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HENRY MCMASTER
ATTORNEY GENERAL

July 5, 2006

Donna McCullum, Interim Planning Director
Sumter City-County Planning Commission
Post Office Box 1449
Sumter, South Carolina 29151

Dear Ms. McCullum:

We received a request for an opinion request from William Hoge, the former Planning Director, concerning the application of conflicting standards contained in the International Building Code and South Carolina Department of Social Services'(DSS) regulations. From our conversations with your office, we were informed that although Mr. Hoge is no longer with the Sumter City-County Planning Commission, you continue to desire a response to his request. In his letter, Mr. Hoge informed us that:

> Pursuant to state mandate, the City and County of Sumter have recently adopted the International Building Code. A citizen of Sumter wishes to keep up to twelve small children in her home and has received approvals from the Department of Social Services and the State Fire Marshal. However, according to the International Building Code, the number of children planned for the child daycare facility in the citizen's home causes the classification of the usage to be designated as Educational Group E, which has more restrictive requirements than those set forth by the DSS regulations. These include a lesser number of children allowed to be kept in the home and certification by an architect concerning the home.

Mr. Hoge also informed us that he was advised, based on a prior opinion of this Office, that

> DSS regulations pertaining to child daycare facilities in homes preempt the requirements set forth by the building code. As the City/County of Sumter is charged with issuing a business license for child daycare facilities in private homes pursuant to the requirements of the International Building Code, would the DSS regulations

Reynard Stetter

> enacted in this area serve as the minimum standards and the final authority as to the pertinent regulations, or would the additional restrictions set forth in the International Building Code serve as additional requirements for the safety and protection of the children?

Law/Analysis

Before addressing the issue at hand, we find it pertinent to discuss the statutory law and regulations applicable to child day care facilities and the International Building Code as it applies to the City of Sumter (the "City") and Sumter County (the "County"). The South Carolina Children's Code contains specific provisions applicable to the operation of child day care facilities. S.C. Code Ann. §§ 20-7-2700 et seq. (1976 & Supp. 2005). Section 20-7-2720 of the South Carolina Code (Supp. 2005) requires an individual or entity to obtain a license issued by DSS prior to operating "a private childcare or group childcare home." Section 20-7-2700(f) of the South Carolina Code (Supp. 2005) defines a "group childcare home" as

> a facility within a residence occupied by the operator which regularly provides childcare for at least seven but not more than twelve children, unattended by a parent or a legal guardian including those children living in the home and children received for childcare who are related to the resident caregiver. However, an occupied residence in which childcare is provided only for a child or children related to the resident caregiver or only for the child or children of one unrelated family or only for a combination of these children is not a group childcare home.

As part of gaining licensure or renewing an existing license, the South Carolina Code requires compliance with regulations promulgated by DSS. S.C. Code §§ 20-7-2730(B) & 20-7-2740(C) (Supp. 2005). Thus, we presume an individual, such as the one mentioned in Mr. Hoge's letter, who wishes to keep twelve children in his or her home, would be subject to the DSS regulations pertaining to group child care homes. DSS regulations pertaining to the licensure of group child care homes can be found in chapter 114, article 5 the South Carolina Code of Regulations.

Chapter 9 of title 6 of the South Carolina Code addresses building codes. Prior to 2003, the building code statutes required all municipalities and counties to adopt by reference the latest version of the building codes published or made available by Southern Building Code Congress International, Inc. S.C. Code Ann. §§ 6-9-10; 6-9-50 (2004). In 2003, the Legislature amended these provisions and instead of requiring adoption of the Southern Building Code Congress International, Inc.'s building codes, these provisions now require municipalities and counties to

enforce the building code as adopted by the South Carolina Building Codes Council (the "Council"). S.C. Code Ann. § 6-9-10 (Supp. 2005). Section 6-9-50 mandates the Council adopt the latest edition of the building code published by the International Code Council, Inc. In our review of the 2003 version of the International Building Code (the "Code"), as published by the Council, we found it regulates various structural and mechanical aspects of various types of buildings. International Code Council, Inc., International Building Code (2003), http://www.ecodes.iccsafe.org. The Code breaks buildings down into categories based on use and occupancy.

