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7 **BEFORE THE CITY COUNCIL OF THE CITY OF BELLEVUE**
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9 In the Matter of the Appeal of:

10 APPLICATION FOR REVOCATION OF
11 KEMPER DEVELOPMENT
12 COMPANY'S CONDITIONAL USE
13 PERMIT FOR BELLEVUE PLACE
14 HELISTOP
15
16
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Case File Nos: 17-104804-LB

CITY OF BELLEVUE'S
DEVELOPMENT SERVICES
DEPARTMENT RESPONSE TO
NOTICE OF APPEAL

(City of Bellevue Hearing Examiner's
April 5, 2018 Findings of Fact,
Conclusions of Law, Decision and
Order)

18 **I. INTRODUCTION**

19 This appeal challenges City of Bellevue (City) Hearing Examiner Barbara Dykes
20 Ehrlichman's April 5, 2018 Decision and Order denying Ina Tateuchi's application for
21 revocation of the Conditional Use Permit (CUP) obtained by the Kemper Development
22 Company for development and use of a helistop on the Bellevue Place building located
23 at 10500 NE 8th Street, Bellevue, Washington. The appellant is Ina Tateuchi
24 (Tateuchi); the permit holder and entity with the underlying property rights in the CUP
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1 is Kemper Development Company (KDC); and the City is the permitting authority that
2 issued the CUP and has processed Tateuchi's application for revocation.

3 The City originally issued the CUP pursuant to Ordinance 6000 in 2011.
4 Tateuchi opposed the City's approval in 2011 and has continued to oppose the CUP
5 throughout each successive year of the CUP's existence. In turn, KDC has defended
6 the CUP in the face of Tateuchi's many attempts to deprive KDC of its property rights.
7 Simultaneously, the City's Development Services Department (DSD) has fully
8 processed Tateuchi's current application for revocation consistent with the City's Land
9 Use Code (LUC), which culminated in the Hearing Examiner Decision denying
10 Tateuchi's application and, shortly thereafter, this appeal.

11 Despite years of hostility and litigation between the parties, Tateuchi's request
12 for revocation is quite narrow and constrained by the provisions of LUC
13 20.30B.170.B(1)-(2), which state a CUP may be revoked only upon a finding that:
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15 (1) The use for which approval was granted has been abandoned
16 for a period of at least one year; or

17 (2) Approval of the [CUP] was obtained by material
18 misrepresentation of fact....

19 LUC 20.30B.170.B(1)-(2). These provisions allow revocation where appropriate ("[a]n
20 approved permit may be revoked only upon a finding that...."), but do not require
21 revocation. *Id.*

22 In support of her two claims, Tateuchi argues the CUP has been abandoned
23 because KDC has landed only one helicopter on the helistop, and she claims that
24 internal emails between KDC's agents show that KDC misrepresented a material fact
25 in connection with the City's approval of the CUP. Tateuchi's first argument fails

1 because the record shows KDC has developed, established, and maintained the
2 helistop, filed required reports informing the City the helistop is fully operational, and
3 operated the communications line/website that is required as a condition of CUP
4 approval. With respect to misrepresentation, Tateuchi's argument fails because the
5 internal communications submitted by Tateuchi regarding the twin-engine condition
6 included in the CUP do not demonstrate KDC obtained CUP approval from the City
7 through misrepresentation of material fact.

8 After considering the evidence and argument presented by Tateuchi and KDC
9 during the land use process and after holding a public hearing on the matter, the
10 Hearing Examiner rejected each of Tateuchi's two arguments. For the reasons
11 discussed below, the City Council should do the same and deny this appeal.
12

13 **II. FACTS AND PROCEDURAL HISTORY**

14 **A. The City Council's Approval of the CUP in 2011.**

15 The City Council approved KDC's CUP to operate a private helistop by
16 Ordinance 6000 on May 16, 2011. Hearing Examiner Report (HE), Ex. C-1, Vol. 2, at
17 641-648.¹ The City's approval imposed numerous conditions on the operation of the
18 helistop, including flight requirements, hours of operation, maintenance requirements,
19 reporting requirements, a communications line/website requirement, vesting provisions,
20 and a condition that limits the use of the helistop to twin-engine helicopters. *Id.*, Ex. C-1,
21 Vol. 2, at 643-646. The twin-engine limitation was inserted into the CUP based on
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24 ¹All citations to the Hearing Examiner's Report (HE) include citation to the specific page numbers
25 in the Hearing Examiner's Report and citations to the specific Exhibit (Ex.) and Volume number when the
citation is to the Exhibit Booklet, Vol. 1-4. DSD provides citations to the Hearing Examiner's Report for
every factual statement contained in this Response.

