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A Child Care Advocacy Guide to Land Use Principles



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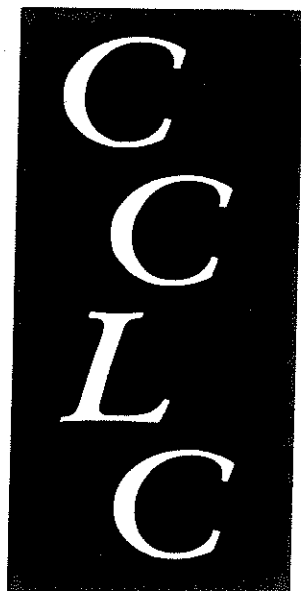
ABOUT THE CHILD CARE LAW CENTER

The Child Care Law Center (CCLC) is a national nonprofit legal services organization that advocates to make high-quality, affordable child care available to every child, every family, and every community. Founded in 1978, CCLC is the only organization in the country devoted exclusively to the complex legal issues that affect the establishment and provision of child care. As a legal services organization, we play a number of related roles. We provide legal information and referral services to over 900 people each year, represent clients in cases with a broad impact, and work with other organizations on policy development and advocacy. We place a high priority on collaboration with other advocates in all our work. Our diverse substantive work includes public benefits, disability rights, housing, economic development, regulation and licensing, and land use. For more information visit our website at www.childcarelaw.org

This manual was authored by the legal staff of the Child Care Law Center, and is part of a larger set of materials for the National Economic Development & Law Center's Local Investment in Child Care Project (LINCC). We take full responsibility for the content, including any errors or omissions. We would like to express our appreciation for the efforts of the many CCLC staff and legal interns who were involved in bringing this publication to fruition, and in particular to our colleague, Abby Cohen, without whom this manual would not have been possible. We would also like to thank the David and Lucile Packard Foundation for the support of our work on the LINCC Project.

This report is designed to provide accurate information on the topics covered as of May 2003. It is made available with the understanding that the Child Care Law Center is not rendering legal advice. If legal assistance is required, the services of a competent lawyer should be sought. As with any report, be certain to check that the information contained in the report remains current.

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INTRODUCTION

Child care is a vital service to families and to communities. It furthers family self-sufficiency and has the potential to promote child development for those children in out-of-home care, two critically important goals for healthy and thriving communities. Despite an increasing need for programs and providers, demand for child care continues to outstrip supply. There are many barriers to expansion, including a shortage of trained teachers and caregivers, and a dearth of fiscal resources. Fortunately, some barriers – in particular, those we call land use restrictions – often can be remedied more readily than others by parents, child care providers and community advocates.

What are these land use restrictions that limit child care supply? Throughout the nation's cities and counties, numerous legal restrictions are placed on properties that prohibit the inhabitants from using their property in a certain manner. These restrictions come from many different sources – from local planning and zoning commissions, property owners' associations, and landlords, to name just a few. Although agreements regarding land use can be used affirmatively to help nurture the child care industry, in many instances these restrictions serve to limit child care providers' abilities to operate out of their homes or out of commercial space. Often, these local restrictions are illegal; however, too few child care providers are knowledgeable about California's state law protections and so the illegal practices continue unabated. In other instances, the local restrictions are simply the result of poor policy choices and can be remedied by marshalling the facts and organizing a supportive constituency.

The purpose of this manual is twofold. First, it is intended to serve as a resource on the law surrounding land use and child care, including both family child care homes and child care centers. Second, it discusses how to ensure that the law is being followed when it is supportive of child care, and how the law can be changed when it is unfavorable to child care. Armed with knowledge and tools, we believe that parents, providers and their advocates, including community planners, can minimize and even eliminate land use barriers. These efforts will help to bring within reach the goal of having an adequate number of child care facilities in every community.

General Plans

Chapter I of this manual addresses a tool used by many communities when making long-term planning decisions—the general plan. General plans are documents that detail a city or county's planning objectives and consequently can be helpful to advocates. Because a general plan is the foundation upon which all community development decisions are made, incorporating child care into a general plan can help ensure that child care will be considered during every major planning step that a city or county takes. Since general plans are the foundation for community planning, advocates may find it useful to first look at their city's general plan. Once an advocate determines what role child care plays, if any, in the general plan, the advocate can begin to rally support for more attention to child care in the planning process and to the effects that new developments have on the supply and quality of child care. Chapter I provides a primer on

general plans and discusses ways in which advocates can influence the general plan to provide more support for new and existing child care facilities.

Zoning Ordinances

Zoning ordinances are one of the ways in which policy objectives listed in the general plan are implemented. Zoning ordinances are local rules that govern how various areas in a community (called zones) can be used. For example, a business generally cannot operate within a residential zone. Zoning ordinances affect child care programs by prohibiting them from operating within certain locations. A community may, for instance, try to prevent family child care homes from operating in residential areas. In California, such an ordinance would be illegal, as state law preempts (overrides) local zoning rules as applied to family child care homes. However, other zoning ordinances that in some way limit the provision of child care may be permitted under California law. Therefore, advocates can help to educate local lawmakers on the importance of child care to everyone in the community and encourage them to repeal restrictive zoning ordinances. In addition, advocates can work to make local ordinances that require child care providers to obtain a child care permit a less onerous and costly process.

Oftentimes, zoning rules are detrimental to child care; however, some zoning ordinances can actually make it easier for child care providers to establish a facility. For example, by permitting child care centers to operate in "light industrial" areas that are safe for children, child care centers can open where once they were not allowed. By working with existing zoning ordinances and by helping to create new and less restrictive ordinances, advocates can assist in opening up more areas of the community to child care providers, while at the same time ensuring that the areas where these facilities are located are safe for children. Chapter II provides a background on zoning law in general and then discusses how it pertains to child care. After addressing preemption issues, it provides suggestions on how advocates can work to help child care providers understand the current laws, and how advocates can encourage lawmakers to adopt more child care-friendly zoning ordinances and procedures.

Rental Properties

Moving beyond the macro planning level, Chapter III discusses the relationship between tenants who provide child care services and their landlords. Unfortunately, landlords often do not want their tenants to provide family child care in their homes. California state law protects family child care providers to some extent from landlords who wish to prevent their tenants from offering such services. Child care centers, located in commercial areas, do not receive similar protection. However, even those providers that are protected under the statutes may find it difficult to establish or maintain their child care homes. Landlords often (and illegally) create special rules for such tenants and may seek to evict them. Advocates can help to ease the tensions in landlord-tenant relations by educating both landlords and child care providers about the law, and about ways in which all parties involved can coexist "peacefully." Advocates can also help to provide legal advice in the unfortunate event that a tenant faces eviction. Chapter III focuses on both current statutory protections for tenant-child care providers and on ways to ensure that tenants meet with less resistance when they seek to establish a family child care home.

Restrictive Covenants

Finally, Chapter IV discusses the relationship between restrictive covenants and child care. Restrictive covenants are agreements between property owners to use or not use their property in a certain way. Just as in the landlord-tenant context, California statutorily protects family child care providers from covenants that effectively prevent them from offering child care services in their homes. Despite such protection, however, many property owners and property owners' associations still try to prevent family child care homes from operating in the neighborhood. Advocates can help alleviate this problem by educating child care providers and their neighbors about the restrictive covenant preemption law, and about ways in which a family child care home will affect the neighborhood. In reality, because family child care homes are restricted in the number of children they may serve, such homes are quite small and the effects on the neighborhood are minimal. In addition, child care providers and the neighbors can work together to further minimize any effects there may be. After providing a legal background regarding restrictive covenants, Chapter IV discusses strategies to help both family child care homes and child care centers (which enjoy fewer protections) to be a more welcomed part of the community.

Adequate child care facilities are crucial to a community's well-being. By having child care facilities that are safe, affordable, and conveniently located, more parents are able to work and support their families without concerns about their children's well-being. Because parents have diverse jobs that are located in all parts of a city and that require work at all hours of the day and night, it is important to have equally diverse types of child care. This includes child care that is located in residential neighborhoods (e.g., family child care homes) and child care centers that are located near office buildings, retail centers, and factories. The community's needs are not truly met until quality child care is accessible to everyone who needs it. The goals of this manual are to educate advocates on the laws governing land use and child care facilities, and to help advocates to understand ways they can work within the law to help child care providers, as well as ways they can help to change the law to make communities more welcoming for child care.

CHAPTER 1: INCLUDING CHILD CARE IN A GENERAL PLAN

Overview

If communities are to succeed in increasing child care capacity, they must undertake long-range child care planning as part of their overall planning process. Planning for child care has tended to occur, if at all, within the local child care planning council, a group separate from the general economic and community planning that goes on in other agencies. Although there are advantages to having people knowledgeable about children and child care spearhead child care planning, this approach does not necessarily result in recognition of child care as an important part of the community infrastructure. Furthermore, isolating child care allows the governmental bodies that engage in more traditional planning to proceed on the assumption that they are free to ignore the child care issue, as they assume it will be addressed elsewhere.

Local LINCC counties, as well as other child care advocates,¹ have attempted to connect community and child care planning by advocating for inclusion of child care in communities' general plans. As the general plan is the foundation for development upon which all land use decisions are based, planning bodies must take into account all general plan provisions in their strategic decisions. Including child care in the general plan not only compels planners to determine and enunciate their child care objectives at the outset, but it also places child care into the long-range growth strategy of the community. Because all subordinate land use actions must be consistent with the general plan,² inclusion of child care in the general plan ensures that the need for child care is reflected in each stage of the development process and accommodated for as specified in the general plan. In other words, involvement in the development of the general plan and its constituent elements presents the opportunity to:

- Make child care as important as other considerations when long range planning occurs;
- Develop a legal basis for requesting that child care needs be considered before building permits, site permits, subdivision and other land use approvals are given;
- Develop a legal basis for zoning ordinances that would be favorable to the establishment of child care; and
- Educate decisionmakers and the public about the need for and importance of planning affirmatively for child care.

Part II of this chapter discusses the term general plan first and then describes the legal requirements for a plan's creation and amendment. Part III discusses general strategies that advocates can use when taking on planning issues as they relate to child care. Part IV lists and discusses six specific options for implementing child care policies into a general plan. Finally, Appendix B contains portions of various general plans that advocates may find useful when beginning work in this area.

I. Legal Background

A. What is a General Plan?

California law requires each county or city planning department to prepare, for adoption by the local legislative body, a “comprehensive, long-term general plan for the physical development” of the jurisdiction.³ The general plan serves as a “constitution” for future community development, and all land use approvals must be consistent with it.⁴ Every general plan must include a statement of development policies, as well as diagrams and text setting forth objectives, principles, standards, and plan proposals.⁵

1. Required Elements

State law requires that a general plan address seven specific issues, called “elements”:⁶

- **Land Use**: As the central framework for the entire plan, the Land Use element identifies the proposed general distribution of land for uses such as housing, business, industry, open space, natural resources, public facilities, and waste disposal sites. This element must include population and building density standards for all territory covered by the plan.
- **Circulation**: This element discusses the location and extent of, among others, present and future thoroughfares, transportation routes, terminals, and public utilities and facilities.
- **Housing**: The legislature has given special priority to this element, requiring much more detail in what it must cover than is required for other elements. The housing element must analyze existing and projected housing needs, identify possible housing sites, and address the housing needs “of all economic segments of the community.”⁷ More specifically, this element must include “quantified objectives and policies relative to the maintenance, preservation, improvement, and development of housing,”⁸ as well as a schedule of actions the local jurisdiction will take to achieve the goals and objectives of the housing element. The housing element must be revised at least once every five years;⁹ other mandatory elements of the general plan need only be reviewed periodically and revised when warranted by changed circumstances.
- **Conservation**: This element addresses the use, development, and conservation of natural resources.
- **Open-space**: Local jurisdictions use this element to govern the preservation and conservation of open land.¹⁰
- **Noise**: After identifying and appraising specific noise problems in the community, planners must develop land use patterns that will minimize residents’ exposure to excessive noise.
- **Safety**: The safety element establishes policies and programs to protect the community from seismic, geologic, flood, and fire hazards.

2. Additional Elements

Counties or cities may include additional elements that relate to the physical development of the community.¹¹ All elements, whether mandatory or optional, carry equal legal status; by statute, all elements of any general plan must be “integrated, internally consistent and compatible.”¹²

Child care can be, and in some localities is, one of these added elements. Once included, it carries weight equal to all other plan elements, compelling city planners to articulate their child care objectives at the outset and incorporate child care into the community’s long-term growth strategy. For the city, it reflects a legally binding commitment to child care in all planning decisions. Because all subordinate land use actions must be consistent with the general plan,¹³ including a child care element ensures that the need for child care is reflected in each stage of the development process, including, for example, the granting of building and site permits and the approval of subdivisions plans. Furthermore, it provides a legal basis for zoning ordinances that favor the establishment of child care.

B. Adopting and Amending the General Plan

State law requires that the general plan be adopted or amended by resolution of a local legislative body,¹⁴ typically a County Board of Supervisors or a City Council. Several steps precede this action, however. The local planning agency is a governmental department whose staff manages day to day planning within the local jurisdiction. Typically, the planning agency or department is overseen by a planning commission – a panel of individuals, often appointed by elected officials, who review and authorize local planning department decisions. The local planning commission will make recommendations concerning the plan after the plan and its proposed elements have gone through several levels of assessment and review.

Community involvement is especially important to the development and review process. The planning agency in charge of this process must provide “opportunities for the involvement of citizens, public agencies ... civic, education, and other community groups”¹⁵ A child care planning council or resource and referral agency can be considered such a community group, given the responsibility of these organizations to help plan for adequate and affordable child care. In addition, before a local planning commission recommends amendment or adoption of a general plan, it must hold at least one public hearing and notify the public of its intent to vote on the issue at least ten days before the meeting.¹⁶ Similarly, before voting on final adoption or amendment, the local legislative body must hold a public hearing and notify the community of its intent to vote on the issue.¹⁷ To encourage robust community participation, any local jurisdiction adopting or amending a general plan should notify a variety of public agencies – including school districts and “any areawide planning agency whose operations may be significantly affected by the proposed action” – regarding the proposed plan amendment.¹⁸ Finally, the planning entity that recommends approval of amendments to the general plan must establish means by which “any interested party [can] file a written request for a hearing by the legislative body ... after the planning agency acts on the proposed amendment.”¹⁹

Although jurisdictions infrequently modify their general plans due to the lengthy and arduous process involved, state law nevertheless prevents jurisdictions from repeatedly modifying their plans. In particular, a local government may not modify mandatory elements in a general plan

more than four times in one year, unless amendments are necessary to: (1) develop low- or moderate-income housing; (2) comply with a court decision; (3) maintain consistency with an airport plan; (4) accommodate a large scale urban development plan, as defined by California Health & Safety Code Section 56032(d); or (5) develop a local coastal protection program.²⁰

Notwithstanding the limitations described above, a local jurisdiction has considerable discretion to decide how and whether to amend the general plan. To understand better how general plan modification works in your community, contact the local planning department or legislative body.

