

Zoning application, review of confidential information

Number: INFORMAL

Date: January 29, 1997

Subject:
Zoning application, review of confidential information

Ms. Maria J. Chiaro
Naples City Attorney
735 Eighth Street South
Naples, Florida 34102-6796

RE: MUNICIPALITIES--ZONING--authority of municipality to review confidential HRS records when considering zoning application for child care facilities.

Dear Ms. Chiaro:

Thank you for considering this office as a source for assistance. You have asked whether the City of Naples is authorized to review confidential information maintained by the Department of Children and Family Services relating to the licensing of child care facilities when the city is considering approval of a petition to operate a child care facility pursuant to its zoning ordinance.

In sum, it is my opinion that the City of Naples is not authorized under current statutory provisions to review confidential information maintained by the Department of Children and Family Services relating to the licensing of child care facilities when the city is considering approval of a petition to operate a child care facility pursuant to its zoning ordinance. However, in light of the city's concerns and potential legal liability, the city may ask those who seek such approval to waive the statutory confidentiality for any such information.

According to your letter, the City of Naples provides for the operation of child care facilities in certain land use designations. In reviewing the applications for child care facilities in permitted locations, the city council has requested information from the proposed operators regarding whether they have received the appropriate licensing and background checks from the state agency granting such a license. The city council has expressed some concern regarding potential legal liability for granting a land use permit to a particular individual or individuals who propose to operate such child care facilities. In light of this concern, you ask whether the city is authorized to request and review confidential records of the Department of Health and Rehabilitative Services, now the Department of Children and Family Services,[1] relating to an individual's application for a license to operate child care facilities.

Zoning is generally understood to be the regulation of land according to its nature and uses.[2] Municipal corporations have no inherent right to restrict the use of land through zoning, rather, that power is delegated to local governments by the Legislature and is limited by the terms of the grant.[3] Thus, zoning enactments cannot validly be extended beyond the accomplishment of those purposes within their scope.[4]

The classification, regulation, prohibition, restriction, permitting and determination of uses within districts constitutes an exercise of municipal zoning and police power, possessed by municipal corporations generally under zoning statutes.[5] Notwithstanding that police powers of municipalities are sufficiently broad so as to control the use of property under a general zoning plan, the application of the plan must not be unreasonable or arbitrary, since the zoning power does not extend to unreasonable or arbitrary intermeddling with the private ownership and use of property.[6] It is generally the case that the right to control the uses of land does not confer the right to control ownership.[7] Thus, it is questionable whether the City of Naples has the power to inquire into the character and conduct of particular landowners in the course of considering and approving the use of their property.

Sections 402.301 through 402.319, Florida Statutes, reflect the Legislature's intention "to establish statewide minimum standards for the care and protection of children in child care facilities, to ensure maintenance of these standards, and to approve county administration and enforcement to regulate conditions in such facilities through a program of licensing." [8] To facilitate this intention "all owners, operators, and child care personnel shall be of good moral character." [9]

Section 402.305, Florida Statutes, establishes licensing standards for child care facilities without regard to the source of funding for operation of the facility or the type of children served by the facility. [10] The standards established in section 402.305 address a range of public concerns:

- "1. The health, sanitation, safety, and adequate physical surroundings for all children in child care.
2. The health and nutrition of all children in child care.
3. The child development needs of all children in child care." [11]

The statute also establishes the following minimum standards for child care personnel:

- "1. Good moral character based upon screening. This screening shall be conducted as provided in chapter 435, using the level 2 standards for screening set forth in that chapter.
2. The department may grant exemptions from disqualification from working with children or the developmentally disabled as provided in s. 435.07.
3. Minimum age requirements. Such minimum standards shall prohibit a person under the age of 21 from being the operator of a child care facility and a person under the age of 16 from being employed at such facility unless such person is under direct supervision and is not counted for the purposes of computing the personnel-to-child ratio.
4. Minimum staff training requirements.
5. Periodic health examinations." [12]

It is those records within the scope of Chapter 435, Florida Statutes, relating to employment screening, that are subject to confidentiality restrictions.

Level 2 screening standards apply to all employees in positions designated by law as positions of trust or responsibility, including child care personnel, and require that these employees undergo a security background investigation as a condition of employment. [13] The statute provides that:

"For the purposes of this subsection, security background investigations shall include, but not be limited to, employment history checks, fingerprinting for all purposes and checks in this subsection, statewide criminal and juvenile records checks through the Florida Department of Law Enforcement, and federal criminal records checks through the Federal Bureau of Investigation, and may include local criminal records checks through local law enforcement agencies." [14]

