

**DECISION OF THE HEARING EXAMINER
CITY OF BAINBRIDGE ISLAND**

In the Matter of the Appeal of
North Hill at Wing Pt. HOA of the Director's
Approval of the SPR Application of

NISHA BHARTI

SPR14120

To Operate a Family Day Care in a
Residential Zone

BACKGROUND

Nisha Bharti made application for Site Plan Review (SPR) to obtain a business license in order to operate a family day care in her home in a residential zone. The Director, Department of Planning and Community Development, reviewed the application and approved it with conditions. The Director's approval was appealed by the North Hill at Wing Point Homeowners Association. The Hearing Examiner held the appeal hearing on December 7, 2006. Parties represented at the hearing were: the Director, Planning and Community Development (Department or PCD), by Jennifer Sutton, Planner; the Applicant, Nisha Bharti, *pro se*; and the appellant group, North Hill at Wing Point Homeowners Association, by Thomas Lonner.

After due consideration of all the evidence in the record, the following constitutes the findings, conclusions, and decision of the Hearing Examiner on this appeal.

FINDINGS

Proposal

1. The subject site, addressed as 1214 High School Road, is developed with a single-family residence owned and occupied by the applicant. The property is zoned residential (R-2.9, one unit per 12,500 sq. ft.). The Comprehensive Plan designation is Semi-Urban Residential (SUR). [See Vicinity map in Exhibit 3; Staff Report, Exhibit 21; Testimony of Sutton]
2. Surrounding uses consist of single-family residences and, to the south, the Wing Point Golf and Country Club. The zoning and Comprehensive Plan designations are the same as the subject property. [Exhibit 21]
3. In April 2006, the City's Code Enforcement Officer inspected the site in response to a complaint. Having determined that the owner of the subject property, Nisha Bharti, was operating a day care without a City of Bainbridge Island business license, the Code

Enforcement Officer advised Ms. Bharti that she must obtain a Site Plan Review (SPR) before the license could be issued. A citation for non-compliance (and a \$500 fine) was issued to Ms. Bharti on June 20, 2006. [Exhibit 21; Testimony of Sutton]

4. Ms. Bharti made application for a SPR in July 2006. The application [SPR14120, Exhibit 8] was deemed complete on July 19, 2006 [Exhibit 11] and notice of application was published August 2, 2006 [Exhibit 12]. The proposal is not subject to environmental review. [Exhibit 21]

5. The Application [Exhibit 8] describes the “Proposal” as: “Family day care in existing house with state licensed approved and no changes to be made.” The day care would have a maximum of 10 children. Ten is the maximum number of children allowed by the day care facility license [Exhibit 4] issued by the State Department of Social and Health Services to Ms. Bharti.

Bainbridge Island Municipal Code (BIMC)

6. In the R-2.9 residential zone, “*Family day care homes*” are a permitted use [see BIMC 18.24.020. BIMC 18.06. 250A defines “*Family day care homes*” as:

...a family abode in which child day care is provided on the premises during part of the 24-hour day to 12 or fewer children, including the provider’s own and foster children under 11 years of age...

7. BIMC Chapter 18.93 addresses day care facilities; the purpose of this chapter is to: “*facilitate siting of child day care facilities in a manner that simplifies review and approval processes while ensuring conformance with surrounding land uses.*”

8. BIMC 18.93.020 provides that: “*A family day care home shall be permitted in all residential zoning districts. Permit approval shall be through an administrative site plan review process...*” Day care facilities must have: one off-street parking space for each nonresidential employee; access, parking and loading sufficient to safely accommodate the use; and, no play area or play structures in the front setback.

9. All day care facilities must meet the decision criteria specified in BIMC 18.93.040. The criteria require: a state day care facility license; building and health code compliance; conformance with development standards of the underlying zone; an off-street drop-off/pick-up area; child care registration with the City; City business license; no structural alteration incompatible with residential character; no hours of operation before 5:00 a.m. or after 9:00 p.m.; on-site vehicle turn-around and loading area; no play structure or area in the front setback; and, landscaping compatible with adjacent residences.

