

2009 HOUSE HUMAN SERVICES

HB 1364

## 2009 HOUSE STANDING COMMITTEE MINUTES

Bill/Resolution No. **HB 1364**

House Human Services Committee

☐ Check here for Conference Committee

Hearing Date: **January 19, 2009**

Recorder Job Number: 7232

Committee Clerk Signature



Minutes:

**Chairman Weisz opened the hearing of HB 1364.**

**Representative Bette Grande, District 41**, introduced the bill. This is before you from the concern of a constituent but it also falls under the realm of what we have been hearing a lot in the news about child care issues. We are aware of the problems that have been coming up.

Again, this weekend another child care closed in Fargo. It's becoming hard to find good, stable, consistent child care in a lot of areas. One of the great places I've always found was in-home child care. She went over the problems of one of her constituents who provided child care in her home. **(Attachment 1, Letter from Pamela Lindner)** I also have amendments **(Attachment 2)** What this bill does is codifies Judge Dawson's ruling. In the ruling child care was not considered a small business.

**Representative Holman:** Who deals with the number of kids you can have in the home? Is that the state or city?

**Representative Grande:** It is in code in definitions. There is a place that allows counties to write administrative rules as to how their county will handle it. It's quite restrictive as to who can have a licensed day care what qualifications you have to have. They are supervised.

There are people that come in and check on them and even drive by to make sure that you have the right number of children in the yard.

**Representative Uglem:** Does this allow for more than 11?

**Representative Grande:** That's where the dispute come in. The county says no more than 12. A family residence has to have fewer than 8.

**Representative Conrad:** Recently in Minot we have task force looking at how we can expand our child care options. One of the things they looked at is the city zoning rules do not discourage child care so they are changing that zoning to make it clear that we want child care wherever we can get it. Is Fargo dealing with zoning laws?

**Representative Grande:** I'm not aware. . .there are groups looking at child care. When Fargo had two large day cares close down, there were actually a group of business people who got together and they have set land and move look at this.

**There was no further testimony on the bill; Chairman Weisz closed the hearing of HB 1364.**

## 2009 HOUSE STANDING COMMITTEE MINUTES

Bill/Resolution No. HB 1364

House Human Services Committee

☐ Check here for Conference Committee

Hearing Date: **January 26, 2009**

Recorder Job Number: 7764

Committee Clerk Signature



Minutes:

**Chairman Weisz opened discussion of HB 1364.** There are extreme concerns about this bill and the way it is written. There is concern about limiting the covenants communities can put in place.

**Representative Holman:** I personally struggle with bills that are put in specifically for a neighborhood situation as it impacts the whole state of ND.

**Representative Potter:** I move **Do Not Pass**.

**Representative Holman: Second.**

**Representative Porter:** When you look at the ramifications of the way the bill is written it has some issues. There is a reasonable fix so you are not lumping future problems with day care neighborhood day care situations. This will put a burden on working families by not putting fixes in place. I will oppose the do not pass motion in hopes that we can put amendments on this.

**Representative Pietsch:** On your amendment, do you have an emergency clause on there?

**Representative Porter:** There is a process you can go through back to the city commission or the zoning authority as long as you have the signatures of the majority of the subdivision

and there are some public hearings, and some loops you have to go through that can get you variances to those existing covenants. It's a fairly cumbersome process.

**Chairman Weisz:** The amendment would have nothing to do with the covenants. It says only that family child care does not fall under the definition of a small business.

**Representative Conklin:** Isn't this what the judge already told them.

**Chairman Weisz:** That is right. This just clarifies that the Legislature has declared they are not a small business.

**Representative Holman:** If the Supreme Court rules that it is sustained, then our action is moot.

**Chairman Weisz:** Our action takes precedence. Legislative Counsel's opinion of what this bill does is that no covenant, past, present, or future can limit family child care.

**Representative Uglem:** I can see where someone like a retirement community would not want a bunch of kids running around.

