

May 4, 2004

To the Honorable
Common Council of the
City of Milwaukee
Room 205 – City Hall

Re: CCFN 031244 – A substitute ordinance relating to zoning regulations
for family day care homes and day care centers

Dear Council Members:

The above-referenced file (copy attached) has been referred to this office for review as to legality and enforceability. We have affixed our signature to the file in this respect. We wish to caution the Committee, however, of the possibility that this proposed ordinance may be found to be contrary to State law, specifically Wis. Stat. § 66.1017.

The proposed ordinance would impose certain zoning regulations upon family day care homes and day care centers. These regulations encompass several substantive changes. First, the proposed ordinance reclassifies a family day care home in which the operator does not reside in one of the units within that dwelling from the category of “family day care home” to the category of “day care center.” Second, it changes the use classification of “day care centers” located in residential zoning districts from that of a special use to that of a limited use. Additionally, the proposed ordinance includes several limited use standards, among which is one that would ban family day care homes classified as “day care centers” (because the operator does not live in one of the on-site dwelling units) from locating in certain residential zoning districts (specifically, RS1 to RS6, RT1 to RT3, RM1 and RM2).

Wisconsin Stat. § 66.1017, reads as follows:

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66.1017 Family day care homes. (1) In this section:

(a) “Family day care home” means a dwelling licensed as a day care center by the department of health and family 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 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 proposed ordinance may raise issues as to its consistency with the provisions of this statute in the following respects:

(1) Wisconsin Stat. § 66.1017(1)(a) defines a “family day care home” as any dwelling licensed as a day care center under Wis. Stat. § 48.65 “where care is provided for not more than 8 children.” Thus, all licensed dwellings providing services to eight or fewer children are classified as a “family day care home.” There is no provision suggesting the classification of any such dwelling as a “day care center” or as anything other than that of a “family day care home.” The proposed ordinance would classify certain dwellings that appear to fall within the State law definition of a “family day care home” as a “day care center,” and impose more restrictive zoning requirements upon such supposed “day care centers” based upon whether the operator does or does not reside in the licensed dwelling. Such a distinction is not specifically contemplated under the provisions of Wis. Stat. § 66.1017(1)(a).

(2) The second limited use standard incorporated within the proposed ordinance might be deemed inconsistent with the provisions of Wis. Stat. § 66.1017(2). The first sentence of that subsection precludes a municipality (including a city, per Wis. Stat. § 66.1017(1)(b)) from preventing the location of a “family day care home” in any zoning

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district “in which a single-family residence is a permitted use.” The proposed ordinance may be construed to permit just that, particularly with respect to family day care homes that have been classified as “day care centers” because the operator does not live in one of the units within the licensed dwelling. This problem applies to every zoning district referenced in this limited use standard, given that a single-family residence is a permitted use in each of them.

(3) The proposed ordinance may be deemed to violate the second sentence of Wis. Stat. § 66.1017(2) because it establishes “standards or requirements for family day care homes different from the licensing standards established under s. 48.65.” This problem is derivative of that discussed in ¶ (1) above in that the proposed ordinance imposes differential zoning requirements upon “family day care homes” based upon whether the operator does or does not live on-site. Such zoning requirements are not incorporated within the State licensing standards for day care centers under Wis. Stat. § 48.65.

We have been provided with a copy of a letter opinion from the office of legal counsel for the Wisconsin Department of Health & Social Services (“Department”) dated January 4, 1988, which is pertinent to consideration of this issue. A copy of this opinion is attached for your consideration. In that opinion, the Department interpreted Wis. Stat. § 66.304 (now Wis. Stat. § 66.1017) in light of the position taken at that time by the City of Milwaukee Department of Building Inspection that that statute (which the Department characterized as a “zoning override law”) did not apply to a day care center operated in a building in which a family does not reside. The Department concluded that the City’s interpretation was a close question, but “not unreasonable.” The opinion explored both the provisions and the legislative history of Wis. Stat. § 66.304 (now Wis. Stat. § 66.1017). The basis of the opinion and its conclusion rests upon the Department’s definition of the term “dwelling” as used in the definition of “family day care home” contained in Wis. Stat. § 66.304(1)(a) (now Wis. Stat. § 66.1017(1)(a)). The Department concluded that the term “dwelling” refers to structures actually used for residential purposes.

In our opinion, the Department’s 1988 legal opinion may provide the basis for a good-faith defense to a challenge that the proposed ordinance (if enacted) would violate Wis. Stat. § 66.1017. This result, however, is by no means certain, and we caution that a court may conclude differently and invalidate this proposed ordinance as contrary to State law.

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Very truly yours,

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