As Mr. Hoge mentioned in his letter, this Office issued an opinion in 2001 addressing conflicts between the requirements of the Standard Building Code (the predecessor to the Code) and the State Fire Marshal's Rules and Regulations pertaining to the review and inspection of child day care centers. Op. S.C. Atty. Gen., October 4, 2001. Specifically, the requester explained the two major differences between these authorities is "the Standard Building Code is more restrictive with the number of children allowed in certain occupancies and the Standard Building Code does not require retrofitting of existing day care centers . . . ." Id. In the opinion, we noted a provision in the State Fire Marshal regulations providing: "'No provision of this subarticle shall apply to the extent that it is in conflict with any statute of this State, any provision of any building or other code duly adopted by ordinance of a municipality, or any duly adopted ordinance of a municipality. In the event of a conflict, such statute, other provision, or ordinance shall apply in all respects.'" Id. (quoting S.C. Code Ann. Regs. 81-8300.15). Using the rules of statutory construction to interpret this provision, we concluded:

> the provision operates to exempt municipalities from particular provisions of the regulations to the extent they are in conflict with the municipality's own duly adopted ordinances or safety codes. By contrast, in unincorporated areas of a county, in municipalities that have not for some reason adopted the standard safety codes, or in areas that have opted-out of provisions of the standard codes, the State Fire Marshal regulations would apply. Thus, in response to your question, because the City of Columbia has adopted State mandated codes by ordinance, the conflicting provisions of the Fire Marshal's Regulations do not apply to the City; instead, the City's duly adopted standard safety code provisions control.

Id.

In 2002, we addressed an issue similar to that in our 2001 opinion concerning the relationship between DSS regulations requiring a day care facility to comply with the rules and regulations promulgated by the State Fire Marshall and local building codes, which the City of Columbia adopted pursuant to an ordinance. Op. S.C. Atty. Gen., July 22, 2002. We noted the 2001 opinion,

stating "[i]n the general sense, this remains the opinion of this Office." Id. However, we went on to acknowledge

> there is a distinction between a certain facility's approval for a municipal business license and the licensure of a day care facility located within a municipality. While a municipality may set standards for business licenses, including those for day care facilities, the South Carolina Department of Social Services (DSS) is the final authority on licensing the business as a day care center capable of operation in the State of South Carolina. DSS licenses and regulates day care facilities on a statewide basis pursuant to S.C. Code Ann. § 20-7-2700 et. seq. Specifically, S.C. Code Ann. § 20-7-2980 authorizes DSS to promulgate regulations related to the operation of such facilities. Pursuant to this authority, DSS has set forth a number of regulations.

Id. Considering the provision of the DSS regulations requiring compliance with the State Fire Marshall's rules and regulations and the Legislature's stated purpose for the DSS licensure statutes and regulations as presented in section 20-7-2710(a), we concluded the regulation requiring compliance with the State Fire Marshall rules and regulations appears not only to be consistent with the purpose of the DSS statutes and regulations, but also in furtherance of those purposes. Id. Thus, finding the DSS regulation valid, we stated: "as DSS regulations apply state-wide, it is my opinion that they are applicable whether a day care facility is located within a municipality with its own building codes and ordinances or in an unincorporated area of a county." Id.