II. General Advocacy Strategies

LINCC advocates have found that convincing the local jurisdiction to include child care in a general plan involves several strategic steps. First, advocates must learn how the local planning process operates and how, if at all, the local jurisdiction handles child care in planning decisions. Second, and perhaps most importantly, the advocate should determine the extent of the community's particular child care needs. This is especially important when educating local planning and elected officials about why child care is a critical component of quality community development and when proposing specific language to key politicians and planners. Finally, advocates should begin to develop recommendations for amending general plans to meet the community's need for child care. The final part of this section provides an overview of advocacy strategies.

A. Examining the Local Planning Process as it Relates to Child Care

Before developing specific proposals or approaching local officials about the need to address child care in the general plan, advocates should review the plan to see how and whether the jurisdiction views child care as part of its overall planning strategy. If a child care advocate – or any other member of the general public – wishes to obtain a copy of the local general plan, the city or county must make a copy available. The local jurisdiction may charge a fee for a copy of the general plan.²¹ General plans can be quite bulky, and certain elements – such as the conservation element – are not particularly relevant to child care. Hence, some LINCC advocates have started their general plan work by reviewing the local general plan and outlining either plan elements that specifically refer to child care or elements in which child care concerns might be best addressed. Such outlines can help advocates understand what child care considerations are absent from the plan and how to structure specific recommendations to address identified deficiencies.

Local jurisdictions take different approaches to organizing their general plans. For example, the Santa Cruz County general plan addresses each required element through a series of broadly worded objectives. It then explains each objective through several policy statements and program ideas for implementing the objective. Hence, when drafting a general plan amendment to address child care concerns in Santa Cruz County, advocates would want to clarify the intent of a broad child care objective through policy and program statements and through explanations of how the objective would be pursued within the jurisdiction. An excerpt from the Santa Cruz

County General Plan, Parks and Recreation, and Public Facilities Element is included below for illustrative purposes.²² Please keep in mind when reading through these examples that they are not meant to be “model” plans, as each community will have different needs that need to be addressed in different ways. Instead, these plans are illustrative of how various communities have incorporated child care into their general plans.

Objective 7.14 Child Care

To ensure that adequate child care facilities and services are provided as an essential public service as part of new development and to alleviate current critical child care shortages.

Policies

7.14.1 Mitigating Impacts From New Development

Review development proposals with respect to their impact on child care; require, where appropriate, that proposed developments provide for mitigation of the impact of the proposed development on the need for child care facilities or services, as a condition of project approval.

7.14.2 Child Care Facilities With Parks

Consider the development of child care facilities within existing and future County parks.

7.14.3 Financing Child Care

Maintain a Child Care Fee for new and expanded development to finance child care facilities and services.

Programs

- a. Support child care programs and the Children’s Commission of Santa Cruz County in long-range planning to assess enrollment and facility needs, and to initiate a site identification and acquisition program. Develop a mechanism to obtain and preserve planned child care sites. (Responsibility: Planning Department, Human Resources Agency, Board of Supervisors)
- b. Develop and administer a method by which the payment of fees, the development of facilities, or a combination thereof is required, as appropriate, to mitigate child care shortages. (Responsibility: Board of Supervisors, County Administrative Officer, Planning Department, County Counsel, Human Resources Agency)

In contrast to Santa Cruz, other jurisdictions have multiple objectives for each issue and consequently, the objectives are more specific. For example, in the San Diego County General Plan, there are three objectives listed under the child care section.²³ For each objective, various policies and corresponding implementation measures are listed. Thus, an advocate in San Diego County would want to make sure that proposed objectives are narrow and that they are linked with effective policy goals and implementation measures. Finally, other jurisdictions, such as Orange County, provide a brief overview to the targeted problem or area of focus before providing goals, policies, and implementing programs.²⁴

B. Evaluating Local Child Care Needs

In addition to advocating the importance of child care generally, it is critical to evaluate the situation locally. A specific understanding of local needs will enable advocates to craft general plan provisions best suited to meet demand. Such an assessment can also show local planners,

business leaders, and officials that community needs are not addressed by the current child care supply, thus building support for positive modifications to the general plan. Finally, an evaluation will help local child care providers decide whether expansion of their programs – or opening new programs – makes good business sense.

Frequently, facilities development advocates will find that the local child care planning council has already evaluated the community's child care infrastructure. Even if more research and analysis is necessary, both the local planning council and the resource and referral agency will have information vital to a thorough evaluation. Rather than duplicating work already done, advocates should coordinate with these agencies to determine what, if any, considerations need to be researched.

Some local jurisdictions have undertaken a separate evaluation process. Before passing its first general plan in 1990, the City of West Sacramento produced a report on child care needs and resources. This report became part of the *Draft General Plan Background Report* that the City published before the City Council reviewed, and ultimately approved, a general plan that included a child care element. The report started with an overview of the child care industry, including the types of care available, the role of subsidies, land use policies affecting child care development, and quality issues.²⁵ The authors also reviewed the availability of, demand for, and cost of care in West Sacramento specifically, and summarized the results of a parent survey concerning needs and current child care usage. The report included an estimate of future child care demand, which, not surprisingly, was expected to increase over the coming years.

Other jurisdictions, rather than incorporating a report by reference, have included basic data regarding the demand for and supply of child care within the general plan itself. Both San Diego and Orange Counties introduce the child care sections of their general plans with descriptions of current industry conditions.²⁶

If local advocates lack the resources to conduct even a scaled-down evaluation, another option might be to create a general plan provision that requires a local government agency to assess child care needs. For example, in general plan segments concerning land use, the local government might pass an amendment that states:

The planning department shall, by _____ (date) _____, conduct an assessment of child care needs and resources in this jurisdiction. Such assessment shall cover, but need not be limited to, the supply of licensed child care by neighborhood, current demand for child care (including preferences for various types of care) by residents and persons employed in this jurisdiction, availability and utilization of license-exempt child care programs, projected demand for child care in the coming years, current zoning limitations upon child care facilities development, any license fees or local business taxes upon child care providers, local employer support for child care, and resource needs of the child care community. Such assessment shall be coordinated with the local child care resource and referral agency and use available data from that agency. Planning department staff shall present the results of this assessment, along with staff's recommendations for

addressing any needs found to exist within the community, within 3 months after the assessment report is issued.

C. Explaining the Importance of Including Child Care Issues in the General Plan

In some communities, the process of approving or amending the general plan can be a highly politicized process; in others, local planning department officials who are outside the political arena act as gatekeepers in regard to what provisions are added. Therefore, before turning to the specifics of weaving child care concerns into a general plan, it is important to note that convincing local officials and/or planners of the importance of child care planning is a key element to advocacy. Fortunately, there is a great deal of evidence of both the beneficial effects of sound child care planning for communities and the economic importance of the child care industry.

Research shows that child care benefits society in numerous ways.²⁷ High quality child care promotes the healthy development, safety, and well-being of children, regardless of parental work status. It leads to increased success in school for disadvantaged children who might not succeed otherwise and helps to prevent delinquency and crime. It enhances the productivity of workers who are also parents by diminishing tensions between work and family responsibilities, and broadens access to employment, thereby reducing welfare dependency. By supporting parents in their dual roles as parents and workers, child care enables children to benefit from reduced poverty and family stress. Universal early childhood services can strengthen appreciation for diversity and promote equity among classes, levels of ability, racial and ethnic groups, and generations.

As LINCC counties have demonstrated in their Economic Impact Reports,²⁸ the licensed child care industry is a major contributor to community economic well-being and growth. In Los Angeles County, it is a \$1.38 billion industry that creates or sustains 64,197 jobs. Recent studies²⁹ document numerous positive economic impacts, including:

- Job creation: Child care programs create jobs both directly, within the industry itself, and indirectly, in industries such as business services, retail trade, and wholesale trade. For every \$1 million that consumers spend on licensed child care operations in a given county over a one-year period, as many as fifty jobs can be created. In California, direct child care employment is comparable in size to employment in the motion picture and air transportation industries;
- Local effects: Virtually all jobs supported by child care remain in the local community;
- Increased worker productivity: Licensed child care increases worker productivity as parents are able to concentrate on their jobs, rather than on child care issues, during working hours;
- Increased commercial productivity and economic competitiveness: Like transportation policies and investments that relieve traffic congestion, local policies and investments which increase the supply of licensed child care improve the productivity of all industries and increase overall economic competitiveness; and

- General positive economic impact: Investing in child care supply-building can increase labor force participation among low-, moderate-, and middle-income families, leading to direct increases in output, personal income, business formation, and property and sales tax revenues.

Educating local planners and officials about the reach of these impacts can turn resistance into enthusiastic support for child care planning, thus making the general plan amendment process easier for child care advocates.

D. Developing Recommendations for the Local General Plan

After garnering some support for the concept of child care development locally, learning how planning decisions are made, and evaluating local child care infrastructure needs, advocates must turn to the task of convincing the local legislative body to include child care considerations in the general plan. Many have found that proactively offering specific language for particular locations within the general plan reduces potential resistance to plan amendment. Other advocates have formed committees – comprised of representatives of provider associations, resource & referral agencies, Head Start programs, planning departments, school districts, and labor groups– to help develop this type of specific language.³⁰ This strategy has the added benefit of creating a group of individuals who understand both the general plan process and child care needs. As a result, they are able to give persuasive public testimony on the importance of including child care in the general plan.

1. Including Child Care in a General Plan

As mentioned above, any general plan must include each of the seven mandatory elements and may add others at the discretion of the local government. Child care can be included either as a subsection of an existing element or as a separate element. Due to the internal consistency requirement,³¹ as long as child care is placed somewhere in the general plan, all other elements must be compatible with the child care provisions. Having child care as a separate element suggests that it stands on an equal footing with other elements. On the other hand, including child care in existing elements explicitly demonstrates the connections between child care and other planning issues and increases the likelihood that staff assigned to implement policies within a particular element will embrace child care issues as well. Deciding where to include child care in the general plan will also depend on how the particular city or county's general plan is structured, how each element is used, and a determination on the advocate's part of which location is most logical. On balance, the location of the proposal is probably less important than the substance.

2. Drafting Language Pertaining to Child Care

When drafting language for the general plan, advocates should keep several guidelines in mind. For each provision, the proposal should identify, with as much specificity as possible, the particular action to be completed and the party responsible. Mandatory language such as "shall" is much better than discretionary language such as "may" or "might" for ensuring that planning items are actually carried out.

Where possible, the general plan language should mandate completion of actions implementing its provisions by a particular date. When dealing with facility development specifically, recommended language should cover the standards, permit processes, approval body, and other relevant considerations. If adoption of an ordinance is inappropriate or impossible – e.g., because research or a study is to take place – advocates should specify when and to whom results must be reported. Depending on the jurisdiction, the above mentioned details may not be included within the general plan itself. Some cities develop a separate implementation plan with actions, timelines, and staff responsibilities to accompany a broadly-worded general plan provision.

In developing substantive planning programs to amend the general plan so that it addresses particular local child care needs, several LINCC advocates referred to the American Planning Association (“APA”) Policy Guide’s suggestions for child care planning.³² Specifically, the APA recommends:

- “[T]he inclusion of child care policies as part of local planning”;
- Legislation protecting “small child care homes as permitted land uses in all zoning districts,” and state preemption of local legislation prohibiting such use;
- The removal of obstacles to child care in all zoning districts that are appropriate and safe for children;
- Offering developers “incentives to provide space for child care in all types of projects, residential, office, mixed use, and commercial”;
- Assessment of and planning for child care needs at the state and local level;
- Zoning ordinances providing “for child care in locations convenient to neighborhoods and in public facilities, such as schools, recreation and social service centers, and subsidized housing projects”; and
- Federal and state legislation providing “adequate funding for safe, convenient and affordable child care opportunities for all children.”³³

3. Local Example

The City of San Clemente’s general plan provides an example of a general plan that mandates research into issues of child care. It includes a broadly-worded objective that is explained through a series of policies, each of which refers to several implementing measures. Each implementing measure, in turn, articulates a concrete action to be taken, the department responsible for carrying out the action, the source of funding to cover it, and a schedule for completion of the action. As an example, the City included a child care objective to “contribute . . . to the future development, implementation, and management of a successful child care network within the community.”³⁴ One policy to support this objective reads:

Policy 7.18.1: Determine the need for child care facilities within the community while identifying the condition of existing facilities and services (*I 7.44 and I 7.45*).³⁵

The above policy refers to two implementing measures: 7.44 and 7.45. 7.45 provides:

Poll and interview a selected percentage of local child care providers and patrons (either through written questionnaires, telephone interviews, or other appropriate methods) in an effort to help monitor and analyze the specific needs of this segment of the community.

Responsibility: City of San Clemente Beaches, Parks and Recreation
Departments/Community Development Department.
Funding Source: City of San Clemente General Fund and/or other available
funding sources approved by the City.
Schedule: As necessary to implement program I 7.44. [A study that
must be completed within five (5) years of General Plan
adoption.]³⁶

Hence, this general plan supports the attainment of its policies and objectives with specific action items that assign responsibility for completing the action to a particular department by a particular date, and further identifies sources of funding for the necessary work.

III. Specific Options for Implementing Child Care Policies in General Plans

Using the above mentioned principles as well as local information, California advocates have pushed for a variety of general plan provisions that affect the development of child care facilities in their local communities. Although differences in wording exist, these provisions fall into six broad (and often overlapping) categories. Advocates seeking to include child care concerns in their local general plans may want to review these options when developing their proposals.

A. Require Planners to Consider Child Care in Reports, Surveys, and Studies

Some advocates have stressed the importance of compelling local planners to gather data on child care demand as part of adequate city planning. Some jurisdictions, recognizing the importance of such data, have made reporting on child care needs a continuing priority. The City of West Sacramento general plan requires the city to “monitor child care supply and demand in West Sacramento on an ongoing basis and implement programs to address shortfalls as necessary.”³⁷ The City of San Clemente developed an excellent general plan proposal for a child care needs study that provides:

Conduct a comprehensive study of the needs for child care, identifying public and private day care services and facilities that are currently operating and needed within the City, and ... propose the implementation of those policies and programs which are deemed to be appropriate and feasible.

