

BEFORE THE HEARING EXAMINER FOR THE CITY OF BELLEVUE

In the Matter of:

Case File No.: 17-104804-LB

Application for Revocation of Kemper
Development Company's Conditional
Use Permit for Bellevue Place
Helistop

**FINDINGS OF FACT, CONCLUSIONS
OF LAW, DECISION AND ORDER**

PROCEDURE

On February 4, 2016, Ina Tateuchi submitted an application to the City of Bellevue's Department of Development Services for revocation of a conditional use permit (CUP) issued to Kemper Development Permit for development and use of a helistop on the Bellevue Place building located at 10500 NE 8th Street, Bellevue, Washington. (Bellevue Place Helistop). The original CUP was issued pursuant to Ordinance 6000 on May 16, 2011 by the Bellevue City Council.

Under the code, the revocation of a CUP is a Process 1 decision which requires a Director's recommendation on the proposal after public comment and a public meeting, a quasi-judicial pre-decision hearing by the Hearing Examiner followed by a decision, and possible administrative appeal to the City Council. BMC 20.35.100; 20.30B.170B. This process is the same as that for issuance of the original CUP.

The Examiner held a telephonic Prehearing Conference March 13, 2018 and a Public Hearing at 6 PM on March 22, 2018. Ms. Tateuchi was represented by attorneys Peter J. Eglick and Joshua A. Whited of Eglick Kiker Whited, PLLC, 1000 Second Avenue, Suite 3130, Seattle Washington 98104; Kemper Development Company was represented by attorneys Alison Moss and Virginia R. Nicholson of Shwabe, Williamson & Wyatt, 1420 5th Avenue, Suite 3400,

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1 Seattle, Washington 98101; and the City was represented by Matt McFarland, Assistant City
2 Attorney, City of Bellevue, 450 110th Avenue NE, P. O. Box 90012, Bellevue, Washington
3 98009.

4 KDC filed a Motion to Dismiss on March 16, 2018. Tateuchi filed a response prior to the
5 hearing.

6 **FINDINGS OF FACT**

7 1. On January 25, 2017, Ina Tateuchi submitted an application to the City of
8 Bellevue's Department of Development Services (DSD) for revocation of a conditional use
9 permit (CUP) issued to Kemper Development Company for development and use of a helistop
10 on the Bellevue Place building located at 10500 NE 8th Street, Bellevue, Washington.
11 (Bellevue Place Helistop). DSD 000007-000016. The original CUP was issued pursuant to
12 Ordinance 6000 on May 16, 2011 by the Bellevue City Council. DSD 000409- 000416.

13 2. The revocation of a CUP is governed by LUC 20.30B.170B, which states in
14 pertinent part:

15 An approved permit may be revoked only upon finding that:

- 16 1. The use for which the approval was granted has been abandoned for a
17 period of at least one year; or
- 18 2. Approval of the permit was obtained by misrepresentation of material fact;
19 or
- 20 3. The permit is being exercised contrary to the terms of approval.

21 3. The original CUP process and subsequent related actions are summarized below:

- 22 • The Bellevue Hearing Examiner approved the KDC Bellevue Place Helistop on
23 December 16, 2010. This decision included a condition to limit the helistop to twin-
24 engine helicopters;¹
- 25 • Tateuchi appealed the Hearing Examiner's decision to the City Council, which denied
her appeal and approved the CUP in Ordinance 6000;

¹ DSD 000133-000137.
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**CITY OF BELLEVUE
450 – 110th Avenue NE
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Bellevue, WA 98009 9012**