In light of our prior opinions, we reiterate our continued position that a distinction exists between the licensure of a day care facility by a municipality or county and those licensed by DSS. Article 8, section 14(6) of the South Carolina Constitution (1976) provides: "In enacting provisions required or authorized by this article, general law provisions applicable to the following matters shall not be set aside: . . . (6) the structure and the administration of any governmental service or function, responsibility for which rests with the State government or which requires statewide uniformity." Our Supreme Court interpreted this section to preclude "the legislature from delegating to counties the responsibility for enacting legislation relating to the subjects encompassed by that section." Robinson v. Richland County Council, 293 S.C. 27, 30, 358 S.E.2d 392, 395 (1987). Additionally, the Supreme Court stated: "When construing Article VIII, section 14, this Court has consistently held a subject requiring statewide uniformity is effectively withdrawn from the field of local concern." Brashier v. South Carolina Dep't of Transp., 327 S.C. 179, 185, 490 S.E.2d 8, 11 (1997) (overruled on other grounds by I'On L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 526 S.E.2d 716 (2000)). The Legislature's intent to provide a system of statewide regulation of day care facilities is evidenced by its statutorily stated purpose to "establish statewide minimum regulations for the care

and protection of children in childcare facilities . . . ." S.C. Code Ann. 20-7-2710. Thus, we believe, as stated in our 2002 opinion, DSS is the final authority on licensing a day care facility, which includes one meeting the definition of a group childcare home. Accordingly, DSS licensure is applicable regardless of local licensing laws.

However, from our reading of the building code statutes contained in chapter 9 of title 6, we also recognize the purposes of these provisions and their requirements indicate the Legislature's recognition that the building codes are also an area of the law requiring statewide uniformity. The fact that the Legislature designated the Council as the only body in the State with the authority to review, adopt, modify and promulgate a statewide set of building codes; requires the Council to adopt the Code, and requires all municipalities and counties to enforce the Code, indicates its desire for uniformity with regard to building code laws. See S.C. Code Ann. §§ 6-9-40; 6-9-10.

In addition to the Legislature's apparent intent for the building code requirements and the DSS licensure requirements to have statewide uniformity, we are of the opinion that the Legislature also intended for them to serve different purposes. "The primary concern in interpreting a statute is to determine the intent of the legislature if it reasonably can be discovered in the language when construed in the light of its intended purpose." Clemson Univ. v. Speth, 344 S.C. 310, 312-13, 543 S.E.2d 572, 573 (Ct. App. 2001).

> Statutes dealing with the same subject matter must be reconciled, if possible, so as to render both operative. "It is presumed that the Legislature is familiar with prior legislation, and that if it intends to repeal existing laws it would . . . expressly do so; hence, if by any fair or liberal construction two acts may be made to harmonize, no court is justified in deciding that the later repealed the first."

Hodges v. Rainey, 341 S.C. 79, 88-89, 533 S.E.2d 578, 583 (2000) (quoting Justice v. Pantry, 330 S.C. 37, 43-44, 496 S.E.2d 871, 874 (Ct. App. 1998)).

The purposes of both the DSS licensure statues and regulations and the building code statutes and the Code itself appear to serve similar, but different goals. The DSS statutes and regulations set forth requirements for licensure of day care facilities. As cited above, the purpose of this body of law is to "establish statewide minimum regulations for the care and protection of children in childcare facilities . . . ." S.C. Code Ann. § 20-7-270. Section 114-510 of the South Carolina Code of Regulations (Supp. 2005) states the purpose of the regulations pertaining to group child care homes is "to establish standards that protect the health, safety and well being of children receiving care in child care facilities, through the formulation, application, and enforcement of these regulations."

On the other hand the building code statute states its purpose is "to maintain reasonable standards of construction in buildings and other structures in the State consistent with the public health, safety, and welfare of its citizens." S.C. Code Ann. § 6-8-5 (Supp. 2005). Furthermore, section 101.3 of the Code states:

> The purpose of this code is to establish the minimum requirements to safeguard the public health, safety and general welfare through structural strength, means of egress facilities, stability, sanitation, adequate light and ventilation, energy conservation, and safety to life and property from fire and other hazards attributed to the built environment and to provide safety to fire fighters and emergency responders during emergency operations.