10. BIMC Chapter 18.105 provides the procedural requirements for Site Plan Review (SPR). Site plan review is an administrative decision of the Director.

Director’s Review and Decision

11. During review of the SPR application, the Director received a number of comments from concerned citizens [Exhibit 21; Testimony of Sutton]. Comments included two in support (one from a next-door neighbor and the other from a neighbor

living directly across the street). These neighbors had not noticed an increase in traffic nor had been otherwise disturbed by the prior operation of the day care. Seven comments opposed the day care [Exhibits 14, 15, 16, 17, 18, 19, and 24]. Those in opposition cited increases in traffic and noise as major concerns. Cars backing into the street after drop-off and pick-up and the potential for children playing in the backyard being injured by errant golf balls, were mentioned as safety concerns. Opposition to allowing a business to operate in a residential neighborhood was a recurrent theme.

12. The Assistant City Engineer reviewed and approved a “T”-design for a 3-point turnaround proposed as an on-site drop-off/pick-up area utilizing the existing driveway and part of the front yard. With use of the turnaround, vehicles could exit the property in a forward direction, eliminating the need to back into the street. An existing three-car garage could provide an on-site parking space for one non-resident employee in addition to providing two spaces for the residents’ vehicles. The Director required the “T” turnaround in Condition 2. [Exhibit 25; Testimony of Sutton]

13. The Staff Report, dated September 14, 2006 [Exhibit 21], includes accurate analyses of land use code compliance and Comprehensive Plan consistency.

14. On September 29, 2006, the Director issued a Notice of Administrative Decision [Exhibit 23], approving “an in-home, family daycare” for a maximum of 10 children. The following were conditions of approval:

1. To mitigate traffic and noise impacts, the day care shall be limited to 10 children per day. The provider’s children under age 11 shall count towards the 10-child maximum.
2. The applicant shall install an on-site vehicle turn-around to the satisfaction of the City Engineer and identify a drop-off/ pick-up area on the property prior to issuance of the business license for the proposed in-home family day care. No on-street parking or idling shall be allowed during the hours of operation of the business.
3. One parking space for an employee, not living in the residence, if applicable, and one additional parking space must be available at all times. These parking spaces must be on the site and must not conflict with the use of the proposed turn-around.
4. To minimize traffic congestion, the applicant, shall stagger drop-off and pick-up times to the maximum extent possible.
5. The applicant must trim the vegetation located at the southeast corner of their property, next to the driveway, to increase visibility for vehicles entering the right-of-way. A planner must inspect that the vegetation has been trimmed prior to the issuance of the business license for the proposed in-home family day care.
6. Fenced, structured areas for active play and play structures are only permitted to the rear of the house, not in the front or side yards. .
7. No structural or decorative alteration, including signs related to the family day care shall be allowed on the exterior of the existing house.
8. The proposed day care services shall not be conducted before 5:00 am or after

9:00 pm. Outdoor play areas shall not be utilized before 9:00 am.

9. The applicant shall meet all state child care licensing requirements and shall comply with all building, fire safety and health code requirements.
10. The applicant shall comply with these conditions of approval and obtain a City business license prior to commencing day care operation and shall file a child care registration form with the city as provided in BIMC Section 18.93.050.

Appeal

15. On September 28, 2006, the North Hill at Wing Point Homeowners Association filed an appeal of the Director's decision. The appeal [Exhibit 26] asserts that unacceptable traffic and noise would be a result of day care operation (as appellants indicated had been the case during the unlicensed operation). The appeal also asserts that the Director's conditions of approval could exacerbate, rather than ameliorate the impacts of the day care operation.

16. Notice of the appeal hearing [Exhibit 29] was given for hearing to be held on November 30, 2006. Due to inclement weather, the hearing was continued to December 7, 2006.