1 testimony of Tateuchi's expert, Gordon Jones, who testified during the approval process
2 that "[y]es, there's a plethora of twin engine helicopters available." *Id.*, Ex. C-1, Vol. 1, at
3 423; *id.*, Ex. C-1, Vol. 2, at 550.

4 Tateuchi appealed the CUP approval to King County Superior Court, which
5 denied her appeal and upheld the CUP. *Tateuchi, et. al. v. City of Bellevue, et. al.*, Case
6 No. 11-2-20007-8 SEA (November 30, 2011). To date, the CUP approved by
7 Ordinance 6000 remains in place, with the twin-engine limitation, and this is the City
8 approval that Tateuchi seeks to revoke. HE at 056-065; HE, Ex. C-1, Vol. 1, at 009-018.

9 **B. KDC's Upgrades to the Helistop, Monthly/Biannual Operation**
10 **Reports, and Communications Line/Website.**

11 On August 8, 2012, KDC applied for the necessary building permit to develop
12 and upgrade the helistop to current Federal Aviation Administration (FAA) design
13 standards and City building code regulations. *Id.*, Ex. C-1, Vol. 2, at 679-692.
14 Consistent with condition 4 of the City's CUP approval, KDC filed monthly operation
15 reports with the City for the first year of the helistop's existence and has continued to file
16 biannual operation reports for each year thereafter. *Id.*, Ex. C-1, Vol. 1, at 400-408; *id.*,
17 Ex. C-1, Vol. 2, at 693-728 & 836-879.

18 When filing these operation reports, KDC has represented to the City that the
19 helistop remains "fully operational," even during the time periods when there are no
20 landings at the helistop. *Id.* The operation report filed with the City on March 5, 2015,
21 identifies and documents a January 21, 2015 light turbine, twin-engine helicopter
22 landing and departure at the helistop. *Id.*, Ex. C-1, Vol. 2, at 848-849. To date, KDC
23 has also continued to operate the communications line/website that is required as a
24 condition of the CUP approval. *Id.*, Ex. C-1, Vol. 2, at 729.
25

1 **C. Tateuchi's Request for a Code Interpretation and Judge Ramseyer's**
2 **December 16, 2016 Order.**

3 Tateuchi continued to challenge KDC's entitlement to the CUP subsequent to the
4 Superior Court's dismissal of her lawsuit and KDC's development of the helistop. *Id.*,
5 Ex. C-1, Vol. 2, at 738-750. Tateuchi first raised the arguments that she now recycles in
6 this appeal in October 2014 when she requested a Code Interpretation from DSD
7 regarding the abandonment and misrepresentation issues. *Id.* KDC opposed Tateuchi's
8 request for a Code Interpretation and explained in detail why Tateuchi's abandonment
9 and misrepresentation arguments had no merit. *Id.*, Ex. C-1, Vol. 2, at 730-737.

10 In June 2015, after reviewing Tateuchi's request, KDC's opposition, and the
11 applicable provisions of the LUC, the City's DSD Director issued a decision finding that
12 KDC had not abandoned the helistop or misrepresented a material fact in obtaining
13 CUP approval to operate the helistop. *Id.*, Ex. C-1, Vol. 2, at 738-750. Tateuchi
14 appealed the Director's determination to the Hearing Examiner, but before the hearing
15 on her appeal, Tateuchi and the City stipulated that Tateuchi would dismiss the appeal,
16 submit an application for revocation of the CUP, and the City would then process
17 Tateuchi's revocation application consistent with the LUC. HE at 082-085; HE, Ex. C-1,
18 Vol. 1, at 019-022.

19 Tateuchi filed her application to revoke KDC's helistop CUP on February 4, 2016.
20 HE at 056-065; HE, Ex. C-1, Vol. 1, at 009-018. The application raised abandonment
21 and misrepresentation arguments that were identical to her Code Interpretation request.
22 *Id.*; HE, Ex. C-1, Vol. 2, at 738-750. After the City cancelled Tateuchi's revocation
23 application based on lack of standing, Tateuchi filed another lawsuit in King County
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1 Superior Court, Case No. 16-2-13322-3 SEA, which was assigned to Judge Judith
2 Ramseyer. HE, Ex. C-1, Vol. 2, at 751-752; HE, Ex. A-1, Vol. 4, at 1641-1643.

