administer in order to ensure adequate care for children placed in family day care homes, while not placing undue burdens on the providers.
- (g) That the state should maintain an efficient program of regulating family day care homes that ensures the provision of adequate protection, supervision, and guidance to children in their homes.
- (h) *That the state should instigate notification procedures to make local jurisdictions aware of this legislation.*

§ 1597.35. *For purposes of this chapter, the following definitions shall apply:*

- (a) *“Department” means the State Department of Social Services.*
- (b) *“Director” means the Director of Social Services.*
- (c) *“Family day care” means regularly provided care, protection and supervision of 12 or fewer children, in the provider’s own home, for periods of less than 24 hours per day, while the parents or guardians are away, and includes the following:*
  - (1) *“Large family day care home” means a home which provides family care to seven to 12 children, inclusive, including children who reside at the home, as defined in departmental regulations.*
  - (2) *“Small family day care home” means a home which provides family day care to six or fewer children, including children who reside at the home, as defined in departmental regulations.*
- (d) *“Provider” means a person who operates a family day care*



*home and is licensed or registered pursuant to the provision of this chapter.*

§ 1597.40.

(a) It is the intent of the Legislature that family day care homes for children must be situated in normal residential surroundings so as to give children the home environment which is conducive to health and safe development. It is the public policy of this state to provide children in a family day care home the same home environment as provided in a traditional home setting.

The Legislature declares this policy to be of state-wide concern with the purpose of occupying the field to the exclusion of municipal zoning, building and fire codes and regulations governing the use or occupancy of family day care homes for children, except as specifically provided for in this chapter, and to prohibit any restrictions relating to the use of single-family residences for family residences for family day care homes for children except as provided by this chapter.

(b) Every provision in a written instrument entered into relating to real property which purports to forbid or restrict the conveyance, encumbrance, leasing, or mortgaging of such real property for use or occupancy as a family day care home for children, is void and every restriction or prohibition in any such written instrument as to the use or occupancy of the property as a family day care home for children is void.

(c) Every restriction or prohibition entered into, whether by way of covenant, condition upon use or occupancy, or upon transfer of title to real property, which restricts or prohibits directly, or indirectly limits, the acquisition, use, or occupancy of such property for a family day care home for children is void.

§ 1597.45

All of the following shall apply to small family day care homes:

(a) The use of single-family residence as a small family day care home shall be considered a residential use of property for the purposes of all local ordinances.

(b) No local jurisdiction shall impose any business license, fee, or tax for the privilege of operating a small family day care home.

(c) Use of a single-family dwelling for the purposes of a small family day care home shall not constitute a change of occupancy for purposes of Part 1.5 (commencing with Section 17910) of Division 13 (State Housing Law) or for purposes of local building codes.

(d) A small family day care home shall not be subject to the provi-

sions of Article 1 (commencing with Section 13100) or Article 2 (commencing with Section 13140) of Chapter 1 of Part 2, except the a small family day care home shall contain a fire extinguisher or smoke detector device, or both, which meets the standards established by the State Fire Marshal.

§ 1597.46

All of the following shall apply to large family day care homes:

(a) A city, county, or city and county shall not prohibit large family day care homes on lots zoned for a single-family dwellings, but shall:

(1) Classify these homes as a permitted use of residential property for residential purposes.

~~(2) Grant a nondiscretionary permit to use a lot zoned for a single-family dwelling to any large family day care home that complies with local ordinances prescribing reasonable standard restrictions, and requirements concerning spacing and concentration, traffic control, parking, and noise control relating to such homes, and complies with subdivision (d) and any regulations adopted by the State Fire Marshal pursuant to that subdivision. Any noise standards shall be consistent with local noise ordinances implementing the noise element of the general plan and shall take into consideration the noise level generated by children. The permit issued pursuant to this paragraph shall be granted by the zoning administrator, if any, or if there is no zoning administrator by the person or persons designated by the planning agency to grant such permits, upon the certification without a hearing.~~

~~(3) Require any large family day care home to apply for a permit to use a lot zoned for single-family dwellings. The zoning administrator, if any, or if there is no zoning administrator, the person or persons designated by the planning agency to handle the use permits shall review and decide the applications. The use permit shall be granted if the large family day care home complies with local ordinances, if any, prescribing reasonable standards, restrictions, and requirements concerning spacing and concentration, traffic control, parking, and noise control relating to such homes, and complies with subdivision (d) and any regulations adopted by the State Fire Marshal pursuant to that subdivision. Any noise standards shall be consistent with local noise ordinances implementing the noise element of the general plan and shall take into consideration the noise levels generated by children. The local government shall process any required permit as economically as possible, and fees charges for review shall not exceed the costs of the review and permit process. Not less than 10 days prior to the date on which the decision will be~~