**Representative Conrad:** I withdraw my motion.

**Representative Holman:** I withdraw my second.

**Chairman Weisz:** I will have LC draw up an amendment.

**Discussion closed.**

## 2009 HOUSE STANDING COMMITTEE MINUTES

Bill/Resolution No. **HB 1364**

House Human Services Committee

☐ Check here for Conference Committee

Hearing Date: **January 27, 2009**

Recorder Job Number: 7910

Committee Clerk Signature



Minutes:

**Chairman Weisz opened discussion of HB 1364.** Will everyone look at the distributed amendment—it says what we discussed yesterday.

**Representative Porter:** I move the Amendment (90656.0101)

**Representative Conrad: Second**

**A voice vote was taken. The amendment was accepted**

**Representative Conrad: I move Do Pass as Amended**

**Representative Nathe: Second**

**Representative Holman:** I'm not entirely clear. One situation comes to mind. I'm in a condominium that has a covenant about age. Could someone set up child care in that?

**Chairman Weisz:** If there is a covenant about age, I would say you couldn't set up. All this does is state that if that condo has a covenant that said "no small business" they couldn't deny a family child care provider. If by age they prohibit it, it will remain prohibited. If it is a prohibition strictly to business nature, then this will open it up.

**A roll call vote was taken. Yes: 12, No: 0, Absent: 1 (Uglen)**

**HB 1364 as amended was passed.**

**Representative Conrad will carry the bill.**

VR  
1/27/09

PROPOSED AMENDMENTS TO HOUSE BILL NO. 1364

Page 1, line 2, replace "on family child care homes" with "regarding small businesses"

Page 1, replace lines 6 through 9 with:

**"Covenant or restriction regarding small business. For purposes of a provision in a covenant or any other restriction on use, a small business does not include a family child care home."**

Renumber accordingly

Date: 27 Jan 09  
Roll Call Vote #:

**2009 HOUSE STANDING COMMITTEE ROLL CALL VOTES**  
**BILL/RESOLUTION NO.**

House HUMAN SERVICES Committee

☐ Check here for Conference Committee

Legislative Council Amendment Number 90656.0101

Action Taken ☒ Do Pass ☐ Do Not Pass ☐ Amended

Motion Made By Porter Seconded By Conrad

Representatives	Yes	No	Representatives	Yes	No
CHAIRMAN ROBIN WEISZ			REP. TOM CONKLIN		
VICE-CHAIR VONNIE PIETSCH			REP. KARI L CONRAD		
REP. CHUCK DAMSCHEN			REP. RICHARD HOLMAN		
REP. ROBERT FRANTSGOG			REP. ROBERT KILICHOWSKI		
REP. CURT HOFSTAD			REP. LOUISE POTTER		
REP. MICHAEL R. NATHE					
REP. TODD PORTER					
REP. GERRY UGLEM					

Total (Yes) Accepted No

Absent

Bill Carrier

If the vote is on an amendment, briefly indicate intent:



Date: 1-27-09  
Roll Call Vote #:

**2009 HOUSE STANDING COMMITTEE ROLL CALL VOTES**  
**BILL/RESOLUTION NO. 1364**

House HUMAN SERVICES Committee

☐ Check here for Conference Committee

Legislative Council Amendment Number \_\_\_\_\_

Action Taken ☒ Do Pass ☐ Do Not Pass ☒ Amended

Motion Made By Rep Conrad Seconded By Rep Nathe

Representatives	Yes	No	Representatives	Yes	No
CHAIRMAN ROBIN WEISZ	✓		REP. TOM CONKLIN	✓	
VICE-CHAIR VONNIE PIETSCH	✓		REP. KARI L CONRAD	✓	
REP. CHUCK DAMSCHEN	✓		REP. RICHARD HOLMAN	✓	
REP. ROBERT FRANTSVOG	✓		REP. ROBERT KILICHOWSKI	✓	
REP. CURT HOFSTAD	✓		REP. LOUISE POTTER	✓	
REP. MICHAEL R. NATHE	✓				
REP. TODD PORTER	✓				
REP. GERRY UGLEM	✓				

Total (Yes) 12 No 0

Absent 1

Bill Carrier Rep Conrad

If the vote is on an amendment, briefly indicate intent:

**REPORT OF STANDING COMMITTEE**

**HB 1364: Human Services Committee (Rep. Welsz, Chairman)** recommends **AMENDMENTS AS FOLLOWS** and when so amended, recommends **DO PASS** (12 YEAS, 0 NAYS, 1 ABSENT AND NOT VOTING). HB 1364 was placed on the Sixth order on the calendar.

