

FAYETTEVILLE

THE CITY OF FAYETTEVILLE, ARKANSAS

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DEPARTMENTAL CORRESPONDENCE

LEGAL DEPARTMENT

TO: **Dan Coody, Mayor**
City Council

FROM: **Kit Williams, City Attorney**

A handwritten signature in black ink, appearing to read 'Kit Williams', with a long horizontal flourish extending to the right.

DATE: **July 3, 2007**

RE: **Appeal of Bohot Conditional Use Permit
for in-home day care for eight children**

When considering the appeal of the Conditional Use Permit granted Wilma Bohot for home day care of eight children at her home on Country Club Hill, you should consider those factors enacted by the City Council as part of Chapter 163: **Use Conditions** of the Unified Development Code. These factors are spelled out for you within the packet prepared by the City's Planning Department. The Planning Department has made its recommendations for your consideration, but you also can consider much other evidence including: the minutes of the Planning Commission meeting, any petitions, letters, photographs, other documents and live statements from proponents and opponents.

Your authority to grant or deny a Conditional Use Permit is the same as the Planning Commission's once an appeal has been filed:

"(3) Grant a conditional use with such conditions and safeguards as are appropriate under this chapter; or

"(4) Deny a conditional use when not in harmony with the purpose and intent of this chapter."

§163.02 (B)(3) & (4) of the U.D.C.

You should consider all the factors specified in the Planning Department's report. I hope you will follow the Planning Commission's

example of touring the site to get a personal feel for traffic, parking, buffering and compatibility issues.

Probably the most difficult issue in this and every Conditional Use request is whether this use would have "**General compatibility with adjacent properties and other property in the district.**" §163.02 (C)(3)(c)(ii)h. of the U.D.C. Because "compatibility" is not specifically defined in the U.D.C., the general rule of ordinance interpretation is that it should be understood in its ordinary, customary usage. Merriam-Websters Collegiate Dictionary, Tenth Edition does not separately define "compatibility", but does define "compatible" as:

"1. capable of existing together in harmony"

As "compatibility" here is used in a planning context, planning reference manuals may also provide useful definitions. The Planning Department may provide definitions from any such reference manuals for your assistance.

"Compatibility" is a factor whenever you consider rezoning. It is listed in two factors for the approval or rejection of a PZD. In most residential zones, the U.D.C. lists more "conditional uses" that would require "general compatibility" with nearby property than "uses by right." Thus, the City's decision makers, the Planning Commission and City Council frequently determine if a proposal is compatible with nearby properties.

A couple of other "side issues" came up during the Planning Commissions' consideration of this issue. One was possible restrictive covenants among the property owners in the County Club subdivision. Restrictive covenants in this case (and usually) are **private** contractual agreements between property owners that restrict the legal uses of the property. **The City is not a party to those agreements nor does it have any enforcement powers.** These restrictive covenants can normally be changed by a majority of owners. These agreements are generally enforced by the Property Owners Association (POA) which can sue offending members. The Circuit Court, not the City, is best equipped and the proper entity to interpret and enforce restrictive covenants. Therefore, the City of Fayetteville has consistently refrained from inserting itself into private contractual disputes between property owners.

Another issue is whether granting a conditional use in this case would constitute a precedent for later requests for other conditional uses. While I believe every conditional use request should be considered on its own merits, it would be you as the decision makers who would ultimately decide whether an existing conditional use should be relevant for compatibility reasons during a later request for another conditional use. You could decide it has no bearing, but you could decide it should be considered either for or against the proposed new conditional use.

It could be considered favorably, I suppose, if the existing conditional use had caused no problems. It could be considered negatively if the traffic from two (but not only one) conditional uses would adversely affect the surrounding neighborhood. A future Planning Commission or City Council could choose to consider an existing conditional use or not.

"Home occupations" which include child care for up to six children, instructional services, professional services and repair services are allowed as a conditional use in every residential zone and the downtown zones, but not in any commercial or industrial zone. Please note that the applicant has not been granted a conditional use for "home occupation", but for §163.05 **Child Care; Nursery School** which has different requirements and allows up to ten children.