

A GUIDE FOR DEVELOPING
CHILD CARE FACILITIES
WITH AFFORDABLE HOUSING

Partnering *with a Provider*



BUILDING SUSTAINING LEADING

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Partnering *with a Provider*

Summary

Once a child care provider has been selected, a developer must structure its relationship with the provider in a way that meets the requirements of the child care facility and the housing development while minimizing risk exposure and protecting both parties. This chapter provides an overview of the issues that may arise in negotiating contractual agreements between the developer and provider, and provides detailed information to consider for each legal document. A sample Development and License Agreement is also provided in the Appendix.

Legal and Structuring Issues during the Development and Operations

The legal agreements should detail the terms and conditions under which the provider and developer will partner for each phase of the development and management process. There are a number of legal agreements necessary when an Owner/Developer and Provider decide to partner to provide child care in a development. The scope and number of agreements vary, depending on:

- The relative ownership interests of the parties (i.e., which party owns the underlying land, improvements and personal property);
- The scope of the services to be provided by either party (e.g., whether the Owner/Developer will perform, or have someone perform on their behalf, the tenant improvement work needed by the Provider);
- The physical location of the facility (i.e., whether it is adjacent to or within the Owner/Developer's development);
- The requirements of the lenders, investors, or providers of operating subsidy.

These four overarching factors will dictate the type of contractual agreements which will be necessary to document the deal between the Owner/Developer and Provider. We describe in the exhibit beginning on the next page the agreements typically used to document the various types of scenarios, the context in which each agreement is normally used and the critical provisions which should be included in each agreement. Before entering into any legal agreements, we advise seeking professional legal assistance. The information provided in the following exhibit is intended to serve as a starting point.

Legal Documents

MEMORANDUM OF UNDERSTANDING

CONTEXT FOR USE

An Owner/Developer and Provider may enter into a memorandum of understanding (“MOU”) to ensure that each party has a preliminary understanding of each others’ objectives and expected roles and responsibilities for the potential partnership. Ideally, the parties should enter into a MOU prior to beginning schematic design documents, although most developers and providers do not finalize a MOU until during the schematic design process or very early in design development.

MOU PROVISIONS

There are no terms which absolutely must be in a MOU, but a basic discussion of each party’s commitment to working toward a partnership is important. The MOU should commit a Provider intending to offer subsidized child care to reserving subsidized slots from their existing contract during the term of the MOU. The Owner/Developer should commit to negotiating in good faith with the Provider, and the Owner/Developer and the Provider may both commit to negotiating only with the other until the MOU is terminated or expires. If the parties have an initial understanding of the following issues, they should also be included in the MOU:

- A. The ownership structure of the development (i.e., which of the parties will own the land and the child care facilities);
- B. Which party will pay for and manage the build out of the facilities;
- C. Each parties’ relative responsibilities for securing financing, providing services and maintaining the property;
- D. Initial understanding of the scope of child care services to be offered by the Provider;
- E. Any enrollment priorities of Owner/Developer, if known at the time;
- F. Any expectations with respect to payment of rent.

The MOU should contain an expiration date so that the MOU expires upon either the expiration date or the execution of an actual services and/or lease agreement, unless the parties agree otherwise. Oftentimes, each party will have the right to terminate the MOU with as little as five to thirty days’ notice. Another helpful part of an MOU can be a section which contains timelines during which each party gathers more information, secures commitments to financing or obtains necessary approvals. Milestones allow each party to understand where they are in the process and to determine whether the other party can live up to their expectations. MOUs are typically non-binding, except where the parties desire to bind each to negotiate in good faith or negotiate exclusively during the term of the MOU. Owner/Developers should also attempt to make Provider’s commitment to reserve subsidized slots a binding provision of the MOU.