Responsibility: City of San Clemente Beaches, Parks and Recreation
Department and the Community Development Department
Funding Source: City of San Clemente General Fund and/or other available
funds approved by the City.

Schedule:

Within five (5) years of General Plan adoption or as funding permits.³⁸

Advocates may find it useful to draft language to be placed in the general plan mandating that research be done into the community's child care needs. By placing such language directly in the plan, city planners demonstrate their commitment to ensuring that child care supply meets demand.

1. "Existing Conditions" Documents

Just as gathering child care data for the jurisdiction as a whole is a prudent planning policy, including child care concerns in any "existing conditions" documents mandated by the general plan for specific neighborhoods or areas is important as well. Existing conditions reports can describe in detail the land uses, density, appearance, traffic patterns, economic vitality, safety issues, and/or natural resource preservation of a particular area. Requiring planners to describe child care in the context of these community concerns – or, alternatively, evaluating the community's child care infrastructure across the jurisdiction – can create a future basis for proposing new child care policies that address the deficiencies detailed in the documents. Existing condition reports should describe current child care facilities, support services for child care providers, and community demand for care. The ideal survey would be detailed enough to address quality issues as well.

2. Environmental Impact Reports

The general plan might also mandate that environmental impact reports specifically address a prospective development's impact on child care supply. Unlike existing conditions reports, which describe current community conditions, an environmental impact report generally evaluates a specific proposal for its effect on noise, traffic, density, the environment, housing, educational facilities, and other community infrastructures. With this information, the community can plan to mitigate, or address, those impacts. As an example, the County of Alameda incorporated a requirement in its general plan that "[t]he County shall consider the effects of major development projects on the supply of child care through the environmental review process"³⁹

Even if the local jurisdiction does not specifically mandate that an environmental impact report detail a prospective development's effect on child care in particular, planners may link traffic impacts with availability of child care. For example, planners can anticipate that a large office development will include a substantial percentage of workers who use child care. If child care facilities are unavailable at the office site, these employees will be making extra trips to take their children to child care. The environmental impact report can detail this effect on local traffic and require the developer to mitigate any adverse impacts.

Considering child care supply and demand in planning reports and surveys ensures that this important issue remains in the forefront of local policymakers' minds, and that it will not be overlooked when major planning decisions are made.

B. Require that Local Land Use Ordinances and Planning Codes Reduce Barriers to Child Care

One of the most efficient ways to promote child care is to ensure that land use policies do not serve as barriers to child care facilities development. Removing land use barriers has the added benefit of lowering child care facilities' development costs. California law limits the ability of local jurisdictions to prohibit certain child care facilities in various zones, preempting local authorities in certain land use decisions affecting child care. Although this preemption statute is discussed in more detail in Chapter 2, it is worth noting here that the statute affects land use planning that governs both small and large family child care homes.⁴⁰

In the past, state law limited small and large family child care homes to the care of six and twelve children, respectively. The law has recently been amended to allow family child care providers to serve up to eight and fourteen children, respectively.⁴¹ Many jurisdictions whose zoning ordinances state the number of children who may be served, rather than using the terms "small and large family child care," have not amended their local ordinances to reflect the additional two children now allowed. Such ordinances violate state law.

Some LINCC partners have advocated for ordinance amendments to address this issue; others have anticipated additional statutory changes by requiring in the general plan that local zoning ordinances comply with and reflect any applicable changes in state law. The Land Use Elements of general plans should take this minimal step of incorporating by reference any changes in state law.

Beyond mere compliance, however, jurisdictions are free to reduce proactively other obstacles to the development of child care facilities. Local governments could, for example, allow large family child care homes as a matter of right in all residential zones, rather than requiring providers to obtain a permit. The City of West Sacramento adopted such a provision, stating in its general plan that family child care homes "shall be permitted uses in all residential land use designations."⁴²

Local jurisdictions can also use general plan provisions to reduce zoning barriers for child care centers, as opposed to family child care homes. The City of South San Francisco – located in San Mateo County, California – included a provision in its Land Use Element stating that efforts to promote the development of child care facilities "should include . . . [p]ermitting childcare centers in all districts."⁴³ The City of West Sacramento wrote a similar, but slightly more restrictive provision stating that "[c]hild care facilities shall not be precluded in any land use designation except the Open Space and Heavy Industrial designations."⁴⁴

Even without changing allowed uses in any particular zone, the general plan can be amended to simplify local procedures for obtaining a child care permit. Permit applications in some local jurisdictions can be technical and onerous for child care providers who typically are unfamiliar with land use terminology or zoning processes. Particularly given the more limited review of large family child care (see Chapter 2), permit applications can be rewritten for lay providers, asking only about considerations that are relevant to child care permits (e.g., spacing, traffic, parking, and noise), in language that providers can understand. This more general approach was

adopted by the City of West Sacramento, which required city officials to “streamline processing and permit regulations to promote the development of child care facilities.”⁴⁵ San Diego County agreed to “[c]ooperate with ... the region’s cities to draft a model ordinance or procedure for the processing of permits for child care facilities” and to “[w]ork with the region’s cities to develop uniform zoning policies regarding location, parking and other requirements.”⁴⁶

Finally, local jurisdictions can reduce barriers to child care development by eliminating – or simply reducing – the types of fees that child care providers are charged for doing business. Although cities and counties may not charge such fees to small family child care homes,⁴⁷ many charge large family child care providers and child care centers substantial business license or land use permit fees. The general plan can eliminate or reduce these fees as they apply to child care providers.⁴⁸

C. Require Mitigation or Incentive Measures to Encourage Developers to Plan for Child Care Facilities

Although reporting and data collection provide useful planning tools, finding gaps in the child care infrastructure does not automatically lead to the creation of slots. To address this problem, some cities and counties have gone on to require developers to mitigate the specific impact of their projects on child care supply, and/or have offered incentives to a range of developers to develop the child care infrastructure generally.

An incentive (or carrot) approach and a mitigation (or stick) approach are similar; however, several differences do arise. First, requiring mitigation – also called exactions – calls for more specific data linking the type of project to its effects on child care supply.⁴⁹

If employed, exaction provisions should describe the need for child care and relate it to new developments. A jurisdiction that provides clear instructions on mitigation will have a stronger legal basis for defending the requirement than one that determines exactions on an informal, case-by-case basis. This need for a precise approach explains why some local plans, such as San Diego County’s, require planners to “[d]evelop a formula for use in assessing the child care needs created by new development.”⁵⁰

Incentives and exactions may also differ in terms of the immediate outcome. Although both can lead to development of on-site facilities, exactions may offer alternatives such as “in lieu” fees paid by developers to the city or county. The local government, in turn, pools these fees to support the development of child care slots in the area. In its East County Area Plan, Alameda County identified a variety of actions a developer might take to mitigate the child care impact of a planned project. These included “providing on-site or off-site facilities; in-lieu fees to provide facilities and/or supplement child care provider training, salaries, or information and referral services; or other measures to address supply, affordability or quality of child care.”⁵¹ An incentive system, on the other hand, might take longer to produce positive effects as developers weigh the costs and benefits of taking part in the program. Results depend on developers choosing to take advantage of incentives to increase child care availability, rather than being *required* to mitigate effects on child care.

Cities throughout California have used both approaches, or even a combination of the two, in their general plans. One example of a mitigation approach is in the City of Marina (Monterey County) General Plan. The plan lists specific local developments that were required to provide for an adequate number of child care facilities. Under the Land Use Element, the Marina General Plan has a provision concerning “Childcare Facilities” that reads:

Provisions shall be made for childcare facilities with the development of major job centers in the MBEST Center and Marina Airport Business Park, the commercial and industrial center of Armstrong Ranch, the West University Village, and all other large-scale mixed-use projects. . . . [T]he facilities shall be adequate to serve the projected employee based of the respective areas.⁵²

Other jurisdictions, rather than requiring mitigation only in particular areas, have required it for a broad range of projects, providing they affect the child care supply. For example, Alameda County’s East County Area Plan states that the County “shall require mitigation if a significant impact [upon child care] is identified” through the environmental review process.⁵³ Given this language, mitigation may be required for housing, retail, or any other type of development. Orange County also took this approach in the southern part of the county when it required that new developments “participate in the Child Care Improvement Program through conditions placed on projects”⁵⁴ To ensure that mitigation is necessary and appropriate, the plan also mandates an Annual Monitoring Report process that would assess the supply of and demand for child care facilities.⁵⁵

The City of South San Francisco uses the incentive approach in its general plan. The plan requires that child care promotion efforts include development of “criteria for incentives for childcare facilities” as part of the bonus program for the jurisdiction’s Transportation Demand Management program.⁵⁶ Depending on the local program, such incentives could mean that developers who plan to improve child care capacity are allowed to build more square footage, higher buildings, or provide fewer parking spaces.

San Diego County explored incorporating both approaches by adopting the following language in its general plan:

Implementation Measure 3.1.2: Investigate the feasibility of requiring applicants for projects for major residential, commercial, and industrial developments to use the developed formula to assess the demand for child care facilities created by the development, and to mitigate these needs.

Implementation Measure 3.1.3: Investigate a program to grant a bonus in density or intensity of use for commercial, industrial, and residential projects that provide child care facilities.⁵⁷

As developers build new spaces in the community, provisions in the general plan can help to encourage them to plan for and build new child care facilities. Whether the general plan provides measures that reward developers who proactively build suitable space or measures that require developers to mitigate adverse impacts on the child care

supply, by involving developers in child care planning, more sites will likely be available in the future.

D. Provide for Governmental Assistance (Informational and Financial) in Child Care Development

Local planning department staff, as well as personnel from other government agencies, can serve as powerful resources to local child care providers. Whether by explaining the permit process to large family child care providers or by researching the impact of a proposed development on the local child care market, government employees have much information that can help to increase the availability of child care slots. For example, a general plan could require that the planning department develop a written “start-up guide” for child care centers and family child care homes within the jurisdiction. In addition to locating the relevant planning, building, fire, and business license requirements in a single and convenient document for providers, this type of guide may have the additional benefit of requiring that all the relevant departments coordinate with each other with respect to child care. By formalizing information sharing between public employees and the child care industry, general plan provisions can ensure that such sharing becomes a valued part of a local official’s workplan.

The City of West Sacramento created an obligation to participate proactively in child care planning and development through several provisions. Examples of these provisions are listed below:

- “The City shall provide information to assist child care providers in getting started and licensed.”⁵⁸
- Make efforts to “explor[e] the feasibility of assisting child care providers and developers to identify and develop potential sites . . . and prepar[e] a childcare start-up guide.”⁵⁹
- “The City shall support or contribute to, as budgetary limits permit, the establishment of child care facilities and services.”⁶⁰
- “The City shall encourage the development of child care facilities within the Redevelopment Project Area to serve the needs of low- and moderate-income families.”⁶¹

Local government also can assist child care development efforts by making various resources available. Placing child care centers in public lands or buildings can lower significantly the financial burden of creating a center, and public dollars can be used as grants or low-interest loans for child care development. San Diego County pledged both types of governmental resources in its general plan, stating specifically that:

Policy 2.1: The County will actively encourage the provision of child care facilities.

Implementation Measure 2.1.1: Where feasible, make underutilized County properties or low-cost loans available to child care providers, particularly for those child care facility types of greatest need.⁶²

Child care providers often need assistance in establishing their facilities. Local government is already actively involved in the development process and therefore, it is in a good position to help providers navigate through the regulatory process, as well as to provide financial assistance to those who are in need. Advocates should encourage local lawmakers to include both *financial* and *informational* assistance to child care providers in the general plan.

E. Support the Inclusion of Child Care Facilities at Transportation Hubs

From a planning perspective, placing child care facilities near key transportation corridors or centers is sensible. Strategic placement can reduce the number and distance of trips families must make during the work day, saving time for parents and reducing vehicle emissions and traffic congestion in the region as a whole. Furthermore, as many families will be moving through transportation hubs, child care providers located in these areas will have a strong market for their services.

To promote the development of child care facilities at transportation hubs, general plan advocates can take several approaches. The most concrete would be a general plan mandate that transportation centers include child care facilities nearby. The South San Francisco General Plan requires that a key 8-acre transportation corridor, which encompasses a major street as well as a Bay Area Rapid Transit (“BART”) station, include certain development characteristics, one of which is child care facilities.⁶³ Clearly identifying a particular area and specifically requiring that child care facilities be included there gives advocates an unmistakable policy to rely on when approaching development in that area.

Taking a less definitive approach, San Diego County simply directed staff to “[s]upport research on the feasibility of locating child care centers at ‘Park and Ride’ sites, transit centers or other locations accessible to public transportation.”⁶⁴ This type of general plan provision may be useful to jurisdictions that have less experience with developing child care facilities or that are concerned that local transit centers may be near toxic waste sites or have toxic emissions.

F. Coordinate with Local School Districts, Parks and Recreation Facilities, and Non-Operational Military Bases to Maximize Child Care Opportunities

As populations increase and decrease, the need for certain community facilities changes as well. These community facilities, often suitable for child care, may go unused for quite some time—until the next “baby boom.” Public schools are perhaps the best known example of facilities whose usage tracks population growth and decline. Even during baby booms, schools, which are designed specifically for children’s use, often are left empty after the school day ends. By coordinating with the local school district, cities and counties may be able to uncover new child care development opportunities.

Recognizing such opportunities, the South San Francisco General Plan requires that local planners “[w]ork with the SSFUSD on appropriate land uses for school sites no longer needed for educational facilities [including to] [a]cquire closed school sites for ... childcare purposes where appropriate.”⁶⁵ Similarly, the County of San Diego’s General Plan directs county officials to “[c]oordinate the planning and siting of schools, recreational facilities, [and] child care centers

...”⁶⁶ Moreover, the County requires that its officials “advocate [for] the inclusion of child care facilities in both the planning of new school facilities, and plans for the expansion or improvements of existing school facilities.”⁶⁷

Other types of community facilities, such as parks and recreation buildings, may be used during “off-times” as well. Finally, military base closures provide opportunities for child care providers to occupy space that may be suitable for children. Advocates should work with communities to determine whether these types of locations may be available for use as child care centers.