3 On December 16, 2016, Judge Ramseyer ordered the City to reinstate and fully
4 process Tateuchi's application for revocation of KDC's CUP. HE, Ex. A-1, Vol. 4, at
5 1642-1643 (12/16/16 Order). Judge Ramseyer determined that the City was required to
6 process the application but that the City's land use process did not mandate any
7 particular outcome. *Id.*, Ex. A-1, Vol. 4, at 1768:18-25 & 1770-1771.

8 Consistent with Judge Ramseyer's Order, the City informed Tateuchi that it
9 would reinstate and process her February 4, 2016 application for revocation and
10 provided her with an opportunity to amend the application if she wished to do so. *Id.*, Ex.
11 C-1, Vol. 1, at 031. However, Tateuchi did not amend her application, and hearing
12 nothing from Tateuchi, the City reinstated and begin processing her application on
13 January 25, 2017. *Id.*, Ex. C-1, Vol. 1, at 030 & 053-054.

14
15 **D. Tateuchi's Revocation Application.**

16 As discussed, Tateuchi's revocation application was limited to the provisions of
17 LUC 20.30B.170.B(1)-(2), which provide two of the criteria for revocation of a CUP. HE
18 at 056-065; HE, Ex. C-1, Vol. 1, at 009-018. Her application first argued that the use
19 granted by the CUP had been abandoned for a period of at least one year pursuant to
20 LUC 20.30B.170.B(1) based on the following:

- 21
- 22 • "KDC's helistop usage reports confirm that the helistop was not
23 used at all for more than three years after the CUP was approved
24 by the King County Superior Court on November 30, 2011."
 - 25 • "The sole landing of a twin engine helicopter at the helistop more
than three years after the CUP was approved came far too late to
avoid an abandonment determination. Moreover, that sole 'test'

1 flight was an illusory, staged event that did not constitute actual use
2 of the helistop.”

- 3 • “However, the helistop was not utilized by twin engine helicopters
4 for over three years and will not be used by twin engine
5 helicopters.”

6 HE at 057; HE, Ex. C-1, Vol. 1, at 010. As made plain by her application, Tateuchi
7 believes that the lack of twin-engine helicopter landings at the helistop demonstrates
8 abandonment under the LUC. HE at 057-059; HE, Ex. C-1, Vol. 1, at 010-012.

9 Tateuchi’s revocation application did not reference or acknowledge the building
10 permits KDC requested and received from the City to upgrade the helistop, nor did her
11 application discuss KDC’s statements to the City, in the monthly and biannual helistop
12 operation reports, that the helistop remains fully operational. HE at 056-065; HE, Ex. C-
13 1, Vol. 1, at 009-018 & 400-408; HE, Ex. C-1, Vol. 2, at 693-728 & 836-879. The
14 application also did not acknowledge the communications line/website that KDC
15 continues to operate consistent with the City’s CUP approval. HE at 056-065; HE, Ex.
16 C-1, Vol. 1, at 009-018; HE, Ex. C-1, Vol. 2, at 729. Instead, the application merely
17 argued that the lack of helicopter landings at the helistop, along with comments by KDC
18 and its agents regarding the twin-engine requirement, demonstrated conclusively that
19 the abandonment criteria in LUC 20.30B.170.B(1) has been satisfied. HE at 057-059;
20 HE, Ex. C-1, Vol. 1, at 010-012.

21 With respect to misrepresentation under LUC 20.30B.170.B(2), Tateuchi alleged
22 that emails between KDC and its agents show that the CUP was obtained through
23 misrepresentation of a material fact. HE at 059-065; HE, Ex. C-1, Vol. 1, at 012-018.
24 The internal KDC communications submitted by Tateuchi suggest that when KDC
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1 accepted the CUP twin-engine condition in 2011, KDC was also deliberating whether
2 the condition would be feasible. *Id.*

3 The emails also show that KDC's agents discussed submitting an application to
4 the City to request modification of the twin-engine condition, and the LUC provides a
5 procedure for such a modification request in LUC 20.30B.170.A. HE at 062-064; HE,
6 Ex. C-1, Vol. 1, at 015-017. In any event, the twin-engine limitation was included in
7 Ordinance 6000, and it has never been modified or removed from the CUP that
8 Tateuchi seeks to revoke. HE, Ex. C-1, Vol. 2, at 641-648.²

9 **E. The Land Use Process and Director's Recommendation.**

10 As directed by Judge Ramseyer's Order, DSD processed Tateuchi's revocation
11 application as a Process I land use matter under the LUC. DSD provided public notice
12 of the application on March 2, 2017, March 9, 2017, and June 8, 2017, and explained to
13 Tateuchi and KDC the format for the public meeting required by the LUC. *Id.*, Ex. C-1,
14 Vol. 1, at 233-236, 263-267 & 335-341; *Id.*, Ex. C-1, Vol. 2, at 774-775.