Page 1, line 2, replace "on family child care homes" with "regarding small businesses"

Page 1, replace lines 6 through 9 with:

"Covenant or restriction regarding small business. For purposes of a provision in a covenant or any other restriction on use, a small business does not include a family child care home."

Renumber accordingly

2009 SENATE HUMAN SERVICES

HB 1364

## 2009 SENATE STANDING COMMITTEE MINUTES

Bill/Resolution No. HB 1364

Senate Human Services Committee

☐ Check here for Conference Committee

Hearing Date: 3/17/09

Recorder Job Number: 11109

Committee Clerk Signature

*Mary K Monson*

Minutes:

**Senator J. Lee** opened the hearing on HB 1364 relating to covenants and other restrictions regarding small businesses.

**Representative Bette Grande** (District 41) introduced HB 1364. Attachment #1

She provided testimony from a constituent who went unnamed because of an ongoing court case dealing with this. Attachment #2

**Rep. Grande** proposed an amendment requesting an emergency clause and some language changes. Attachment #3

**Senator J. Lee** explained that covenants are usually written so that until the neighborhood is fully developed the developer who owns it will have control. As the lots get sold the neighborhood activities are eventually turned over to a neighborhood association. Covenants are more restrictive than the zoning. They are not a city law but are neighborhood development criteria.

**Rep. Grande** said the covenant does not spell out child care.

**Senator J. Lee** – it says business and child care is a business.

**Rep. Grande** replied that it was ruled by the judge that child care was not a business.

**Senator Heckaman** asked Rep. Grande to tell her about the calls from every county.

**Rep. Grande** said that every county has a childcare licensing specialist. She had notified the constituent and Rep. Grande that she was hearing from every county about this issue.

There was discussion that most of the counties wouldn't have covenants at all. They are most likely only in the eight major cities. Most people moving into a neighborhood with a covenant do so because they want that control.

**Senator Dever** asked if this was an older neighborhood and if the covenants dated back some time.

**Rep. Grande** said it isn't. She thinks the issue is that it probably isn't completely developed and the developer still has control.

**Senator Dever** made a couple of observations – (1) last session a bill was passed that said when a covenant says you can't have signs, that doesn't apply to political signs – so there is some precedent for looking at this. (2) it seems to him there should be some way of establishing some kinds of restrictions as far as traffic etc. if it becomes a problem.

**Rep. Grande** said she wanted to keep this down to numbers that are typical – under 12. The provider has no intention of having more. The county won't license for more than that in the in-home child care.

(Meter 18:10) She spoke about the National Association of Family Child Care looking into zoning restriction covenants.

**Senator J. Lee** pointed out the difference between zoning restrictions and covenants. Discussion followed on providing other services out of the home. Traffic is usually the objection.

**Rep. Grande** (meter 21:15) talked about the suspected reason the man brought this against the day care provider – his son not allowed on the playground equipment during day care hours.

**Senator J. Lee** was a little anxious about appearing to intrude into an ongoing court action with the emergency clause. She spoke about the benefits of covenants.

**Rep. Grande** didn't have an objection to not putting the emergency clause on but she did want to clean up the language.

**Blake Crosby** (Business Manager, ND Child Care Resource and Referral) provided testimony on behalf of the president of ND Child Care Providers, Inc., Earleen Frieze. Attachment #4 He pointed out that most family child care providers actually have around seven which doesn't generate an inordinate amount of traffic. He pointed out that location is a very critical component of child care.

The levels of child care were reviewed. (Meter 31:40)

**Senator Dever** asked what it takes to change a covenant.

**Senator J. Lee** said what she has ever seen has been the super majority, usually about 75%. It all depends on how the covenant was drafted in the first place.

**Mr. Crosby** said he believed there is some covenant standard that does exempt some home businesses from being treated like a business within some zoning restrictions and in some covenants.

(Meter 37:00) There was discussion that this is in the Supreme Court and if the decision would affect anything except this one individual provider.

The issue here is probably not the business, but probably because they put up the playground equipment in the yard.

