

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

In the Matter of the Appeals of

JAMES KENNEDY, ET AL.

and

ADM 15492

**Tim and Jana Wilkins,
d/b/d Bainbridge Island Taxi, LLC**

From a zoning code interpretation

Introduction

James Kennedy, et al., appealed the administrative zoning code interpretation issued by the Director, Department of Planning and Community Development, regarding the classification of a taxi service business for property at 11201 Sunrise Drive. Tim and Jana Wilkins, d/b/a/ Bainbridge Island Taxi, LLC, appealed the Director's determination to make the interpretation appealable.

After Cross Appellants/Respondents' prehearing Motion to Dismiss was initially granted and then denied upon reconsideration, a public hearing was held March 13, 2000. James Kennedy represented himself and others who joined in his appeal; Dennis D. Reynolds, attorney at law, represented cross appellants/respondents Wilkins; and Paul McMurray, City Attorney, represented the Director, Department of Planning and Community Development.

All section numbers in the decision refer to the Bainbridge Island Municipal Code, unless otherwise indicated.

After due consideration of all the evidence in the record consisting of the testimony at the hearing and the documentary evidence admitted at the hearing, the following shall constitute the findings, conclusions, and decision of the Hearing Examiner in this matter.

Findings

1. Tim and Jana Wilkins, d/b/a Bainbridge Island Taxi, LLC, applied for a business license renewal with a new location for their administrative office and parking for their taxi business at the Rolling Bay Shopping Center in a Neighborhood Service Center (NSC) zone at 11201 Sunrise Drive.

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2. The Bainbridge Island Municipal Code does not list taxi service as a use. According to Katharine Cook, Director, Department of Planning and Community Development, (“Director”) staff must determine if an unlisted use may be classified under a similar or broader use category or, if not, it is prohibited. Exhibit 17.
3. The City held neighborhood meeting on July 31, 2008, to receive comments on the use and issued a written memo on September 25, 2008 (Exhibit 6, Attachment A) stating that the taxi service is a “personal service”, a use allowed in the NSC zone. After another neighborhood meeting October 6, 2008, the Director issued a memorandum regarding Classification of Taxi Service (Exhibit 5) and a Notice of Administrative Zoning Code Interpretation (Exhibit 6, Attachment B) on October 10, 2008, indicating that the interpretation was subject to appeal.
4. Jim Kennedy, along with others (“Appellants Kennedy”), filed an appeal of the zoning code interpretation on October 24, 2008. Tim and Jana Wilkins filed an appeal challenging the Director’s determination that her interpretation was subject to appeal.
5. The Wilkins moved to dismiss the Kennedy appeal on the basis that the interpretation did not accompany any specific land use application or enforcement action and, therefore, pursuant to Sections 2.16.130(A) and 2.16.095, was not subject to appeal. An Order Dismissing Appeal was entered, the hearing examiner finding that there is no authority to hear an appeal of an interpretation that is not in response to an application. Upon Appellants Kennedy’s motion for reconsideration, additional information showed that there was an “application” so the hearing examiner has authority to consider the appeal.
6. The location of the taxi service business is in an existing neighborhood shopping center. Other businesses include an upholstery shop, a mini-mart, a parent and toddler activity center, and a small retail boutique associated with the Wilkins. Surrounding the site are the Bay Hay and Seed nursery, the Municipal Court, an auto repair shop, a mini storage facility, a professional building, and a parking lot for a church.
7. In making his recommendation to the Director, the planning manager, Bob Katai, considered the nature of the use but did not analyze whether the business was compatible in scale or intensity with the other businesses in the zone, or review for consistency with the Comprehensive Plan policies for NSC zoning. He concluded that because the zoning ordinance implements and is consistent with the Comprehensive Plan, a use conforming to the zoning must necessarily conform to the Comprehensive Plan. Testimony of Katai.
8. The planner did consider whether the taxi service use should be classified as a light manufacturing use but concluded that the use provides a service rather than manufacturing a product so that classification would not be appropriate.
9. The taxi business operates 24 hours a day and owns 12 cabs. The drivers are on staggered shifts and some keep their cabs at their homes. According to Wilkins, with drivers’ vehicles and parked cabs, there would not be more than 12 vehicles on the site at any one time, and that many only after 7 p.m. The dispatch center is in Silverdale and countywide taxi service is provided. Some customers walk onto the site to obtain service.

