

BEFORE THE BELLEVUE CITY COUNCIL

In the Matter of Ina Tateuchi's Application to
Revoke Kemper Development Company's
CUP for a Private Use Helistop

Case File No. 17-104804-LB

KEMPER DEVELOPMENT COMPANY'S
BRIEF IN OPPOSITION TO APPEAL

I. INTRODUCTION

On May 16, 2011, by Ordinance 6000, the City Council approved Kemper Development Company's application for a conditional use permit ("CUP") for a private use helistop on the roof of the Bellevue Place Bank of America Building. In the ensuing seven years KDC has been forced to participate in the unnecessary and frivolous litigation and appeals brought by Ina Tateuchi ("Tateuchi") over its CUP. Tateuchi has used the Superior Court, the Hearing Examiner, and now, once again, the City Council to harass KDC, forcing KDC to defend itself in multiple hearings in multiple forums over a legally obtained and legally maintained permit. KDC is weary of the constant burden of this litigation.

II. FACTS

The following abbreviated procedural facts demonstrate Tateuchi's tactics:¹

1. In 2008, KDC applied for a CUP to activate and use an existing helicopter landing pad located on the roof of the Bank of America building.²

¹ The Hearing Examiner's Record ("HER") consists of 12 electronic volumes comprised of: Hearing Examiner Report including a Summary, Hearing Examiner Decision, Appeal, DSD Staff Report and Recommendation, Maps, Correspondence, Additional Submittals, and Transcript of the Hearing; Exhibits (Ex.) C-1 through C-3 submitted by the DSD; Ex. P-1 through P-2, submitted by the Property Owner, KDC; Ex. A-1 through A-4, submitted by Tateuchi. References in this brief to the documents contained in the volume entitled Hearing Examiner Record provide the name of the document referenced and the Bates-numbered page(s); references to exhibits include the exhibit number, the document referenced, and the Bates-numbered page(s).

² HER, Ex. C-1, Hearing Examiner's July 20, 2009 Findings of Fact, Conclusions of Law and Decision ("HE

2. The Hearing Examiner recommended approval the CUP on December 16, 2010.³
3. Tateuchi appealed the Hearing Examiner's decision to the City Council, which denied her appeal and approved the CUP.⁴
4. Tateuchi appealed the Council's CUP approval to King County Superior Court, which upheld the Council's decision in November, 2011.⁵
5. On August 8, 2012, KDC applied for the necessary building permit to upgrade the helistop facility to current FAA design standards and city building code regulations consistent with the CUP approval.⁶
6. Consistent with CUP Condition C.4,⁷ on December 20, 2012, KDC submitted the Bellevue Place Helistop Operations Manual to the City.⁸
7. Consistent with CUP Condition A.4,⁹ in March, 2013 through March, 2014, KDC submitted to the City monthly flight operations logs.¹⁰
8. In 2013, KDC applied for a CUP modification to allow single-engine helicopters to use the helistop. Tateuchi vigorously opposed the application.¹¹
9. Before Bellevue issued a decision on the modification request, an accident involving a King 5 single-engine helicopter occurred in Seattle. In April, 2014, KDC asked Development Services Department ("DSD") to put its application on hold until the National Transportation Safety Board published its investigation results.¹²
10. Consistent with CUP Condition A.4,⁹ in September, 2014 and every 6 months thereafter, KDC submitted flight operations logs for prior 6 months.¹³
11. On October 17, 2014, Tateuchi requested a Formal Land Use Code Interpretation and findings of fact that KDC abandoned its helistop and obtained its CUP through misrepresentation.¹⁴

July, 2009 Decision"), Summary ¶ 2, pp. 481-501.

³ HER, Ex. C-1, Hearing Examiner's Second Revised and Final Report of Findings, Conclusions and Recommendation ("HE Final Recommendation"), pp. 563-589.

⁴ HER, Ex. C-1, Ordinance 6000, pp. 641-648.

⁵ HER, DSD Land Use Staff Report, p. 92.

⁶ HER, DSD Land Use Staff Report, p. 92; HER, Ex. C-1, DSD File 12-114026-BZ, pp. 679-692.

⁷ HER, Ex. C-1, Ordinance 6000, pp. 646-647.

⁸ HER, Ex. C-1, Letters to Hamlin and LaFave transmitting Operations Manual, pp. 726-728.

⁹ HER, Ex. C-1, Ordinance 6000, p. 644.

¹⁰ HER, Ex. C-1, Bellevue Collection Flight Operation logs, pp. 700-725.

¹¹ HER, DSD Land Use Staff Report, p. 92.

¹² HER, Ex. C-1, Formal Land Use Code Interpretation, p. 741.

¹³ HER, Ex. C-1, Bellevue Collection Flight Operation logs, pp. 693-699 and pp. 836-847.

¹⁴ HER, Ex. C-1, Formal Land Use Code Interpretation, p. 738.