IV. Conclusion

As the above demonstrates, incorporating child care issues into a community’s long-term planning strategy will be a lengthy process. In addition, an advocate who successfully negotiates inclusion of child care issues in the general plan has much work yet to do. Advocates must monitor the implementation of general plan provisions to ensure that promises are carried out and implemented effectively. Fortunately, in the course of general plan advocacy, LINCC participants have discovered that local planners and other officials who adopt such policies often become invested in the issue of community support for child care. Hence, LINCC participants have created new advocates for child care – advocates who are eager to monitor the impacts of their general plan policies.

¹ Although individuals outside of the LINCC project who have engaged in land use advocacy on behalf of child care providers are too numerous to list, the Child Care Law Center would like to acknowledge Abby Cohen, a former CCLC attorney, and Kristen Anderson, Child Care Coordinator for Redwood City, for their contributions to the child care field on land use issues generally, and to this manual specifically. CCLC would also like to acknowledge Marsha Ritzdorf, former Associate Professor of Planning at the University of Oregon in Eugene. Now deceased, Professor Ritzdorf made a tremendous contribution to the issue of zoning and child care.

² CAL. GOV’T CODE §§ 65454-55 (West 1997).

³ *Id.* § 65300. For a detailed description of general plans, required elements, the amendment process, and other issues, see GOVERNOR’S OFFICE OF PLANNING AND RESEARCH, GENERAL PLAN GUIDELINES (1998).

⁴ CAL. GOV’T CODE §§ 65454-55 (West 1997).

⁵ *Id.* § 65302.

⁶ *Id.* § 65302(d).

⁷ CAL. GOV’T CODE § 65583 (West Supp. 2000).

⁸ *Id.*

⁹ CAL. GOV’T CODE § 65588 (West Supp. 2000).

¹⁰ CAL. GOV’T CODE §§ 65560-70 (West 1997).

¹¹ *Id.* § 65303. The City of Chula Vista General Plan has a separate Child Care Element. See Appendix A, *infra* for a copy of the child care element.

¹² *Id.* § 65300.5.

¹³ *Id.* §§ 65454-55.

¹⁴ *Id.* § 65356.

¹⁵ *Id.* § 65351.

¹⁶ *Id.* § 65353 (mandating notice and hearing for general plan adoption and amendments); CAL. GOV’T CODE § 65090 (West Supp. 2000) (describing notice).

¹⁷ CAL. GOV’T CODE § 65355 (West 1997).

¹⁸ CAL. GOV’T CODE § 65352(a)(4) (West 1997). Although this statute gives such agencies 45 days to comment on the proposed action, failure of the local jurisdiction to notify these agencies of the action does not affect the validity of the action. *Id.* § 65352(a)(6), (c)(1).

¹⁹ *Id.* § 65354.5. The legislative body may charge a fee to cover the cost of the hearing procedure. *Id.*

²⁰ *Id.* § 65358.

²¹ *Id.* § 65357.

²² SANTA CRUZ COUNTY, CAL., GENERAL PLAN AND LOCAL COASTAL PROGRAM LAND USE PLAN, Objective 7.14 (adopted May 24, 1994).

²³ SAN DIEGO COUNTY, CAL., GENERAL PLAN, Public Facility Element, XII-14-1 to XII-14-9 (amended October 28, 1993) (hereinafter SAN DIEGO COUNTY GENERAL PLAN). For portions of the San Diego General Plan, see Appendix B.

²⁴ For examples of how various jurisdictions organize their general plans and address child care, see Appendix B.

²⁵ A copy of the chapter on child care in the Background Report to the West Sacramento General Plan is available from the City of West Sacramento. The Background Report was revised and adopted on June 14, 2000. For an example of a discussion of child care need within a general plan itself, see SAN DIEGO COUNTY GENERAL PLAN, *supra* note 23, Public Facility Element, XII-14-1 to XII-14-9.

²⁶ See, e.g., SAN DIEGO COUNTY GENERAL PLAN, *supra* note 23, Public Facility Element, XII-14-1 to XII-14-9; ORANGE COUNTY, CAL., GENERAL PLAN, Public Services and Facilities Element, 2-114 (adopted January 9, 1985) (hereinafter ORANGE COUNTY GENERAL PLAN). For portions of the Orange County General Plan, see Appendix B.

²⁷ See, e.g., JOHN M. LOVE, ET AL., BUILDING THEIR FUTURES: HOW EARLY HEAD START PROGRAMS ARE ENHANCING THE LIVES OF INFANTS AND TODDLERS IN LOW-INCOME FAMILIES (2001), available at http://www.acf.dhhs.gov/programs/core/ongoing_research/faces/hs_pdf/sumreport_jan10_2001.pdf.

²⁸ For a more detailed description of these Economic Impact Reports, including how to create such a report for your local community, see NATIONAL ECONOMIC DEVELOPMENT AND LAW CENTER, A METHODOLOGY GUIDE: CREATING AN ECONOMIC IMPACT REPORT FOR THE CHILD CARE INDUSTRY (2001).

²⁹ See, e.g., NATIONAL ECONOMIC DEVELOPMENT AND LAW CENTER, THE ECONOMIC IMPACT OF THE CHILD CARE INDUSTRY IN CALIFORNIA (2001).

³⁰ See, e.g., SAN DIEGO COUNTY GENERAL PLAN, *supra* note 23, Public Facility Element, XII-v (amended October 1993) (listing members of the Child Care Working Committee).

³¹ CAL. GOV'T CODE § 65300.5 (West 1997).

³² AMERICAN PLANNING ASS'N, POLICY GUIDE ON THE PROVISION OF CHILD CARE (1997), available at <http://www.planning.org/policyguides/childcare.htm?project>.

³³ AMERICAN PLANNING ASS'N, *supra* note 32. The specific results of the LINCC advocates' efforts are discussed in Part II, *supra*.

³⁴ SAN CLEMENTE, CAL., GENERAL PLAN, Public Facilities and Services Element, Objective 7.18 (adopted 1992) (hereinafter SAN CLEMENTE GENERAL PLAN). For portions of the City of San Clemente General Plan, see Appendix B.

³⁵ SAN CLEMENTE GENERAL PLAN, *supra* note 34, Public Facilities and Services Element, Policy 7.18.1.

³⁶ SAN CLEMENTE GENERAL PLAN, *supra* note 34, Public Facilities and Services Element, Implementation Program 7.45.

³⁷ WEST SACRAMENTO, CAL., GENERAL PLAN, Section IX, Goal A, Policy 1 (adopted 1990) (hereinafter WEST SACRAMENTO GENERAL PLAN). For portions of the City of West Sacramento General Plan, see Appendix B.

³⁸ SAN CLEMENTE GENERAL PLAN, *supra* note 34, Public Facilities and Services Element, Implementation Program 7.44.

³⁹ ALAMEDA COUNTY, CAL., EAST COUNTY AREA PLAN, GENERAL PLAN, Public Services and Facilities Element, Policy 220 (adopted May 5, 1994) (emphasis omitted) (hereinafter ALAMEDA COUNTY GENERAL PLAN). For portions of the East County Area Plan see Appendix B.

⁴⁰ CAL. HEALTH & SAFETY CODE § 1597.40 (West 2000) (permitting small family child care as a matter of right in residential zones and limiting local land use authority over large family child care).

⁴¹ Section 1596.78 of the California Health and Safety Code mandates that children in small and large family day care homes be under the age of 10. CAL. HEALTH & SAFETY CODE § 1596.78 (West 2000).

⁴² WEST SACRAMENTO GENERAL PLAN, *supra* note 37, Section IX, Goal A, Policy 5.

⁴³ SOUTH SAN FRANCISCO, CAL., GENERAL PLAN, Implementing Policy 2-I-12. (adopted October 1999) (hereinafter SOUTH SAN FRANCISCO GENERAL PLAN). For portions of the City of South San Francisco General Plan, see Appendix B.

⁴⁴ WEST SACRAMENTO GENERAL PLAN, *supra* note 37, Section IX, Goal A, Policy 4.

⁴⁵ WEST SACRAMENTO GENERAL PLAN, *supra* note 37, Section IX, Goal A, Policy 6. Similarly, San Diego County required that officials "[r]eview the zoning ordinance to simplify the procedures for land use permits for child care

centers.” SAN DIEGO COUNTY GENERAL PLAN, *supra* note 23, Public Facility Element, XII-14-8, Implementation Measure 2.1.2.

⁴⁶ SAN DIEGO COUNTY GENERAL PLAN, *supra* note 23, Public Facility Element, XII-14-8, Implementation Measures 2.2.1, 2.2.2.

⁴⁷ CAL. HEALTH & SAFETY CODE § 1597.45 (West 2000).

⁴⁸ The City of West Sacramento adopted such a provision, stating that “family day care homes shall be exempted from payment of City business license fees.” WEST SACRAMENTO GENERAL PLAN, *supra* note 37, Section IX, Goal A, Policy 7.

⁴⁹ Some cities – rather than including fees and exactions in the general plan – have passed local laws that mandate child care fees for certain developers. *See, e.g.*, SAN FRANCISCO, CAL., PLANNING CODE § 314 (adopted August 17, 2001).

⁵⁰ SAN DIEGO COUNTY GENERAL PLAN, *supra* note 23, Public Facility Element, XII-14-9, Implementation Measure 3.1.1.

⁵¹ ALAMEDA COUNTY GENERAL PLAN, *supra* note 39, Public Services and Facilities Element, Policy 220.

⁵² MARINA, CAL., GENERAL PLAN, Land Use Element, Objective 2.107 (adopted 1982) (hereinafter MARINA GENERAL PLAN).

⁵³ ALAMEDA COUNTY GENERAL PLAN, *supra* note 39, Public Services and Facilities Element, Policy 220.

⁵⁴ ORANGE COUNTY GENERAL PLAN, *supra* note 26, Public Services and Facilities Element, 10-24.

⁵⁵ *Id.*

⁵⁶ SOUTH SAN FRANCISCO GENERAL PLAN, *supra* note 43, Implementing Policy 2-I-12.

⁵⁷ SAN DIEGO COUNTY GENERAL PLAN, *supra* note 23, Public Facility Element, XII-14-9, Implementation Measure 3.1.3.

⁵⁸ WEST SACRAMENTO GENERAL PLAN, *supra* note 37, Section IX, Goal A, Policy 3.

⁵⁹ SOUTH SAN FRANCISCO GENERAL PLAN, *supra* note 43, Implementing Policy 2-I-12.

⁶⁰ WEST SACRAMENTO GENERAL PLAN, *supra* note 37, Section IX, Goal B, Policy 2.

⁶¹ WEST SACRAMENTO GENERAL PLAN, *supra* note 37, Section IX, Goal B, Policy 3.

⁶² SAN DIEGO COUNTY GENERAL PLAN, *supra* note 23, Public Facility Element, XII-14-8, Policy 2.1.

⁶³ SOUTH SAN FRANCISCO GENERAL PLAN, *supra* note 43, Implementing Policy 3.4-I-5.

⁶⁴ SAN DIEGO COUNTY GENERAL PLAN, *supra* note 23, Public Facility Element, XII-14-8, Implementation Measure 1.1.1.

⁶⁵ SOUTH SAN FRANCISCO GENERAL PLAN, *supra* note 43, Implementing Policy 5.2-I-1.

⁶⁶ SAN DIEGO COUNTY GENERAL PLAN, *supra* note 23, Public Facility Element, XII-10-12, Implementation Measure 3.2.1.

⁶⁷ SAN DIEGO COUNTY GENERAL PLAN, *supra* note 23, Public Facility Element, XII-14-8, Implementation Measure 1.1.2.

CHAPTER 2: ZONING POLICIES AND CHILD CARE

Overview

Zoning is the means by which a local government organizes land use within its boundaries. By controlling the kinds of buildings that will be built and the types of activities permitted in different parts of the community, zoning decisions shape the character of a city or county. A local government has broad discretion in its use of zoning power, as long as the decisions made under it promote the public good in one or more of four areas: public health, safety, morals, and general welfare. Ideally, zoning decisions create a coherent structure to the area and promote quality of life.

More specifically, zoning policies can be used to facilitate (or hinder) the development of child care facilities in the community. Making zoning policies sensitive to the need for a variety of types of child care – including family child care homes and child care centers – benefits the community by increasing the supply of quality child care. LINCC advocates should use zoning policies as a tool with which they can help child care providers establish and maintain facilities that adequately serve the community.

Part I of this chapter provides a brief legal background on zoning policy. It provides a tutorial on the law of zoning ordinances, describes how zoning rules are adopted and amended, and discusses the definition of and procedure by which one can obtain a use permit. Part II discusses zoning policy as it pertains to child care. The effects of zoning on child care can be tremendous, and even well-intentioned zoning ordinances can make it extremely difficult for child care providers to operate. However, California law does offer some protection for both child care homes and centers against burdensome local policy. Finally, Part III provides advocates with strategies for eliminating barriers to child care in their communities.

I. Legal Background

A. What are Zoning Ordinances?¹

California law permits cities and counties to adopt zoning laws – called ordinances – that regulate the use of buildings and land within their jurisdiction.² Typically, cities divide the jurisdiction into residential, commercial, open space, and industrial zones. Zoning ordinances may also set restrictions regarding the size and density of buildings and establish requirements for open space.³ Subcategories of zones may also exist, e.g., residential zones may be divided into single-family residential and multi-family residential. Within each zone, certain activities are allowed as a matter of right, meaning that property owners do not need to get permission from the local government to use their property in a particular “pre-approved” manner. Other uses are conditional (permitted under certain circumstances) or prohibited entirely. Often, cities

and counties have maps that show where each zone lies and what uses are permitted within every zone.

As mentioned in Chapter 1, zoning ordinances must be consistent with the jurisdiction's general plan – the supreme planning document of a local government. If they are not, any resident or property owner of the city or county may sue the local government to change the zoning code.⁴

California also requires that local regulations be uniform — the same standards must apply to each type of building or use of land — within each zone.⁵ Importantly, this mandate prevents local government officials from treating various property owners differently simply based upon the officials' preferences for either the owner or the use of land.

B. Adopting and Amending Zoning Rules

California law establishes minimum standards for city and county zoning decisionmaking processes.⁶ A local government wishing to adopt or amend zoning ordinances must first give notice of and hold a public hearing on the proposed rules before the planning commission.⁷ After this hearing, the planning commission must make a written recommendation on the proposed rule to the local legislative body, usually a city council or county board of supervisors.⁸ The commission must give reasons for its recommendation and explain the proposal's relationship to the general plan.⁹

After receiving the planning commission's recommendation, the local legislative body must hold another public hearing on the proposed zoning ordinance.¹⁰ At the public hearing, the legislative body may approve, modify, or disapprove the planning commission's recommendation.¹¹ If the proposal is modified, however, the legislative body must first refer the matter back to the planning commission for a report and recommendation.¹²

C. Permitted and Conditional Uses of Property

When a property owner or resident wishes to use property in a particular way, the first step generally is to consult the local government codes to see if that use is permitted in the zone where the property is located. To obtain a copy of community zoning ordinances, check with the local planning department. Many cities and counties now post their local codes on the jurisdiction's official web site as well.