~~made on the application, the zoning administrator or person designated to handle such use permits shall give notice of the proposed use by mail or delivery to all owners shown on the last equalized assessment roll as owning real property within a 100 foot radius of the exterior boundaries of the proposed large family day care home. No hearing on the application for a permit issued pursuant to this paragraph shall be held before a decision is made unless a hearing is requested by the applicant or other affected person. The applicant or other affected person may appeal the decision. The appellant shall pay the cost, if any of the appeal.~~

(b) A large family day care home shall not be subject to the provisions of Division 13 (commencing with Section 21000) of the Public Resources Code.

(c) Use of a single-family dwelling for the purposes of a large family day care home shall not constitute a change of occupancy for purposes of Part 1.5 (commencing with Section 17910) of Division 13 (State Housing Law) or for the purposes of local building and fire codes.

(d) Large family day care homes shall be considered as single-family residences for the purposes of the State Uniform Building Code Standards and local building and fire codes, except with respect to any additional standards specifically designed to promote the fire and life safety of the children in these homes adopted by the State Fire Marshal pursuant to this subdivision. The State Fire Marshal shall adopt separate building standards specifically relating to the subject of fire and life safety in large family day care homes which shall be published in Title 24 of the California Administrative Code. These standards shall apply uniformly throughout the state and shall include, but not be limited to: (1) the requirement that a large family day care home contain a fire extinguisher or smoke detector device, or both, which meets standards established by the State Fire Marshal; (2) specification as to the number of required exits from the home; and (3) specification as to the floor or floors on which day care may be provided. Enforcement of these provisions shall be in accordance with Sections 13145 and 13146. No city, county, city and county, or district shall adopt or enforce any building ordinance or local rule or regulation relating to the subject of fire and life safety in large family day care homes which is inconsistent with those standards adopted by the State Fire Marshal, except to the extent the building ordinance or local rule or regulation applies to single-family residences in which day-care is not provided.

(e) No later than April 1, 1984, the State Fire Marshal shall adopt

the building standards required in subdivision (d) and any other regulations necessary to implement the provisions of this section.

§ 1597.47.

The provisions of this chapter shall not be construed to preclude any city, county, or other local public entity from placing restriction on building heights, setback, or lot dimensions of a family day care facility as long as such restriction are identical to those applied to other single-family residences. The provisions of this chapter shall not be construed to preclude the application to a family day care facility for children of any local ordinance which deals with health and safety, building standards, environmental impact standards, or provisions of third chapter also shall not be construed to prohibit or restrict the abatement of nuisances by a city, county, or city and county. However, such ordinance or nuisance abatement shall not distinguish family day care facilities from other single-family dwellings, except as otherwise provided in this chapter.

§ 1597.52.

(a) Licensing reviews of care and services of family day care home for children shall be limited to health and safety considerations and shall not include any reviews of the content of any educational or training programs of the facility.

(b) No home shall be licensed or registered as a large family day care home after January 1, 1984, unless the provider has at least one year experience as a regulated small family day care home operator or as an administrator of a licensed child care center. The director may waive this requirement upon the finding that the applicant has sufficient qualifying experience.

§ 1597.53.

No family day care home for children shall be licensed under Chapter 3 (commencing with Section 1500), but shall be subject to licensure exclusively in accordance with this chapter and Chapter 34 (commencing with Section 1596.70) which shall apply to family day care homes.

§ 1597.531.

(a) All family day care homes for children shall either maintain in force liability insurance covering injury to clients and guests in the amount of at least three hundred thousand dollars (\$300,000) for each injury or death sustained on account of the negligence of the licensee or its employees, or a bond in the aggregate amount of three hundred thousand dollars (\$300,000). In lieu of the liability insur-

ance or the bond, the family day care home may maintain a file of affidavits signed by each parent with a child enrolled in the home which meets the requirements of this subdivision. The affidavit shall state that the parent has been informed that the family day care home does not carry liability insurance or a bond according to the standards established by the state. These affidavits shall be on a form provided by the department and shall be reviewed at each licensing inspection.

(b) The department shall initiate proceedings to revoke the license of any family day care home that is out of compliance with this section.