LEASE AGREEMENT

CONTEXT FOR USE

A Lease is necessary when the Owner/Developer will not sell its land or improvements to the Provider but will let the Provider occupy the space in exchange for Provider's services and/or a fee. The Lease describes the Provider's and Owner/Developer's respective rights and obligations during the Provider's occupancy of the Owner/Developer's space. A Lease may also include provisions relating to the child care services the Provider is to provide to the development, as opposed to including those provisions in a separate services agreement. If the Lease will include services-related provisions, the Owner/Developer should take care to separate the occupancy-related and services-related provisions in the Lease, so as to keep the obligations distinct and clear. In addition, the Lease should also make clear that a default by the Provider under a service-related provision (e.g., the Provider does not fulfill service-related licensing requirements) could result in the termination of the Provider's occupancy rights under the Lease. Relevant services-related provisions can be found in the Services Agreement section below.

LEASE AGREEMENT PROVISIONS

Owner/Developer Entry Rights

The Lease should ensure that Owner/Developer has the right to enter the property with reasonable notice for maintenance and repairs, and without notice in emergencies. The Lease should also specify Owner/Developer's rights to enter any common area controlled by the Provider. For example, if there is a play area that the Provider uses during the business day, the Lease should describe whether the Provider's use is exclusive. Exclusive use could mean the Owner/Developer's residents can only use the area after the Provider's use of it during the business day, or it could mean that the Provider has exclusive use and control of it at all times, irrespective of whether the Provider is using the area.

Provider Access to Property

The Provider's clients and residents of the development should have separate access to their respective parts of the development. In order to minimize cross-liability for events happening on the other party's property, each party should have a different route set aside in order to get from the street to its respective part of the development, including separate corridors and entryways.

Utilities

The Lease should describe which party will arrange and pay for each of the utilities, including janitorial, trash, telephone, electric, gas and water. Identify common area utility charges for which the Provider will be responsible on a prorated basis. Separate utility hookups for the Provider, other tenants and the Owner/Developer (as applicable) are strongly recommended.

Maintenance

The Lease should distinguish between general maintenance and repairs, and describe which party will be responsible for each and which will be responsible for the costs of each. The Lease should also discuss who performs maintenance or repairs on (i) tenant improvements constructed by the Owner/Developer, (ii) Provider-installed improvements, and (iii) common space (hallways, restrooms, etc.)

Rent

Any rent to be paid should be outlined as to amount and timing of payment.

Center Opening Date

The Lease should have a date when the Provider must be prepared to open and operate the child care facility unless the Owner/Developer causes a delay.

Taxes

The Lease should detail how property taxes are being paid and how personal property taxes (if any) will be paid. If a tax exemption will be filed, the Lease should specify who will file for the exemption. The Lease should also specify that the Provider must cooperate with tax exemption filings made by Owner/Developer and that the Provider will be responsible for any taxes or penalties which result from Provider's lack of cooperation with an exemption filing.

Prohibited Uses

The Lease should describe prohibited Provider uses, including standard prohibitions against the use of hazardous materials, activities constituting a nuisance or activities which would be prohibited by standard insurance, and that the Provider's use of the child care center should comply with all laws and regulations.

Tenant Improvements and Alterations

Description—Describe tenant improvements to be completed by the Owner/Developer prior to commencement of the Lease. The Provider should state that the improvements are suitable for the Provider's intended use.

Alterations—Include language requiring prior Owner/Developer consent for post-lease commencement alterations or improvements by the Provider above a certain dollar threshold. The Provider must give advance notice of work start date and promise lien-free, diligent, first quality work, performed with appropriate permits.

Ownership—Describe which party owns improvements after the term of the Lease. The Owner/Developer typically owns all improvements after the term except for unattached, moveable trade fixtures.

Lease Expiration—The Owner/Developer should retain the right to require the Provider to remove any additions or fixtures placed on the improvements and obligate the Provider to repair any damage caused by the installation or removal of the additions or fixtures.

Parking—The Lease should specify the number of parking spaces to be provided on the property to the Provider, including the number of spaces that will be "exclusive," i.e., reserved only for the Provider, or nonexclusive. The Lease should also specify how the Provider would access the spaces and time constraints, if applicable. The parking spaces should be separated into categories, as applicable: (i) employee spaces, (ii) short-term parent drop-off spaces (ideally, the drop-off spaces should be as close as possible to the entry for each classroom), and (iii) visitor parking.