As mentioned above, zoning codes permit some uses of property as a matter of right – also called an allowed or permitted use – and an owner or resident may use the land for that purpose without seeking permission to do so. Be certain, however, that when the term 'permitted' is used, it is indeed referring to "permitted by right" since some uses are also permitted but conditionally, only if certain conditions are met. One obvious example of an allowed use is living in a home in a residential zone: a property owner does not need permission to live with his or her family on property within such an area. In California, small family child care homes also are an allowed use in all residential zones.¹³

On the other hand, some uses are conditional, meaning that a property owner or tenant must obtain permission from the local government before using the parcel in a particular way. For example, if a zoning ordinance states that a child care center is a conditional use in certain residential zones, before opening the facility a provider must obtain permission to operate a child care center from the local government. To obtain such permission, the provider first would have to apply for a “conditional use” permit (“CUP”) or a “nondiscretionary” permit.

D. How Does a Child Care Provider Apply for a Use Permit?

The process for obtaining a permit can vary, depending on the rules of the local jurisdiction. Generally, however, one starts the process by submitting a permit application to the local planning department. Often, several additional documents are required to complete the request. If the additional documentation is too difficult to obtain, planning staff may tell the applicant about alternative ways to comply with the application process. Given that many planning departments deal with an enormous volume of paperwork, permit applicants should make copies of everything they submit. It is also helpful to file the application and all supporting documentation at one time, rather than submitting parts of the application at different times.

Local governments usually charge a processing fee which must be paid upon submission of the completed application. By statute, the fee must be “reasonable,” which means that the permit fee should not be more than the amount required to process the application.¹⁴ The fee will not be refunded even if the permit application is denied.

California law allows local governments to assign initial decisionmaking authority on permit applications to local commissions or officials – often called boards of zoning adjustment or zoning administrators.¹⁵ After an initial decision is made, an individual who believes the decision is inappropriate, whether the owner of the property in question or other residents of the area, usually may appeal that decision to the zoning appeals board. The board, in turn, may accept or reject the initial decision or modify the permit.¹⁶ For both the initial decision and appeal, a public hearing must be held to consider the merits of the permit request.¹⁷ At the hearing, both supporters and persons opposing the application will have a chance to speak, although generally each will be given only a limited time. Hence, permit applicants often organize as many supporters as possible to speak in favor of the permit request. For child care provider applicants, such supporters may include parents, provider associations, child care planning council representatives, and even neighbors.

State law also requires that the local government make certain materials pertaining to zoning decisions available to the public. As mentioned above, for contested permit requests, the local government must hold a hearing. Prior to or at the beginning of this hearing, any planning staff reports on the subject of the hearing must be made public.¹⁸ Having a copy of the planning department’s staff report will be useful to applicants during the hearing process, enabling them to learn of the staff’s concerns and strategize about how to address those concerns at the hearing. Furthermore, cities and counties must record their hearings and make the record available to the public.¹⁹

In addition to the permit application and appeal process – which governs the use of the land – individuals may apply for a variance in unusual circumstances. The variance allows a reasonable use of the building, structure, or property that otherwise would not be allowed. A variance may be granted when the application of zoning laws would create unnecessary hardship and deprive the property of privileges enjoyed by owners of other parcels in the zone, due to the size, shape, topography, location, or surroundings of the land.²⁰ Through the variance process, an owner may be able to get permission to build differently than the zoning code requires. A variance is usually appropriate for deviations from the dimensional requirements of the ordinance (e.g., building height or yard size), but may not be used to permit a land use that is otherwise prohibited in that zoning district.

II. ZONING POLICIES AND CHILD CARE

A. Effects of Zoning Policies on Child Care

Depending on how child care is classified, zoning ordinances can limit the supply of child care in several ways: (1) by completely prohibiting child care in certain zones; (2) by creating unreasonable obstacles to the development of child care programs; and (3) by implementing policies that inhibit the expansion of existing child care programs.

An ordinance that prohibits child care centers in all industrial zones would be an example of the first limitation – a complete prohibition in certain areas.²¹ Although such a restriction may have been appropriate decades ago when industrial development was synonymous with pollution, high noise levels, and dangerous machinery, “light industry” now may pose no danger to the health or safety of children playing nearby. Thus, having a child care center close to an assembly plant may be safe for children while at the same time providing a convenient place for parents to leave their children during work shifts.

Other zoning requirements effectively prohibit child care programs by creating insurmountable requirements to their operation, sometimes by failing to recognize that child care operates differently than other types of businesses. For example, parking requirements based on the number of children cared for can be expensive and useless because parents do not park at the child care facility all day; instead, drop-off and pick-up zones make much better sense.

In some jurisdictions, zoning laws’ attempts to address health and safety issues conflict with or duplicate health and safety requirements imposed by state Community Care Licensing, a division of the California Department of Social Services charged with reviewing applications for and monitoring conditions of licensed facilities. Although concern over the health and safety of children is laudable, local government officials should know that the state licensing framework is designed to provide minimum health and safety standards that cover the physical environment, including square footage requirements, the qualifications and number of staff, operation standards, and requirements for the care of children. Licensed child care providers must also pass a fire inspection demonstrating compliance with specifications set by the State Fire Marshal. As these inspections cover critical safety concerns, local jurisdictions need not duplicate them. If community

members have health and safety concerns about child care facilities, a better approach is to support the improvement of state licensing requirements rather than to use zoning laws for this purpose.

Finally, zoning laws and policies may inhibit the expansion of existing child care programs. For example, zoning policies may limit the hours of care provided, yet given the growing importance of alternative child care hours for parents who work nights and weekends, these restrictions may conflict with the goal of making care available to all segments of the workforce. In other cases, zoning policies may interfere with the child care goals of other local government agencies. For example, one county department may furnish grants and loans to encourage child care renovation and expansion projects, but exorbitant fees for a conditional use permit for those projects may eat up much of this financial assistance.

Moreover, the local planning department can block efforts to increase child care capacity by adopting burdensome procedures or simply by providing information in a confusing or technical manner that child care providers may find difficult to understand. Even when ordinances attempt to reduce barriers, the permit process may present an obstacle to providers who are not experienced developers. The manner in which planning department staff members interact with providers is at least as important as the ordinance's provisions.

Although local planning and zoning policies may make establishing a child care facility unduly difficult, being armed with information before the child care provider approaches the planning desk may make the process a bit easier.

B. State Law Protection for Family Child Care Homes from Restrictive Local Zoning Laws

Family child care, by definition, is operated in the home of the child care provider. The California legislature has declared its support for family child care as a matter of state policy and has articulated the importance of locating family child care in residential areas as follows:

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.²²

Therefore, California State law preempts – or supercedes – local zoning laws in order to protect family child care providers who operate in residential areas from local land use prohibitions.²³

1. Small Family Child Care

Small family child care homes – licensed facilities serving up to eight children in which care is offered in the home of the provider²⁴ – have considerable protection under state law. California law requires that small family child care be considered a residential use of property;²⁵ in other words, small family child care programs are permitted in a particular zone to the same extent that individuals are permitted to reside on certain pieces of property. The law also provides other

protections for small family child care homes; for example, local jurisdictions may not impose upon them a business license, fee, or tax.²⁶ However, small family child care homes must have a fire extinguisher and smoke detector that meet State Fire Marshal standards.²⁷

In some local jurisdictions, the definition of “small family day care” may present a problem because the zoning ordinance is outdated. When the state protection for small family child care was passed in 1983, a “small family day care home” could care for up to six children. However, in 1996 the state licensing law was amended to increase the capacity of these homes to eight children.²⁸ Zoning ordinances that reflect the old capacity limit of six may impose restrictions on small family child care providers caring for seven or eight children, and thus now violate state law. A simple way of resolving this problem is to amend the zoning ordinance to define “small family day care home” as a home licensed by the California Department of Social Services, rather than specifying the capacity in the zoning ordinance. In this manner, the ordinance will follow the licensing definition whenever changes occur.

2. Large Family Child Care

California law also limits the discretion of cities and counties to restrict large family day care homes on lots zoned for single-family dwellings.²⁹ State law permits large family day care homes to care for up to fourteen children in the provider’s home.³⁰ While permitting more local government intervention than for small family child care homes, state law limits restrictions on large family day care homes to “reasonable” standards or requirements addressing the following four factors:

1. spacing and concentration
2. traffic control
3. parking
4. noise control

Restrictions that are unreasonable or unrelated to these factors are not permitted under state law. In addition, any noise standards must be consistent with local ordinances implementing the noise element of the general plan and must take into consideration the noise level generated by children.³¹ State law in this area preempts or overrides local ordinances; therefore, all cities and counties must comply with these requirements.

Occasionally, local fire inspectors will try to impose requirements beyond those imposed by the State Fire Marshal. However, state law prohibits “any building ordinances 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.”³² Thus, additional inconsistent local zoning requirements related to fire or safety are illegal.

In addition to permitting local jurisdictions to regulate in the four aforementioned areas, state law allows communities to establish a permit system for large family child care homes. Specifically, a local jurisdiction may do one of the following with respect to large family child care homes³³:

- (1) Classify them as a permitted use of residential property, effectively treating them the same as small family child care homes for which no permits are required.

- (2) Grant a permit without notice to the neighbors or a public hearing by way of a nondiscretionary permit process. This process allows use of a lot zoned for a single-family dwelling by any large family day care home that complies with reasonable local ordinances meeting the four criteria described above and any regulations adopted by the State Fire Marshal.
- (3) Require a large family day care home to obtain a use permit. This permit must be granted if the home complies with reasonable ordinances meeting the four criteria described above and any regulations adopted by the State Fire Marshal. Under this option, at least ten days prior to deciding the permit application, the zoning administrator must give notice of the proposed large family child care home to all property owners within a 100 foot radius of the exterior boundaries, rather than the 300 feet usually required. A public hearing is scheduled only if the applicant or another affected person requests one.

If a local jurisdiction opts for either the second or third option, it may charge a reasonable fee to cover the costs of the review and permit process.

Finally, as with small family child care, the zoning definition of “large family day care” may be outdated. Although previously these homes were limited to serving twelve children, protections for large family child care now apply to providers who care for up to fourteen children.³⁴ Again, local planners should amend the zoning ordinance to define “large family day care home” as that term is defined in the California Health & Safety Code.

C. State Law Protection for Child Care Centers from Restrictive Local Zoning Laws

California law does not provide special protection for child care centers. However, as a matter of policy, a jurisdiction that is committed to meeting the community’s child care needs would want to limit restrictions on centers to those necessary to protect children’s health and safety. Indeed, child care centers, like schools, should be considered a community resource essential to residential areas. Moreover, child care centers in office and commercial zones can provide a real convenience for working parents and employers. Limitations on child care in industrial and agricultural zones should take into consideration actual hazards and environmental quality; child care in light industrial parks may provide an essential service for employees without imposing risks that may be presented by heavy industry or by the production or use of hazardous materials.

One expert has recommended the following criteria for imposing zoning standards on child care centers:

Necessity: the planning department must have real and substantial evidence to justify imposing the standard (i.e., not just basing standards on outmoded assumptions, stereotypes, etc.);

Clarity: the standard must be clear on its face as to what it requires, giving providers predictability as to what is expected of them and how a standard will be implemented in practice;

Consistency: the standard must be consistent with other zoning provisions, local laws, and state and federal statutes and regulations;

Non-duplication: the regulation must not duplicate other provisions, regulations, or statutes; and

Consideration of the cost of compliance: the cost must not be prohibitive. While cost should not be an overriding factor, it should enter the calculus if there are alternative means of achieving the same end at a lesser cost. These alternatives should be spelled out and made available without the necessity of an onerous waiver process.³⁵

Incorporating these criteria into local zoning policy will make it easier for providers to establish child care centers, while at the same time keeping the safety of children and other interests of the community in mind.

III. Strategies for Eliminating Barriers to Child Care

LINCC advocates have approached the elimination of zoning barriers to child care programs with many of the same strategies used in general plan advocacy: (1) educating local planning and elected officials about the importance of an adequate child care infrastructure; (2) obtaining information about how existing local zoning ordinances interfere with child care facilities development; and (3) developing specific proposals for amendments to local zoning ordinances.

As Chapter 1 of this manual and other LINCC manuals address the education of local officials in detail, we will turn directly to other advocacy strategies.³⁶ In particular, advocates should first evaluate local zoning ordinances to determine their impact on child care. If after evaluating the ordinances, the advocate determines that the existing law is inadequate to serve the community's child care needs, the advocate should push for amendments to the ordinances. The discussion below provides options for evaluating and amending local laws.

A. Evaluating Local Zoning Ordinances

In order to comply with local zoning laws, or to encourage child care friendly amendments to these laws, the first step is to learn what local zoning ordinances apply to various types of child care facilities. Many zoning ordinances can be found on the city or county's official web site. If not, advocates can obtain a copy of local planning codes and ordinances from the planning department.

Advocates should begin by checking the index and the definition sections of the code to look for mention of child care. If child care is mentioned, advocates should create a chart for the various types of child care arrangements – small family child care, large family child care, child care centers, after school programs, and park and recreation programs, among others. It is important to look for definitions that do not track state licensing law; terms such as “nursery school” and

“preschool” are frequently used in local ordinances and not in state laws. For each form of care, advocates should list the zoning code sections and policies that apply. This chart will be useful to advise providers about how to comply with local land use laws and to advise local government officials about how to amend the zoning ordinance to facilitate child care development. A sample of a similar chart can be found in Appendix C.³⁷

Depending on the jurisdiction, advocates may have difficulty in determining how zoning law applies to various forms of child care. In addition, if child care is poorly defined in zoning ordinances, child care providers may be unsure as to what standards apply to them. As an example, local ordinances may fail to define family child care specifically, or fail to distinguish between family child care and other forms of out-of-home care, such as center-based care. As a result, family child care providers may be expected to meet standards designed for child care centers or residential (24-hour) care facilities that may be impossible for these smaller providers to meet.