15 The City held the public meeting on the application on June 27, 2017. *Id.*, Ex. C-
16 3, Vol. 4, at 1489-1512 (Public Meeting Transcript). Tateuchi's attorneys, KDC's
17 attorneys, and City staff attended the public meeting, and four (4) members of the public
18 spoke during the public comment portion of the meeting. *Id.*

19 Following the public meeting, the attorneys for Tateuchi and KDC continued to
20 submit information to DSD to consider in connection with the application. KDC
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24 ² Although KDC submitted an application to modify the twin-engine condition in 2013, File No. 13-
25 107448-LI, KDC later cancelled the modification request on October 28, 2015. HE, Ex. C-1, Vol. 1, at 085.
The merits of any hypothetical request for modification to remove the twin-engine condition that KDC may
or may not submit in the future is not an issue before the City Council in connection with this appeal.

1 submitted a detailed letter and twenty (20) attachments to the City that opposed
2 Tateuchi's application and explained again why the application had no merit. *Id.*, Ex. C-
3 1, Vols. 1-2, at 420-752. When Tateuchi requested an opportunity to respond to KDC's
4 opposition, DSD confirmed that the City would consider any response submitted by
5 Tateuchi and encouraged the parties to submit any argument, information,
6 documentation, or other evidence they deemed relevant during the land use process.
7 *Id.*, Ex. C-1, Vol. 1, at 397-399. Tateuchi then submitted a response to KDC's opposition
8 on October 2, 2017. *Id.*, Ex. C-1, Vol. 2, at 937-941.

9 On March 1, 2017, after considering the evidence and argument submitted by the
10 parties, DSD issued the Director's Recommendation. HE at 089-103; HE, Ex. C-1, Vol.
11 1, at 077-090. The Director's Recommendation was issued by Land Use Director
12 Elizabeth Stead and accompanied by a staff report drafted by Senior City Planner Reilly
13 Pittman. *Id.* The staff report provided an overview of the application, review process,
14 procedural history, site description, public comments, and revocation criteria under LUC
15 20.30B.170.B(1)-(2). HE at 089-098; HE, Ex. C-1, Vol. 1, at 077-086.

17 The Director recommended that the Hearing Examiner deny the application
18 because (1) ongoing helicopter activity is not necessary to establish a helistop or
19 demonstrate the use remains operational, and (2) the evidence in the record submitted
20 by Tateuchi did not support a conclusion that the City's approval of the CUP was
21 obtained by misrepresentation. HE at 095-098; HE, Ex. C-1, Vol. 1, at 083-086. The
22 staff report cited to the record generated during the course of the land use process,
23 including the application submitted by Tateuchi, KDC's opposition, and Tateuchi's
24 response, as well as the operation reports submitted by KDC, Ordinance 6000, DSD's
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1 2015 Code Interpretation Decision on the same issues, and Judge Ramseyer's Order.
2 HE at 089-103; HE, Ex. C-1, Vol. 1, at 077-090. The staff report set a public hearing
3 date on the application for March 22, 2018. HE at 089; HE, Ex. C-1, Vol. 1, at 077.

4 **F. The Pre-Hearing Conference and Public Hearing.**

5 Prior to the public hearing, the Hearing Examiner held a pre-hearing conference
6 with the parties' attorneys on March 13, 2018. HE, Ex. A-4, Vol. 4, at 1828-1866 (Pre-
7 Hearing Conference Transcript). During this preliminary conference, KDC objected to
8 the application based on Tateuchi's lack of standing, and the Hearing Examiner directed
9 KDC and Tateuchi to submit their standing arguments in legal briefing prior to the public
10 hearing. *Id.*, Ex. A-4, Vol. 4, at 1835-1838.

11 All the parties agreed at the pre-hearing conference that the helistop had not
12 been used for landing or takeoff after January 21, 2015. *Id.*, Ex. A-4, Vol. 4, at 1840.
13 Similarly, Tateuchi's confirmed that, "[o]ur main position has always been quite simply
14 that there is a one-year standard for abandonment and that this helistop has not been
15 used for many years." *Id.*, Ex. A-4, Vol. 4, at 1845:13-15. Following the pre-hearing
16 conference, Tateuchi and KDC submitted briefing on the standing issue as directed by
17 the Hearing Examiner. *Id.*, Exs. P-1 & A-1, Vol. 4. Tateuchi also submitted a selection of
18 briefs and letters to the Hearing Examiner. *Id.*, Ex. A-2, Vol. 4.

