

SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: Children and Families Committee

BILL: SB 336

SPONSOR: Senator Wilson

SUBJECT: Family Day Care Homes

DATE: February 1, 2005

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Sanford	Whiddon	CF	Pre-meeting
2.	_____	_____	CA	_____
3.	_____	_____	JU	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

I. Summary:

Senate Bill 336 prohibits a deed restriction, covenant, or other binding agreement from preventing or forbidding, either directly or indirectly, the use of a residential dwelling as a family day care home. Exceptions are provided for condominiums, timeshare properties, cooperatives, and for cases where prohibiting the family day care home is determined necessary for the health, safety, and welfare of the neighborhood residents. The bill sets forth legislative findings and intent for eliminating the use of deed restrictions, covenants, or other binding agreements to prohibit the establishment or operation of family day care homes.

This bill creates s. 402.31302 of the Florida Statutes.

II. Present Situation:

Family day care homes are residences where child care is provided for between four and ten children, depending on the age of the children, from at least two unrelated families, for a fee (s. 402.302(7), F.S.). These family day care homes are required to either be licensed (if there is a county licensing ordinance or county resolution requiring licensing) or registered (s. 402.313(1), F.S.). Minimum licensing standards relative to staffing, training, immunization records, health, and enforcement must be met by family day care homes required or choosing to be licensed (s. 402.313(13), F.S.). Family day care homes which are not required or do not choose to be licensed must register annually with the department pursuant to s. 402.313(1)(a), F.S., which requires the provision of the following information: name of the operator and home, address of the home, number of children being served, a plan for a substitute caregiver in an emergency, proof that the criminal background and employment history check was completed, proof that the required 30-hour training program was completed and competency test passed, and proof that the immunization records are maintained.

The Department of Children and Families (DCF) is responsible for the licensure and enforcement of child care licensure standards, including those applied to family day care homes, unless a county has chosen to assume the child care licensing responsibility pursuant to s. 402.306, F.S. Currently, seven counties have assumed this role.

According to DCF, many parents prefer the setting and services provided by a family day care home because these homes are often closer to home or work, provide a more home-like environment, offer a consistent caregiver over a longer period of time, often have a lower child-to-staff ratio, and provide smaller group sizes. As of February 1, 2005, DCF reports there are 4,912 licensed family day care homes and 2,581 registered family day care homes in Florida.

The ability of an individual to operate a family day care home out of his or her residence can be impeded by either zoning restrictions or covenants of the homeowners' association that consider the family day care home a business. Current Florida law, however, requires that the operation of a family day care home be considered a valid residential use for municipal or county zoning regulations (ss. 125.0109 and 166.0445, F.S.), thus preventing zoning regulations from defining a family day care home as a business that could be prohibited from operating in an area zoned for residential use. These sections apply to family day care homes that are either licensed or registered with DCF and also prohibit the requirement of a special exemption, waiver, or fee in order to operate in an area zoned for residential use.

The deed restrictions or covenants of homeowners' associations can include restrictions which prevent a family day care home from operating. Chapter 720, F.S., sets forth the statutory framework for homeowners' associations. The "declaration of covenants" is defined by this chapter as the recorded written instrument of covenants that run with the land¹ and subject the land to the jurisdiction and control of a homeowners' association (s. 720.301(4), F.S.). The declaration of covenants for many homeowners' associations includes a prohibition against conducting a business from the residence, the predominant covenant or deed restriction preventing the operation of family day care homes. The Florida Family Child Care Home Association reports that this covenant or deed restriction has resulted in family day care homes having to close their programs.