- Tateuchi appealed the CUP approval to King County Superior Court, which upheld the Bellevue City Council's decision in November 2011;
- In 2013, KDC applied for a CUP modification to allow single-engine helicopters to use the helistop. Tateuchi opposed the application.
- Before the City issued a decision on the modification request, an accident involving a single-engine helicopter occurred in Seattle. In October 2015, the City cancelled the modification application based on a request by KDC.
- In October 2014, Tateuchi requested a Code Interpretation from the DSD for a determination that the Bellevue Place Helistop CUP should be revoked, on the bases that 1) KDC abandoned the helistop, and 2) KDC obtained the CUP through misrepresentation;
- In June 2015, the Director issued a decision finding no support for the requested code interpretation;
- Tateuchi appealed the Director's determination to the Hearing Examiner in July 2015;
- Before the hearing, the City and Tateuchi stipulated to dismiss the code interpretation case, in exchange for the following:

The parties further agree the Appellant may submit to the Development Services Department ("DSD")/City a new application for revocation of Kemper Development Company's underlying conditional use permit for the helistop that is the subject of the instant appeal and that the new application will be accepted by DSD/City and processed under Process I in accordance with the Bellevue Land Use Code . . .

2. Consistent with the requirements applicable to Process I decisions specified in LUC 20.35.100 through 20.35.150, the revocation application will require, inter alia, that the DSD director, or designee, make a recommendation on Appellant's application to the Hearing Examiner, that the Hearing Examiner hold a hearing and render a decision on the application, and that the Hearing Examiner's decision is ultimately an appealable decision – again all in accordance with the express provisions and procedural requirements provided for in LUC 20.35.100 through 20.35.150.

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- 1 • The Hearing Examiner dismissed the appeal on the 22nd of January 2016.²
- 2 • Tateuchi filed the application to revoke the Bellevue Place Helistop on February
- 3 2016.
- 4 • On May 17, 2016, the Director rejected Tateuchi's application to revoke the CUP
- 5 based on a finding that Tateuchi lacked standing to bring the revocation action
- 6 under the code.³
- 7 • Tateuchi appealed the Director's decision rejecting her application to the Hearing
- 8 Examiner. The Hearing Examiner dismissed Tateuchi's appeal on September 1,
- 9 dismissing the appeal in its entirety for lack of jurisdiction to grant the relief
- 10 requested.
- 11 • Tateuchi appealed the Director's decision to King County Superior Court (Case
- 12 No. 16-2-13322-3.
- 13 • On December 16, 2016, Judge Judith Ramseyer granted Tateuchi's Motion for
- 14 Summary Judgment and denied the City's Motion to Dismiss, incorporating her oral
- 15 ruling by reference. Judge Ramseyer found that the revocation and Process 1 procedures
- 16 are within the City's legal authority under city code. She further found that although
- 17 the stipulation and order of dismissal entered into in July 2015 by the City and Tateuchi
- 18 did not follow the requirements of the code, the departure was still "consonant with the
- 19 policies that seem to underlie these provisions and, therefore, are more a departure of
- 20 procedural requirements than of substantive law."⁴ She further determined that the
- 21 Stipulation and Order did not implicate KDC's property right in the CUP because it does
- 22 not mandate a substantive outcome. She therefore granted the summary judgment
- 23 motion on the basis that the stipulation is enforceable.⁵

21 _____
22 ² The Stipulation and Order of Dismissal is one document, signed by the City and Tateuchi, with the Order signed
23 by the Bellevue Hearing Examiner. DSD 0000064-0000067.

24 ³ DSD 000418, attachment 20.

25 ⁴ VRP at 50.

⁵ VRP at 51.
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1 4. On January 25, 2017, Ina Tateuchi submitted an application to DSD for revocation
2 of a conditional use permit (CUP) issued to Kemper Development Permit for development
3 and use of a helistop.⁶

4 5. The revocation of a CUP is governed by LUC 20.30B.170B, which states in
5 pertinent part:

6 An approved permit may be revoked only upon finding that:

- 7 1. The use for which the approval was granted has been abandoned for a
8 period of at least one year; or
9 2. Approval of the permit was obtained by misrepresentation of material fact;
10 or
11 3. The permit is being exercised contrary to the terms of approval.