19 The March 22, 2018 public hearing went forward as calendared by DSD. HE at
20 107-222 (Public Hearing Transcript). At the outset of the hearing, City Planner Reilly
21 Pittman presented testimony and a power point that explained the background, land use
22 process, decision criteria, and Director's Recommendation. HE at 116-118 (Transcript,
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1 pp. 10-12); HE, Ex. C-2, Vol. 4. Tateuchi and KDC then had the opportunity to cross-
2 examine Mr. Pittman. HE at 114 (Transcript, p. 8:6-9).

3 During cross-examination, Mr. Pittman confirmed that he had reviewed all of the
4 documents and public comments contained in the two files associated with Tateuchi's
5 request for revocation, File Nos. 16-124851-LB and 17-104804-LB. HE at 122-123
6 (Transcript, pp. 16-17). Mr. Pittman then explained that he relied upon the monthly and
7 biannual operation reports submitted by KDC in concluding that the helistop use had not
8 been abandoned:

9 **Mr. Pittman:** I believe [the operation reports are] how the
10 applicant was showing they were maintaining
11 their use. I relied upon that because it said it's
12 fully operational. So, therefore, I'm assuming
they're in compliance with all the conditions.

13 **Tateuchi Attorney:** So that was your assumption?

14 **Pittman:** Yes.

15 HE at 137 (Transcript, p. 31:18-24). In response to further questioning on the
16 abandonment issue, Mr. Pittman explained that he understood KDC's operational
17 reports to mean that a helicopter could land on the helistop:

18 **Tateuchi:** Do you know what -- or what's your
19 understanding of the term "operational," Mr.
Pittman?

20 **Pittman:** I'm assuming it means that a helicopter could
21 land.

22 **Tateuchi:** And that's in the subjunctive or whatever you
23 call that when you say could, not that
24 helicopters are landing, but that they could
land?

25 **Pittman:** Yes. If a helicopter wanted to land there, it
could do so.

1 **Tateuchi:** Well, could a helicopter compliant with the city
2 council-imposed safety condition land at the
3 Kemper helistop?

4 **Pittman:** I'm relying on their logs to say it's operational.
5 I'm trusting they have maintained it in
6 compliance with the condition.

7
8 HE at 156 (Transcript, p. 50:6-20); see *also* HE at 159-160 (Transcript, pp. 53:7-13 &
9 54:11-13).

10 During his testimony, Mr. Pittman also explained that the one-year abandonment
11 criteria contained in LUC 20.30B.170.B(1) is not satisfied in this case "because the
12 applicant actively maintained their helistop." HE at 140 (Transcript, p. 34:1-2). Faced
13 with further questioning on the matter from Tateuchi's attorney, he stated, "[a]gain, if the
14 person has maintained [the use], I would say they haven't abandoned it." HE at 152
15 (Transcript, p. 46:12-13). Mr. Pittman's testimony, consistent with his staff report,
16 confirmed that maintaining a helistop use is not limited to landing helicopters on the
17 helistop, and as long as KDC has actively maintained the use, it has not abandoned the
18 use under the decision criteria in LUC 20.30B.170.B(1). HE at 152-153 (Transcript, pp.
19 46-47).

20 When questioned about Tateuchi's misrepresentation claim, Mr. Pittman
21 explained that the twin-engine requirement is a condition of the CUP, and KDC's
22 internal evaluation of whether or not that condition is feasible does not evidence
23 misrepresentation. HE at 155-156 (Transcript, pp. 49-50). Mr. Pittman also testified,
24 again consistent with the staff report, that if KDC submits an application for modification
25 of the twin-engine condition pursuant to the LUC, such a request for modification does
 not evidence misrepresentation. HE at 156 (Transcript, p. 50:1-3).

1 Following cross-examination of Mr. Pittman, Tateuchi's attorney provided
2 testimony and argument on the abandonment and misrepresentation claims. HE at 161-
3 189 (Transcript, pp. 55-83). After Tateuchi's presentation, three (3) members of the
4 public provided comment; two (2) of these public comments voiced generalized
5 concerns regarding the safety of operating a helistop in downtown Bellevue and the
6 third asked where the City had documented his comments from the June 27, 2017
7 public meeting. HE at 190-204 (Transcript, pp. 84-98).

