

BEFORE THE BELLEVUE CITY COUNCIL

IN THE MATTER OF: CITY COUNCIL  
APPEAL OF HEARING EXAMINER'S  
DECISION RE: TATEUCHI'S APPLICATION  
FOR REVOCATION OF KEMPER  
DEVELOPMENT COMPANY'S HELISTOP  
CONDITIONAL USE PERMIT

File Number: 17-104804-LB

**READ THIS FIRST:**

APPELLANTS' MEMORANDUM  
SUMMARIZING THEIR APPEAL

**I. QUICK READ SUMMARY**

**A. Background.**

Kemper Development Company ("KDC" or "Kemper") obtained a CUP from the City in 2011 for a private helistop on a high-rise building in the heart of downtown Bellevue. The CUP was approved by the Council on the explicit condition that the helistop could only be used by twin engine helicopters, which are safer than single engine helicopters.<sup>1</sup> KDC knew at the time that the twin engine restriction would preclude use of the helistop, but did not want to jeopardize its permit application "foot in the door" by disclosing that to the City. Instead, KDC told the Council that the helistop would be used by twin engine helicopters when it knew that was not the case. KDC advocated for the twin engine condition as a means of obtaining approval of the CUP. Its plan was to get the conditional use permit in hand and then circle back around to City staff to quietly remove the twin engine safety condition.<sup>2</sup>

In June, 2013, staff issued a ruling that staff by itself could at KDC's request remove the twin engine condition adopted by the City Council. Appellant Tateuchi vigorously opposed this plan. Ultimately after two years, in October, 2015 Kemper withdrew its request

<sup>1</sup> Private helistops are no longer allowed in the City of Bellevue. See Bellevue Ordinance 6277.

<sup>2</sup> See HE Report 19, 33, 63-64. The record in this matter consists of 5 separate, bound volumes. One volume of the record is the Hearing Examiner Report with Bates stamped pages 001 through 242. Citations to the Hearing Examiner Report will be in the following format: "HE Report \_\_\_\_". In addition to the Hearing Examiner Report, there are also 4 volumes of exhibits which are Bates stamped 001 through 1867. To avoid confusion, citations to exhibits will be in the following format: "AR \_\_\_\_".

1 to remove the safety condition, but held on to the permit itself.

2 In the seven years since KDC obtained the helistop CUP with the twin engine safety  
3 condition, KDC has not once actually used the helistop. And, KDC has acknowledged in no  
4 uncertain terms that, due to the twin engine restriction, the helistop cannot be used as  
5 permitted.

6 City staff nonetheless failed to apply the Code provisions concerning revocation due  
7 to nonuse and misrepresentation. Ina Tateuchi therefore submitted an actual application to the  
8 City for revocation of the KDC helistop CUP.<sup>3</sup> Various twists and turns followed. These  
9 included a King County Superior Court Order to the City to process the application after staff  
10 abruptly refused to do so. Ultimately, staff recommended against revocation. On April 5,  
11 2018, a Hearing Examiner decision<sup>4</sup> adopted staff's recommendation. This appeal to Council  
12 followed.  
13

14 **B. Short Answer: Why Council Should Order Revocation:**

15 Under the applicable Code provisions, the Council has the final City say on this. Here  
16 in summary form is why the Council should care about this issue and order grant of  
17 Tateuchi's request for revocation of the helistop permit:  
18

- 19 1. Conditional uses are not permitted "outright." That is why they are  
20 "conditional." They are uses that require special approval and are subject to  
21 special, specific limitations that do not apply in other contexts.<sup>5</sup>  
22 2. Here, the condition imposed by Council requiring safer twin engine helicopters  
23 was a "no brainer" for helicopter landings and take-offs in the heart of a dense  
24 downtown area packed with people, cars, and taller buildings (with more to  
25 come).

26 <sup>3</sup> See HE Report 56-75 (Application for Revocation dated February 4, 2016). Several copies of the Application  
for Revocation and multiple, duplicative copies of other documents as well, appear throughout the record. Only  
one copy of each document that is referenced in this memorandum is cited.

<sup>4</sup> HE Report 1-14.

<sup>5</sup> See Bellevue Land Use Code ("LUC") 20.30B.120.

