



State of Wisconsin DEPARTMENT OF HEALTH AND SOCIAL SERVICES

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MEMORANDUM

TO: Eloise Anderson
Division of Community Services

FROM: Neil Gebhart *MB*
Assistant Legal Counsel
Office of Legal Counsel

RE: Applicability of Family Day Care Center Zoning Override Law to
Premises Not Used as a Residence

Silvia Jackson, Director, Milwaukee Regional Office, has requested a legal opinion as to the validity of the City of Milwaukee's interpretation of s. 66.304, Stats., which provides as follows:

- "(1) In this section:
 - (a) 'Family day care home' means a dwelling licensed as a day care center by the department of health and social services under s. 48.65 where care is provided for not more than 8 children.
 - (b) 'Municipality' means a county, city, village or town.
- (2) No municipality may prevent a family day care home from being located in a zoned district in which a single-family home residence is a permitted use. No municipality may establish standards or requirements for family day care homes different from the licensing standards established under s. 48.65. This subsection does not prevent a municipality from applying to a family day care home the zoning regulations applicable to other dwellings in the zoning district in which it is located."

The City of Milwaukee, Department of Building Inspection, takes the position that s. 66.304, Stats., does not apply to a day care center operated in a building in which a family does not reside. The case in question involves Gray's Child Development Center, which proposes to operate a day care center for not more than 8 children in a single family residence. The center would operate from 6:30 a.m. until 11:00 p.m. From 11:00 p.m. until 6:30 a.m., the building would be locked and unoccupied.

Though the question presented is a close one, in my opinion the City of Milwaukee's interpretation that s. 66.304, Stats., does not apply to the proposed day care center described above is not unreasonable.

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Section 66.304, Stats., provides zoning override protection for "family day care homes." The statute defines "family day care home" as a "dwelling" licensed as a day care center for not more than 8 children. Well-established rules of statutory interpretation dictate that every word of a statute must be given meaning. Donaldson v. State, 93 Wis.2d 306, 286 N.W.2d 817 (1980). Statutes must be construed to avoid rendering any word or phrase superfluous. Green Bay Broadcasting Co., v. Redevelopment Authority of City of Green Bay, 116 Wis.2d 1, 342 N.W.2d 27 (1983). In interpreting s. 66.304, Stats., therefore, the word "dwelling" must be ascribed some meaning.

The word "dwelling," as used in s. 66.304, Stats., is not defined in statute. An undefined statutory term is construed consistent with its common and ordinary meaning, as established by the definition set forth in a recognized dictionary. State v. Mauthe, 123 Wis.2d 288, 366 N.W.2d 871 (1985). The Wisconsin Supreme Court has approved the use of Webster's New International Dictionary (3d Ed.) as a source of common and ordinary meaning. That dictionary defines "dwelling" as "a building or construction used for residence; abode, habitation."

The word "dwelling" is defined for different purposes in 7 different sections of the Wisconsin Statutes. In statutes relating to tax liens and tax foreclosures, "dwelling" is defined as a structure used as a residence. Sections 75.143(1), 75.195(1), and 75.521(3m), Stats. For purposes of the 1- and 2-family dwelling code and manufactured building code, "dwelling" is defined as a structure "used or intended to be used as a home." Sections 101.61(1) and 101.71(2), Stats. In the lead poisoning prevention law, "dwelling" means a structure "designed or used for human habitation." Section 151.01(2), Stats. In the municipal mortgage assistance law, "dwelling" means a structure "used or intended to be used for habitation." Section 66.38(1)(b), Stats.

Reading together the dictionary and other statutory definitions of the term "dwelling," there is some doubt as to whether the legislature intended that word, as used in sec. 66.304, Stats., to be limited to structures actually used as residences, or to apply as well to structures designed or intended for residential use but not currently occupied. When a statute is capable of being construed in two different ways by reasonably well informed persons, it is ambiguous, and courts will examine the scope, history, context, subject matter and object of the statute in order to discern the intent of the legislature. Matter of Condemnation by Redevelopment Authority of City of Green Bay, 120 Wis.2d 402, 355 N.W.2d 240 (1984).

Section 66.304, Stats., was created by 1983 Wis. Act 193. That act related generally to "day care services and funds," and also created the day care

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funding program under sec. 46.98, Stats., and day care certification system under sec. 48.651, Stats. Act 193 was the result of legislation (1983 Assembly Bill 434) introduced by the Legislative Council at the request of the special committee on child care and early education.