8 KDC's opposition followed public comment, and KDC's attorney directed the
9 Hearing Examiner to the portions of the record documenting the operation reports
10 discussed by Mr. Pittman, KDC's building permit to update the helistop to FAA
11 standards, and the communications line/website maintained by KDC as required by the
12 CUP. HE at 206 (Transcript, p. 100:6-17). KDC also reminded the Hearing Examiner
13 that DSD had previously found, on at least three separate occasions, that there is no
14 basis to revoke the CUP based on the same arguments raised by Tateuchi. HE at 208
15 (Transcript, p. 102:14-22). After DSD provided the Hearing Examiner with a citation to
16 the transcript of the June 27, 2017 public meeting, Tateuchi's attorney provided a
17 lengthy closing statement that repeated the arguments raised in the application and
18 criticized DSD's land use process. HE at 210-218 (Transcript, pp. 104-112).

19
20 **G. The Hearing Examiner Decision.**

21 The Hearing Examiner issued her Decision on April 5, 2018. HE at 001-012. The
22 Decision included a discussion of the procedural background, twelve (12) findings of
23 fact, and separate conclusions of law regarding the standing, abandonment, and
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misrepresentation issues raised by Tateuchi and KDC over the course of the land use process. *Id.*

The Decision explained in detail why Tateuchi had failed to establish that KDC had abandoned the use authorized by the CUP. *Id.* at 007-009. First, the Hearing Examiner framed the abandonment inquiry as a question of whether or not upkeep of the helistop and the filing of reports constitutes “use” of the facility. *Id.* at 009. The Hearing Examiner compared the helistop CUP to a bed and breakfast or guesthouse CUP, concluding that as long as the authorized facility was ready to be used, the use would not be discontinued simply because no guest frequented the facility. *Id.* Second, the Hearing Examiner concluded that—although Tateuchi had correctly cited the law regarding abandonment—Tateuchi’s argument nonetheless failed because a lack of helicopter landings does not demonstrate abandonment by a preponderance of the evidence. *Id.*

Finally, the Hearing Examiner rejected Tateuchi’s misrepresentation argument because the internal KDC communications submitted by Tateuchi did not support the conclusion that KDC obtained approval of the helistop through a misrepresentation of material fact. *Id.* at 010. The Hearing Examiner noted that the twin-engine condition was inserted into the CUP based on testimony by Tateuchi’s expert, and “[t]he emails proffered by Tateuchi show no more than an applicant’s experts discussing possible strategies to support their client.” *Id.*

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III. Standard of Review.

A. City Council Decision Criteria.

Under the decision criteria contained in LUC 20.35.150.7.a, the City Council is required to accord substantial weight to the decision of the Hearing Examiner. LUC 20.35.150.7.a. The appellant, Tateuchi, bears the burden of proof demonstrating that the Hearing Examiner Decision is not supported by material and substantial evidence. *Id.* Thus, the City Council may only grant Tateuchi's appeal, or grant the appeal with modifications, if Tateuchi proves that the Hearing Examiner Decision was not supported by material and substantial evidence in view of the entire record. *Id.*

B. Revocation Criteria under LUC 20.30B.170.B.

As explained throughout this brief, this appeal is subject to and constrained by the CUP revocation criteria under LUC 20.30B.170.B(1)-(2), which state the following:

B. Revocation. The Hearing Body may revoke an approved permit through Process I, LUC 20.35.100 et seq. An approved permit may be revoked only upon finding that:

1. The use for which the approval was granted has been abandoned for a period of at least one year; or

2. Approval of the permit was obtained by misrepresentation of material fact;....

LUC 20.30B.170.B(1)-(2).

Tateuchi's application alleges that KDC's CUP should be revoked based on the criteria found in LUC 20.30B.170.B(1) (abandonment) and 20.30B.170.B(2) (misrepresentation). HE at 056-065; HE, Ex. C-1, Vol. 1, at 009-018. The application does not allege revocation under LUC 20.30B.170.B(3)—*i.e.*, "the permit is being

1 exercised contrary to the terms of approval”—and this third potential basis for
2 revocation of a CUP is not before the City Council.

3 **IV. DISCUSSION**

4 **A. KDC has not abandoned the helistop use under 5 LUC 20.30B.170.B(1).**

6 The Director's Recommendation and Hearing Examiner Decision recognize that
7 KDC has developed, established, and maintained its helistop, and the helistop remains
8 fully operational. HE at 006-009, 092 & 095-096. As Mr. Pittman stated during the
9 public hearing, "if a helicopter wanted to land there, it could do so." HE at 156
10 (Transcript, p. 50:6-20). Therefore, the record developed over the course of the land
11 use process does not support Tateuchi's belief that KDC abandoned the use
12 authorized by the CUP for a period of at least one year as required by LUC
13 20.30B.170.B(1).