- 1           3. The Land Use Code, adopted by Council, provides for revocation of a  
2 conditional use permit (CUP) when "[t]he use for which the approval was  
3 granted has been abandoned for a period of at least one year" or when it is  
4 discovered that "[a]pproval of the permit was obtained by misrepresentation of  
5 material fact."<sup>6</sup> The abandonment standard is objective and simple: no proof of  
6 intent is required.
- 7           4. Use it or lose it: the LUC abandonment revocation provision ensures that a  
8 conditional use approval only lasts while the authorized use actually occurs. It  
9 precludes acquisition and speculation in inactive conditional use permits as  
10 long term passive investments. This is especially important when the  
11 conditional use has safety implications.
- 12           5. The Decision by the Hearing Examiner upholding the staff recommendation is  
13 cursory and incorrect. It follows the staff recommendation in failing to apply  
14 or even acknowledge the Land Use Code definition of "Use" despite its  
15 obvious relevance.<sup>7</sup>
- 16           6. The staff recommendation, upheld by the Examiner, that the KDC conditional  
17 use continues "even though it is never used"<sup>8</sup> is absurd -- and contrary to the  
18 LUC.
- 19           7. The LUC misrepresentation revocation provision ensures that an applicant is  
20 straight with the City during the application process and is ultimately held  
21 accountable if it was not.
- 22           8. KDC represented in pursuing and defending its helistop conditional use that it  
23 was designed for and would be utilized by twin engine helicopters, as the  
24 Council condition requires. But KDC knew the Council condition would  
25 prevent helistop use as confirmed by internal KDC emails that predated KDC's  
26 submissions to the Council and Superior Court.

27           The Council should grant this appeal, reverse the Hearing Examiner Decision, and  
28 conclude that the helistop conditional use has been abandoned and that the CUP was obtained  
29 through misrepresentation, with either one or both resulting in revocation of the CUP.<sup>9</sup>

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<sup>6</sup> See LUC 20.30B.170.B.1 and LUC 20.30.B.170.B.2.

<sup>7</sup> The appeal grounds challenging Hearing Examiner Conclusions of Law 1 and 3 are laid out in Section 6 of the Notice of Appeal. See HE Report 23-26 at ¶¶(i)-(x).

<sup>8</sup> HE Report 96.

<sup>9</sup> LUC 20.30B.170.B.1, 2.

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## II. MORE DETAILED FACTUAL BACKGROUND AND ARGUMENTS SUPPORTING APPEAL<sup>10</sup>

### A. The Use Granted By the CUP Has Been Abandoned Per the LUC Abandonment Provision and Land Use Definition.

The Tateuchi Application for Revocation pointed out that since obtaining the CUP in 2011, KDC had never used the helistop and that KDC has admitted that due to the twin engine safety condition, the helistop will in fact never be used. AR 57-58.

Under LUC 20.30B.170.B.1, abandonment is deemed to occur after 1 year of nonuse. A land “use” is defined in the Land Use Code as “[t]he use to which an area of land, or building thereon, is put; human activity taking place thereon.” LUC 20.50.032 (emphasis added).<sup>11</sup> In other words, the LUC defines use in common sense terms of how an area is actively put to use.

For seven years, the entire time of the CUP’s existence, there has been no helicopter activity at the helistop site. This is clearly confirmed by KDC’s inaptly titled “Helistop Usage Reports” which acknowledge that the helistop never been used. *See* AR 836-879. The Code abandonment provision is triggered after only one year of nonuse. LUC 20.30B.170.B.1. Here, there has been no use year after year for seven years.<sup>12</sup>

A February 20, 2103 letter from KDC counsel, Keith Dearborn, to City staff predicted the abandonment in no uncertain terms. Referring to the Council’s twin engine safety restriction, KDC counsel admitted that:

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<sup>10</sup> Appellants’ Notice of Appeal filed April 18, 2018 provides extensive factual background and arguments in support of this appeal and is incorporated here by reference. HE Report 17-88.

<sup>11</sup> LUC 20.50.050 refers to the definition of “Land Use” to define the term “Use”.

<sup>12</sup> One “demonstration” or “test” flight by Airlift NW was apparently orchestrated by KDC in January, 2015 in an attempt to avoid a finding of abandonment. But by January 2015 the helistop had already been unused for many years. And it has not been used in the three and a half years since that “demonstration.” *See* HE Report 6 at ¶9 (parties agree “that the helistop has only been used once since it was approved, and that was a demonstration flight.”); *see also* HE Report 58.