12 6. In her application, Tateuchi alleges that: 1) The use granted by the CUP has been
13 abandoned; and 2) The CUP was obtained by material misrepresentation of fact. Thus, Tateuchi
14 bases her application on BMC 20.30B.170B (1) and (2). BMC 20.30B.170B (3) was not a basis
15 of her application. *See* DSD 000007-000016.

16 7. The first allegation, that the use granted by the CUP has been abandoned, is
17 based on the following allegations, quoted from her February 4, 2016 letter below:

18 (1) The CUP approved use of the helistop only by twin engine
19 helicopters. KDC's helistop usage reports confirm that the helistop was
20 not used at all for more than three years after the CUP was approved by
21 the King County Superior Court on November 30, 2011. Accordingly,
22 "[t]he use for which the approval was granted has been abandoned for a
23 period of at least one year" under LUC 20.39B.179B.1. The sole landing
24 of a twin engine helicopter at the helistop more than three years after the
25 CUP was approved came far too late to avoid an abandonment
determination. Moreover, that sole "test" flight was an illusory, staged
event that did not constitute actual use of the helistop.

(2) In obtaining its CUP for the helistop, KDC represented that the
helistop was designed for twin engine helicopters and would be utilized by
twin engine helicopters. However, the helistop was not utilized by twin
engine helicopters for over three years and will not be used by twin engine
helicopters. KDC admitted years ago to the City that if the CUP is not

⁶ DSD 000075; DSD 000007-000016.
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1 modified to allow single engine helicopter usage, "the practical effect of
2 the twin engine restriction is the Helistop will not be used." Letter from
3 Dearborn to Helland dated February 20, 2013. This confirm abandonment
4 of the approved use. It also demonstrates that "[a]pproval of the permit
5 was obtained by misrepresentation of material fact" under LUC
6 20.30B.170.B.2.

7 8. Kemper Development has vigorously defended the CUP throughout this
8 process. KDC maintains that (1) Tateuchi has no standing to bring this Revocation
9 Application; (2) Regarding abandonment, the construction of and subsequent upgrades to the
10 helistop as well as historical project records submitted with their September 5, 2017 letter
11 show a history of intent to maintain the helistop despite only one documented landing of a
12 helicopter after approval of the CUP; and (3) Regarding misrepresentation of material fact, the
13 evidence in the record does not rise to the level of material misrepresentation of fact, in that
14 the condition was placed in the CUP decision at the eleventh hour at the behest of Tateuchi,
15 and a few emails that discuss a possible future strategy to amend the CUP by an attorney at
16 the end of the process do not constitute a material misrepresentation of fact. DSD 000418;
17 DSD 000082; and Public Hearing Transcript.

18 9. KDC and Tateuchi agree that the helistop has only been used once since it was
19 approved, and that flight was a demonstration flight. The parties differ on whether lack of use
20 of the helistop demonstrates abandonment.

21 10. After a public comment and meeting process, the Director issued his
22 Recommendation on the Revocation Application on March 1, 2018. The Director made a
23 recommendation of denial of the revocation application, finding that KDC had neither
24 abandoned its use or demonstrated an intent to abandon the use, nor had KDC obtained
25 approval of its permit through misrepresentation of a material fact or tried to mislead the
City.⁷

11. The arguments made by Tateuchi and KDC concerning the grounds stated for the
revocation application will addressed in the conclusions of law.

⁷ DSD 000075- 000088; DSD 000082-000083.
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12. Any finding of fact herein which may be deemed a conclusion of law is hereby adopted as such, and vice versa.

CONCLUSIONS OF LAW

1. The Hearing Examiner has jurisdiction over this appeal. LUC 20.35.100 et seq. In accordance with LUC 20.35.140,

The Hearing Examiner shall approve a project or approve with modifications if the applicant has demonstrated that the proposal complies with the applicable decision criteria of the Bellevue City Code. The applicant carries the burden of proof and must demonstrate that a preponderance of the evidence supports the conclusion that the application merits approval or approval with modifications. In all other cases, the Hearing Examiner shall deny the application.