Assignment and Subletting

The Lease should describe the Provider's ability to assign its rights under the Lease or sublet the premises. Oftentimes, the Provider is absolutely barred from assignments or subletting. This prohibition is included because the Owner/Developer has a significant interest in keeping the Provider as the tenant since the Owner/Developer specifically chose the Provider for its ability to provide and finance the child care services to be provided to the property.

Indemnification

The Provider should indemnify the Owner/Developer for any claims or costs arising from the acts or omissions of the Provider, including any mechanic's liens or other encumbrances which may be placed on the property.

Damage or Condemnation

The Lease should give the Owner/Developer the absolute right to terminate the Lease if there is total or partial destruction or condemnation of the premises. The Provider should assign to the Owner/Developer any rights to awards and the Provider should have no claim against the Owner/Developer because of the destruction or condemnation.

Default

The Owner/Developer should deem any uncured default by the Provider to be a material default and possible grounds for termination of the Lease. If the Provider has a separate contract for supportive services with the Owner/Developer, the Lease and Services agreement should have cross-default provisions, i.e. a default under one of the agreements is a default under the other and either or both can be terminated by the Owner/Developer after an uncured default.

Recourse

Owner/Developers who are required by a lender or public agency to provide child care services to the property for a specific term as a condition of funding (please see the "Recourse Considerations" section of Chapter V for examples) should attempt to give the Provider financial incentives to avoid defaulting under the Lease, particularly where the Provider's default will cause the Owner/Developer to default under any loan, grant or other funding source where the Owner/Developer is the borrower. This financial incentive helps to mitigate the risk to the Owner/Developer of a Provider default causing the Owner/Developer to default under its own funding sources.

Owner/Developer should attempt to include in the Lease and/or Services Agreement a provision that provides for financial recourse against the Provider where a Provider default causes or will cause Owner/Developer to default under its funding. Examples of the type of financial recourse against Provider upon Provider default are: (1) a security deposit (separate from the typical security deposit used to fund repairs to property damage caused by Provider) or (2) a letter of credit from a reputable bank. In each case, if the Provider defaults (for example, Provider does not give sufficient notice of termination as set forth in the Lease and described in detail below), Owner/Developer can retain the secondary security deposit or draw on the letter of credit.

Termination

Providers will often demand the right to terminate the Lease and/or Services Agreement upon a certain number of days' notice to Owner/Developer. Owner/Developers who are required by a lender or public agency to provide child care services to the property for a specific term as a condition of funding (please see the "Recourse Considerations" section of Chapter V for examples) should ensure that the termination language allows for sufficient prior notice of termination from the Provider so that the Owner/Developer will have enough time to find a replacement provider. In other words, the Provider must give the Owner/Developer notice of termination on a date that is a specific number of days prior to the actual day when the Provider will cease providing services so that the Owner/Developer can avoid a gap in service which would cause the Owner/Developer to be in default under its funding sources.

The determination of what will be a sufficient number of days' notice depends on a number of factors which are particular to each child care center. The type of funding used to fund the development is one determining factor because each funding source will have different requirements and timeframes for approval of substitute providers, and the Owner/Developer may need a longer notice timeframe from the Provider in order to ensure that the Owner/Developer can find and obtain funding source approval of the new child care provider prior to the departure of the current provider. Owner/Developers should also consider the general availability of qualified providers in their area as a factor in deciding how much notice they need from the Provider. For example, if qualified providers are scarce in the Owner/Developer's area, the Lease should provide for a longer notice timeframe from the current provider. In almost all cases, the Owner/Developer should get at least 180 days prior notice of termination, in order to safely mitigate the risk of the Owner/Developer defaulting under the funding sources of their development, and to prevent a possible interruption of services to the property which may create a hardship for tenants and other clients of the child care services.