1 [T]he practical effect of the twin engine restriction is the  
2 Helistop will not be used.<sup>13</sup>

3 The Hearing Examiner Decision does not acknowledge this un rebutted evidence,  
4 entirely ignores the LUC definition of "Use," and avoids applying the straightforward LUC  
5 standard for abandonment.

6 During the Hearing Examiner hearing, City staff Pittman, responsible for the  
7 Department's recommendation on revocation<sup>14</sup>, testified on cross-examination that he did not  
8 even know whether the LUC contained a definition of "use." AR 134. The Department  
9 recommendation he prepared against revocation clearly did not refer to, consider, or apply the  
10 LUC definition. See HE Report 89-102. It took the position, entirely inconsistent with the  
11 LUC definition of "use," that "[t]he completion of helicopter flights is not necessary to  
12 establish a helistop or demonstrate that the use is operational. . . .If a use meets all  
13 requirements to open and operate, and receives approval from the City to operate, *they have*  
14 *established and can continue to maintain the use even though it is never used.*" HE Report 96  
15 (emphasis added).  
16

17 This staff conceit, that "Nonuse is use," effectively repeals by staff fiat the LUC  
18 20.30B.170.B.1 abandonment provision adopted into the Code by Council.  
19

20 Appellants provided a handout to the Examiner and parties containing the LUC  
21 definitions for the terms "Use" and "Land Use" and noted that the definitions are not passive  
22 ones, i.e. use requires human activity on an area of land or building. AR 164-165. Yet,  
23 despite having been physically provided with the definitions and hearing argument concerning  
24 them, the Examiner's Decision does not address them at all.  
25

26 <sup>13</sup> AR 1781 (emphasis added).

<sup>14</sup> Mr. Pittman prepared the Development Services Department Land Use Staff Report and Recommendation.

1           B. The LUC Abandonment Provides an Objective One Year Standard.

2           The Examiner's Decision aligns with staff and concludes that actual "use" is not  
3 required to avoid a finding of abandonment under the LUC, comparing the helistop use to a  
4 bed and breakfast for which business is slow:

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

10           HE Report 9. This is a fundamental misreading effectively rewriting the Code.

11           "Intent" and/or an "overt act" are not requirements for abandonment under LUC  
12 20.30B.170.B.1, applicable to conditional use permits. LUC 20.30B.170.B.1 establishes an  
13 objective, simple to apply one year benchmark: use it or lose it. The only "overt act" required  
14 under the Code for nonuse is – not using it. The Examiner's approach rewrites the Code,  
15 eliminating its straightforward one year nonuse benchmark and replacing it with a standard  
16 requiring mindreading and analysis of the meaning of gestures. The equation here under the  
17 Code is direct: KDC has not used the helistop in the 7 years since it has had the permit. This  
18 is precisely the circumstance in which the Code one year abandonment provision is  
19 triggered.<sup>15</sup>

20           As part of its substitution of more murky factors for the straightforward one year test  
21 actually in the Code, the Examiner states that that KDC "has actively maintained and even  
22 improved the helistop." Again this is not a factor in the objective Code test concerning use.  
23 However, even if it were, the Examiner makes no Finding of Fact on maintenance or  
24 improvement of the helistop by KDC, so the source of the statement in the Conclusion, other  
25

26           <sup>15</sup> Even if there were overt act and/or intent to abandon requirements, such requirements are met here where  
KDC has clearly indicated that the helistop will not be used as approved due to the twin engine restriction.

1 than wishful thinking, is uncertain. What is certain is that the record does not reflect any  
2 particular active maintenance of or improvements to the helistop over the years, even if the  
3 LUC included such a criterion, which it does not.

4 **C. The Helistop Is Not An Unsuccessful Bed and Breakfast.**

5 The Examiner's Decision analogizes the KDC helistop to an unsuccessful bed and  
6 breakfast. However, KDC is not an innkeeper struggling for business during a down  
7 economy. The KDC helistop, unlike the bed and breakfast, is subject to a very specific and  
8 stringent restriction on who can use the facility. It is uncontradicted in this record, including  
9 from KDC's own admissions, that the helistop therefore has not and will not be used. KDC is  
10 not standing by waiting for new business in the form of twin engine helicopters to arrive at its  
11 proverbial front door; it already knows and has admitted that will not be happening.