There was no opposing or neutral testimony.

The hearing on HB 1364 was closed.

## 2009 SENATE STANDING COMMITTEE MINUTES

Bill/Resolution No. HB 1364

Senate Human Services Committee

☐ Check here for Conference Committee

Hearing Date: 3/18/09

Recorder Job Number: 11226

Committee Clerk Signature

*Mary K Monson*

Minutes:

**Senator J. Lee** called the committee to order to work on HB 1364.

**Senator Heckaman** thought that because of the litigation and the fact that this was getting into local laws they shouldn't get involved with this.

**Senator Heckaman** moved a **Do Not Pass**.

Second by **Senator Erbele**.

**Roll call vote 5-0-1 (Senator Marcellais) Motion carried.**

Carrier is **Senator J. Lee**.

Attachment #5 – additional information.

PROPOSED AMENDMENTS TO ENGROSSED HOUSE BILL NO. 1364

Page 1, line 2, after "businesses" insert "; and to declare an emergency"

Page 1, line 7, remove "a family" and after "care" insert "services provided in a private residence"

Page 1, line 8, remove "home"

Page 1, after line 8, insert:

**"SECTION 2. EMERGENCY.** This Act is declared to be an emergency measure."

Renumber accordingly



Date: 3/18/09

Roll Call Vote #: \_\_\_\_\_

**2009 SENATE STANDING COMMITTEE ROLL CALL VOTES**

**BILL/RESOLUTION NO.** HB 1364

Senate Human Services Committee

☐ Check here for Conference Committee

Legislative Council Amendment Number \_\_\_\_\_

Action Taken ☐ Do Pass ☒ Do Not Pass ☐ Amended ☐ Rerefer to Appropriations

☐ Adopt Amendment ☐ Reconsider

Motion Made By Sen. Heckaman Seconded By Sen. Erbele

Senators	Yes	No	Senators	Yes	No
Senator Judy Lee, Chairman	✓		Senator Joan Heckaman	✓	
Senator Robert Erbele, V.Chair	✓		Senator Richard Marcellais		
Senator Dick Dever	✓		Senator Jim Pomeroy	✓	

Total (Yes) 5 No 0

Absent 1

Floor Assignment Senator J. Lee

If the vote is on an amendment, briefly indicate intent:

**REPORT OF STANDING COMMITTEE (410)**  
March 19, 2009 1:44 p.m.

**Module No: SR-50-5372**  
**Carrier: J. Lee**  
**Insert LC: . Title: .**

**REPORT OF STANDING COMMITTEE**

**HB 1364, as engrossed: Human Services Committee (Sen. J. Lee, Chairman)**  
**recommends DO NOT PASS (5 YEAS, 0 NAYS, 1 ABSENT AND NOT VOTING).**  
Engrossed HB 1364 was placed on the Fourteenth order on the calendar.

2009 TESTIMONY

HB 1364

Pamela Lindner  
3402 28<sup>th</sup> Ave SW  
Fargo, ND 58103

December 24, 2008

North Dakota Legislators  
Bismark, ND 58505

same given  
to Sen. K

#1

Dear North Dakota Legislators:

I am asking your support in passing this legislation that would specifically prevent by statute the adopting or enforcing of any covenants, conditions, restrictions, regulation or by-law that directly restricts the creation or operation of home daycares. In fact, it would prove North Dakota has a strong public policy of promoting "home daycares for children" that are "situated in normal residential surroundings." Hopefully you will see how important this piece of legislation is for the State of North Dakota and the future preservation of our home daycares after hearing about the battle I am currently fighting to preserve my 21-year licensed home daycare; and, how this legislation could impact the whole State of North Dakota as other States have already felt this impact and initiated legislation to protect their home daycares.

A year ago I received a letter from our next-door neighbors' lawyer telling us to Cease and Desist operation of my home daycare business because we were in direct violation of the restrictive covenants in our housing development of which we had lived and I had operated my home daycare business for over 6-1/2 years without any complaints. (I operated a licensed home daycare consisting of 7 families, Monday – Friday from 7:30 AM – 5:30 PM.) The covenants read "shall be used for single family residential purposes only . . . no building or structure intended for or adopted to business purposes . . . " ; therefore, our neighbors interpreted this to mean a licensed home daycare business should not be permissible.