Customers also come to the business office to pay their accounts, make arrangements for service, check for lost items, etc.

10. The building in which the business is located is approximately 6,000 square feet in size. Testimony of Katai. The Wilkins lease approximately 1,600 square feet, a smaller area than the Jiffy Mart and larger than the child activity center at approximately 1200 square feet. The taxi business offices occupy approximately 470 square feet.

11. The parking area associated with the shopping center housing the taxi business office and other uses can accommodate some 34 spaces. Exhibit 25. The planner used the parking requirement standards for retail and office uses of four spaces per 1,000 square feet of space. He found that eleven spaces would be left after subtracting the required parking for the other businesses, which he determined would be sufficient for the taxi business.

12. The owner of the children's activity center reported that parked taxis created congestion in the lot and their comings and goings interfered with the operation of her business. She identified from 11 to 14 related autos on-site including the taxis, drivers' cars, owners' vehicles and that of a business office worker within the business office. Testimony of Kent.

13. Photographs (Exhibit 29) showed a large expanse of unstriped, vacant space. In addition to parking associated with the taxi business and patrons of the mini-mart and children's activity center, the photos showed cars associated with workers and patrons of businesses across the street from the shopping center. There is also a large vacant, undeveloped piece of land under the same ownership attached to the parking lot.

14. "Personal service" means

...an establishment that provides service(s) in a non-office environment including, but not limited to, beauty shops, shoe repair, laundry, dry cleaning services and tanning salons. Auto repair and body shops are not included under this definition.

Section 18.06.830.

15. The current "personal service" definition replaced "Personal and professional service" in the prior version of the zoning code. That earlier definition specified that the use required providing services "involving the care of a person" and included such uses as real estate offices and engineering services. Exhibit 20.

16. Personal and professional services are permitted uses in the NSC zone. Section 18.66.020.

17. Section 18.66.010 provides that the purpose of the neighborhood service center is

...to provide a mix of neighborhood-scale commercial and service activity which is compatible with the scale, character, and intensity of the surrounding residential neighborhood and which minimizes the impact of noise, odor, lighting, fire safety, and transportation on the neighborhood and the impact on water quality, storm water runoff, and critical areas.

18. The taxi company has been in business since 1935. In addition to carrying regular private and business clientele such as to and from the ferry, the company serves as non-emergency medical transport, transports people released from the hospital, dialysis patients, adult and retirement home riders, and people in wheel chairs, and responds to police requests for transport, provides car battery jumps, and makes deliveries within the NSC, among others.

19. Other nearby businesses in the NSC have island-wide clientele. Each provides goods or services on-site, however some provide goods or services off-site as well such as the nursery, which delivers to customers, and the engineering firm. Neither is an example of a personal service use.

20. Robert W. Thorpe, AICP, with over 40 years of land use planning experience, reviewed the Director's zoning code interpretation and concluded that the analysis that the taxi business is a personal service use is appropriate. He also conducted a review of the Comprehensive Plan and determined that treating a taxi business as a personal service use would be consistent with the Comprehensive Plan goals and policies related to neighborhood service center zoning. Exhibit 24.

21. Respondents have proposed a site plan that includes striping of the parking lot and some landscaping. They also propose to limit the business' use to eleven parking spaces.

Conclusions

1. As determined in the prehearing rulings, the Hearing Examiner has jurisdiction to hear and decide this appeal pursuant to Section 2.16.130.