12  
13 In fact, the record is that KDC has not had its helistop included on official notices or  
14 lists of available helistops in the region. See AR 1792-1826 (Public Internet Listings of  
15 Airports and Heliports). Even assuming that the burden of proof, demonstration of intent, etc.  
16 were all as the Examiner's Decision describes, KDC's failure to have its "bed and breakfast"  
17 helistop included on such notices over seven years is evidence of abandonment. What bed  
18 and breakfast -- except one that is not in use and abandoned -- keeps its availability a secret?<sup>16</sup>

19  
20 **D. The LUC Provisions for Conditional Use Abandonment Are Not the Same As the**  
21 **LUC Provisions for Nonconforming Uses.**

22 The Examiner's Decision relies on caselaw concerning nonconforming uses, but  
23 conditional uses and nonconforming uses are governed by different, distinct LUC provisions.

24  
25 <sup>16</sup> Here again, the Examiner's Decision does a disservice to the Council. It does not mention this fact at all, even  
26 to explain why it does not make a difference to the Examiner. An Examiner Decision should at least lay out for  
the benefit of the reviewing Council the key facts and related contentions of the hearing participants so that the  
Council can understand the issues and how and why they were resolved by the Examiner.

1 The helistop was never a use that was permitted outright and became nonconforming when  
2 the zoning law changed. It has always been a conditional use – never permitted outright. The  
3 case law concerning nonconforming uses does not apply to CUPs. Further, even if it did, the  
4 nonconforming use case law recognizes that when there is a time limit in the Code, once that  
5 time is up with no use, then the nonconforming use owner has the burden of showing that the  
6 use was not abandoned. The Examiner's Decision acknowledges this proposition generally,  
7 but then goes on to ignore it entirely and incorrectly shifts the burden of proof here onto  
8 Appellants.<sup>17</sup>  
9

10 Conclusion of Law 3 states that “a lack of helicopter landings does not demonstrate by  
11 a preponderance of the evidence abandonment or discontinuance. In this case, the Examiner  
12 concludes that the burden does not shift back to KDC because Tateuchi did not meet the  
13 initial burden of proving abandonment by a preponderance of the evidence.” This turns the  
14 Code on its head: there is no such burden on a party seeking revocation. Again, under the  
15 simple LUC one year standard for abandonment of conditional uses, once KDC failed to use  
16 the helistop for a period of a year, the use was abandoned under the Code. Even if the LUC  
17 provision for conditional use abandonment included a burden of proof or presumption, the  
18 fact of years of nonuse, admitted by all concerned, would create a strong presumption of  
19 abandonment requiring KDC to come forward with convincing evidence of use to rebut that  
20 presumption.<sup>18</sup> Examiner Conclusion 3 perversely places the burden of proof on the  
21 Appellants, not KDC, even when the fact of years of nonuse is undisputed.  
22  
23  
24

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25 <sup>17</sup> See HE Report 8-9 (citing *Miller v. Bainbridge Island*, 111 Wn.App. 152, 43 P.3d 1250 (2002) and *Skamania*  
26 *Cy. V. Woodall*, 104 Wn.App. 525, 16 P.3d 701 rev. denied, 144 Wn.2d 1021 (2001)).

<sup>18</sup> Here, none was presented other than the assertion that filing periodic reports confirming the helistop was not  
used are somehow evidence that the use was not abandoned.



1           **E. The CUP Was Obtained by Misrepresentation of Material Fact.**

2           Under the Land Use Code, revocation of a CUP is also appropriate when "Approval of  
3 the permit was obtained by misrepresentation of material fact." *See* LUC 20.30B.170.B.2.  
4 The Application for Revocation pointed out that KDC explicitly relied on the twin engine  
5 safety condition before the City Council and later in Superior Court. KDC represented that  
6 the helistop was designed for and would be utilized by safer twin engine helicopters when in  
7 fact KDC knew the restriction would prevent helistop use -- as confirmed by internal KDC  
8 emails that predated KDC's submissions to the Council and Superior Court.<sup>19</sup>  
9

10           In concluding that there was no misrepresentation by KDC in securing the CUP, the  
11 Examiner stated:

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

18           An applicant has the legal ability under the code to seek a  
19 modification of a CUP at any time after approval. LUC  
20 20.30B.170.A. The emails proffered by Tateuchi show no more  
21 than an applicant's experts discussing possible strategies to support  
their client. Tateuchi has failed to show any material  
misrepresentation of fact that would support revocation.