I immediately contacted the City of Fargo from whom I had received a Certificate of Occupancy Permit when I opened my licensed home daycare. They immediately sent me to see Mark Williams, Planning/Zoning Administrator, who willingly wrote a letter explaining how our property was zoned and I was permitted by the City of Fargo to have a daycare of 1- 12 children in my residence as an accessory use to the allowed primary use by right with the current zoning laws. This letter did not stop my neighbor's litigation process. They forced us into District Court to enjoin the operation of my home daycare in alleged violation of restrictive covenants.

The case was heard by Judge Georgia Dawson. We supported our case with three arguments:

- 1) The operation of the daycare did not violate the restrictive covenants. We were using our home for a single family residence. The daycare was an accessory use.

Because the care and raising of children is a single family residential purpose, this operation does not violate the covenant;

- 2) The restrictive covenants and zoning ordinances from the City of Fargo combine to allow the daycare. (In an additional paragraph in the covenant it was stated " all properties were subject to all *privileges* given to it by the City of Fargo . . .no covenants . . .shall be in conflict with any zoning ordinance or land use law . . . of the City of Fargo;"
- 3) Public Policy. We referenced ND Child Care Resource and Referral Network showing the need for in-home daycare in ND. We also showed how other States have held that public policy is in favor of home daycares.

Judge Dawson ruled in my (Defendant's) favor. By Order of Dismissal the Plaintiff's complaint was **DISMISSED WITH PREJUDICE**. In summary, her reasons included:

The twofold purpose of the Covenant's paragraph was highlighted by its title "Land Use and Building Type." (emphasis added).

1. "The Language in the first half of paragraph one of the Restrictive Covenants does not prohibit business or commercial uses. (*"all lots shall be used for . . .residential purposes only . . ."*) The children are cared for in her home and in the adjoining yard. The only observable factor which would indicate to an observer that the Defendant does not have a large family is the vehicular traffic in the morning and afternoon when the children arrive and depart. When focusing on the objective activities involved in this case, the Court finds they are simply residential in nature. Therefore the Defendants' use of their home as a daycare is consistent with an incidental use of their home as a residence and does not violate the residential use restriction in the Restrictive Covenants. "
2. The Language in the second half of paragraph one of the Restrictive Covenants does not prohibit business or commercial uses. (*"no building or structure intended for or adopted to business purposes . . . shall be erected, placed, permitted or maintained on any such lot or any part of such lot . . ."*) This Court is of the view that a restriction against the erection of a building for or adapted to business purposes "is a restriction only as to the type of construction and not as to the subsequent use of the structure.." If the drafters of the Restrictive Covenants had wanted to exclude all business use of the residential properties, they could have expressly and plainly stated as much.

Judge Dawson concluded her 9-page Law and Analysis with this final paragraph: "In view of the above conclusions it becomes unnecessary to discuss the other questions raised by the

Defendants, such as the effect of zoning laws on the use of the Defendants' property or public policy invalidating the restrictive covenants at issue."

Now, 60 days after Judge Georgia Dawson's ruling, my neighbor has filed a Notice of Appeal with the North Dakota Supreme Court. You can imagine the emotional and financial turmoil I have already endured through this year long process trying to keep a home daycare going with the burden of Court costs and legal fees, only to find out we are now being pushed into the ND Supreme Court with even additional legal fees to protect myself. I feel all this could be avoided for me and for home daycares throughout North Dakota with the passing of this legislation, as other States in the United States have already done. If by chance my neighbor is able to get this overturned in the North Dakota Supreme Court, it will set precedence for other cases and affect any home daycares operating in a housing development with restrictive covenants. It has been brought to my attention that this will affect home daycares in Fargo, Minot, Bismarck, Grand Forks, and all over the state of North Dakota as all these cities have housing developments with restrictive covenants. Please consider the affect this could have on the future of North Dakota's home daycares, and consequently the availability of child care for North Dakota's workforce and furthermore North Dakota's economic development as we have all recognized the connection between child care and economic development and view child care as an integral part of a community's infrastructure.