Insurance

The Lease should require the Provider to maintain standard insurance coverage and to provide the Owner/Developer evidence that affirmatively states that the Provider has all required coverage. Owner/Developer should have the right under the Lease to periodically request from the Provider confirmation of its maintenance of the coverage. Standard insurance coverages should protect owners and managers from the additional liability exposure that results from a child care use in the development. Increases in limits or additional coverages are not typically recommended except for sexual abuse and molestation coverage, as described below. Generally speaking, the Provider will typically be liable for damage or injury associated with the child care use and the Owner/Developer liable only in cases of Owner/Developer willful misconduct or negligence. Indemnification language in the Lease, Services Agreement and/or CC&Rs between the Owner/Developer and the Provider should give further protection against Owner/Developer liability.

The Lease should require the Provider to maintain liability insurance and workers' compensation insurance, with the Owner/Developer, management entity for the development and possibly the Owner/Developer's lender named as additional insureds. Limits should be no less than \$1,000,000 per occurrence, but certain Owner/Developers may want to consider higher limits.

The key coverage to be obtained by the Provider is sexual abuse and molestation coverage. This coverage is typically provided by standard liability policies unless specifically excluded, but many policies affirmatively exclude the coverage, and separate coverage must be purchased. We suggest that the Lease or Services Agreement, as applicable, mandate that the Provider obtain this coverage. Generally, separate kidnapping insurance is not necessary because the occurrence of a kidnapping is likely to be considered the result of the negligence of the Provider, and covered by insurance in that fashion. Owner/Developers should consult with their insurance advisors before mandating or accepting any of the coverages in this section, because situations and contexts may vary.

Lender Requirements

The Owner/Developer should be sure to incorporate into the Lease any requirements of its lenders that are to be passed on to the lessee. Examples may include additional insurance requirements, income restrictions, local hiring requirements, etc.

SERVICES AGREEMENT

CONTEXT FOR USE

A Services Agreement is necessary to specify the rights and obligations of the Provider and Owner/Developer with respect to the Provider's provision of child care and other services to the development. An agreement detailing these provisions is necessary whenever the Provider plans to provide services to the Owner/Developer's development, irrespective of whether the Owner/Developer or the Provider owns the land or improvements on the property. In the situation where the Owner/Developer retains ownership of the improvements, and leases the space to the Provider, service-related provisions may be included in a separate Services Agreement or could be put in a separate section of the applicable Lease. If the services-related provisions will be included in the Lease as opposed to being included in a stand-alone services agreement, the Owner/Developer should take care to separate the occupancy-related and services-related provisions in the Lease, so as to keep the obligations distinct and clear. The stand-alone Services Agreement should still be cross-defaulted with the Lease, i.e., a default under either document could be deemed, at the discretion of the Owner/Developer, as a default under the other, potentially resulting in the termination of rights under either document. For example, if the Provider does not fulfill a service-related licensing requirement under the Services Agreement (a default), a cross-default provision would mean that the Owner/Developer could terminate rights to occupy the premises under the Lease.

SERVICES AGREEMENT PROVISIONS

Number of Staff

The Agreement should provide minimum staffing requirements for the child care program for the infant/toddler and preschool age groups. The requirements should include minimum staff/child ratios that meet state licensing requirements because (i) the Owner/Developer must have a licensed child care center, or (ii) a major source of operating funds for the center is from state contracts or sources. The requirements should include minimum staff/child ratios that meet, at a minimum, the requirements of Title 22 of the California Health and Safety Code. If a Provider is providing a child care program that is funded by the California State Department of Education or the Federal Government for Head Start, then the Provider must comply with both Title 22 and Title 5 of the California Education Code.

Credentialing Requirements

The Agreement should provide that the Provider's child care staff should fulfill minimum certification and licensing requirements of the State of California for child care staff, including any relevant education requirements of the State of California or the federal government for Head Start. The Provider should be obligated on a periodic basis to provide to the Owner/Developer evidence that it has met the State's or funding program's minimum certification and licensing requirements.

Employment Opportunities for Residents

The Agreement should describe any Provider obligations relating to the hiring of qualified residents, including advertising and training requirements, if applicable.

Corollary Services for Families

The Agreement should describe any services that the Provider will provide for families in the development in addition to the Provider's child care services, such as parenting classes.