22 HE Report 10 (Conclusion of Law 4). This solicitous interpretation does not square with an  
23 objective reading of the actual record items, which the Council should itself examine.<sup>20</sup>  
24

25 <sup>19</sup> *See* HE Report 59-64; *see also* HE Report 70-75.

26 <sup>20</sup> The appeal grounds challenging Conclusions of Law 4 are further enumerated in Section 6 of the Notice of  
Appeal. *See* HE Report 26-27 at ¶(xi).

1 The Examiner Decision goes out of its way to make excuses for KDC: there were  
2 many conditions involved, the twin engine condition was inserted by the Hearing Examiner  
3 after testimony from an opponent's expert, an applicant can apply for modifications, etc. But  
4 the Decision does not explain why these should make a difference. In fact, it makes no  
5 difference whether there were other CUP conditions in addition to the critical twin engine  
6 requirement. Nor does it make a difference that KDC is allowed to seek modification of a  
7 CUP after it is obtained. KDC may of course apply for modifications, but that does not mean  
8 that during the original application process it was entitled to misrepresent any material fact(s).  
9

10 The issue presented concerning misrepresentation is that KDC knew when the twin  
11 engine safety condition first came up that it would prevent KDC from being able to use the  
12 helistop. KDC concealed that fact and instead pretended that twin engine helicopters would  
13 be the primary user of the helistop even though it knew that they could not be. KDC's plan,  
14 reflected in the contemporaneous documents in the record, including behind-the scenes  
15 emails, was to get the permit in hand by saying whatever was necessary and then circle back  
16 to have the key safety condition removed by staff without involvement of the City Council.  
17

18 The Examiner's conclusion that the emails "show no more than an applicant's experts  
19 discussing possible strategies to support their client" effectively suggests that strategies  
20 involving misrepresentation are OK. Perhaps this statement by the Examiner is a reflection of  
21 the times in which we live. However, such strategies are not OK. The key fact prompting the  
22 experts – and KDC counsel – to start "discussing" "strategies" was their knowledge that the  
23 twin engine safety condition could not be met. The emails' substance and timing demonstrate  
24 that, to obtain the permit, KDC made statements to the City Council (and later to the Superior  
25 Court) that it knew were not true -- and those statements concerned the key safety condition.  
26

1 More specifically, in obtaining the CUP, KDC explicitly relied on the twin engine  
2 condition and represented that the helistop was designed for and would be utilized by twin  
3 engine helicopters. On April 20, 2011, in its defense before the Bellevue City Council of the  
4 final Hearing Examiner approval recommendation, KDC argued:

5 In addition to the safety determination by the FAA, many of the conditions  
6 of approval also assure the proposed Helistop will be operated safely. . . .  
7 Condition 3 has been revised to limit use to **twin engine** helicopters which  
are generally quieter and safer than those with single engines . . .<sup>21</sup>

8 KDC also expressly represented to the City Council on April 20, 2011: "The EC 135 is  
9 expected to be the helicopter that is used most frequently. It is a two engine helicopter bur  
10 [sic] newer and quieter than either helicopter used in the noise tests. . . . So, the recorded  
11 noise levels are higher than those expected in actual operations." AR 611. It was on the basis  
12 of these representations that the City Council approved the CUP.  
13

14 KDC then made these same (mis)representations to the King County Superior Court  
15 about use by twin engine helicopters when the CUP was challenged by Tateuchi and others  
16 under the Land Use Petition Act ("LUPA"). KDC affirmatively assured the Court:  
17

18 One type of **twin-engine** helicopter is the EC 135. This model is expected  
19 to be the one that will most frequently use the Helistop. It was the design  
20 helicopter used to size the landing pad. The EC 135 is a new generation of  
21 helicopter and is quieter than the models used in the flight tests and also  
22 requires a shorter cool-down and warm-up. Again, see Exhibit A to this  
Motion for excerpts from the June 10 and June 11, 2009 Hearing  
transcripts that document these facts.