1 12. DSD recognized that Tateuchi sought a permit revocation, not a code interpretation,
2 and properly found that a code interpretation is not the appropriate mechanism to
initiate revocation of a CUP.¹⁵ Nevertheless, DSD processed her application.

3 13. On June 25, 2015, the DSD Director issued his Formal Land Use Code Interpretation,
4 finding no support for Tateuchi's allegations of abandonment and misrepresentation.¹⁶
In the "Background" discussion, the Decision explained:

5 The City imposed numerous conditions to allow KDC to operate its private
6 helistop. These conditions included limiting the frequency of flights and the hours
7 of operation, restricting the flight path, limiting the types of helicopters that may
8 use the helistop, requiring reporting of flight frequency, times, and any deviations
9 from the required flight path, submittal of required documents with the FAA,
lighting restrictions, fire suppression requirements, implementing a weather
station, providing communication channels for the public, and providing the city
with a standard operations procedure manual before activation of the helistop.¹⁷

10 14. On July 9, 2015, Tateuchi appealed the Director's Formal Land Use Code
Interpretation to the Hearing Examiner.¹⁸

11 15. Without knowledge or any involvement of KDC, the City and Tateuchi entered into a
12 Stipulation to which KDC was not a party. In the Stipulation, they agreed: (1) to
13 dismiss Tateuchi's appeal of the Formal Land Use Code Interpretation and rescind the
14 Interpretation; and (2) that Tateuchi could apply to revoke KDC's CUP. They filed the
Stipulation with the Hearing Examiner on January 22, 2016. He dismissed Tateuchi's
appeal the same day.¹⁹

15 16. On February 22, 2016, Tateuchi filed an application to revoke KDC's CUP. Her
16 arguments were identical to those presented in her Request for Formal Land Use Code
Interpretation.²⁰

17 17. The City initially accepted the application, but then determined that Tateuchi did not
18 have standing to apply to revoke KDC's CUP. On May 17, 2016 the Land Use Services
Director rejected the application.²¹

19 18. Tateuchi appealed the Land Use Services Director's decision to reject her application
20 to King County Superior Court, alleging breach of contract. KDC brought a Motion to
Dismiss KDC as a party because Tateuchi had no claim against KDC, nor did she allege
21 one. All of her claims were based on the allegation that the City reneged on an
22

23 ¹⁵ HER, Ex. C-1, Formal Land Use Code Interpretation, p. 743.

24 ¹⁶ HER, Ex. C-1, Formal Land Use Code Interpretation, pp. 738-750.

25 ¹⁷ HER, Ex. C-1, Formal Land Use Code Interpretation, pp. 740-741.

26 ¹⁸ HER, Ex. C-1, Appeal, pp. 1044-1054 (Note that the pages in the HER appear to be in reverse order).

¹⁹ HER, Ex. C-1, January 22, 2016 Stipulation and Order of Dismissal ("Stipulation"), pp. 19-22. The pertinent
terms of the Stipulation are recited HER, Hearing Examiner's Decision, p. 3.

²⁰ HER, Ex. C-1, 2016 CUP Revocation Application, pp. 950-974.

²¹ HER, Ex. C-1, May 17, 2016 Letter from Carol Helland to Josh Whited ("Rejection Letter"), pp. 751-752.

1 agreement to which KDC was not a party. Pursuant to a stipulation between the parties,
2 the Court dismissed KDC from this matter on November 30, 2016.²²

- 3 19. On December 16, 2016, Judge Ramseyer granted Tateuchi's Motion for Summary
4 Judgement, incorporating her oral ruling by reference.²³ In her oral ruling, Judge
5 Ramseyer described the Stipulation as *ultra vires*,²⁴ irregular,²⁵ outside of what is
6 required by the law,²⁶ outside of the Land Use Code provisions for the normal process
7 that would initiate a permit revocation proceeding,²⁷ and beyond the requirements of
8 the code,²⁸ concluding:

9 "and so I don't want there to be any misunderstanding that I'm finding that
10 somehow this — — it's okay to use this departure."²⁹

11 She further determined that the Stipulation did not implicate KDC's property
12 right in the CUP because it did not mandate a substantive outcome:

13 "I think it's clear that the stipulation [erroneously]³⁰, under the procedures
14 laid out in the Land Use Code, allowed the plaintiff to initiate, through
15 application, a permit revocation proceeding. But that's really all it does."³¹

16 Based on her determination that the Stipulation did no more than establish a
17 process, Judge Ramseyer ordered the City to specifically perform its
18 obligations under the Stipulation by reinstating and fully processing Tateuchi's
19 CUP revocation application.³²

- 20 20. On January 25, 2017, Tateuchi filed an application to revoke KDC's CUP,
21 raising arguments identical to the arguments presented in her Request for
22 Formal Land Use Code Interpretation and 2016 revocation application.³³

- 23 21. On March 1, 2018, after the public comment and meeting process for a Process
24 I application, the Director issued his Recommendation on the 2017 CUP
25 revocation application, recommending denial of the application, finding that
26 KDC had neither abandoned its use nor demonstrated an intent to abandon its
27 use, and that KDC had not obtained its permit through misrepresentation of
28 material fact or tried to mislead the City.³⁴

29 ²² HER, Ex. A-1, pp. 1714-1717.