If child care is not addressed specifically in the zoning code, local zoning officials may interpret the business or commercial portions of the ordinance as applying to all forms of out-of-home child care. Family child care also may be addressed under “home occupation.” “Home occupation” ordinances usually permit home-based businesses if they are incidental to the primary use of the building as a residence. In California, state law explicitly provides that family child care homes “constitute accessory uses of residentially zoned and occupied properties and do not fundamentally alter the nature of the underlying residential uses.”³⁸ Hence, most home occupation ordinances will cover California family child care homes unless the local code mentions family child care specifically. In either case, if it is unclear how a local ordinance applies to family child care homes, the advocate should contact the local planning department and ask for an interpretation of the code.

Advocates must understand how family child care and center-based programs are addressed under local zoning practice. This inquiry includes not only determining in which zones of the community such facilities are permitted, conditionally permitted, or barred, but also what procedures, conditions, and fees are required. The following questions will help evaluate each of these concerns and ensure that local zoning codes comply with state law:

1. Does this jurisdiction consider small family child care a residential use for the purposes of all local ordinances, as required by California state law?
2. If local ordinances define small family child care by the number of children, have the ordinances been amended to reflect the “plus two” amendments (which were enacted in 1996) that permit small family child care providers to care for up to eight children?
3. Does local law place any conditions on the operation of small family child care?
4. Do any license fees or business taxes apply to small family child care programs?

5. Does the local Fire Inspector impose any requirements beyond those required by the State Fire Marshal?
6. Do local ordinances and practices regarding large family child care conform to state law requirements?
7. If local ordinances define large family child care by the number of children, have the ordinances been amended to reflect the “plus two” amendments (which were enacted in 1996) that permit large family child care providers to care for up to fourteen children?
8. Are restrictions placed on large family child care limited to those related to:
 - spacing and concentration
 - traffic control
 - parking
 - noise control?
9. Are all such restrictions reasonable?
10. Is large family child care permitted as a matter of right in residential areas? If not, does the permit process impose unreasonable barriers (time, cost, expertise) on family child care providers?
11. Does the ordinance impose clear and uniform requirements on child care, or does it allow case-by-case determinations?
12. Are child care centers permitted as a matter of right in residential and commercial zones? If not, are the restrictions reasonable, given the need for child care in each zone? Do the restrictions reflect the way that child care actually operates?
13. If child care centers are prohibited in any zone, what are the reasons for that prohibition? Do these reasons make sense in light of the need for child care services in the community? Is there a less restrictive way to meet the concerns about locating child care in these zones?
14. Are child care centers permitted in industrial zones? Are any hazardous material safety buffer zones reasonable?
15. Are the zoning provisions consistent with other policies? Does this jurisdiction include child care in its general plan? Does it have other policy statements about the need to encourage high quality care for the children of the community and their families?
16. How do local child care providers experience the zoning process in this jurisdiction? Have additional child care slots been added recently? Have there been controversies about child care? Have child care providers had trouble negotiating the process?

B. Amending Local Zoning Ordinances

Occasionally, LINCC advocates have found that: (1) local law violates the state preemption statute with respect to family child care providers; (2) child care providers are finding it difficult to obtain the required use permits due to overly burdensome procedures or requirements; or (3) that local zoning requirements and state licensing requirements contradict each other. In these instances, LINCC partners have determined that rather than trying to navigate an unworkable zoning system, it makes more sense to change local land use law.

In addition to ensuring that local zoning ordinances comply with the state law requirements described above, LINCC advocates have referred to the American Planning Association's ("APA") Policy Guide on Child Care in developing specific proposals for zoning laws and policies.³⁹ The APA encourages communities to consider amending local zoning ordinances to remove obstacles to regulated group and family care in all zoning districts that are appropriate and safe for children. Specifically with regard to zoning, the APA recommends:

- Legislation providing for small family child care homes as permitted land uses in all zoning districts, and state preemption of local legislation that does not permit this type of child care home;
- The removal of obstacles to child care in all zoning districts that are appropriate and safe for children;
- Child care facilities location procedures that are not overly burdensome and are related to size and land use impacts of the facility;
- Zoning ordinances providing for child care in locations convenient to neighborhoods and in public facilities, such as schools, recreation and social service centers, and subsidized housing projects; and,
- Negotiations with large scale developers regarding incentives or mitigations to provide space for child care in all types of projects – residential, office, mixed use, and commercial – including new construction and reuse.⁴⁰

Using these APA principles as well as information about local policies and child care infrastructure needs, California advocates have pushed for a variety of zoning provisions that affect the development of child care facilities in their local communities. Although differences in wording exist, these provisions fall into three broad, often overlapping categories.

1. Ensure that Local Zoning Ordinances Comply with the State Zoning Preemption Law

State law preempts local zoning ordinances with regard to small family child care, and sets certain limits on local jurisdictions with regard to large family child care. Many local codes are using an outdated definition of small and large family child care homes, relying on prior state law that limited such facilities to six and twelve children, respectively. However, state law now defines small family child care as having up to eight children and large family child care as having up to fourteen children. Local codes should be revised to reflect these new numbers. Rather than amending the local ordinance to increase the number of children permitted, a better approach is to amend the local code to state that small family child care is defined as programs

licensed as such under the California Health & Safety Code. Similar language may be used for large family child care as well. Should the state again change the number of children permitted in each of these types of facilities, local jurisdictions will not have to undertake another amendment process.

As discussed above, state law requires that local jurisdictions do one of the following: (1) permit large family child care homes as a matter of right, (2) use a non-discretionary permit process, or (3) utilize a conditional use permit process.⁴¹ After evaluating local zoning policy, advocates can make a decision as to which system might work best for their particular community. Once advocates make this determination, they can study examples of area cities that have adopted each approach.

The City of Alameda passed an ordinance years ago that adopted the first of these options, thus allowing both small and large family child care as a matter of right in all residential zones.⁴² Similarly, San Francisco lists as a permitted use a “child-care facility providing less than 24-hour care for 12 or fewer children by licensed personnel and meeting the open-space and other requirements of the State of California and other authorities.”⁴³ Although this code provision should be amended to allow for large family child care homes of thirteen or fourteen children, the treatment of both small and large family child care as a permitted use in all residential districts optimizes child care development opportunities. Moreover, this code allows for the possibility of larger child care facilities, such as child care centers, in all residential zones through the conditional use permit process. Redwood City has a zoning code provision adopting the second of the statutory options, a non-discretionary permit.⁴⁴ The ordinance states that “Large Family Day Care Homes shall be permitted in any Zoning District provided that the use complies with all of the following conditions.” The conditions include requirements that:

- The provider is licensed;
- The facility is used principally as the provider’s residence;
- No structural changes are proposed that would alter the residential character of the facility;
- One off-street parking space (which may be in the driveway) per employee of driving age;
- Facilities on major streets have a pick-up/drop-off zone which may be a driveway;
- The facility gives the planning department a copy of its license; and
- The facility is not detrimental to the health, safety, and welfare of the neighborhood.⁴⁵

Under this ordinance, if a large family child care provider applies for the permit and meets these criteria, the permit must be issued, and no hearing will be held.

The third option that cities and counties may adopt regarding large family child care requires an application for a conditional use permit – a process that requires notice to the neighbors and a public hearing but mandates that the application be granted if the large family day care home complies with certain requirements. In jurisdictions that choose this option, it is important that the reasons for denial comply with state law and that the process not be too expensive or otherwise burdensome. Whether or not the requirements are reasonable depends on their

consistency with requirements imposed on other uses for each zone and the experience of child care providers who have attempted to obtain permits.

2. Eliminate or Reduce Business License Requirement, Fees, and Taxes for Child Care Facilities, in Particular Large Family Child Care Homes and Nonprofit Child Care Centers

Although state law forbids cities and counties from imposing “any business license, fee, or tax for the privilege of operating a small family day care home,”⁴⁶ local jurisdictions may charge large family child care programs and child care centers reasonable fees without running afoul of the law. On the other hand, such charges may undermine the attempts of other local government agencies to encourage and support child care. For example, if a local social service agency gives grants to child care providers to expand their programs and another local agency charges a fee or tax, then the fee or tax lessens the impact of the public grant.

Advocates can take a number of approaches to remedy this issue. First, they can suggest the elimination of any local fees or business taxes for child care providers. Depending on the structure of the local zoning ordinance, a special section can be added stating that child care providers, as defined by the ordinance, “shall not be required to obtain a business license, or assessed any fees or tax.” Alternatively, in each of the code sections creating the fee or tax, a phrase can be added to provide that the section shall not apply to child care providers. Finally, should the local government resist complete elimination of such fees, the zoning code might be amended to reduce the fee or tax for child care providers.

3. Permit Child Care Centers in All Zones, Consistent with the Health and Safety of Children

Family child care must be in a provider’s residence, but child care centers may be located in a variety of spaces, such as schools, church basements, and commercial properties. Cities and counties have taken different approaches in developing zoning ordinances affecting child care centers. The San Francisco Planning Code, for example, is supportive of child care centers. It permits smaller child care facilities in all types of zones (residential, commercial, combined residential-commercial, industrial). Only one district, a “downtown support district” of wholesale shops, printers, building services, secondary office space, and parking, requires approval for small child care facilities. The San Francisco Code permits larger child care centers in most commercial and industrial zones without going through a permit process, as well as in residential areas with the approval of the Planning Commission.

Advocates should work to encourage local lawmakers to expand the areas in which child care centers may be located, taking into account the needs of individual communities. By placing child care centers in commercial areas that are close to transportation hubs or office buildings, more parents will be able to work while care for their children is provided nearby.

IV. Conclusion

Zoning ordinances can be a useful tool to increase the supply of child care in a community. By making the approval process for new child care facilities less onerous, and by changing existing ordinances both to comply with state law and make more land available for child care homes and centers, cities and counties will be able to provide a higher quality of life for their residents. However, it is essential that before advocates try to change zoning policy, they understand the need for child care in the community as well as how zoning law operates both in the state and the locality. By knowing about the specific needs of the community, advocates can concentrate their efforts and consequently be more effective in their campaign for more child care.

¹ A glossary of terms for this somewhat confusing area of the law is located at the end of this manual.

² CAL. GOV'T CODE § 65850 (West Supp. 2000). For a copy of this and other statutory provisions frequently cited in this chapter, see Appendix A.

³ *Id.*

⁴ *Id.* § 65860 (West Supp. 2000).

⁵ *Id.* § 65852 (West 1997).

⁶ *Id.* § 65804. These minimum standards do not apply to "chartered cities" in California, which should have their own standards enumerated in the city's charter. *Id.* § 65803.

⁷ *Id.* § 65854. As a general matter, notice must be given pursuant to CAL. GOV'T CODE § 65090 (West Supp. 2000). If the proposed ordinance affects the permitted use of property, then notice must be given pursuant to CAL. GOV'T CODE § 65091 (West Supp. 2000).

⁸ CAL. GOV'T CODE § 65855 (West 1997).

⁹ *Id.* For more information on general plans, see Chapter 1, *supra*.

¹⁰ CAL. GOV'T CODE § 65856 (West 1997). One exception to this public hearing requirement exists: If the proposed change involves changing property from one zone to another, and the planning commission has recommended against the amendment, then a public hearing need not be held unless an interested party requests one.

¹¹ *Id.* § 65857.

¹² *Id.* The planning commission need not hold another public hearing in order to issue a report and recommendation on the modification, and it must report back within 40 days.

¹³ CAL. HEALTH & SAFETY CODE § 1597.46 (West 2000).

¹⁴ CAL. GOV'T CODE § 65909.5 (West 1997).

¹⁵ *Id.* §§ 65900, 65901. If the local jurisdiction does not create a zoning board or administrator, then the planning commission carries out these duties. *Id.* § 65902.

¹⁶ *Id.* § 65903. If the local jurisdiction does not create a zoning appeals board, then the local legislative body carries out these duties. *Id.* § 65904.

¹⁷ *Id.* § 65905. For these hearings, notice must be given pursuant to CAL. GOV'T CODE § 65091 (West 1997).

¹⁸ CAL. GOV'T CODE § 65804(c) (West 1997).

¹⁹ *Id.* § 65804(b). The local government may charge an individual who requests the record the cost of reproducing the tape or document.

²⁰ *Id.* § 65906.

²¹ California state law requires that family child care homes – by definition, a type of child care program that occurs in the provider's residence – be permitted in all residential areas. CAL. HEALTH & SAFETY CODE § 1597.46 (West 2000).

²² *Id.* § 1597.40.

²³ See generally CHILD CARE LAW CENTER, STATEWIDE ZONING PREEMPTION FOR FAMILY CHILD CARE: A STATUS REPORT AND ADVOCACY GUIDE (1994). Many states (nineteen including California) have similar preemption statutes pertaining to the preemption of local zoning ordinances, deed restrictions, or both. The states with statewide zoning preemption are: Connecticut (CONN. GEN. STAT. ANN. § 8-3j (West Supp. 2001); 2001 Conn. Pub. Acts 01-206), Florida (FLA. STAT. ANN. §§ 125.0109, 166.0445 (West 2000)), Hawaii (HAW. REV. STAT. § 46-15.35 (2000), amended by 2001 Haw. Sess. Laws 225), Indiana (IND. CODE ANN. § 36-7-4-1108 (West 1997)), Massachusetts (MASS. GEN. LAWS ANN. ch. 40A, § 3 (West Supp. 2001) which, in addition to preempting local zoning ordinances regarding family child care, includes limited preemption of zoning limits against child care centers), Michigan

(MICH. COMP. LAWS ANN. §§ 125.216g, 125.286g (West 1997)), Minnesota (MINN. STAT. ANN. § 462.357 (West 2001), amended by 2001 Minn. Sess. Law Serv. ch. 174, H.F. 1507 (West) and 2001 Minn. Sess. Law Serv. ch. 207, H.F. 1310 (West); MINN. STAT. ANN. § 245A.14 (West Supp. 2001)), Montana (MONT. CODE ANN. § 76-2-412 (1999)), Nebraska (NEB. REV. STAT. § 43-2616 (Supp. 2000)), New Jersey (N.J. STAT. ANN. §§ 40:55D-66.5a, 40:55D-66.5b (West Supp. 2001)), New York (N.Y. SOC. SERV. LAW § 390(12)(a), (b) (McKinney 2001)), Ohio (OHIO REV. CODE ANN. § 5104.054 (West 1994)), Oregon (OR. REV. STAT. § 657A.440 (Supp. 1994), amended by 2001 OR. LAWS 704 (H.B. 3326)), Rhode Island (R.I. GEN. LAWS § 45-24-37 (1999)), Vermont (VT. STAT. ANN. tit. 24, § 4409 (Supp. 2000)), Virginia (VA. CODE ANN. §§ 15.2-741, 15.2-914, 15.2-2292 (Michie 1997)), Washington (WASH. REV. CODE ANN. §§ 35.63.185, 35A.63.215, 36.70A.450 (West Supp. 2001)), and Wisconsin (WIS. STAT. ANN. § 66.1017 (West Supp. 2000)). Significantly, some preemption laws forbid family child care homes from being barred, but may still require that the homes be approved in some fashion. Other statutes, however, not only forbid homes from being barred, but forbid the imposition of any conditions.