2. Does Tateuchi Have Standing to Submit the Revocation Application? KDC filed a motion to dismiss alleging that Tateuchi does not have standing under the code. Nonetheless, it urges the Examiner to rule on the merits of the case.

Given Judge Ramseyer's ruling finding that the City's Stipulation and Order signed with Tateuchi was enforceable, the fact that the code does not provide standing is a moot point. The Examiner is constrained by the terms of that order, which specifically provides "that the Hearing Examiner hold a hearing and render a decision on the application."⁸ The Examiner denies the motion to dismiss.

3. Did KDC Abandon its Use?

a. Tateuchi argues that application of the plain language of the first prong of LUC 20.30B.170B demonstrates that KDC has abandoned its helistop use, because as KDC stipulates, the helistop was used only once in 2015. Since the helistop has not had a documented helicopter landing in the last year, Tateuchi argues that the use has been abandoned.

b. The City concluded that

The completion of helicopter flights is not necessary to establish a helistop or demonstrate that the use is operational. Any use may receive final approval from the City to operate but if they choose to never open or do not get any customers it does not mean the use is abandoned. If a use meets all the requirements to open

⁸ See DSD 0000064-0000067.
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1 and operate, and receives approval from the City to operate, they have established
2 and continued to maintain the use even if it is never used.

3 . . . “[T]he law regarding abandonment in Washington is well-established. The
4 question of whether abandonment has occurred is one of fact that the person
5 alleging abandonment has the burden of proof.” *Van Sant v. Everett*, 69 Wn.
6 App. 641, 649, 849 P. 2d 1276 (1993) (citations and quotations omitted). And the
7 burden is not an easy one. *Id.* Abandonment or discontinuance is a question of
8 fact, and ordinarily depends upon a concurrence of two factors: “(a) an intention
9 to abandon; and (b) an overt act, or failure to act, which carries the implication
10 that the owner does not claim or retain any interest in the right to the
11 nonconforming use.” (Emphasis added).

12 Despite not having ongoing helicopter activity at its helistop, KDC has
13 maintained its private helistop and filed required operational reports. In addition,
14 KDC, who is the permit holder and operator of the helistop, has consistently
15 opposed revocation of this helistop under the 2014 code interpretation and initial
16 CUP application for revocation in 2016. KDC has defended its permit, and its
17 actions demonstrate it has no intent to abandon the helistop. Under both the LUC
18 and the common law of abandonment, the Director does not conclude that KDC
19 has abandoned its use or demonstrated an intent to abandon its use. The helistop
20 has been maintained.

21 c. Tateuchi puts several arguments forward in support of her position. First, Tateuchi
22 states that *Van Sant v. Everett*, cited above by the City, has been modified by *Miller v.*
23 *Bainbridge Island*, 111 Wn. App. 152, 43 P.3d 1250 (2002) to provide that the burden shifts
24 back to the owner of the use if the local ordinance establishes a time period of discontinuance
25 of the use.

Van Sant adopts the common law abandonment doctrine, namely that once a
nonconforming use is established, it is the burden of the party claiming abandonment to prove
such. *Van Sant, supra*, stated the test for abandonment of a nonconforming use depends upon
concurrence of two factors: (a) An intention to abandon; and (b) an overt act, or failure to act,
which carries the implication that the owner does not claim or retain any interest in the right to
the nonconforming use. *Van Sant, supra*. The *Van Sant* abandonment doctrine has been
extended, as Tateuchi correctly points out, to consider how the burden may shift when an
ordinance, such as Bellevue’s, establishes a time period for discontinuance. As succinctly
stated in *Skamania Cy. v. Woodall*,

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1 The land occupier has the initial burden of proving the existence of a nonconforming
2 use. . . Once the land occupier establishes this nonconforming use, the burden shifts to
the person claiming that the right has been extinguished to prove that this has in fact
occurred . . .

3 Here, the Skamania County ordinance provides that a land occupier loses the right to
4 continue a nonconforming use if the use was "discontinued for one year." . . . If the
ordinance references a time frame, - such as discontinued for one year - then once the
5 person seeking to prove discontinuance proves the land occupier has not used the
property for that time period, a rebuttable presumption arises that the land occupier has
6 intended to abandon the nonconforming use.