Food Service

The Agreement should describe the extent of food service to be provided by the Provider and whether the service should meet any governmental requirements or standards. The Agreement should specify what type of food area the Provider will provide to the development, particularly if it is important to the Owner/Developer (for financing reasons) that Department of Health (“DOH”) guidelines are met. For example, a “food preparation area” under DOH guidelines is defined as “space used to heat up or organize food delivered from DOH inspected facilities.” A “kitchen” is defined as a “space used to make food which has been inspected by the DOH.” If DOH or other governmental guidelines do apply, carefully draft the Lease provisions to specify the correct guidelines to be satisfied.

Program and Financial Reporting Requirements

The Agreement should contain annual financial and statistical reporting requirements for the Provider relating to the operation of the child care facility. The Owner/Developer’s lender requirements should be included. The Lease may also mandate the Provider’s delivery of financial reports which show the financial health of the Provider’s corporate entity.

Fee Schedules

The content of this section will vary based on the relative importance to the Owner/Developer of resident use of the child care facilities. If it is very important to the Owner/Developer that a certain proportion of its residents be income eligible to use the facilities, then this section should provide that the (i) Provider will provide, for Owner/Developer review, fee schedules mandated by Provider’s funding sources and (ii) that the Provider will comply with those fee schedules. If resident usage is not a priority for the Owner/Developer, a requirement that the Provider provide the Owner/Developer with the fee schedule itself should suffice.

Preferences for Residents

The Agreement should detail any enrollment priorities and order to be followed by the Provider, including preferences for residents of the property or the neighborhood, any preferences for the Owner/Developer’s employees or residents of nonprofit-owned developments. The Agreement may also contain specific advertising obligations for the Provider, including mandates for the scope and forms of advertising. If the specific hours of operation of the child care center are a significant concern for the residents of the property, minimum or maximum hours of operation should also be included in the Agreement.

Provider Obligation to Reserve Subsidized Spaces

Oftentimes, a Provider is chosen based on the financing it has secured, including contracts the Provider has obtained to provide subsidized child care spaces to different facilities. If the Owner/Developer wants to ensure that a certain number of its child care spaces are subsidized, it is advisable to obligate the Provider in the Agreement to reserve a certain number of its contractually subsidized spaces for the Owner/Developer’s project. This helps to avoid the situation where the Provider has obligated its subsidized spaces to another facility although the Owner/Developer had underwritten and analyzed the Provider based on its ability to provide subsidized spaces to the Owner/Developer’s project.

Default

The Owner/Developer should deem any uncured default by Provider to be a material default and possible grounds for termination of the Agreement. If the Provider has a separate Lease with the Owner/Developer, the Lease and Services agreement should have cross-default provisions, i.e. a default under one of the agreements is a default under the other and either or both can be terminated by the Owner/Developer after an uncured default.

DEVELOPMENT SERVICES AGREEMENT

CONTEXT FOR USE

A Development Services Agreement is necessary where the Owner/Developer expects to perform, or have its contractor perform, specific tenant improvement work to the premises for the benefit of, and pursuant to the specifications of, the Provider. This setting is in contrast to where the Owner/Developer provides the Provider with a “shell” and the Provider is responsible for any Provider-specific “tenant improvements” to that shell to create the child care center. As in the case of the Services Agreement, however, these types of provisions could be included in the Lease to the Provider, if there is a Lease. A Development Services Agreement could also be attached as an exhibit to the Lease. If the development services-related provisions will be included in the Lease as opposed to being included in a stand-alone Development Services Agreement, the Owner/Developer should take care to separate the occupancy-related and services-related provisions in the Lease, so as to keep the obligations distinct and clear. In addition, the Lease should also make clear that a default under a service-related provision (e.g., the Provider does not pay Owner/Developer for its construction of the child care center space) could result in the termination of Provider’s rights to occupy the space under the Lease. This caution with regard to cross-defaults is valid even if the Development Services Agreement is a separate document and/or is an exhibit to the Lease. The stand-alone Development Services Agreement should still be cross-defaulted with the Lease, i.e., a default under either document could be deemed, at the discretion of the Owner/Developer, a default under the other, potentially resulting in the termination of rights under either document.

