

A Child-Care Center's Physical Space

The facility that will house a center is one of the most critical components in a successful program. The correct design and location of a child-care facility can promote safety, increase effectiveness, and enhance the quality of child-care and the success of the center's programs. A nonprofit seeking to establish a new child-care center has three options when it comes to selecting a space for the center: using an existing space that conforms to minimum standards, modifying an existing space, or building a completely new space. The option that a nonprofit chooses will be subject to several factors outlined below, including the minimum requirements that the state of Texas requires licensed child-care centers to meet. This chapter will begin by discussing the factors to be considered in site selection as well as the minimum requirements for the physical facilities of a child-care center and other legal issues that affect the location of a center. The chapter will then cover legal issues involved in leasing or purchasing a child-care center space.

Site Selection Factors

Safety and Security

The safety and security of the center's children, parents, and employees is an important factor in the selection of the location for the center. A sex-offender search should be conducted to be sure that no offenders are located within 1000 feet of the center. The center should also make sure to ask for notification if a sex offender seeks to be located within 1000 feet of the center so they can register a protest.

The traffic patterns at the location should also be taken into consideration. The center will need to be sure that there is adequate safe parking for parents dropping off and picking up children. In addition, if the center does not have enough adequate adjacent outdoor play space, additional space that can be safely reached through traffic will have to be found. This is discussed further below.

A circular driveway will allow parents peace of mind when unloading their children and picking them up, while providing easy access to the building itself. This provision also will increase safety to the children by forcing the building to be further back from the road. Fencing the property is also important.

Market Feasibility

An organization should conduct a feasibility study of any location selected for the center. The center should be located in an area within easy transportation distance for parents in the target neighborhoods or businesses. It is best if it is an easy to find location, with good access and visibility.

Texas Minimum Space Requirements for a Licensed Child-Care Center

In Texas, licensed child-care centers must meet indoor and outdoor space requirements established by the DFPS to ensure that child-care centers provide a safe and adequate care space for the children in their charge. Local health and safety ordinances may have additional requirements.

Indoor Space Requirements

DFPS's indoor space requirements cover, among other things, the amount of space required per child, the location of the caregiving area, the amount of storage space per child, and the number of sinks and toilets provided per child. In addition, DFPS requires that children younger than 18 months of age be cared for in an area separate from children older than 18 months of age. A child-care center building must also at least two exits to the outside that are located in distant parts of the building.

Outdoor Space Requirements

DFPS's outdoor space requirements cover the amount and location of outdoor activity space per child, the size of the fencing required, exits from the space, and who may share activity space.

ADA Requirements

Child-care centers built or renovated after January 26, 1993 must comply with Title III of the American Disabilities Act (ADA). The ADA requires that all newly-constructed facilities be fully accessible to individuals with disabilities. Existing facilities must be modified to be fully accessible only if the modifications are readily achievable. The only general exception to these requirements is for child-care centers run by religious entities; child-care centers merely housed by a religious organization are not exempt. Organizations seeking to evaluate an existing facility or to build or renovate a facility should contact an architect for assistance. For more information on a center's disability policy please see the Operating Section.

Ineligible Neighbors

A child-care center may not be located near certain types of businesses, including adult-oriented businesses or those that sell firearms.

Zoning and Land Use Issues

A center's ability to use an existing building for a child-care business or to build a new facility on an undeveloped piece of land depends on the allowable uses of the land on which the building is or will be located. Land use is governed by zoning ordinances, deed restrictions, and other land transfer documents or restrictions created by homeowners associations and recorded in the county land records.

Zoning Ordinances

Texas law allows cities and some counties to regulate the use of land within their jurisdictions. Cities typically divide the land in their jurisdiction into districts that are classified as residential, commercial (sometimes further divided into office and retail), and industrial zones. Zoning ordinances are laws that restrict the use of land in each zone. Typically, the zoning regulations are consistent within each district but may differ between districts. Most Texas cities and some counties have enacted a master plan and appropriate zoning ordinances. Zoning regulations cover among other things: how land may be used, the height of buildings, how far buildings must be set back on each lot, the density of the building allowed on each lot, the ratio of built space to natural space, and the signage allowed on the land.

For each zone, a city may determine whether a type of use is permitted, conditionally permitted, or prohibited. A permitted use indicates that use can be exercised by right in that zone. A conditionally permitted use is one that is allowed only with prior approval from the city. To grant a conditional permit, a city has the right to impose additional conditions on the use of the land. A prohibited use is one that is not allowed under any circumstance.

A growing number of cities are imposing additional restrictions on land that has been zoned. For example, the City of Austin has several districts in which a neighborhood overlay (created by a neighborhood planning committee) cuts across several zones and imposes restrictions designed to create uniformity to community sections.