7 104 Wn. App. 525, 16 P.3d 701, *rev. denied*, 144 Wn.2d 1021 (2001).

8 Here, the issue boils down to whether upkeep of the facility and the filing of reports as
9 required under the original conditional use permit conditions constitutes "use" of the facility,
or conversely, whether the lack of helicopter landings constitutes "discontinuance" of the use.
10 Comparing this to other conditional uses is instructive. A bed and breakfast inn or guesthouse
11 is a conditional use under most municipal ordinances. If in a particular case, a proprietor of a
12 bed and breakfast had the facility ready to receive guests under the conditions of the
conditional use permit, would the use be discontinued if no guests frequented the bed and
13 breakfast? As long as the facility was ready to be used, the use would not be discontinued
14 simply because no guests frequented the facility.

15 Similarly, the absence of helicopters landings at the Bellevue Place Helistop is not
16 determinative of discontinuance. As long as KDC has actively maintained and even improved
17 the helistop, it has not committed any overt act evidencing abandonment. Nor does the lack
18 of helicopter landings evidence intent to abandon.

19 The Examiner concludes that while Tateuchi correctly recited the law, her argument
20 fails because a lack of helicopter landings does not demonstrate by a preponderance of the
evidence abandonment or discontinuance. In this case, the Examiner concludes that the
21 burden does not shift back to KDC, because Tateuchi did not meet the initial burden of
22 proving abandonment by a preponderance of the evidence.

23 4. Did KDC Obtain its CUP for the Bellevue Place Helistop by Making a Material
24 Misrepresentation of Fact?

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1 Tateuchi points to emails obtained through discovery from KDC as proof that KDC
2 materially misrepresented that it would limit the helistop to twin-engine helicopters. Tateuchi
3 claims that the emails show that KDC misrepresented that it accepted the condition, and even
4 during the Council proceedings it was planning to ask for a modification of the condition.⁹

5 The Examiner does not read any of these emails to support the conclusion that approval
6 of the Helistop was obtained through a material misrepresentation of fact. The record reveals
7 that numerous conditions accompanied the grant of the conditional use permit, including the
8 frequency of flights, the restriction of the flight path, the hours of operation, type of helicopter
9 to be flown, and reporting requirements. This particular condition was inserted by the
10 Hearing Examiner after testimony by Tateuchi's expert, Gordon Jones.¹⁰

11 An applicant has the legal ability under the code to seek modification of a CUP at any
12 time after approval. LUC 20.30B.170.A. The emails proffered by Tateuchi show no more
13 than an applicant's experts discussing possible strategies to support their client. Tateuchi has
14 failed to show any material misrepresentation of fact that would support revocation.

15 5. Other Issues Raised at the Hearing.

16 Tateuchi raised other issues for the first time at hearing, including whether the staff,
17 during its review of the revocation application, had reviewed KDC's compliance with all the
18 conditions of the CUP. The staff had not.

19 The Examiner finds that staff was not required to do so in review of this application.
20 Tateuchi did not base her application on LUC 20.30B.170B.3, which alleges that the permit
21 holder has operated the use contrary to the conditions of the approval.

22 Members of the public testified, most with generalized concerns regarding the safety of
23 operating helistops in the downtown core. While the Examiner appreciates these concerns,
24 and may agree with many of them, those issues were addressed in the original CUP approval.
25 This revocation application only looks at the two narrow issues raised by Tateuchi; it does not
reopen the entire approval process for the CUP.

6. Any conclusion herein which may be deemed a finding is hereby adopted as such.

⁹ See DSD 000133- 000137.

¹⁰ DSD 00425 & Exh. 7, attached.
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ORDER

The Application for Revocation of the Conditional Use Permit obtained by the Kemper Development Company approving the Bellevue Pace Helistop is denied.

SO ORDERED, this 5th day of April, 2018.