III. Effect of Proposed Changes:

Senate Bill 336 creates s. 402.31302, F.S., which provides that a licensed family day care home may not be prohibited by any deed restriction, covenant, or binding agreement that runs with the land from operating in a residential dwelling except under certain circumstances. A family day care home may not be directly prohibited by a deed restriction or covenant from operating nor may the deed restriction or covenant indirectly have the effect of prohibiting the family day care home from operating. The bill allows the deed restriction, covenant, or other binding agreement to prohibit a family day care home from operating in a residential dwelling if the prohibition is necessary for the preservation of the health, safety, and welfare of the other residents of the neighborhood. However, this prohibition must be applied on a case-by-case basis, and the party

¹A "covenant running with the land" is a promise made in a deed or implied by law that, because it relates to the land, binds the successor grantees indefinitely (Black's Law Dictionary, 7th Edition).

seeking to apply this prohibition has the burden to prove that the restriction is necessary for the health, safety, and welfare of the neighborhood residents. The bill also exempts from the provisions of this section and, thus, permits deed restrictions to prohibit family day care homes from operating in condominiums that meet the definition in s. 718.103, F.S., timeshare properties that meet the definition in s. 721.05, F.S., and cooperatives that meet the definition of s. 719.13, F.S.

The bill provides legislative findings and intent for creating a public policy that eliminates the use of deed restrictions, covenants, and other binding agreements to prohibit the establishment and operation of licensed family day care homes. Specifically, the bill expresses the legislative intent of providing families with family day care in order to protect the children's health, safety, and welfare and to offer a child care option that is homelike and in neighborhood settings. The legislative findings set forth in the bill include that family day care homes increase the availability of care for siblings in the same program; offer children enhanced communication and learning experiences; meet the transportation, scheduling, financial, and emotional needs of many working parents; and provide an environment that closely resembles the families' homes. The bill further reiterates the exemption to local zoning regulations relative to residential use currently provided to family day care homes.

The bill takes effect upon becoming law.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

The Florida and United States Constitutions prohibit the Legislature from enacting laws impairing the obligation of contracts (Fla. Const. Art. I, s. 10; U.S. Const. Art. I, s. 10). Covenants running with the land are a form of a contractual obligation to which this prohibition would apply. While the courts have historically applied this restriction strictly, they have recognized the need to provide exemptions to the law when there is an overriding public necessity for the state to exercise its police powers [*Park Benziger & Co. v. Southern Wine & Spirits, Inc.*, 391 So.2d 681 (Fla. 1980)]. This exception extends to laws that are reasonable and necessary to serve an important public purpose [*Yellow Cab Co. v. Dade County*, 412 So.2d 395 (Fla. 3rd DCA 1982)] and including protecting the public's health, safety, or welfare [*Khoury v. Carvel Homes South, Inc.*, 403 So.2d

1043 (Fla. 1st DCA 1981)]. Historically, both the state and federal courts have attempted to find a rational and defensible compromise between individual rights and public welfare when laws are enacted that may impair existing contracts [*Pomponio v. Claridge Pompano Condominium, Inc.*, 378 So.2d 774 (Fla. 1979)].

Florida law currently provides for three limitations to covenants:

- A covenant may not prohibit solar collectors or other energy devices, s. 163.04, F.S.;
- A covenant may not prohibit the owner from implementing “Florida-friendly landscape” or “Xeriscape” on his or her land, ss. 125.568, and 166.048 F.S., and
- A declaration of covenants may not preclude property owners from displaying a United States flag, s. 720.3075, F.S.

The bill sets forth legislative intent and findings to support a public policy of eliminating covenants and deed restrictions that are barriers to the establishment and operation of family day care homes

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

Family day care homes that would currently be prohibited from operating would be able to operate under this bill.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

The bill prohibits the application of covenants and deed restrictions that would prevent the operation of a family day care home. This prohibition may inadvertently affect other restrictions affecting home ownership. For example, the covenant or deed restriction of a neighborhood may apply limitations on fencing that may be contrary to the family day care licensing requirements which currently require a four foot high fence if the home is on a public road or a lake, canal, or other water hazard. With this bill, such deed restrictions and covenants would not be applied to a family day care home if the requirement or restriction could prevent the operation of the family day care home.

The constitutional issues with the bill are largely the result of the potential for retrospective application of the prohibitions. If the bill were to be made prospective in application, the constitutional issues would largely be resolved, but the impact of the bill would be considerably lessened.

This Senate staff analysis does not reflect the intent or official position of the bill's sponsor or the Florida Senate.

VIII. Summary of Amendments:

None.

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