DEVELOPMENT SERVICES AGREEMENT PROVISIONS

Term of Agreement

The Agreement should specify when the Agreement commences and terminates.

Scope of Work

The Agreement should contain an exhibit that specifically details the scope of work to be completed by the Developer, the timeframe for completion and the source of funding for the work. If the exhibit does not include all of the Provider’s specifications, the Agreement should include milestones for the Developer receipt of the Provider specifications. Timeframes for the Provider responses to the Developer requests for information should also be included. The Provider may want the right to terminate if Developer fails to meet the agreed to construction deadlines. *See the Section below entitled “Financing Covenants with Milestones.”*

Fees

Any fees to be paid to the Developer for the work should be detailed in the Agreement, including the timing for payment of the fees.

Mediation and Arbitration

The Agreement may specify a method of dispute resolution, such as mediation as a first step and then arbitration, to potentially minimize legal costs. The clauses should specify which dispute resolution body will host and govern the process (e.g., the American Arbitration Association or JAMS, the Judicial Arbitration and Mediation Services, Inc.) and the details of the process.

Indemnification

The Developer should be indemnified by the Provider for claims against the Developer that are not the result of the gross negligence or willful misconduct of the Developer during the buildout of the child care facilities. Certain Providers may request an affirmative indemnification by the Developer for buildout-related claims or costs, i.e., the Developer would have to indemnify the Provider against claims related to the Developer's buildout of the tenant improvements (e.g., a constructive defect claim). Ideally, the Developer's indemnity would be limited only to claims resulting from the gross negligence or willful misconduct of the Developer with respect to the buildout.

PURCHASE AND SALE AGREEMENT

CONTEXT FOR USE

A Purchase and Sale Agreement is necessary where the Provider will purchase from Owner/Developer either the raw land, improvements (e.g., the Provider is solely purchasing the building and improvements where the child care services will be provided) or both the improvements and the land upon which the improvements exist. If the Provider is purchasing just the improvements built by the Owner/Developer, a Purchase and Sale Agreement and a ground lease (to lease to the Provider the land under the improvements) will be necessary (see the leasing section above). If the Provider is only purchasing the land and will construct a child care facility which will be used by residents of the Owner/Developer's development, the Owner/Developer may need certain CC&Rs (see CC&R section below) to have authorized access and other rights to the facilities. These CC&Rs may be included as a separate exhibit to the Purchase and Sale Agreement.

PURCHASE AND SALE AGREEMENT PROVISIONS

Terms of Sale

Purchase of Entire Property or Only Tenant Improvements—The Agreement should specify what the Provider is purchasing, i.e. will the Provider own the land as well as the improvements or will they own the improvements and operate the child care facilities pursuant to a ground lease for the land?

Analysis of Necessary Easements and Other Developer Rights—The Agreement should explicitly include, for the benefit of the Developer, any easements or licenses to use or enter the Property that are necessary for the development. These rights should be contained in Covenants, Conditions and Restrictions agreements (CC&Rs) or easement agreements that are recorded at closing of the sale of the property to the Provider.

Casualty or Destruction—The Agreement should address whether the Provider who owns the child care facilities and land has any obligation to rebuild if a major casualty or destruction occurs to their property. These issues are particularly important if the Provider-owned child care facilities are attached to, or underneath, the Developer's project. For example, if the child care facilities are on the ground floor of a four-story rental project, is the Provider obligated to rebuild the child care facility to allow the Developer to rebuild the Developer's facilities?

Survival of Terms—The Agreement should explicitly provide that certain terms of the Purchase and Sale Agreement “survive” the closing of the sale, i.e., that those terms will be a continuing requirement of one or both of the parties. For example, if in the Purchase and Sale Agreement the Provider has agreed to rebuild its center with insurance proceeds from any damage or destruction, the Agreement should state that those terms “survive” the closing of the purchase and sale.