²⁴ CAL. HEALTH & SAFETY CODE § 1596.78(c) (West 2000).

²⁵ *Id.* § 1597.45.

²⁶ *Id.* § 1597.45(b).

²⁷ *Id.* § 1597.45(d).

²⁸ *Id.* § 1596.78(c). A small family child care provider may care for more than six children only if two or more of the children are at least six years of age and if no more than two infants are cared for during the time that more than six children are in the home. *Id.* § 1597.44.

²⁹ *Id.* § 1597.46.

³⁰ *Id.* § 1596.78(b). A large family child care provider may care for more than twelve children only if two or more of the children are at least six years of age and if no more than three infants are cared for during the time that more than twelve children are in the home. *Id.* § 1597.465.

³¹ *Id.* § 1597.46(a)(2)-(3).

³² *Id.* § 1597.46(d).

³³ *Id.* § 1597.46(a).

³⁴ *Id.* §§ 1596.78(b), 1597.465.

³⁵ Abby J. Cohen, *Stumbling Block to Building Block: Zoning and Child Care Centers*, CALIFORNIA PLANNER 1, 6-7 (April 1988).

³⁶ See, e.g., NATIONAL ECONOMIC DEVELOPMENT AND LAW CENTER, A PLANNING GUIDE: LINKING CHILD CARE TO ECONOMIC DEVELOPMENT: BEST PRACTICES OF THE CALIFORNIA LOCAL INVESTMENT IN CHILD CARE (LINCC) PROJECT (2001).

³⁷ ALAMEDA COUNTY CHILD CARE PLANNING COUNCIL, CHILD CARE LAND USE ZONING REPORT (1999). See Appendix C.

³⁸ CAL. HEALTH & SAFETY CODE § 1597.43(a) (West 2000).

³⁹ AMERICAN PLANNING ASS'N, POLICY GUIDE ON THE PROVISION OF CHILD CARE (1997), available at <http://www.planning.org/policyguides/childcare.htm?project> (See Appendix C).

⁴⁰ The last of these APA recommendations will be dealt with in more detail in Chapter 4, *infra*.

⁴¹ For a more detailed description of these limitations, see *supra* note 33 and accompanying text.

⁴² CITY OF ALAMEDA, CAL., MUNICIPAL CODE ch. 30, § 30-2 (enacted February 19, 1980) (defining family day care homes as a permitted use in residential zones).

⁴³ SAN FRANCISCO, CAL., PLANNING CODE § 209.3(e) (adopted August 17, 2001).

⁴⁴ REDWOOD CITY, CAL., ZONING ORDINANCE § 2.21.1 (adopted January 28, 1991).

⁴⁵ This last provision, regarding health and safety, is not one of the four enumerated items that the state preemption statute permits local governments to consider; hence, depending upon how a local jurisdiction interprets this provision, it could violate state law.

⁴⁶ CAL. HEALTH & SAFETY CODE § 1597.45(b) (West 2000).



CHAPTER 3: FAMILY CHILD CARE IN RENTAL PROPERTY

Overview

Currently, about one-third of the children in licensed child care settings in California are cared for in family child care homes, making family child care a significant and important source of licensed child care in California.¹ By definition, family child care must be in the provider's home.² Many family child care providers rent – rather than own – their homes, which means that a significant proportion of California's child care is taking place in rental units.

Unfortunately, landlords often are unreceptive to the idea of having child care in their units and consequently, there are many barriers to family child care homes in rental property. Some of these barriers arise simply due to ignorance of the law and can be removed easily; others arise out of a specific desire to keep child care out of rental properties and therefore require more advocacy on the provider's behalf.

This chapter describes the legal rights of child care providers who operate family child care homes in rental units in California, as well as some strategies for helping providers enforce those rights. In particular, Part II presents a legal background of the validity and enforceability of lease restrictions. Part III describes lease restrictions as they pertain to child care. Finally, Part IV provides some specific strategies that providers and their advocates can employ when confronted with burdensome and possibly illegal lease restrictions.

I. Legal Background

Landlords may place a wide range of requirements or restrictions on the use of rental property. For example, they may limit the term of a lease, limit the presence of pets, and require a tenant to pay a security deposit. These restrictions can be written down in the lease or rental agreement or can be unwritten oral agreements. For simplicity's sake, this chapter will refer to these restrictions as "lease restrictions," even though they are not necessarily documented in the lease.

A. Legal Limits on Lease Restrictions

State, federal, and local laws limit the ability of landlords to impose certain lease restrictions or require certain activities. For example, it is illegal for a landlord to refuse to rent an apartment to someone because of his or her race, as this violates both federal and state law.³ In the case of family child care in California, state law prohibits landlords from using lease restrictions to prohibit or restrict family child care.⁴ This provision is discussed in detail below.

B. Enforcement of Valid Lease Restrictions

If a tenant fails to comply with a material provision of a lease or rental agreement, such as failing to pay rent, a landlord can terminate the tenancy and evict the tenant. However, landlords must follow certain procedures created by state law in order to evict noncomplying tenants.⁵

II. Lease Restrictions and Child Care

Unfortunately, some landlords object to the presence of family child care on their rental property. Because family child care is so important to California's families, the state has enacted several laws that protect the right to provide licensed family child care in rental property. This part describes the legal rights of providers who rent their units, as well as the rights of their landlords.

California law protects family child care by making lease restrictions void and therefore unenforceable if they limit or prohibit family child care. California Health and Safety Code Section 1597.40 provides in part:

- (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 the 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) Except as provided in subdivision (d), 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.

Taken together, these two sections prohibit a landlord from placing restrictions on the use or occupancy of a home as a family child care home, aside from those specifically allowed by the statute. These specific exceptions will be discussed below.

A. Lease Restrictions Providing for "No Business Use" or "Residential Uses Only"

Even if the provider has signed a lease that states "no businesses," "no commercial use," "residential use only," or "no child care," the law protecting family child care applies; a court will not enforce a lease restriction if it limits or prohibits family child care. Consequently, an eviction on the basis that the tenant was operating a family child care home would be denied by the court, as this would be insufficient grounds for an eviction.

B. Practical Effect of the Law

Aside from prohibiting direct and absolute restrictions on family child care homes, the law also prohibits landlords from creating rules that in practice make it impossible or very difficult for tenants to establish family child care in their units. Listed below are a few examples of prohibited restrictions or activities:

- Evicting a provider for planning or operating a family child care home.
- Telling a prospective provider that he or she may not start a family child care home.
- Telling a current provider that he or she must stop operating a family child care home.
- Raising the provider's rent because he or she operates a family child care home.
- Requiring a family child care provider to reveal names or other information regarding the children in his or her care.
- Requiring a family child care provider to purchase liability insurance. It is important to note that California Health and Safety Code Section 1597.531 permits landlords to require that a family child care provider add the landlord as an additional insured if (1) the provider already has insurance, (2) the landlord makes a written request to be added, (3) the provider's insurance will not be cancelled as a result of the additional coverage, and (4) the landlord pays any additional premiums. However, if the provider does not have insurance, the landlord cannot force him or her to purchase a policy.
- Requiring the provider to pay dues, fees, or surcharges beyond those charged to all tenants.
- Restricting the use of common facilities for family child care providers in a way that is different than the requirements or restrictions imposed on all tenants.
- Imposing staffing or health and safety requirements on family child care providers. Family child care is regulated by the state; landlords may not impose additional requirements.
- Requiring that the provider indemnify the landlord, as this might entail a large financial burden if the landlord were to be found liable for costs associated with an injury arising out of the landlord's negligence.
- Requiring waivers of liability from the provider, as this would limit the provider's ability to operate his or her child care facility since insurance might not cover the landlord's negligence.

Of course, a landlord may still evict a family child care provider for other reasons, such as nonpayment of rent, violating the lease, or the expiration of the lease term. However, a landlord may not evict a family child care provider simply for operating a family child care home. A landlord may also raise the rent, so long as rent increases are not due to the operation of the family child care home. The landlord must give proper notice of any rent increases and all rent increases must comport with any local rent control ordinances.

C. Application of the Law Beyond Apartments

The statute provides that lease restrictions or conditions relating to "real property" that limit or prohibit family child care are void.⁶ This means that the statute applies to all types of property in

the state, including houses, apartments, condominiums, cooperatives, mobile homes, and government-subsidized housing.⁷

Some mobile home park owners have attempted to argue that because tenants often own their mobile homes and rent only the spaces that the homes occupy, the statute does not apply. This interpretation, however, does not fit within the plain language of the statute, which applies to all "real property." Renting a space in a mobile home park constitutes the leasing of real property; consequently, the landlord may not limit the use of the mobile home space.

Some landlords of government-subsidized housing, such as private landlords under the Section 8 program or public housing authorities ("PHAs"), may argue that since they operate federally-subsidized programs, they are not subject to state or local rules. However, state law does not contain any exemptions for subsidized housing, and the Pacific/Hawaii Division of the United States Department of Housing and Urban Development ("HUD") has indicated that landlords of subsidized housing must comply with state law in the absence of conflicting federal law. Thus, the state statutes that protecting family child care homes against lease restrictions apply to subsidized housing units in California.⁸

D. Landlords Have Special Rights Vis à Vis Tenants Who Operate Family Child Care Homes

A landlord may treat a family child care provider differently than other tenants in several specific ways and must follow specific procedures. These statutory rights are listed below.

1. Increased Security Deposit

A landlord may charge a family child care provider the maximum security deposit allowed by law, even if he or she charges other tenants lesser amounts. The landlord may charge this increased security deposit "upon commencement of, or knowledge of, the operation of a family [child] care home on his or her property."⁹ The maximum security deposit allowed by law in California is the equivalent of two months' rent for an unfurnished home and three months' rent for a furnished home (in addition to the first month's rent).¹⁰

2. Insurance Rider

Although a landlord may not require a provider to obtain liability insurance, if the provider does have insurance coverage, then the landlord may demand to be added to the policy as an additional insured (commonly known as a rider) if the following conditions are met:

- a) The request is made in writing;
- b) Adding the landlord will not result in cancellation of the policy; and
- c) The landlord pays the additional premium.¹¹

3. Notice Before Commencement of Operation

Providers must notify their landlords before they commence operation of family child care homes. The time frames for notification are enumerated in the statute:

- *If the provider is about to start operating a new family child care home, he or she must notify the landlord **thirty days** before commencing operation.¹² It is important to note that the time frame is triggered by the commencement of operation, not the application for a license. Providers may choose when to notify the landlord so long as they do so at least thirty days before they start caring for children.*
- *If the provider already operates a family child care home, but is moving to a new house or apartment, the provider should contact the licensing analyst who will determine when the landlord must be notified. Sometimes the amount of time required for the notice can be shortened because it might take less than thirty days to transfer a license to the new home.¹³*
- *If the provider already operates a family child care home, but has never notified the landlord, he or she must give notice immediately.¹⁴*

4. Ability to Grant or Deny Permission for "Plus Two" Children

A provider may be licensed to care for up to eight children in a small family child care home.¹⁵ However, an operator of a small family child care home who wants to care for more than six children (i.e., for either seven or eight) must obtain written permission from the landlord for the additional two children.¹⁶ Similarly, a provider operating a large family child care home may be licensed for up to fourteen children but he or she must obtain written permission from the landlord to care for more than twelve children.¹⁷

The landlord is not required to grant permission for the additional children. However, if the landlord refuses to give written permission to care for the additional children, the provider may still care for six children with a small family child care license or twelve children with a large family child care license.

E. Enforcing Providers' Rights to Operate Family Child Care Homes

There are a variety of steps that providers can take to enforce their right to operate family child care homes. These options range from informing the landlord of the provider's rights, to the more drastic step of bringing a lawsuit against the unyielding landlord.

1. Informing Landlords About the Rights of Providers

Many landlords are unaware of the protections built into California law for child care providers. Thus, they may erroneously tell a child care provider that he or she may not operate a child care home. In some cases, if the provider or another advocate informs the landlord or his or her attorney of the law, the landlord will concede and allow the operation of the child care home¹⁸.

2. Retaliatory Evictions

Despite the aforementioned protections for providers, a landlord may persist in refusing to allow the family child care or in imposing illegal restrictions or requirements that effectively prevent a provider from operating a family child care home. If the landlord threatens the provider with eviction, the provider should seek legal assistance immediately. Although the provider does have strong rights in this situation, he or she may need the help of an attorney to enforce those rights. An attorney can begin by informing the landlord of the provider's rights.

If the landlord actually carries out a threat and starts the legal process to evict a family child care provider tenant, the provider or the provider's attorney may be able to argue that the eviction is retaliatory and therefore unlawful under California Civil Code Section 1940. An eviction is retaliatory if it is done "in retaliation for the exercise of an otherwise lawful right." Here, the right at issue would of course be to provide family child care in one's home. However, the landlord may counter that the eviction is predicated on some reason that is unrelated to child care. Thus, a provider who is considering fighting an eviction proceeding should first seek legal advice about the likelihood of winning based on the facts of the particular case. In making this assessment, it will be important to consider matters such as what evidence the provider has that the eviction is related to the child care and whether the tenant has complied with all other provisions of the lease.

3. Complaining to a Rent Board Regarding an Illegal Rent Increase

Some communities have rent boards that enforce local rent control ordinances or other laws relating to rent. Where such a body exists and the landlord attempts to effect a rent increase due to the family child care home, a provider may be able to bring his or her complaint before the board.

4. Bringing Affirmative Lawsuits to Enforce a Provider's Rights

Some providers have attempted to sue landlords for interfering with their businesses. The Child Care Law Center can provide more information on affirmative lawsuits to enforce providers' rights to operate family child care in rental property.

III. Strategies for Eliminating Barriers to Family Child Care Homes in Rental Units

Child care advocates can employ a variety of strategies to ensure that landlords do not restrict or prohibit the operation of family child care in their community. Educating landlords and their attorneys can often resolve problems before they escalate into costly legal battles. However, advocates may also want to develop resources for providers who need legal assistance. This part describes these various educational and legal assistance strategies.