14 The most glaring problem with Tateuchi's argument on appeal is her erroneous
15 interpretation of the applicable revocation criteria in LUC 20.30B.170.B(1). Tateuchi
16 states in her notice of appeal that LUC 20.30B.170.B(1) establishes an abandonment
17 test, which she describes as "abandonment is deemed to occur after 1 year of nonuse."
18 HE at 023. This statement is not supported by the statute, and as a result, Tateuchi has
19 provided the City Council with incorrect criteria under which to evaluate her claims.
20

21 The plain language of LUC 20.30B.170.B(1) actually provides that a CUP may be
22 revoked if "[t]he use for which the approval was granted has been abandoned for a
23 period of at least one year." The operative question under the statute is whether the
24 use has been abandoned for a period of at least one year. In contrast to Tateuchi's
25 interpretation of the statute, LUC 20.30B.170.B(1) provides a relevant time period to

1 consider—one year—but does **not** establish the elements of abandonment or establish
2 an abandonment “test” as Tateuchi claims. Instead, the revocation criteria requires
3 consideration of the use that was approved and of the factual record supporting, or not
4 supporting, a finding of abandonment of that use for a period of at least one year.

5 Here, the use approved by the CUP is far broader than Tateuchi’s narrow
6 interpretation of a use that only includes the landing and departure of helicopters. In
7 approving the CUP, Ordinance 6000 expressly identified flight requirements, hours of
8 operation, maintenance requirements, reporting requirements, a communications
9 line/website requirement, vesting provisions, and a condition that limits the use of the
10 helistop to twin-engine helicopters. HE, Ex. C-1, Vol. 2, at 643-645. Thus, the use
11 approved by the City was not limited to the takeoff and landing of helicopters as
12 Tateuchi contends. *Id.*

13
14 Further, the record shows that KDC has upgraded the helistop to FAA design
15 standards and City building code regulations; has filed operation reports consistent with
16 condition 4 of the City’s CUP approval; and has continued to maintain the
17 communications line/website that is required as a condition of CUP approval. HE, Ex. C-
18 1, Vol. 1, at 400-408; *id.*, Ex. C-1, Vol. 2, at 679-729, & 836-879. When filing the
19 mandatory operation reports, KDC has represented to the City that the helistop remains
20 “fully operational,” even during the time periods when there are no landings at the
21 helistop. *Id.* There is simply no evidence in the record establishing or even suggesting
22 that the helistop is not fully operational, or that KDC has failed to establish, maintain,
23 and improve its helistop.
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1 The record demonstrates a lack of abandonment under LUC 20.30B.170.B(2)
2 without any consideration of KDC's subjective intent. However, given that the
3 revocation criteria contained in the statute does not establish the elements of
4 abandonment, well-established law discussing the concept of abandonment in
5 Washington is instructive and appropriate to consider here:

6 Abandonment or discontinuance is a question of fact, and
7 ordinarily depends upon a concurrence of two factors: "(a) an
8 intention to abandon; and (b) an overt act, or failure to act, which
9 carries the implication that the owner does not claim or retain any
10 interest in the right to the nonconforming use." *Van Sandt v.*
11 *Everett*, 69 Wn. App. 641, 649, 849 P.2d 1276 (1993); *City of*
12 *University Place v. McGuire*, 144 Wn.2d 640, 652-653, 30 P.3d 453
13 (2001); *Rosema v. City of Seattle*, 166 Wn. App. 293, 299-301, 269
14 P.3d 393 (2012) (right to use house as duplex not abandoned when
15 house "maintain[ed] the structural capability" to operate as duplex).

16 Contrary to Tateuchi's claims that a lack of helicopter flights constitutes abandonment,
17 "there is no act or omission that, as a matter of law, is proof of abandonment." *City of*
18 *Univ. Place*, 144 Wn.2d at 653.

19 Particularly damaging to Tateuchi's abandonment argument under the above-
20 referenced legal standard is the dearth of evidence in the record showing that KDC
21 intended to abandon the helistop, and the absence of any overt act demonstrating that
22 KDC does not claim or retain any interest in the helistop. To the contrary: both the staff
23 report prepared by DSD and the Hearing Examiner Decision pointed to KDC's
24 consistent and vigorous opposition to Tateuchi's repeated attempts to revoke the CUP
25 as additional evidence showing a lack of abandonment. HE at 006, 008 & 096.