Barbara Dykes Ehrlichman
Hearing Examiner

NOTICE OF RIGHT TO APPEAL
(Pursuant to Resolution No. 5097)

RIGHT TO APPEAL - TIME LIMIT

A person who submitted written comments to the Director prior to the hearing, or submitted written comments or made oral comments during the hearing on this matter, may appeal the decision of the Hearing Examiner to the Bellevue City Council by filing an appeal notification form, written statement of the Findings of Fact or Conclusions which are being appealed, and paying a fee, if any, as established by ordinance or resolution, no later than 14 calendar days following the date that the decision was mailed. The appeal must be received by the City Clerk by **5:00 p.m. on Thursday, April 19, 2018.**

TRANSCRIPT OF HEARING - PAYMENT OF COST

An appeal of the Hearing Examiner's decision requires the preparation of a transcript of the hearing before the Hearing Examiner. Therefore, the request for appeal must be accompanied by an initial deposit of \$100 per recording hour. Should the actual cost be less the amount of the deposit, any credit due shall be reimbursed to the appellant. Should the cost for transcript preparation be more than the deposit, the appellant will be additionally charged.

WAIVER OF TRANSCRIPTION FEE

Upon request, the City Clerk will waive transcription fees upon submission by an appellant of the following documentation: a) an affidavit stating that the appellant's net financial

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worth does not exceed \$20,000; b) an affidavit stating that the appellant's annual income does not exceed \$5,200; c) a brief statement of the issues sought to be reviewed; d) a designation of those parts of the record the party thinks are necessary for review; e) a statement that review is sought in good faith.

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CITY OF BELLEVUE
450 – 110th Avenue NE
P. O. Box 90012
Bellevue, WA 98009 9012

AFFIDAVIT OF SERVICE

STATE OF WASHINGTON)
) ss.
COUNTY OF KING)

Charmaine Arredondo, being first duly sworn upon oath, deposes and states:

In the Matter of: **Tateuchi's Application for Revocation of Kemper Dev. Co.'s Helistop CUP**, on the 5th day of April, 2018, I served a copy of:

FINDINGS OF FACT, CONCLUSIONS OF LAW, DECISION AND ORDER

☒ **BY ELECTRONIC SERVICE – EMAIL** by electronically mailing a true and correct copy thereof through the City of Bellevue's electronic mail system to the email address(es) set forth below:

whited@ewlaw.net

eglick@ewlaw.net

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AMoss@SCHWABE.com

RPittman@bellevuewa.gov

MMcfarland@bellevuewa.gov

☒ **BY U.S. MAIL** by placing a true and correct copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, addressed as follows, for collection and mailing at the City of Bellevue in accordance with ordinary business practices:

Mr. Peter Eglick
Mr. Josh Whited
E&W Law
1000 Second Avenue, Suite 3130
Seattle, WA 98104

Ms. Laura Hurdelbrink
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Su Development
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Bellevue, WA 98004

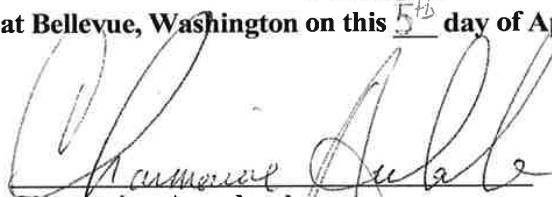
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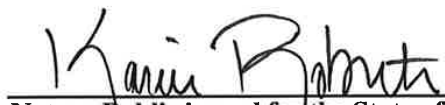
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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. Executed at Bellevue, Washington on this 5th day of April, 2018.


Charmaine Arredondo
Assistant Director, City Clerk's Office

Subscribed and sworn this 5th day of April, 2018




Notary Public in and for the State of
Washington, residing at
Sammamish, WA
My appointment expires: 02/01/2022

Application, Petition or Case:

Tateuchi's Application for Revocation of Kemper
Dev. Co.'s Helistop CUP / File No.: 17-104804-LB