17. All parties were represented at the hearing on December 7, 2006. The Director's representative presented the staff report and the conditions of approval. The appellant's representative gave testimony and presented witnesses and exhibits in support of the appeal. The applicant gave little testimony; she indicated that she had decided not to operate a day care and intends to sell the property. [Testimony of Sutton; Lonner; Bharti]

18. Appellants' witnesses [Testimony of Lonner, Conrad, Johansson, and Jorgenson] testified to their observations that when the day care had been in operation at the Bharti residence, there was noticeable traffic and noise associated with it. There was also testimony that the "T" turnaround required by Condition 2 for drop-off and pick-up [see Finding 13], would bring vehicle movements (and noise) "too close" to the adjacent neighbor's property.

19. It is anticipated that, at maximum capacity, the day care could generate as many as 22 vehicle trips per day (2 trips associated with one non-resident employee, 10 drop-off trips, and 10 pick-up trips). The times of the drop-off and pick-up trips would likely reflect staggered arrivals and departures throughout the day as was the case when the facility previously had operated. The Director's approval includes the requirement [Conditions 4] that drop-off and pick-up times be staggered "to the maximum extent possible." [Exhibits 10 and 21; Testimony of Sutton]

20. To improve visibility for drivers backing out of the subject driveway, Director's Condition 5 would require that the applicant cut back mature vegetation on the east side of the driveway near the street. Witnesses credibly testified that this vegetation is not on the applicant's property and that the neighboring property owner would not consent to removal or cutting back of that vegetation.

21. The Director's representative credibly testified that the proposal meets all the criteria for approval. [Testimony of Sutton]

22. BIMC 2.16.130 authorizes the Hearing Examiner to hear and decide appeals of administrative decisions. The Hearing Examiner, after holding a public hearing, may affirm, reverse, affirm with modifications, or remand the Director's decision. In making the appeal decision, the Hearing Examiner is required to give "*substantial weight to the decision of the department director.*"

CONCLUSIONS

1. The Hearing Examiner has jurisdiction to hear and decide this matter. To overcome the substantial weight accorded the Director's decision, an appellant has to show that the decision is clearly erroneous. Under this standard of review, the Director can only be reversed if the Hearing Examiner is left with the definite and firm conviction that a mistake has been made.
2. The proposed facility meets the applicable conditions of BIMC 18.93.020 for a family day care home (*i.e.*, it has one parking space for the non-resident employee; safe access and appropriate loading area; and, no active play area or structure in the front setback). The relatively small amount of traffic associated with day care operation, occurring on an improved street in a suburban neighborhood, would not be a significant impact (nor would it be an impact not reasonably anticipated given the uses permitted in the zone).
3. The decision criteria of BIMC 18.93.040 are met (*i.e.*, there is a state day care facility license and compliance with other applicable state and local regulations, including an off-street drop-off/pick-up area for loading that would be developed in accordance with the plans approved by the City Engineer).
4. Condition 5 would require the applicant to cut back vegetation to increase visibility for vehicle backing movements. As the vegetation is on a neighbor's property and backing movements would be rendered by unnecessary by the "T" turnaround, Condition 5 is not reasonable or appropriate; it should be eliminated.
5. The appellants have not shown that the Director was mistaken in finding that the proposal meets the criteria for approval. The Director followed the applicable review procedures and the criteria for approval are met. No error has been shown and the Director's decision should be affirmed. However, Conditions 5, requiring the applicant to trim vegetation not on her property, should be eliminated.

DECISION

The decision of the Director approving application SPR14120 is **AFFIRMED AS MODIFIED** to eliminate Condition 5.

Entered this 16th day of January 2007.

signed in original
Meredith A. Getches
Hearing Examiner

Concerning Further Review

NOTE: It is the responsibility of a person seeking review of a Hearing Examiner decision to consult applicable Code sections and other appropriate sources, including State law, to determine his/her rights and responsibilities relative to appeal.

Request for judicial review of this decision by a person with standing can be made by filing a land use petition in superior court within 21 days in accordance with the Land Use Petition Act, Revised Code of Washington, Chapter 36.70C. See also BIMC 2.16.130F.6.