Child-care centers are typically considered commercial enterprises and therefore are permitted to be located only on property that is zoned for such purposes. Zoning issues arise when a child-care center classified as a commercial use seeks to locate in a district that is zoned as residential.

Conditional Use Permit

In some jurisdictions, child-care centers are allowed to operate as conditionally permitted uses in areas zoned as residential. If a center wants to locate in an area in which child-care is a conditionally permitted use, the center should apply for a permit. The application process will typically involve the notification of the owners of the surrounding property and may or may not involve a hearing. In addition, a jurisdiction may charge a fee if the conditional use permit is granted.

Variance

If child-care is not classified as a conditionally permitted use, a center may seek a variance. A variance is a waiver from a zoning provision. Variances may be granted when a zoning restriction causes *unnecessary hardship* to the business. The application process will typically involve the notification of the owners of the surrounding property and will likely involve a hearing. Zoning jurisdictions typically charge fees for the application process. In addition, a jurisdiction may charge a fee if the variance is granted.

Applications for conditional use permits and variances are filed with the city or county office that oversees development. Conditional use permits and variances are reviewed by the zoning or planning commission or other government body making land use decisions. Appeals from the decision of the administrative body are made to the city or county government. Applications for conditional use permits or variances will typically require the following information: exterior and interior site and building plans, maps of the neighborhood, a traffic analysis, letters from the affected neighborhood or homeowners associations, a recommendation from a city or county staff person, and additional information about the business to be located at the site.

The zoning jurisdiction will notify surrounding property owners, neighborhood associations, and other stakeholders of the application and, if appropriate, will set the application for a hearing, at which the surrounding property owners may voice their concerns and protests. The center will have a chance to respond at the hearing. Child-care centers have typically raised concerns regarding traffic congestion, lack of parking, large signage, noise, and the general concern that a commercial use will attract additional business uses that will lower the property value of the surrounding neighborhood.

Some best practices are:

- Don't sign an earnest money contract without a requirement that appropriate zoning be obtained.
- Review the zoning maps or neighborhood plans that apply to the specific property or area in which the child-care center is interested.
- If child-care is not a permitted use, contact the city or county development office to discuss the possibility of locating a child-care business in the zone.
- Identify and contact the affected stakeholders, including the surrounding property owners and tenants to discuss the merits of locating an affordable child-care center in the location.
- Take note of any concerns raised and incorporate those concerns into a development plan.
- Allow the stakeholders to review the development plan.
- If the use is ultimately allowed, be vigilant about maintaining good relations with the neighbors.

Deed Restrictions and Other Restrictions in Land Transfer Documents

Some Texas jurisdictions, such as Houston, have not implemented a master plan and have no zoning. Instead land use planning is covered by deed restrictions and homeowners associations. In certain circumstances, a center may seek to obtain a text amendment, which is a legislative change in the zoning of an area.

Environmental Issues

Because a child-care center will serve children under the age of 18, environmental considerations must be investigated and addressed. Environmental concerns may occur in the building, in the playground equipment or in the land itself.

Lead paint: Existing buildings may be contaminated with lead. Lead is particularly poisonous to children. The most common form of lead is in paint. Lead paint is present in many buildings built before 1978, especially those built before 1960. Lead paint can be found on any painted surface, but it is most often found on windows, trim, doors, columns, porches, and outside walls. Lead paint is believed to pose the greatest risk to children between six months and six years of age. Children of this age are at the greatest risk for lead based poisoning because they are most likely to come into contact with paint chips and paint dust on floors and windowsills. Existing buildings must undergo a lead paint test conducted by a certified lead paint evaluation professional before a child-care center will be licensed. In some circumstances, the lead paint must be removed before a jurisdiction will issue a certificate of occupancy. This process is known as lead paint abatement and must be performed by a certified lead paint specialist. For more information about lead based paint see <http://www.cpsc.gov/cpscpub/pubs/lead/6007.html> or <http://www.hud.gov/offices/lead/>.

Asbestos: Existing buildings built before the mid-1980's may have asbestos issues. Asbestos is a now banned in insulation and siding material because it has been shown to cause lung cancer. Asbestos may be contained or removed.

Radon or carbon monoxide poisoning: Both radon and carbon monoxide are especially dangerous for children. Carbon monoxide is a poison that results from incomplete oxidation of carbon in combustion processes like un-vented heaters, leaking chimneys and furnaces, wood stoves, and gas pipes. The Texas Human Resources Code requires child-care centers to have carbon monoxide alarms. Radon is a naturally occurring gas that comes from various rocks and soils and can cause lung cancer. Most child-care centers take precautions against radon gas. A center can buy a radon kit from many department stores and should test for radon every three months. More information about radon and carbon monoxide poisoning can be found at <http://www.state.in.us/idem/kids/5star/resources.html>.