23 AR 651 (KDC Motion to Dismiss dated July 5, 2011) (emphasis added). KDC further  
24 represented to the Court:

25 The record is clear that the EC 135 is expected to be a frequent user of the  
26 Helistop. Pages 65 and 66 of the June 11, 2009 Hearing Transcript

<sup>21</sup> AR 610 (KDC Second Remand Mem. dated April 20, 2011) (emphasis added).

1 (Exhibit A). Yet the Petitioners [Tateuchi et al] never offered rebutting  
2 information that questioned these factual statements.

3 AR 653-654. In other words, KDC made a point of criticizing the LUPA Petitioners,  
4 including Mrs. Tateuchi, for questioning Kemper's repeated reassurance that the twin engine  
5 EC 135 would be the primary craft landing at the site. Yet again, KDC's lawyer told the court:

6 The dual-engine Eurocopter EC 135 is expected to be the helicopter that  
7 is used most frequently.

8 AR 1623-1624 (Response Memorandum of KDC dated October 31, 2011) (emphasis added).

9 The emails cited in the Tateuchi revocation Application, which the Examiner  
10 dismisses as inconsequential, demonstrate that KDC knew at the time it was making these  
11 statements to the City Council and Superior Court that the twin engine condition would  
12 prevent implementation of the helistop use. In other words, the statements KDC made to the  
13 City Council and Superior Court were not innocent mistakes; KDC made the conscious,  
14 deliberate, strategic choice to affirmatively misrepresent material facts and mislead the  
15 Council and Superior Court in order to obtain the CUP.

16  
17 In an April 18, 2011 email titled "Twin-engine helicopter condition" from KDC  
18 consultant Ketchum<sup>22</sup> to KDC attorney Dearborn, Mr. Ketchum explains that the twin engine  
19 condition will limit use of the helipad, while acknowledging that "there is no doubt that a  
20 twin-engine helicopter in competent hands has a safety advantage." HE Report 71.

21 The very next day, though, on April 19, 2011, Mr. Ketchum rasies in an email to KDC  
22 attorney Dearborn a plan to accept the twin-engine condition initially, but then circle back to  
23 the City to ask that it be removed: "What is your opinion about requesting to remove the  
24 twin-engine condition in the future if KDC wishes to?" HE Report 70. This April 18-19,

25  
26 <sup>22</sup> Mr. Ketchum has from the outset been KDC's primary consultant with regard to the design and potential  
operation of the helistop.

1 2011 email exchange pre-dates KDC's April 20, 2011 Second Remand Memorandum  
2 submitted to the City Council advocating for the Council to approve the CUP based on the  
3 twin-engine condition. *See* AR 605-640.

4 Subsequent November, 2011 emails predating the Superior Court entering a final  
5 Order in the unsuccessful LUPA action challenging the CUP show KDC executive Hill  
6 writing to Ketchum: "I am still very disturbed by the twin-engine requirement,"<sup>23</sup> with  
7 Ketchum agreeing that "The multi-engine limitation from the HE is a problem for us." *Id.*

8 Another email exchange among Mr. Ketchum, Mr. Dearborn, and numerous KDC  
9 personnel on November 22, 2011, makes clear that KDC strategically accepted the twin  
10 engine condition to obtain a final CUP that it knew was problematic and then purposefully  
11 waited until all appeal deadlines in the court case had finally passed, at which point it planned  
12 to have the condition removed. HE Report 75.

13 KDC knew that twin engine helicopter use of the helistop was at best problematic and  
14 that the safety condition could result in the helistop not being used at all. Rather than  
15 acknowledging this, KDC hid the ball and touted the twin engine condition as part of its  
16 argument for the CUP.

17 The misrepresentation provision of the Land Use Code authorizes CUP revocation  
18 when "Approval of the permit was obtained by misrepresentation of material fact." LUC  
19 20.30B.170.B. 2 (emphasis added). The provision does not require misrepresentation of  
20 material facts (plural) and it does not give an applicant a free pass to misrepresent one  
21 material fact just because there are "numerous conditions" involved. The provision also does  
22 not require that the misrepresentation of material fact must have occurred in connection with a  
23

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25  
26  

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<sup>23</sup> HE Report 73.

1 condition originally proposed by the applicant. Rather than considering the evidence and  
2 applying the standard as written, the Examiner in a few short lines dismissed and ignored the  
3 un-rebutted evidence, and applied a different standard than the one provided for by the Code,  
4 without even clearly explaining that different standard.