The purpose of level 2 security background investigations is to ensure "that no persons subject to the provisions of this section have been found guilty of, regardless of adjudication, or entered a plea of nolo contendere or guilty to, any offense prohibited under any of the following provisions of the Florida Statutes or under any similar statute of another jurisdiction [.] "[15] A list of offenses follows including such crimes as aggravated manslaughter of a child; [16] assault on a minor; [17] battery on a minor; [18] child abuse, aggravated child abuse, or neglect of a child; [19] and negligent treatment of children. [20] The statute requires that, under penalty of perjury, all employees in positions of trust or responsibility must attest to meeting the requirements to qualify for employment and agree to inform their employer immediately if convicted of any of the disqualifying offenses during their employment. [21]

Chapter 435, Florida Statutes (1996 Supp.), also provides strict confidentiality requirements on personnel background check information:

"No criminal, juvenile, or abuse hotline information obtained under this section may be used for any purpose other than determining whether persons meet the minimum standards for employment or for an owner or director of a covered service provider. The criminal records and juvenile records obtained by the department or by an employer are exempt from s. 119.07(1), Florida Statutes." [22]

Further, the statute makes it a crime for any person to willfully, knowingly, or intentionally use this information for purposes other than screening for employment or to release records information to other persons for purposes other than screening for employment. [23]

Based on the specific statutory language discussed above, it is my opinion that the City of Naples is not authorized by current provisions of the statutes to review confidential information from the Department of Children and Family Services relating to the licensing of child care facilities when the city is considering approval of a petition to operate a child care facility pursuant to its zoning ordinance. Such information is exempt from disclosure pursuant to section 435.09, Florida Statutes (1996 Supp.), and may only be released as provided therein for purposes of employment screening.

However, in light of the city's concerns and the potential legal liability of the city for approving such a use, it may be appropriate under these circumstances for the city to request that those seeking the city's permission to operate a child care center sign a waiver of these statutory confidentiality provisions. While failure to sign such a waiver may not be sufficient alone to deny an applicant the requested use of the property, it may warrant additional investigation prior to the granting of city approval for use of the property for this purpose.

I trust that these informal comments will assist you in advising your client, the City Council of the

City of Naples. The conclusions contained herein are those of the writer and do not constitute a formal Attorney General's Opinion.

Sincerely,

Gerry Hammond
Assistant Attorney General

GH/tgk

[1] See s. 5, Ch. 96-403, Laws of Florida, renaming the Department of Health and Rehabilitative Services as the Department of Children and Family Services.

[2] See 7 Fla. Jur. 2d *Building, Zoning, and Land Controls* s. 53, citing *Barefield v. Davis*, 251 So. 2d 699 (Fla. 1st DCA 1971).

[3] The zoning power of municipalities is derived from s. 2(b), Art. VIII, Fla. Const., and s. 166.021(4), Fla. Stat. See also *Hillsborough Association for Retarded Citizens, Inc., v. City of Temple Terrace*, 332 So. 2d 610 (Fla. 1976).

[4] See *Davis v. Sails*, 318 So. 2d 214 (Fla. 1st DCA 1975).

[5] See generally 8 McQuillin *Municipal Corporations* s. 25.120 (3rd Ed.).

[6] See generally 7 Fla. Jur. 2d *Building, Zoning, and Land Controls* s. 102.

[7] See 8 McQuillin *Municipal Corporations* s. 25.119 (3rd Ed.).

[8] Section 402.301(1), Fla. Stat.

[9] Section 402.301(2), Fla. Stat.

[10] Section 402.305(1), Fla. Stat.

[11] Section 402.305(1)(b)1.-3., Fla. Stat. (1996 Supp.). And see s. 402.305(1)(c), which requires that the standards established under ss. 402.301- 402.319 must be consistent with the rules adopted by the State Fire Marshal for child care facilities.

[12] Section 402.305(2)(a) - (e), Fla. Stat. (1996 Supp.).

[13] Section 435.04(1), Fla. Stat. (1996 Supp.).

[14] Section 435.04(1), Fla. Stat. (1996 Supp.).

[15] Section 435.04(2), Fla. Stat. (1996 Supp.).

[16] Section 435.04(2)(c), Fla. Stat. (1996 Supp.).

[17] Section 435.04(2)(f), Fla. Stat. (1996 Supp.).

[18] Section 435.04(2)(h), Fla. Stat. (1996 Supp.).

[19] Section 435.04(2)(x), Fla. Stat. (1996 Supp.).

[20] Section 435.04(2)(z), Fla. Stat. (1996 Supp.).

[21] Section 435.04(4), Fla. Stat. (1996 Supp.).

[22] Section 435.09, Fla. Stat. (1996 Supp.).

[23] Section 435.11(1)(b), Fla. Stat. (1996 Supp.). Section 435.11(1)-(2), Fla. Stat. (1996 Supp.) makes it a misdemeanor of the first degree to release such information; if the records released are those of a juvenile, the crime is a felony of the third degree.