Poisons in playground equipment: Most playground equipment manufactured in the United States is treated with chromated copper arsenate (CCA), a type of arsenic. Some research has shown that repeated exposure to CCA is associated with a higher risk of cancer especially in children. Currently, neither the Environmental Protection Agency (EPA) nor the DFPS ban the use of CCA. Some local jurisdictions, however, have banned the use of CCA treated wood in playground equipment. Whether or not a local jurisdiction allows CCA treated materials, the best risk management practice is to consider purchasing playground equipment treated with arsenic-free preservatives or using materials that don't contain arsenic, such as metal, plastic, and naturally rot-resistant wood. This will eliminate the possibility of a lawsuit against the center for use of potentially poisonous equipment. For the EPA's position on CCA in playground equipment, see <http://www.epa.gov/pesticides/factsheets/health.fs.htm>.

Site Control Issues

Buying vs. Leasing

A nonprofit may or may not have a choice regarding whether to lease or buy an existing building or to build a new facility. Many nonprofits establishing new child-care programs choose to lease space for the initial program period. Leasing a space is often a less expensive and more flexible option than either purchasing an existing space or constructing a new one. A lease requires less financial investment and spans a finite term; thus it often allows a child-care program to try out different spaces and locations without serious commitment. This feature is often attractive to child-care programs in their initial stages. Some of the drawbacks to leasing include complications with renovations to meet child-care licensing and fire safety requirements. For example, requirements for running water may preclude the use of some buildings. Landlords may ask for a long-term lease to help cover those costs. Alternatively, landlords may ask programs to pay for renovation costs up front, thereby increasing the value of the building and raising the potential for increased rental fees later on. Churches, schools, and nonprofit organizations may provide space at little or no cost. Other related costs, such as custodial service or utilities, may be minimal.

New centers may have the option of buying a space or building a new facility. In addition to building equity through the ownership of an asset, owning a space gives the nonprofit more control over design or remodeling decisions. Sometimes owning a building can be less expensive than renting or leasing when renovations improve the energy efficiency of a building and loan payments are lower than rent. However, buying or building a facility is a complex undertaking and requires management by persons experienced in real estate and construction. The drawbacks include a large initial monetary investment, which frequently requires a nonprofit to borrow money.

Whether a nonprofit chooses to lease or purchase, the corporation should conduct extensive research into the property. This process is called due diligence and consists of researching the property's ownership, encumbrances, zoning, easements, and suitability for use as a child-care center.

Corporate Authority

Texas law requires the board of directors to document authorization for the purchase of property through a corporate resolution. The contract should be signed by the person(s) authorized to sign in the nonprofit's bylaws.

Leasing a Facility

Nonprofit child-care programs that choose to lease space should work with an attorney to conduct a thorough investigation of the space to determine whether the location meets the minimum facility requirements, whether child-care is a permitted use of the land, and whether any environmental conditions exist that may prohibit the operation of a child-care business at the desired site. If the nonprofit determines that the site is suitable, it should negotiate a leasing arrangement and make sure that all agreements are incorporated as provisions into a signed written lease agreement.

Lease

A lease is a written summary of the agreement between a landlord and tenant. The lease transfers the right of possession of a property from a landlord to a tenant. The tenant may use the leased property in any lawful or reasonable manner, subject to any provisions within the lease itself.

Lease Provisions

Many landlords use leases that are mass-produced documents or standard forms. These form documents often contain provisions that favor landlords over tenants. Therefore, it is very important to read and understand all the provisions of the lease. The time to negotiate any changes to provisions is before signing the document.

Provisions that are normally incorporated into a lease govern:

- the property to be leased, both indoor and outdoor;
- the duration of the lease;
- the commencement date of the lease;
- the rental payment date;
- landlord responsibilities;
- tenant responsibilities;
- services to be provided by the landlord (i.e. repairs, maintenance, operating expenses — in many commercial leases, landlords are responsible for outside and structural repairs while tenants are responsible for interior repairs — some which include plumbing and heating/cooling);
- landlord's right to enter;
- modifications to be made to the property prior to the commencement date of the lease;
- permitted uses of the building; (The lease should clearly permit the operation of child-care

center but should be broad enough to allow a nonprofit to assign the lease or sublease the property if the site is not workable for the child-care center.)