5 In summary, the CUP was obtained by misrepresentation of material fact and  
6 revocation is therefore appropriate; the Council should reverse the Examiner's Decision and  
7 require revocation based misrepresentation.  
8

9 **F. The Examiner Decision is Confused In Its Conclusions Concerning Revocation**  
10 **for Failing to Comply With CUP Conditions.**

11 Appellants have consistently requested revocation based on two independent grounds,  
12 abandonment per LUC 20.30B.170.B.1 and misrepresentation per LUC 20.30B.170.B.2. A  
13 third revocation ground listed in the LUC, failure to comply with CUP conditions per LUC  
14 20.30B.170B.3, was not originally raised by Appellants. Examiner Conclusion of Law 5 says  
15 that City staff was therefore not required to address this question of compliance with  
16 conditions because "Tateuchi did not base her [revocation] application on LUC  
17 20.30B.170B.3, which alleges that the permit holder has operated the use contrary to the  
18 conditions of approval."  
19

20 The problem with this conclusion is that while Tateuchi did not base her revocation  
21 application on this separate issue of CUP conditions compliance, KDC and City staff  
22 themselves injected it into the proceeding. They took the position that compliance with just  
23 one permit condition, the one for periodic reports of helistop use -- which in this case have  
24 been regular reports acknowledging nonuse -- demonstrated that KDC did not abandon the  
25  
26

1 conditional use.<sup>24</sup> In response to this issue injected by KDC and staff, Tateuchi offered  
2 evidence in the form of testimony admissions extracted on cross-examination of City staff at  
3 the public hearing that they had not even inquired into compliance with other CUP conditions.  
4 See HE Report 124-131.

5 Again, Compliance or noncompliance with conditions is not a criterion for the Code's  
6 objective one year abandonment provision. The Examiner nonetheless allowed City staff and  
7 KDC to argue that compliance with one singled out of many CUP conditions showed no  
8 abandonment. That was itself a mistake. The mistake was compounded and turned into a  
9 fundamental error with the Examiner's refusal to allow Tateuchi to respond concerning KDC  
10 (non)compliance with other more important CUP conditions. These conditions include ones  
11 requiring careful review of pilot qualifications prior to use of the facility, requiring  
12 maintenance of an operational weather station at the site, and, perhaps most notably, requiring  
13 monitoring of potential flight path obstructions "resulting from the construction of new high-  
14 rise buildings or other obstructions in the future..." See AR 643-648.<sup>25</sup>

15  
16  
17 In sum, the Examiner's Decision allowing KDC and staff to cite compliance with the  
18 CUP usage report condition as demonstrating non-abandonment, but refusing to allow  
19 Appellants to inquire into and cite non-compliance with other CUP conditions is legal error  
20 and fundamentally unfair. It also sets the City up for significant liability in light of recent  
21 rezoning and pending developments in the area of the helistop flight path. The Examiner  
22 Decision effectively converts the helistop CUP, subject per Code to a one year shelf life, into  
23

24 <sup>24</sup> See 836-878 (KDC non-usage reports); HE Report 126-128 (testimony from staff, Pittman, that submission of  
usage reports required by a CUP condition was relevant, but non-compliance with other conditions was not  
relevant).

25 <sup>25</sup> Perhaps the staff (and Examiner, following staff's lead) shied away from the flight obstruction condition  
26 because it includes a continuing KDC obligation to apply to the FAA and the City to modify the helistop  
operations plan when there is new construction implicating the flight path. There is nothing in the record to  
support that this has ever occurred despite the obvious construction in the area.

1 a protected long term passive investment. But has the City disclosed this to property owners  
2 and applicants for high rise development in the area of the helistop and its flight path?

3 At a minimum, if the Council decides compliance with CUP permit conditions is  
4 somehow relevant to whether or not the use has been abandoned, then it should remand this  
5 matter for further proceedings to correct the Examiner's refusal to examine KDC compliance  
6 with more than just the one permit condition selected by staff and KDC.  
7

### 8 III. CONCLUSION

9 The Council is respectfully requested to decide that:

- 10 1. The Tateuchi application for revocation is granted due to abandonment; and/or  
11 2. The Tateuchi application for revocation is granted due to misrepresentation; and/or  
12 3. The matter is remanded for further proceedings per Council instructions.

13 Respectfully submitted this 13<sup>th</sup> day of June, 2018.  
14

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