2. The Hearing Examiner is required to give substantial weight to the decision of the Director. Section 2.16.130F2. The "substantial weight" requirement means that the decision must be reviewed under a "clearly erroneous" standard. *Norway Hill Pres. & Prot. Ass'n v. King County Council*, 87 Wn.2d 267, 275, 552 P.2d 674 (1976), *superseded by statute on other grounds as recognized in Moss v. City of Bellingham*, 109 Wn. App. 6, 21, 31 P.3d 703 (2001). A finding is clearly erroneous when, although there is evidence to support it, the reviewer is left with the definite and firm conviction that a mistake has been made. *Wenatchee Sportsmen Ass'n v. Chelan County*, 141 Wn.2d 169, 176, 4 P.3d 123 (2000).

3. The code provides no indication that taxi service is a prohibited use in the city so the Director must determine how to classify it. The definition of "personal service" is specific as to what may not be considered personal service but is structured clearly to allow for the classification of other businesses as personal service. The Director has exercised that discretion by classifying taxi service as a personal service use and Appellants Kennedy urge that she is wrong because the taxi service is a transportation, not a personal service, use. They observe that the other businesses present provide their services in the NSC, i.e., people come to the municipal court to get justice, to the mini-mart for products, to the nursery for supplies, even while acknowledging that some of the

nursery products are delivered to the customer. But, because the transportation provided is personal to the customer, the Department concluded that it is a personal service.

4. The taxi business does provide a service. And though the earlier language required that the “personal and professional service” involve the care of a person, that language addressed a broader classification so does not provide the kind of guidance that legislative history may. However, even if the definition were unchanged, provision of transportation to a person in a wheelchair, for example, involves the care of a person just as much as providing engineering services, an example in the former definition. The service provided by the business is to persons and the service is provided in a non-office environment. The examiner’s role is not to impose her judgment but to determine whether appellants have made a sufficient showing to convince the examiner that the Director’s interpretation is clearly erroneous. The record does not leave the examiner with a definite and firm conviction that a mistake has been made in classifying a taxi service as a personal service.

5. Appellants Kennedy further contend that, even if the taxi business is a personal service use, the business is not consistent with the neighborhood feel because of its visual impact. The Department’s position that if the business is a personal service, it is allowed without a separate analysis of its impacts, presumably other than any required by SEPA, seems to be supported by the code’s structure. However, even if visual impact were to be separately considered, the record shows only that taxis and other vehicles are parked in a parking lot in a shopping center where the parking is used by other businesses as well, is surrounded by other businesses with parking and across from a parking lot for a church. The record does not support the contention that parking from the taxi business alters the neighborhood’s character.

6. The record shows that the Department did not use the Comprehensive Plan’s goals and policies for NSC zoning in deciding how the business should be classified. The respondents’ expert apparently considered that a necessary review. Whether that analysis was required or not need not be determined as the record shows that the use is largely consistent with those goals and policies.

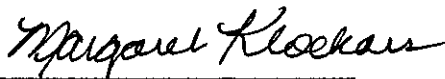
7. Appellants Kennedy fault the Director for not considering whether the business was “neighborhood-scale.” The code addresses this by specifically limiting the size or intensity of some uses. No size limitation is placed on personal services.

8. Finally, Appellants Kennedy argue that commercial parking is not a permitted use in the NSC zone. Parking is required for personal service uses, Section 18.81.030, so, as the Director determined, is an integral part of the service, though ancillary. Those uses are allowed in the NSC zone. Commercial parking is not shown as a permitted use, but the facts in this record do not show the shopping center parking to be a commercial parking business.

Decision

The Director's Administrative Zoning Code Interpretation is affirmed and the appeals are denied.

Entered this 27th day of March 2009.



Margaret Klockars
Hearing Examiner *pro tem*

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.

The decision of the hearing examiner shall be final in this matter unless, within 21 days after issuance of a decision, a person with standing appeals the decision in accordance with Chapter 36.70 RCW.