- permitted modifications to the building; (Leases often provide landlords absolute discretion over alterations to their premises. However, a child-care center may stipulate in the lease that the use of discretion be reasonable. A center that plans to make alterations to a building may also want to stipulate that the landlord respond to alteration requests within a specified time period and provide reasons for any denial of a request.)
- permitted signage;
- who will pay, and in what proportion, for expenses (utilities, telephone, computer, internet, insurance, taxes, cleaning, garbage, security, etc.);
- hours of use of common space;
- right to assign the lease;
- right to sublease;
- right to renew or extend the lease; and
- lease termination. (It is in the tenant's favor to have as many termination rights as possible. The most frequent events that trigger tenant's termination rights include casualty/condemnation, inhabitability of the premises, and landlord's breach of obligations under the lease. Given the nature of the nonprofit sector, in addition to requesting these common termination rights, a nonprofit center may also want to request that its termination rights be triggered by a loss or decrease in funding. Since a landlord's only other option than granting termination in the face of decrease in funding would be to face a defaulting, judgment-proof tenant, a landlord will often grant this termination right. A child-care center might specifically seek termination rights if it fails to obtain or loses a license from DFPS.)

Liability Provisions

Because caring for children brings a high amount of liability, a landlord may seek specific indemnification language and specific levels of insurance from the nonprofit. The nonprofit should consider the possibility of adding the landlord as an additional insured to the center's liability policy.

Subordination of the Lease Clause

An unconditional subordination provision is standard in leases and provides that a lease is subordinate to any mortgages then or thereafter attached to the property. This type of provision allows a mortgage lender to foreclose and eject a tenant from a property regardless of whether the tenant is in default. A center may protect itself from this by negotiating that as long as the center abides by the lease terms, the center cannot be evicted from the space even if the building ownership is transferred. This protection measure is appropriate for a short-term lease, i.e. less than 5 years; however, if the lease is long term, a center should simply negotiate a long advance notice period.

Signing the Lease

The center should make sure that the person, partnership or corporation named as landlord is the owner of the property. The center should ask to see a deed or title insurance policy to verify that the named landlord really owns the building. If the building is owned by an individual, that person or an authorized person should sign the lease. If the building is owned by a business entity, the center should make sure that the person signing the lease has the authority to sign for the entity.

If a rental agent will be negotiating the lease and signing it on behalf of the owner, the center should ask for written confirmation from the owner that the agent has the authority to sign the lease.

For its own part, the center should make sure that the person signing the lease on their behalf is given authority to do so in the bylaws. The center should also be sure to enact the appropriate board resolution authorizing the lease of real property.

Buying a Facility

Nonprofits opting to purchase or build a new facility should work with an attorney experienced in real estate transactions. Real estate transactions vary from deal to deal. The discussion below is intended to introduce some of the basic steps. If the center chooses to purchase space, each potential property should be researched to determine the appropriateness of the space for the intended use.

Title

In order to secure ownership of a property, a buyer should ensure that the seller has clear title. Clear title means that no other person or entity can claim a right of ownership or financial interest in the property. Without clear title, the property can not easily be sold and most lenders will not make loans to purchase or renovate the property. Ownership of property can be determined by a search of the deed records in the county where the site is located. A child-care center's best bet is to work with a title company to conduct a title search and issue a title policy to protect the nonprofit's ownership.

If a site for purchase is selected, the nonprofit should follow established land purchase methods to ensure that the ownership of the property is secure.

A contract for the purchase of real property or a purchase contract is an agreement to purchase named real property within a specified period at an agreed-upon purchase price. Most purchase contracts will include the following terms:

- A clear description of the real property to be purchased;
- The earnest money deposit;

- The purchase price and how it will be paid;
- The closing date and any agreements regarding extensions of time;
- Any existing leases or contracts affecting the contract;
- The seller's obligation to disclose condition of property and any/all defects;
- The buyer's rights upon post-escrow discovery of defects;
- A right to assign contract to another party;
- Any existing easements encumbering the property;
- The closing costs and who will pay them;
- Prorated taxes, insurance, rents, etc; and
- The broker's fees if any and who will pay the fee.

The following types of contracts are variations on the standard purchase contract that provide flexibility to the buyer and so may be good choices for a center.

Option Contract: This type of contract gives the buyer the right to purchase a property for a set period of time at an agreed upon extra amount, called the option fee or option price. If the option is not exercised, the option price set in the contract is usually lost. If the option is exercised, the option price may or may not be applied to the purchase price. The buyer may choose not to exercise the option for any reason. Option contracts may be extended according to the agreement of the buyer and the seller. Option contracts allow a buyer to secure a property while the nonprofit secures financing, obtains required permits or waivers, resolves title problems, and conducts other purchase business. A center may record an Option Contract to protect the center's rights during the option period.