Zoning of family day care centers was one of several day care issues addressed by the special committee. Staff provided committee members with information on local zoning of family day care centers in Wisconsin and recent California legislation which preempted local zoning control of family day care homes. Staff noted that some Wisconsin municipalities treat family day care as a "home occupation," which staff described as an occupation "carried on within the home" for zoning purposes. Staff also observed that "municipalities classifying family day care as a permitted use often require that no one other than family members be employed to provide care." (Legislative Council Memo No. 7 to members of the Special Committee on Child Care and Early Education, February 21, 1983.)

Staff also provided special committee members with a September, 1979, memo on zoning of family day care by the California legislature's assembly office of research. That memo referred to family day care as "persons regularly providing care to unrelated children in their home." The memo observed that "most providers and users of the service believe this activity is an extension of the home use by the day care mother," and that "it is a flexible, family arrangement." The memo stated that, taking into account "the essential home character of family day care," child care professionals believe "family day care should be treated as a residential home use," and the California Day Care Licensing Task Force recommended "family child day care should be treated as a customary home use."

With the above information at its disposal, the Wisconsin Legislative Council Special Committee discussed the issue of family day care zoning at its meeting of February 22, 1983. The committee looked at the precedent of zoning override legislation for group homes in Wisconsin. Committee member State Representative Lolita Schneiders

"indicated that she was concerned about linking family day care homes with group homes. She indicated that in her opinion it would be wiser to provide that a home in which a certain number of children are cared for is still considered a family residence." (Wisconsin Legislative Council, Summary of Proceedings, Special Committee on Child Care and Early Education, February 22, 1983, p. 3.)

At its meeting of March 17, 1983, the special committee unanimously approved the introduction of a bill drafted by the Legislative Council to prohibit a municipality from preventing a family day care home from

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operating in an area zoned for residential use. The draft legislation approved by the special committee defined "family day care home" as

"A dwelling licensed as a day care center by the Department of Health and Social Services under sec. 48.65 where, for compensation, a resident of the dwelling provides care and supervision for at least 4 and not more than 8 children under the age of 7 for less than 24 hours a day." (WLCS: 71/1, March 16, 1983.) (Emphasis added.)

As introduced, 1983 Assembly Bill 434 omitted the words "a resident of the dwelling provides care" and inserted in their place "where care is provided" in the definition of "family day care home." Nevertheless, the Legislative Reference Bureau Analysis of 1983 Assembly Bill 434, incorporating a Legislative Council prefatory note, stated:

"A family day care home is defined as a dwelling licensed as a day care center by the DHS where, for compensation, a resident of the dwelling provides care for not more than 8 children."

The Legislative Reference Bureau drafter suggested in a drafter's note that the above-quoted portion of the bill analysis be changed to reflect the wording of the definition in the bill itself. However, though other changes in the analysis suggested in this drafter's note were eventually made, the words "a resident of the dwelling" were retained in the explanation of the "family day care home" definition.

As it made its way through the legislative process, 1983 Assembly Bill 434 was the subject of considerable debate and the target of numerous amendments. However, the definition of "family day care home" remained unchanged. One proposed amendment would have added the words "who are not children of the family to be licensed" to the definition of "family day care home." (1983 Assembly Bill 434, Assembly Amendment 5 to Assembly Substitute Amendment 1.) (Emphasis added.) This proposed amendment was rejected by the Assembly on a vote of 51 to 46 on October 13, 1983.

1983 Assembly Bill 434 was signed by Governor on April 5, 1984, and published as 1983 Wisconsin Act 193 on April 9, 1984.

In light of the legislative history summarized above, it would not be unreasonable for a municipal zoning authority to interpret sec. 66.304, Stats., as inapplicable to day care centers located in a building which is not also used for residential purposes. Statutes authorizing municipalities to enact zoning ordinances are liberally construed in favor of the authority of the municipality. Section 62.23(7)(a), Stats., Black v. City of Waukesha, 125 Wis.2d 254, 371 N.W.2d 389 (1985), Rodgers v. Menomonee

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Falls, 55 Wis.2d 563, 201 N.W.2d 29 (1972). Liberally construing sec. 66.304 in favor of municipal zoning authority, a court would probably conclude that a municipality has the power to prevent a day care center not also used as a residence from being located in a district zoned for residential use.

Please let me know if you have any additional questions in this matter.

NG/er

cc: Silvia R. Jackson
Larry Reuter
Pat Franke ✓