When Tateuchi does discuss the legal standard for abandonment, her discussion
is limited to her attorney's contention that the burden of proof in this dispute should shift

1 to KDC under *Miller v. Bainbridge Island*, 111 Wn. App. 152, 43 P.3d 1250 (2002).
2 Taking Tateuchi's argument at face value, her appeal nonetheless fails because the
3 record shows that KDC has actively established and maintained the helistop and has
4 never abandoned the use. HE, Ex. C-1, Vol. 1, at 400-408; *id.*, C-1, Vol. 2, at 679-729 &
5 836-879. The situation here is quite different than in *Miller*, where it was undisputed
6 that the use at issue, a concrete casting business, had been discontinued for a time
7 period well beyond the statutory time period. *Miller*, 111 Wn. App. at 156-157, 165, 43
8 P.3d 1250. Although Tateuchi's recitation of the general legal standard articulated in
9 the *Miller* case may be correct, application of that standard to the facts at hand does not
10 save her appeal.

11 The Hearing Examiner framed the abandonment issue as a question that "boils
12 down to whether upkeep of the [helistop] and the filing of reports as required under the
13 original conditional use permit conditions constitutes 'use' of the facility, or conversely,
14 whether the lack of helicopter landings constitutes 'discontinuance' of the use." HE at
15 009. Tateuchi's argument ignores both the use authorized by the CUP and the
16 evidence showing KDC has maintained and improved the helistop, along with KDC's
17 repeated assurances to the City that the helistop remains fully operational and ready to
18 use to this day. The Hearing Examiner correctly concluded that Tateuchi's revocation
19 application fails in light of this record, and the Hearing Examiner Decision on this issue
20 should be upheld.

21
22 **B. Tateuchi failed to establish that KDC obtained the CUP through**
23 **misrepresentation of material fact.**

24 Tateuchi's misrepresentation argument should be summarily rejected. The
25 fallacy of this argument is that it assumes the City granted the CUP to KDC based

1 exclusively on KDC's acceptance of the twin-engine condition included in the CUP.
2 However, the record shows that the City imposed numerous conditions on the CUP,
3 including the frequency of flights, the restriction of flight path, the hours of operation,
4 the type of helicopter to be flown, the operation reports requirement, the
5 communication line/website requirement, general maintenance and communication
6 provisions, and vesting provisions. HE, Ex. C-1, Vol. 2, at 643-645. The type of
7 helicopter was but one condition relevant to the City's approval of the CUP.

8 The evidence submitted by Tateuchi shows, at best, that KDC and its agents
9 were deliberating the effect of the twin-engine condition during the land use process.
10 HE at 059-065; HE, Ex. C-1, Vol. 1, at 012-018. This was completely understandable
11 given that the twin-engine limitation was inserted into the CUP based on the testimony
12 of Tateuchi's expert. *Id.*, Ex. C-1, Vol. 1, at 423; *id.*, Ex. C-1, Vol. 2, at 550.
13
14 Regardless, KDC's internal discussion of the timing and process involved in seeking
15 modification of the twin-engine condition does not evidence that KDC misrepresented
16 any material fact. This is particularly true given that KDC's agents' discussions are
17 consistent with the LUC, which permits KDC to seek modification of a CUP at any time
18 after approval. LUC 20.30B.170.A.

19 Finally, the City Council should note that the twin-engine condition was included
20 in Ordinance 6000, and this limitation has never been modified or removed from the
21 CUP. HE, Ex. C-1 at 641-648. The question of whether or not a hypothetical
22 modification request from KDC to remove the twin-engine condition is appropriate or
23 supportable is not an issue that is before the Council. The issue before Council is
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1 whether KDC obtained its CUP by making a misrepresentation of material fact, and the
2 evidence proffered by Tateuchi does not support this basis for revocation.

3 **V. CONCLUSION**

4 For all of the foregoing reasons, and based on the evidence and argument
5 provided during the land use process on this matter, the City Council should affirm the
6 Hearing Examiner's April 8, 2018 Decision in full and deny this appeal.

7 DATED this 13th day of June, 2018, at Bellevue, WA.

8
9 CITY OF BELLEVUE
10 OFFICE OF THE CITY ATTORNEY
Lori M. Riordan, City Attorney

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DECLARATION OF SERVICE

I declare that I am employed with the City of Bellevue, Office of the City Attorney, ("Bellevue City Attorney") whose address is 450 110th Avenue NE, Bellevue, WA 98004. I am not a party to the within cause and I am over the age of 18 years.

I further declare that I am readily familiar with the methods and practices for service listed below, and that on this 13th day of June, 2018, I served a copy of:

**CITY OF BELLEVUE'S DEVELOPMENT SERVICES DEPARTMENT
RESPONSE TO NOTICE OF APPEAL**

by electronically mailing a true and correct copy thereof through the City of Bellevue's electronic mail system to the email addresses set forth below:

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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 the 13th day of June, 2018.

/s/ Lyudmila Ernst
Lyudmila Ernst, Declarant
Paralegal