Financing Covenants with Milestones

The Agreement should contain covenants that the Provider will actively and diligently pursue the financing necessary to purchase the property from the Developer. The Agreement may provide milestones for financing hurdles to be met, so that the Developer will have some assurance that Provider will obtain financing in time to close on the purchase. The Developer should have the right to terminate the Purchase and Sale Agreement if the Provider misses financing milestones or does not perform a covenant. These covenants could also include financing covenants relating to the Provider’s service-related subsidies, i.e., if the Provider cannot show it has obtained funding to operate the facility or provide subsidized slots, the Developer can terminate the sale. In addition, the Provider may also want the ability to terminate the Purchase and Sale Agreement if the Developer, after notice and cure periods expire, does not complete in a timely manner the improvements to be constructed by the Developer. The Provider might want this termination right because the Provider’s contract with the State may provide that a minimum number of children must be served by a particular date or the State will “recapture” the funds it committed to the Provider.

COVENANTS, CONDITIONS AND RESTRICTIONS (“CC&Rs”)

CC&Rs PROVISIONS AND CONTEXT FOR USE

There are a variety of ownership structures for child care facilities in development projects. The variations stem from the different possibilities for ownership of the land itself, ownership of the child care improvements (including the building) and differences in the location of the facility. Accordingly, each possibility requires a different set of CC&Rs for dealing with the unique issues that arise based on the ownership structure and location of the particular child care facility.

Below is a list of relevant ownership structure possibilities.

1. The Developer owns the land and the child care facility and improvements. The Developer leases both the ground and the facility to the Provider.
2. The Developer owns the land but the Provider owns the child care facility and improvements. In this scenario the Developer leases just the land under the facility to the Provider.
3. The Provider owns both the land (where the Developer sold or donated the land to the Provider) and the improvements. This scenario is only relevant where there are shared access issues, including parking.

Five relevant combinations arise from the above ownership and child care facility location scenarios. There are many CC&Rs that may be necessary in each of these scenarios, and the appropriate combination will depend on the exact details of the project. However, there are a number of issues that are likely to arise in each scenario. In any of those scenarios, the location of the facility, i.e., whether it is adjacent to the Developer's project or within the Developer's project, is important to determine which CC&Rs (particularly easements) are necessary. A discussion of those typical issues follows. This list is not exhaustive, but includes the most likely combinations:

Scenario 1

The Developer owns the land, the Provider owns the improvements, and the improvements are within the Developer's project

Driveway and Parking Easements—The Provider will need an easement to use the Developer's driveway and shared parking, as applicable, since the Developer owns that land and the Provider must access the Developer's land to travel to and enter its child care facility.

Construction, Alteration and Maintenance Easements—Both the Developer and the Provider may need easements from the other party in order to construct, install or maintain its respective improvements. Advance notice of exercise of the easement is usually required, except in cases of emergency. Maintenance easements that benefit only the Developer may be required where the Developer has maintenance responsibilities for (i) certain Provider improvements, or (ii) shared resources on the Provider's property (e.g., a play area) or (iii) where emergency or other repairs must be made to the Provider's improvements in order to protect the Developer's property.

Easements for Access and Use of Utility Facilities—Depending on the location of the utility facilities for the development and the child care facility, both the Developer and Provider may need nonexclusive reciprocal easements for ingress and egress over each other's property to access and use the utility facilities.

Easements for Access and Use of Emergency Exit Facilities—Depending on the location of the child care facility within the development, both the Developer and Provider may need nonexclusive easements for the purpose of accessing and utilizing emergency exit facilities which serve both the Developer's and Provider's property.

Easements for Access to Trash Facilities—Depending on the location of trash facilities in the development and whether they are shared by the Developer and Provider, reciprocal easements may need to be granted to access the trash facilities. One of the parties may also need an easement to cross through or over the other party's land to access a trash drop-off location.

Maintenance Conditions—The CC&Rs should describe each party's obligation to maintain its improvements and whether any maintenance costs will be jointly paid. They should also describe whether the Developer will be responsible for the maintenance of certain of the Provider's improvements for efficiency or to ensure that the work gets completed. Each party may have a right to perform emergency maintenance or repairs if necessary to protect its property, after attempting to notify the other party. A budgeting and reimbursement process may be created to deal with joint expenses.