Conditional Purchase Contract: This type of purchase contract makes the purchase subject to contingencies that are specified in the contract. The buyer must purchase the property unless the specified contingencies prevent the completion of the purchase. A conditional contract typically includes a nonrefundable deposit that the nonprofit will forfeit if it is not able to purchase the property. When the purchase is prevented by a contingency, it may be possible for the nonprofit to renegotiate the forfeiture of the deposit. Failure of the center to obtain licensing or to obtain the needed zoning waivers may be named as one of the contingencies in the contract.

Title Insurance

Purchasing title insurance is important to a child-care center for several reasons. First, title insurance will protect a center from issues affecting the title of the property that might not appear in any public records. Second, title insurance is often required to obtain financing on a property — most financial lenders will require a mortgage title insurance policy before lending money for the purchase or improvement of a piece of property. Finally, without title insurance and the protection of a title search, a center could be accountable for prior liens, judgments and back taxes, even without knowledge of their existence.

There are two types of title insurance: a mortgage policy that protects the lender, and an owner's

policy that protects the owner. Owner's title insurance protects the owner against financial loss if problems develop regarding the right to ownership in property. Title insurance does not guarantee that the owner will continue to have the right to possess or use the property, but it does guarantee that a title company will defend the owner from any lawsuits by other persons claiming an interest in the property and reimburse the owner for any financial loss incurred as a result of any claims covered by the title policy.

Facility Development

A center faced with a need to engage in facility development, either to renovate an existing facility or to construct a new one, should engage appropriate professionals to provide technical assistance, including architects, engineers, contractors, and construction managers. Nonprofits will need to engage in complex project management when building or improving a facility. Necessary project components include financial feasibility and appropriate design. Some of the most common issues during facility construction are discussed below.

Contractor Qualifications: Whether a nonprofit is building a new facility or modifies an existing one, the choice of a competent builder is critical. It is important to work with contractors qualified in particular areas of construction. In Texas, only specialty contractors, including HVAC, fire sprinkler systems, plumbing, and electrical specialists, need to be licensed. To obtain these licenses contractors must pass one or more exams and meet certain requirements. Ideally, the contractor would be familiar with child-care center state and local design regulations. In addition, some funders might have additional qualifications.

Bidding Process: A nonprofit may be required to engage in a competitive bidding process by funding sources. In the competitive bidding process the plan is drawn up by an architect and bids are solicited from multiple contractors. Nonprofits may also have the option of bidding out the contract through a guaranteed maximum price. This allows the nonprofit to choose a contractor prior to settling on a design and seek the contractor's input into the design process. A nonprofit should be sure to enlist an architect or design professional to assist with preparation of a bid or request for qualifications.

Construction Contract: The construction contract should contain:

- a timeline for the project;
- whether or not a performance bond will be secured;
- a list of materials that will be used;
- identification of subcontractors;
- a maximum price of the work;
- any penalties that will be incurred for finishing late (liquidated damages clause);
- who is responsible for obtaining insurance coverage, criminal background checks, and the necessary construction permits; and
- a clearly specified statement that modifications to the contract must be made in writing.

Davis-Bacon Act: Nonprofits should be mindful of the Davis-Bacon Act. This Act requires contractors to use the prevailing wage rates (determined by the U.S. Department of Labor) for all Federal construction/rehabilitation projects in excess of \$2,000. Most centers' construction/rehabilitation will not be directly covered by the Act, but might be covered by a related act, especially the Housing and Community Development Act of 1974. A center should check with a federal funding grant or loan officer to determine if the Davis-Bacon Act applies.

Mechanic's Lien Documents: A contractor secures the promise of payment upon the completion of work through a mechanic's lien contract, a mechanic's lien note, and a deed of trust. The mechanic's lien contract will typically include a description of the real property to be improved, the work to be completed, dates for completion of the work, liquidated damages, and the contractor's and owner's obligations and rights. The mechanic's lien note functions as a promissory note that is secured by the deed of trust.

The mechanic's lien documents are recorded against the property itself. Failure to pay a contractor for work performed may result in a lien being placed against the property. Property cannot be sold and often cannot be refinanced when a mechanic's lien is placed against the property.

Required Permits and Approvals: Several public approvals are needed before a center can begin operations. These approvals might include utility, building safety, fire code approval, and a retail food and beverage permit. Operating permits are discussed in greater detail in the Operations Section. Properties within earthquake, flood, and coastal zones might require additional approvals. Center staff should set up a calendar for obtaining the needed approvals, and research what standards the site will need to meet to obtain the approval.