International Code Council, Inc., supra, § 101.3.

The stated purposes for the DSS statutes and regulations emphasize the Legislature and DDS's desire to protect children cared for in day care facilities and specifically in this instance, those cared for in a group child care home. Thus, these statutes and regulations appear to focus on the welfare of children. Contrarily, although the Code also considers the welfare of children, it appears to focus on the structural integrity of buildings and the furtherance of public health, safety, and welfare of all citizen's of this State. Accordingly, we believe the Legislature created these bodies of law to serve two different functions.

In addition, we found the provisions set forth in the Code and those set forth the DSS regulations pertaining to group child care homes differ for the most part. In our review of the Code, we found it regulates aspects of building construction such as building height; types of construction; use of fire-resistant construction; interior finishes; fire protection systems; accessibility; energy efficiency of exterior walls; roof structures; structural design, tests, and inspections; foundations; types of constructions materials; and electrical, mechanical, plumbing, and elevator systems. International Code Council, Inc., supra. Whereas, the DSS regulations pertaining to group child care homes sets forth the following requirements: limits on capacity; incident reports; parents' access to information; record keeping, staff qualifications, supervision of children, health, sanitation, and safety requirements; program curriculum requirements; meal, food preparation, and food storage requirements; and special requirements for the care of infants, toddlers, mildly ill children, and night care. S.C. Code Ann. Regs. 114-513; 114-514; 114-515; 114-516; 114-518; 114-519. Furthermore, section 114-517 of these regulations states the requirements for the physical site at which the group child care home is located. These requirements include: minimum square footage per child; ventilation, lighting, water supply, temperature, and sanitation requirements; special rules for dealing with environmental hazards; requirements for doors, landings, stairs and railings; provisions for electrical sources; outdoor space requirements; requirements for furniture, toys, recreational

equipment, bed, and cribs; and special requirements for certain types of environmental hazards such as poisons, water, firearms and weapons, and animals.

Although the DSS regulations provide certain requirements for the physical building housing the group child care home, these regulations do not appear to conflict with those in the Code and appear more related to child safety than the structural quality of the building. Thus, we believe these two bodies of law are not in conflict with one another and could be read to give effect to both as applied to group child care homes. Moreover, as previously mentioned, the Legislature, through a 2003 amendment to the building code statutes, requires the Building Codes Council to adopt the latest version of the Code. Thus, we presume the Legislature knew of the DSS licensing statutes and regulations when it enacted this requirement. Based on our general review of both bodies of law, while both conceivably could concern the regulation of group child care home facilities, we believe they may be read in concert with one another.

Although we generally found no conflict between the text of the DSS statutes and regulations governing the licensure of group child care home and the Code, Mr. Hoge's letter and our conversation with a representative in your office, alerted us to potential conflicts in the application of these two bodies of law. Mr. Hoge indicated pursuant to the building classification system under the Code, some group child care homes may be classified as Educational Group E occupancy, which Mr. Hoge stated "has more restrictive requirements than those set forth in the DSS regulations." We agree with his assessment that some group child care homes may be classified as Educational Group E occupancy. Section 305.1 of the Code defines "Educational Group E" occupancy as including "among others, the use of a building or structure, or a portion thereof, by six or more persons at any one time for educational purposes through the 12th grade." International Code Council, Inc., supra, § 305.1. Furthermore, section 305.2, specifically referring to day cares, provides: "The use of a building or structure, or portion thereof, for educational, supervision or personal care services for more than five children older than 2 ½ years of age, shall be classified as a Group E occupancy." Id. § 305.2. Section 308.5.2 states:

> A facility that provides supervision and personal care on less than a 24-hour basis for more than five children 2 ½ years of age or less shall be classified as Group I-4. Exception: A child day care facility that provides care for more than five but no more than 100 children 2 ½ years or less of age, when the rooms where such children are cared for are located on the level of exit discharge and each of these child care rooms has an exit door directly to the exterior, shall be classified as Group E.