Sincerely,

Pamela Lindner  
3402 28<sup>th</sup> Ave SW  
Fargo, ND 58103

enclosure

2

HB 1364

Proposed amendments:

Line 9 After home add, and group child care home

Section 2. Emergency clause:

And to declare an emergency.

Chairman Lee and members of the Human Services committee,

As you are aware there is a problem with the families finding good, safe, consistent childcare in most areas of the state. One of the great places to find competent childcare is in a home setting.

It was brought to my attention by a constituent after she had been running an at home childcare for 7 years and now a neighbor has taken her to court to close it down.

I would like to refer to her testimony at this time and I ask that the committee to understand I cannot use her name or location as now the neighbor, after losing in court has now appealed to the Supreme court and with a case pending she is asking not to mention her name.

Thanks you,

Representative Bette Grande



## Written Testimony supporting HB1364

Chairman Judy Lee and members of the Senate Human Services Committee,

My name is Earleen Frieze. I am President of ND Child Care Providers, Inc. a statewide organization whose membership consisting of child care providers, local child care associations and interested persons. I provided licensed child care in our home for 26 years, retired for health reasons and for the past 7 years have been employed part time as the executive secretary for the Hettinger Chamber and Adams County Development Corporation.

North Dakota be is in the cities or rural areas, is faced with an ever increasing child care shortage. As new housing developments are created, they typically include covenants which exclude small businesses from the development which only increases the child care shortage. Currently the definition of a small business is cloudy when it comes to allowing family child care settings. This law is necessary to clarify that family child care settings can be allowed to operate in developments having this restrictive covenant.

The National Association of Family Child Care in 2008 adopted a four page document addressing this issue. I will quote the opening paragraph. "Family child care providers who are in compliance with their state licensing regulations are being confronted with barriers created by local zoning laws and homeowners associations' restrictive covenants. These restrictions and prohibitions force family child care providers to go out of business or move to communities without restrictions, severely limiting the supply of regulated child care. Policy makers need to recognize family child care as an essential component of the early care and education infrastructure and must plan to include child care in communities where it will be accessible to parents."

ND Child Care Providers, Inc. sees licensed family child care as an important option for parents and would strongly support HB1364. North Dakota can not afford to further limit child care options.

Earleen Frieze, President  
North Dakota Child Care Providers, Inc.

## **Zoning and Restrictive Covenants Prohibiting Family Child Care**

The Issue: Family child care providers who are in compliance with their state licensing regulations are being confronted with barriers created by local zoning laws and homeowners' associations' restrictive covenants. These restrictions and prohibitions force family child care providers to go out of business or move to communities without restrictions, severely limiting the supply of regulated child care. Policy makers need to recognize family child care as an essential component of the early care and education infrastructure and must plan to include child care in communities where it will be accessible to parents.

### **What is family child care?**

Family child care is an early care and education service provided for a fee in a child care provider's home to children unrelated to the provider. States typically regulate family child care to protect the health and safety of the children in care. Each state makes policy decisions about how it will regulate family child care and what a family child care provider must do in order to receive the state's permission to operate a family child care home.

The number of family child care homes in this country, and the number of children they serve, indicates that family child care is an essential component of our early care and education infrastructure. At the time of the National Association for Regulatory Administration (NARA) 2005 Child Care Licensing Study<sup>1</sup>, there were 213,966 licensed family child care homes in the United States with the capacity to care for 1,921,639 children. Only ten states, however, require family child care providers to be licensed when they care for one unrelated child. The rest do not regulate family child care homes until the number of children served reaches the state's threshold for licensing, so the actual number of legally operating family child care homes is much higher than the number cited in the licensing study.

Although family child care is a service provided for a fee and regulated by the state, it is by definition a business that cannot exist outside of a residential setting. Family child care can only be provided in a home environment, offering a small group of children responsive, nurturing care with all the comforts of learning basic early childhood skills in a setting as similar to their own homes as possible. Because the number of children is small and their ages range from infant to school age, a family child care home allows siblings to stay together. Because children can stay in the same provider's care from infancy through elementary school, they can develop long-term relationships with their family child care provider and the other children in the provider's care. Family child care resembles the care a stay-at-home mother provides for her family, and a

---

<sup>1</sup> National Association for Regulatory Administration and National Child Care Information and Technical Assistance Center. *The 2005 Child Care Licensing Study: Final Report*. December, 2006. Accessed at <http://www.nara.affiniscape.com/displaycommon.cfm?an=1&subarticlenbr=104> on September 18, 2007.

family child care home is first and foremost a family residence, with all the comforts of home, even when it is offering early care and education services to other children in the neighborhood.