A. Help Family Child Care Providers Educate and Work with Their Landlords

Even though the law is clear that California landlords may not use lease restrictions or other conditions to limit or prohibit family child care, some landlords – whether from ignorance of the law or a blatant disregard for providers' rights – continually try to prevent renters from providing family child care in their units. Some providers may lack the skills, confidence, or knowledge they need to press effectively for their rights. Others may be scared, threatened, or reluctant to engender bad relations with their landlords.

Child care advocates can help family child care providers and the family child care community develop tools to educate landlords about family child care and the rights of family child care providers. Listed and described below are some strategies, many of which are also described in Chapter 4, that advocates may find useful.

1. Educate Family Child Care Providers and Other Family Child Care Advocates about Their Rights

Many providers are unaware or unclear about the statutory protection for family child care. Before these providers can begin to educate their landlords, they themselves must understand their rights. A free Child Care Law Center publication is available that explains tenants' rights to provide family child care in rental property¹⁹. These materials can be used in workshops or meetings or can be distributed to individual providers. Once family child care providers have the appropriate information, they may feel able to advocate for themselves or even for each other through family child care organizations. In addition, by creating more educated providers who know about their rights and about the licensing process, advocates can increase the ability of licensing officials to assist family child care providers.²⁰

2. Help Family Child Care Providers Educate and Maintain Good Relations with Their Landlords

Some landlords oppose family child care homes out of ignorance or a misunderstanding about them. Many landlords imagine hordes of children making a constant racket at unreasonable hours and being picked up by parents who create traffic jams on their streets. Child care advocates can help providers de-escalate the situation by assisting them in gathering and presenting information on the nature of family child care and the real (as opposed to imagined) impact a family child care home has on a rental unit. Advocates can also encourage providers to implement practices that will help them maintain good relations with their landlords, thus allaying the landlords' fears and making the prospect of legal action against or harassment of the provider less likely. Some of these practices are detailed below. In some cases, the provider can present this information to the landlord. In other cases, the child care advocate may want to step in and help the provider try to create a friendlier environment for the family child care home.

a. *Liability*

The primary concern of many landlords is the potential for liability for injuries sustained by children or their parents. Child care advocates can suggest that providers purchase liability insurance and offer the landlord additional coverage (at the landlord's expense). In this way, both the provider and the landlord will be covered for injuries arising in the course of the operation of the family child care home.

b. *Wear and Tear*

Landlords may imagine that the children in a family child care home will create more wear and tear than a typical family. Providers can point out to their landlords that since they are operating a business and are subject to unannounced inspections by Community Care Licensing, their homes are likely to be far cleaner than the homes of other tenants. A provider can offer to make specific arrangements with the landlord regarding certain items, such as paint and carpeting. Finally, the provider may want to offer a larger security deposit, up to the legal maximum, to allay the landlord's fears.

c. *Number of Children*

The landlord may imagine a full-scale school or child care center operating in the rental unit. It may help to point out to the licensing regulations regarding the number of children allowed in a family child care home. It may also be helpful for providers to tell landlords for exactly how many children they are licensed, and for how many they will be caring.

d. *Parking*

Landlords may worry about parking, especially if they envision all the children arriving and leaving at the same time. Child care advocates can help providers show their landlords that the impact on parking is minimal by encouraging them to keep a log of when children are dropped off in a car. If providers stagger the children's schedules in some way, it should be easy to show that parents picking up children will not have a large impact on parking in the area. Additionally, if siblings are picked up together or carpools are used, the impacts can be further minimized. If providers are not yet operating a family child care home, they might get useful data from a similarly sized family child care home. It may also be helpful for providers to make specific arrangements with their landlords regarding parking.

e. *Noise Levels*

Child care advocates can help providers point out that a small family child care home generates noise levels similar to that of other families in the area. Child care advocates can also suggest to providers that they create a schedule that accommodates the needs of landlords or other tenants or neighbors by, for example, not allowing the children to play outside early in the morning.

f. *Hours of Operation*

The landlord may be concerned about the hours of operation of a family child care home, imagining the home to be similar to a residential care facility where clients live full time. It may be helpful to point out that licensing regulations limit the total time children may spend in the family child care home. The provider may also want to give the landlord a copy of his or her schedule, so that the landlord understands exactly when to expect the children and their parents in the home.

g. *Health and Safety*

The landlord may be unaware that family child care is not only legal and protected, but also regulated by the state. Information regarding the licensing system may allay fears regarding the safety of the children, as well as demonstrate that the landlord need not even consider imposing additional restrictions to address health and safety.

3. Help Providers Explain Their Rights to Landlords

In some cases, educating landlords and attempting to allay neighbors' concerns may be insufficient, and a landlord will persist in threatening legal action or otherwise harassing a provider. In these situations, it may be necessary to help the provider explain to the landlord and the landlord's attorney that California Health and Safety Code Section 1597.40 prohibits enforcement of any restrictive covenants that restrict or prohibit family child care. This assistance might be given through a letter written on behalf of the provider or a formal or informal meeting with the landlord. A sample letter is printed in Appendix D.

B. Ensure That Large Housing Development Leases Do Not Contain Restrictions or Prohibitions on Family Child Care

Although this strategy is applicable to all housing developments, it is especially relevant for subsidized housing. Many family child care providers live in publicly subsidized housing where there is a great need for child care for low-income children. In some areas, welfare to work programs even train welfare recipients to become child care providers. However, the training will be wasted and child care will remain scarce in low-income areas if the landlords of publicly subsidized housing create barriers to the operation of family child care homes in these units.

Advocates can educate low-income housing and non-profit community developers, local housing authorities, local Housing and Urban Development ("HUD") offices, local Rural Housing offices, and local government officials about the rights of family child care providers. Since they rent homes to many potential providers, educating these landlords may have a very large impact in low-income communities. At a minimum, advocates should ensure that the landlords understand clearly that their leases may not restrict or prohibit family child care, despite their "special" status as subsidized housing providers.

C. Work with Developers to Create Specially Designed Family Child Care Units in New Developments

Developers who understand the value of family child care to a planned community may be willing to go beyond avoiding restrictions on family child care. They may be willing to designate certain units as family child care units, with increased square footage, outdoor play spaces, and easy access for children with disabilities.

D. Create Grant or Loan Funds to Help Providers Pay Increased Security Deposits

A provider who is just starting his or her business may not be able to afford the increased security deposit allowed by state law. A small grant or loan may enable a provider to offer his or her landlord an increased security deposit, which in turn may help allay the landlord's fears of increased wear and tear on the property.

E. Create Grant or Loan Funds to Help Providers Purchase Liability Insurance Policies

Providers new to the child care business also will often find it difficult to afford liability insurance policies. A grant or loan for payment of the first year's premium may enable a provider to buy insurance and offer his or her landlord the option of purchasing a rider, which may put to rest fears of increased liability. A grant or loan to pay the premium for an entire year may have the added benefit of reducing the cost of insurance, as many child care insurers offer a discount if the provider can pay the full annual premium in advance.

F. Develop Free or Low-Cost Legal Resources for Providers Who Require Legal Assistance in Exercising Their Rights

Some landlords may be so unwilling to allow family child care that, despite the law protecting it, they insist that a provider not operate the family child care home. In some cases they may attempt to evict the provider or raise the rent. In other cases, they may simply harass a provider to such an extent that operating family child care no longer seems worthwhile. Especially if the provider has few financial resources with which to fight the landlord, it may be much easier to stop operating despite the legal right to continue. In these situations, advocates can help preserve the supply of child care by helping the provider to obtain legal assistance for free or at low cost.

There are a number of possible sources of legal representation, although advocates may have to try several of them before finding the appropriate lawyer to assist the provider. Before discussing these possible sources of legal representation, it is important to remember that rental housing issues have very high stakes for providers who stand to lose their homes as well as their employment if they are evicted. Thus, although it is possible for child care advocates to help a

provider educate a landlord who does not understand the law, a provider who could face an eviction should immediately be referred to an attorney for legal assistance.

It is also important to note that timelines for responding to a summons and complaint in an “Unlawful Detainer” (eviction) action, are very short. If the tenant does not file an answer to the complaint within five days, the landlord can ask the court clerk to enter a “default judgment” without the case ever being heard by a judge. If a tenant does file an answer with the court clerk, the case will be scheduled for trial before a judge. Tenants may decide to file an answer on their own first to make sure they meet the deadline, and then seek legal help. The trial is supposed to be scheduled within twenty days but often, because of the volume and backlog, the case will take much longer to be heard. Providers who receive notices indicating an eviction is or could be in process should pay particular attention to any deadlines specified and contact an attorney immediately.

Given the seriousness of eviction and other legal actions pertaining to rental units, it is important to help providers find appropriate legal help as quickly as possible. A few such sources are discussed below.

1. Legal Services

Government funded legal services programs offer free legal assistance to low-income individuals.²¹ It may even be possible to work with legal services programs to develop funding that would allow them to aid providers who do not meet their standard income eligibility guidelines, especially if the providers serve low-income children. The Child Care Law Center can help advocates establish relationships with legal services programs and may be able to provide technical assistance to legal services advocates who work with or represent providers.

2. Volunteer Legal Services Panels

Some county bar associations in California operate volunteer legal services panels through which attorneys volunteer time to help low-income clients *pro bono* (for free). Again, it may be possible for advocates to bring this type of case to the attention of county bar personnel who assign cases for *pro bono* assistance, so as to raise awareness of the need for representation in family child care eviction cases. It may even be possible for an advocate to arrange for a training of local attorneys on the laws specific to family child care so that they are prepared when a case arises. Like legal services, however, volunteer legal services panels are often limited to low-income clients, so the provider may have to meet income eligibility requirements.

3. Economic Development Legal Clinics

Legal clinics that focus on economic development issues may be able to assist low-income microenterprises to establish their businesses and help them to navigate relevant statutory and regulatory provisions.²² Family child care homes, in addition to small centers, are microenterprises and as such may be eligible for assistance if the providers are low-income.

4. Law Firms

Law firms often offer *pro bono* assistance. As discussed above, advocates may need bring the vital importance of licensed child care in the community to the attention of the law firm and explain how evictions and illegal rent increases disrupt that supply, despite the legislature's attempt to limit these negative effects. Also, an individual provider may be intimidated by the thought of asking a law firm for free legal assistance. Advocates can help smooth the way for providers either in advance, or when a particular case arises.

5. Attorney Associations

Children's advocates or associations of women lawyers may have a special interest in these cases.

6. Housing Mediation Services

Housing mediation services may be able to help a family child care provider mediate a dispute with his or her landlord. Frequently, however, even experienced housing mediators may not be aware of the special protections available to family child care providers. Advocates can work to educate mediators so that they can help providers reach agreements with their landlords.

7. Law Enforcement

In some extreme cases, landlords or neighbors may try to intimidate or harass the provider or the parents of the children in his or her care. If this harassment at any point becomes dangerous or represents a serious threat to the safety of the provider, his or her family, or the children, the incident should be reported to local law enforcement.

V. Conclusion

California law has a variety of measures in place to prevent landlords from making it unduly burdensome to establish a family child care home. However, landlords are often unaware of such protections, or sometimes they may simply choose to ignore them. By developing an advocacy strategy that (1) educates both landlords and providers about the providers' rights as well as measures that can lessen the perceived burden on the landlord, and (2) affirmatively protects providers from eviction or financial duress, advocates can help to ensure that the community's needs for child care in rental properties are met.

¹ CALIFORNIA CHILD CARE RESOURCE AND REFERRAL NETWORK, THE 1999 CALIFORNIA CHILD CARE PORTFOLIO.

² CAL. CODE REGS. tit. 22, § 102351.2(f) (2000).

³ See Fair Housing Act of 1968, 42 U.S.C. §§ 3601-12.

⁴ CAL. HEALTH & SAFETY CODE § 1597.40 (West 2000).

⁵ For more information about evictions and landlord-tenant law in general, see MYRON MOSKOVITZ & RALPH WARNER, CALIFORNIA TENANTS' RIGHTS (Janet Portman ed., 15th ed. 2001).

⁶ CAL. HEALTH & SAFETY CODE § 1597.40 (b)-(c) (West 2000).

⁷ CAL. CIV. CODE § 658 (West 1982).

⁸ In a legal opinion dated March 21, 2001 from the Office of Counsel for the United States Department of Housing and Urban Development, Pacific/Hawaii Division, HUD stated that Health and Safety Code Sections 1597.30 et. seq. apply to an insured 236 project receiving loan management set aside section 8 assistance. In particular, a property manager insisted that a tenant in a 236 project obtain liability insurance to cover her small family child care home. Under California Health and Safety Code §1597.531, a landlord may not insist that a tenant obtain such insurance. The legal opinion states that the site manager brought no preemptive federal authority to HUD's attention and, in the absence of federal preemption, the state statute providing protections to family child care providers applies in federally subsidized housing units. Therefore, the property manager was not permitted to insist that the tenant obtain liability insurance for her family child care home.

⁹ CAL. HEALTH & SAFETY CODE § 1597.40(d)(4) (West 2000).

¹⁰ CAL. CIV. CODE § 1950.5 (c) (West 1982).

¹¹ CAL. HEALTH & SAFETY CODE § 1597.531 (West 2000).

¹² *Id.* § 1597.40 (d)(1).

¹³ *Id.* § 1597.40 (d)(2).

¹⁴ *Id.* § 1597.40 (d)(3).

¹⁵ *Id.* § 1597.44.

¹⁶ *Id.* § 1597.44 (d).

¹⁷ *Id.* § 1597.465.

¹⁸ See, CCLC's publication, *Questions & Answers for California Landlords About Family Child Care*, in Appendix D.

¹⁹ See CCLC's publication, *Your Rights and Responsibilities: Family Child Care Homes in Rental Property in California*, in Appendix D

²⁰ The licensing child care advocates can, in some cases, advocate on behalf of a family child care provider; see Cal. Health & Safety Code §1596.872(a &b).

²¹ For a listing of legal services in California, see Public Interest Clearinghouse, *Directory of California and Nevada Legal Services Programs*, available at www.pic.org/resx/direclsp.htm.

²² For a description of various legal services that focus on economic development assistance, see Stephanie Upp et al., *Child Care and Community Economic Development: Critical Roles for Legal Services*, CLEARINGHOUSE REVIEW, May-June 2000, at 3 (2000).