Id. § 308.5.2. Furthermore, based on our review of the Code, a group child care home accommodating five or fewer persons for less than 24 hours would be classified as Residential Group

R-3 occupancy. Id. ("Residential occupancies where the occupants are primarily permanent in nature and not classified as R-1, R-2, R-4 or I and where buildings do not contain more than two dwelling units as applicable in Section 101.2, or adult and child care facilities that provide accommodations for five or fewer persons of any age for less than 24 hours.").

In our brief review of the Code, we discovered, as Mr. Hoge noted in his letter, that a classification as a Group E occupancy will subject a building to greater restrictions, especially in areas concerning fire protection, than a Group R-3 occupancy. See, eg., International Code Council, Inc., supra, § 705.4 (requiring a higher fire-resistance rating for fire walls for Group E occupancy classifications than Group R-3 occupancy classifications); § 803.5 (requiring more stringent requirements for interior wall finishes on Group E occupancy classifications that Group R-3 occupancy classifications); § 903 (mandating the installation of an automatic sprinkler system for Group E occupancies if the area is greater than 20,000 square feet and for portions of the building below the level of exist discharge, but requiring their installation on a less stringent basis for group R occupancies). Furthermore, we also observed several provisions in the Code that exempt a Group R-3 occupancy building from requirements applicable to other classifications. See, eg., International Code Council, Inc., supra, § 704.11 (exempting some Group R-3 occupancy classifications from the general requirement that parapets must be provided on exterior walls of a building). However, we did not discover additional qualifications required of Group E occupancies that conflict with the DSS regulations.

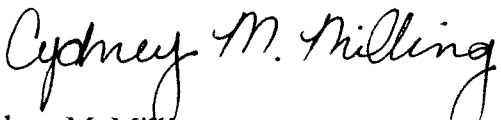
Although we find the DSS regulations and statutes pertaining to group child care homes not in conflict with the Code, and theoretically, a group child care home may comply with the requirements of both, conversations with your office alluded to some particle difficulties that may arise in an effort to comply with both. For instance, Mr. Hoge indicated if a group child care home has a child occupancy level of greater than six children, the Code classifies it as a Group E occupancy, and therefore, it must satisfy requirements above those required of an traditional home classified as a Group R-3 occupancy. Mr. Hoge suggests, if the group child care home does not meet these requirements, the Code effectively lessens the maximum number of children an operator may keep in the home from twelve, as allowed by DSS laws, to six.

We understand satisfying the additional requirements for Group E occupancy may create a hardship and be extremely difficult or financially impossible for the operator. However, we do not believe that the application of the Code to a group child care facility is impossible based on the plain language contained in the DSS regulations and in the Code. Recognizing the dilemma this situation may create for some operators, we suggest you seek to modify the Code through action of the Legislature in order to resolve the particular issues arising from the compliance with both bodies of law.

Conclusion

Based on our reading of both the DSS statutes and regulations governing the licensure of group child care homes and our reading of the Code, we believe these two bodies of law regulate two different, but related public concerns. The DSS statutes and regulations aim to protect children by setting forth requirements for an operator of a group child care home to gain and maintain a license. Whereas, we believe the Code aims to protect the public at large and specifically children in the case of Group E occupancies, from structure and fire protection issues related to buildings. In addition, we find no direct conflict in the requirements set forth in these two bodies of law. Thus, given the presumption that if at all possible, statutes should be read as consistent with one another and that the Legislature presumably knows of the DSS statutes and regulations when it chose to mandate localities enforce the Code, we find both bodies of law are valid.

Very truly yours,



Cydney M. Milling
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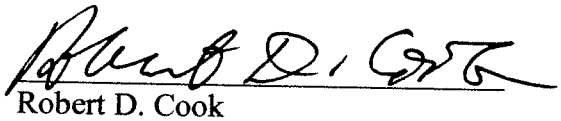

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