Family child care is also an important community asset. Both families and employers depend on child care to enable parents to go to work. Widely recognized brain development research has demonstrated that young children benefit from high quality early learning experiences in the first five years of their lives. In many rural areas, family child care homes are the only early care and education facilities available. In more heavily populated areas, family child care homes offer parents the choice of a setting where their children can learn in their home language or spend their child care hours with their siblings. Whatever their reasons, many parents want their children to receive their early education in a family child care home. Family child care not only educates young children, it also gives parents the support they need to be dependable, productive employees. Local policy makers must recognize this benefit to the community and support family child care that is operated in compliance with state regulations. Unfortunately, the trend in recent years shows the number of regulated family child care homes in the country is declining. One of the reasons for that decline may be found in local land use policy decisions.

#### **What impact do zoning and restrictive covenants have on family child care?**

Local governments enact zoning laws that keep most business activities out of residential neighborhoods, and they can set restrictions and charge fees for permits for the businesses they allow. Developers of residential communities can include restrictive covenants in deeds and homeowners' association covenants that prohibit or limit business activity in homes in the community. Both zoning laws and restrictive covenants, which are also sometimes called deed restrictions, are used to prohibit or restrict the operation of family child care homes that meet state licensing requirements.

Local planning and zoning officials and real estate developers often seem to be unaware of the difference between a large child care center, in a commercial space used only for the child care business, with dozens of children and staff coming and going all day, and a small family child care home, with much less visibility as a single provider cares for six or eight children who eat their meals in the home's kitchen and play in its family room and back yard. Because family child care homes look just like other homes on the block, local policy leaders who have no previous contact with family child care may assume that all child care facilities are like the centers whose signs and parking lots and playgrounds they see as they pass by. But a family child care home is a home first and foremost.

Contrary to the arguments made by those who want to erect barriers to family child care, it is not a business that will negatively impact the quality of life in a community. The problems planners and developers imagine arising include increased traffic and parking problems, excessive noise, commercial signs, and additional liability for personal injuries on playgrounds and other common areas in residential developments. These fears are unfounded and not based on actual experiences with regulated family child care homes. A family child care home may bring a few extra cars into the neighborhood at the beginning and end of the day, although often these cars belong to families who already live in the neighborhood. Children usually arrive and leave on staggered schedules, so demands for parking are both short term and sequential. Family child care homes can be expected to comply with residential standards for noise and signs, and

family child care providers' licensing regulations hold them to higher standards for supervision of children than parents when their children play on local playground facilities, so the risk of injuries will be lower for children in family child care.

States enact child care licensing laws to implement policy decisions they make regarding how child care should be regulated. When family child care providers comply with state licensing laws, they are granted permission by the state to legally operate their family child care homes. But local planning and zoning boards and private real estate developers can disregard the state's policy decisions and restrict, impose fees on or even prohibit family child care in their communities. When local policy makers pass a zoning law that reduces the number of children permitted in family child care homes below the state's legal capacity and charge providers exorbitant permit fees, they make family child care homes less viable economically. These restrictions also make it harder for parents to find care for their children. When real estate developers use restrictive covenants to prohibit family child care in new developments, family child care providers who relocate are forced to give up their profession if they want to purchase a home in a development with restrictive covenants, and families moving into developments with restrictive covenants cannot find child care in their neighborhoods.

#### **NAFCC's position on family child care zoning and restrictive covenants**

Family child care is an asset to a community and an essential component of the early care and education delivery system. It offers a safe place for millions of children to play and learn in a home environment every day while their parents work. It also offers many family child care providers a way to work at home while caring for their own young children. When states set the requirements for family child care homes, those requirements should take precedence over zoning and restrictive covenants, so all providers throughout the state operate under the same set of regulations. A family child care provider should not be limited in where in a state she can live and work by restrictive covenants and prohibitive zoning laws; no local jurisdiction should be allowed to charge family child care providers zoning permit fees that make it more costly to operate family child care homes in some parts of the state than in others; and families should be able to find family child care homes in their neighborhoods, wherever they live.