§ 1597.54.

All family day care homes for children, shall apply for an initial license under this chapter, except that any home which on June 28, 1981, had a valid and unexpired license to operate as a family day care home for children under other provisions of law shall be deemed to have a license under this chapter for this chapter for the unexpired term of the license at which time it may be renewed upon fulfilling the requirements of this chapter.

An applicant for initial licensure as a family day care home for children shall file with the department, pursuant to its regulations; an application on forms furnished by the department, which shall include, but not limited to, all of the following:

(a) A brief statement confirming that the applicant is financially secure to operate a day care home for children. The department shall not require any other specific or detailed financial disclosure.

(b) Evidence that the small family day care home contains a fire extinguisher or smoke detector device, or both, which meets standards established by the State Fire Marshal under subdivision (d) of Section 1597.46.

(d) Evidence of a current tuberculosis clearance for any adult in the home during the time that children are under care.

(e) Such other information as may be required by the department for the proper administration and enforcement of this chapter.

§ 1597.55.

No site visitations, or unannounced visits or spot checks, shall be made under this chapter except as provided in this section.

(a) A site visitation shall be required prior to the initial licensing of the application.

(b) An unannounced site visitations shall be required for the renewal of a license.

(c) A public agency under contract with the department may make

spot checks if it does not result in any cost to the state. However, spot checks shall not be required by the department.

(d) The department or licensing agency shall make an unannounced site visitation and a follow-up visit on the basis of a complaint.

(e) In addition to any site visitation or spot check authorized under this section, the department shall annually make unannounced visits on 10 percent of all family day care homes for children licensed under this chapter. The unannounced visits may be made at any time, including the time of a request for a renewal of a license.

§ 1597.57.

The department shall do all of the following:

(a) Develop and utilize one application form for all family day care homes for children requesting a new license or a renewal of a license.

(b) Establish for parents a consumer education program annually on the laws and regulations governing family day care homes for children under this chapter and the role of the state and other public entities and local associations in relation to family day care homes for children. In planning this program, the department shall seek the assistance of other public entities and local associations.

(c) Administer an orientation program for new operators of family day care homes for children which may be conducted directly by the department or by contract with local governments or family day care home associations.

§ 1597.58.

Each license issued or renewed pursuant to this chapter shall expire three years from the date of its issuance.

Application for renewal of a license shall be filed with the department not less than 30 days prior to the expiration date. Failure to submit a renewal application prior to that date shall result in expiration of the license.

§ 1597.60.

No fee shall be charged by the department for the initial issuance or renewal of a license or for processing any application therefore under this chapter.

§ 1597.61.

(a) When the department determines that a family day care home for children is operating without a license and notifies the unlicensed provider of the the requirement for the license, the licensing agency may issue a cease and desist order only if it finds and documents that

continued operation of the facility will be dangerous to the health and safety of the children. In all other cases where the licensing agency determines such a facility is operating without a license and notifies the unlicensed provider of the requirements for the license, the licensing agency may issue a cease and desist order only if the unlicensed provider does not apply for a license within a reasonable time after the notice.

(b) If an unlicensed family day care home fails to respond to a cease and desist order issued pursuant to subdivision (a), or if the department determines it necessary to protect the immediate health and safety of the children, the licensing agency may bring an action to enjoin such a home from continuing to operate.

(c) The district attorney of a county shall, upon application by the department, institute and conduct the prosecution of any action brought by the licensing agency against an unlicensed family day care home located in that county.

(d) Any action brought by the division against an unlicensed family day care home shall not abate by reason of a sale or other transfer of ownership of the family day care home which is the party to the action except with written consent of the licensing agency.

\* omitted § 1597.62 regarding the California Pilot registration project.

§ 1597.62.1.

Family day care homes which, on December 31, 1983, have a valid unexpired registration to operate as a family day care home for children pursuant to Section 1597.62 in one of the pilot counties shall be deemed to be issued a family day care license effective January 1, 1984. Licensure pursuant to this section shall not require a visit pursuant to the requirement set forth in subdivision (a) of Section 1597.55. However, all other requirements of licensing shall continue to be met. Complaint and revocation procedures may be enforced. The department shall establish a schedule of expiration dates for licenses issued pursuant to this section. Licenses issued pursuant to this section shall be eligible for renewal under the license renewal procedures contained in Section 1597.58. All requirements of family day care licensing shall be met at the time of renewal.