Alterations—The CC&Rs should also provide that major alterations ("major" may be defined by a certain dollar amount) by either the Provider or Developer require the approval of the other party (the approval may not be unreasonably withheld, conditioned or delayed). This provision may also be drafted mostly for the benefit of the Developer by restricting Provider's approval rights solely to alterations that materially affect the structural integrity of the Provider's improvements or which would alter its access or parking rights. Under this structure, the Developer would otherwise retain unlimited alteration approval rights for the Developer.

Use Restrictions—The CC&Rs should restrict the use of the Provider’s improvements to child care or related uses, and prohibit nuisance or illegal activities. These provisions should work in concert with the use, assignment and subletting restrictions in the ground lease. The CC&Rs should also address any constraints on signage used by the Provider and covenants and conditions relating to garbage and refuse storage and disposal. Minimum insurance requirements could be included as well.

Damage or Destruction—Since the Provider’s improvements are within the Developer’s property, the CC&Rs should detail whether Provider has an obligation to rebuild in the case of damage or destruction of the Provider’s improvements and which party will coordinate and control the rebuilding. The Developer may have the absolute right to re-build the Provider’s improvements if it cannot rebuild its property without rebuilding the Provider’s improvements (e.g., where the Provider’s improvements are the first floor of the Developer’s building). In the case of a total destruction of the Provider and Developer’s improvements, the CC&Rs should detail whether the Developer has the right or obligation to rebuild and/or the right or obligation to sell the entire property.

Scenario 2

The Developer owns the land, the Provider owns the improvements, and the improvements are adjacent to the Developer’s project.

The fact that the child care facility is adjacent to and not part of the Developer’s project may lead to more reciprocal easements in that both parties may have a greater need to cross over or through the other’s property. Although there are exceptions to the rule, the Provider will typically not need utility or emergency exit easements from the Developer where the child care facility is only adjacent to Developer’s property. This is true because the adjacent child care facility will usually be required to have separate utilities and emergency exits and will not need access to the Developer’s utilities or exits.

However, reciprocal easements are likely needed to address issues relating to each party’s (a) access to drive-ways and parking, (b) construction, alteration and maintenance of improvements, and (c) access to municipal or shared trash facilities. Covenants, conditions and restrictions relating to maintenance, alterations, uses, and damage or destruction may still be necessary under this scenario, although the restrictions or covenants on maintenance and uses may have a lesser scope, since the Provider’s property is adjacent to, and not a part of, the Developer’s property. The extent that the child care facility and the Developer’s project share resources (e.g., parking) will be an important factor in deciding the scope of the CC&Rs necessary in this scenario. For specific discussion of each of the issues, see the above discussion.

Scenario 3

The Provider owns the land (obtained from the Developer) and owns the improvements and the facility is adjacent to the Developer’s project.

This scenario may possibly require the greatest number of easements, since each party separately owns its own land and improvements. The extent of easements and CC&Rs necessary under this scenario will depend upon the scope of shared facilities used by the parties and the particulars of the site plans of the adjacent parcels. If the Provider purchased the land from the Developer, the Developer should be able to obtain many of the protections found in the easements and conditions found in Scenario #1, although the Provider’s ownership of the land and improvements may limit the rights the Developer can obtain in the CC&Rs.

Scenarios 4 and 5

The Developer owns the land and improvements, the facility is within the Developer's development, and the Developer leases the land and facility to the Provider.

The Developer owns the land and improvements, the facility is adjacent to the Developer's development, and the Developer leases the land and facility to the Provider.

Please note: Scenarios #4 and #5 arise in the leasing context, and therefore the relevant issues and solutions would usually be contained in the Lease Agreement, not in CC&Rs. Many of the issues (and the wording used to address the issues) are the same, however, so we include these two scenarios here for completeness. For specific discussion of the leasing-related issues, please refer to the Lease Agreement provisions section above.