**It is the position of NAFCC that family child care must be protected by state law as a residential use. States should enact both preemptive zoning legislation and legislation declaring family child care to be a residential use that shall not be prohibited by restrictive covenants.**

This position is consistent with the *Policy Guide on the Provision of Child Care* issued in 1997 by the American Planning Association.<sup>2</sup>

Most states classify family child care homes as either small family child care homes, which usually have only one provider, or large family child care homes, which require two or more providers depending on the number of children and their ages. A small family child care home operating within the state licensing standards should be classified as a residential use, not subject to any further restrictions by local ordinances or restrictive covenants because the family

<sup>2</sup> American Planning Association, *Policy Guide on the Provision of Child Care*, 1997, accessed at <http://www.planning.org/policyguides/childcare.htm> on October 18, 2007.

child care use is so similar to the residential use of the other homes in the neighborhood. A large family child care home should also be considered a residential use, but because it has a larger number of client families and one or more employees, some reasonable local restrictions to maintain traffic safety may be imposed. For example, a jurisdiction could use a non-discretionary, no fee permit process to restrict the number of large family child care homes that can operate on one block or could require a provider to create a traffic and parking plan for the family child care home's clients and staff.<sup>3</sup>

The NAFCC mission is to promote quality child care by strengthening the profession of family child care. Zoning and restrictive covenants that prohibit or place limitations on family child care weaken our profession by driving family child care providers who are willing to comply with state child care licensing out of the field. We urge all local policy makers to examine their land use plan and find ways to protect family child care providers who meet their state child care licensing requirements.

---

<sup>3</sup> See Low Income Investment Fund report, *Responding to Child Care Facilities: A Practical Guide for City and County Planners*, 2007, accessed at [http://www.liifund.org/PROGRAMS-NEW/CHILDCARE/TOOLS/\(3\)%20Responding to Child Care Facilities.pdf](http://www.liifund.org/PROGRAMS-NEW/CHILDCARE/TOOLS/(3)%20Responding%20to%20Child%20Care%20Facilities.pdf) on October 18, 2007.

## NDLA, S HMS

---

**From:** Lee, Judy E.  
**Sent:** Saturday, March 14, 2009 6:08 PM  
**To:** NDLA, S HMS  
**Subject:** FW: HB 1364 SPONSOR NOTIFICATION

Mary -  
Please make copies for all of us.

Senator Judy Lee  
1822 Brentwood Court  
West Fargo, ND 58078  
home phone: 701-282-6512  
e-mail: [jlee@nd.gov](mailto:jlee@nd.gov)

-----Original Message-----

**From:** Mathern, Tim  
**Sent:** Thursday, March 12, 2009 7:19 PM  
**To:** Lee, Judy E.  
**Cc:** Grande, Bette B.  
**Subject:** FW: HB 1364 SPONSOR NOTIFICATION

Senator Lee, Senate Human Services Committee

Ingredient of children feeling safe and parents feeling responsible is having direct knowledge about their day care provider outside the day care arrangement. Having day care in our neighborhoods provides an opportunity for families to have knowledge of day care providers from other neighbors and provides children a sense of safety related to some familiarity.

HB 1364 is a modest but important way to encourage development of day care services in neighborhoods. This is positive for families using the services.

Please provide copies of this email to committee members and your clerk.

I ask for a yes vote on HB 1364.

Thank you, Senator Tim Mathern

-----Original Message-----

**From:** COMMITTEE CLERK [mailto:[schief@nd.gov](mailto:schief@nd.gov)]  
**Sent:** Thursday, March 12, 2009 5:04 PM  
**To:** Mathern, Tim  
**Subject:** HB 1364 SPONSOR NOTIFICATION

SPONSOR NOTIFICATION Desk 27

Sen. Mathern  
Human Services Committee  
J. Lee, Chairman  
Will hear: HB 1364 at 9:45 AM on 3/17  
Red River Room