30 ²³ HER, Ex. C-1, Order on Tateuchi's Motion for Summary Judgment, pp. 946-948.

31 ²⁴ HER, Ex. P-1, Verbatim Report of Proceedings ("VRP"), p. 1578, line 4.

32 ²⁵ HER, Ex. P-1, VRP, p. 1577, line 13, p. 1578, line 4.

33 ²⁶ HER, Ex. P-1, VRP, p. 1575, lines 21-22.

34 ²⁷ HER, Ex. P-1, VRP, p. 1578, lines 4-6.

35 ²⁸ HER, Ex. P-1, VRP, p. 1578, lines 9-10.

36 ²⁹ HER, Ex. P-1, VRP, p. 1578, lines 10-12.

37 ³⁰ The VRP incorrectly uses the word "earnestly." Judge Ramseyer used the word "erroneously." Ex. P-1,
38 Declaration of Virginia Nicholson, p. 1524-1525, ¶ 4.

39 ³¹ HER, Ex. P-1, VRP, p. 1576, lines 2-6.

40 ³² HER, Ex. C-1, Order on Tateuchi's Motion for Summary Judgment, pp. 946-948.

41 ³³ HER, Ex. C-1, 2017 Application to Revoke CUP, pp. 3-29

42 ³⁴ HER, DSD Land Use Staff Report, pp. 89-98.

22. On April 5, 2018, the Hearing Examiner denied Tateuchi's application.³⁵

23. On April 18, 2018, Tateuchi appealed the Hearing Examiner's decision to the City Council.³⁶

III. STATEMENT OF THE ISSUES

The issues presented in this appeal are:

A. Whether the Hearing Examiner's Conclusion of Law that Tateuchi did not meet her initial burden of proving abandonment by a preponderance of the evidence is supported by material and substantial evidence.

B. Whether the Hearing Examiner's Conclusion of Law that Tateuchi did not show any material representation of fact that would support revocation is supported by material and substantial evidence.

IV. ISSUES NOT BEFORE THE CITY COUNCIL

In her appeal statement, Tateuchi explains that she has "consistently questioned the safety and appropriateness of the proposed helistop."³⁷ As the Hearing Examiner ruled at the prehearing conference, those arguments seek to re-litigate the CUP and were not properly before the Hearing Examiner.³⁸ Nor are they properly before the City Council.

V. ARGUMENT AND AUTHORITY

The burden of proof of abandonment and misrepresentation of material fact is Tateuchi's. Both require a high bar which Tateuchi has not met and cannot meet.

DSD has found three times that KDC neither abandoned its CUP nor misrepresented material facts in obtaining it: in 2015 when it issued its Formal Land Use Code Interpretation; in 2016 when it rejected Tateuchi's 2016 application to revoke the CUP; and in its 2017 recommendation to the Hearing Examiner in the matter on appeal to the City Council. In each of these applications, she presented the same arguments. After carefully considering her arguments, the Hearing Examiner correctly concluded that Tateuchi failed to show either abandonment or misrepresentation. The City Council should deny her appeal.

³⁵ HER, Hearing Examiner's Decision, pp. 1-14.

³⁶ HER, Appeal, pp. 15-88.

³⁷ HER, Appeal, p. 18, lines 3-5.

³⁸ HER, Ex. A-4, Transcript of Telephonic Preliminary Conference, p. 1856, line 14 - 1857, line 1.

1 **A. KDC's CUP is a valuable property right.**

2 In her oral ruling, Judge Ramseyer recognized that KDC's CUP is a valuable property
3 right.³⁹ The right to use and enjoy land is a valuable property right.⁴⁰ Development rights,
4 including conditional use permits, are beyond question a valuable right in property.⁴¹

5 **B. Tateuchi Does Not Have Standing to Apply to Revoke KDC's**
6 **Permit.**

7 KDC has steadfastly maintained that Tateuchi does not have standing to apply to
8 revoke its permit.⁴² Both Judge Ramseyer and the Hearing Examiner acknowledged that the
9 Land Use Code does not provide Tateuchi standing. *See*, LUC 20.35.030.A.1. For this reason,
10 Judge Ramseyer found that the Stipulation was *ultra vires*. Nevertheless, she ordered the City
11 to "fully process[] the application for revocation of Kemper's conditional use permit."⁴³ Judge
12 Ramseyer reasoned that the application process does not mandate an outcome.⁴⁴

13 The Hearing Examiner concluded that, given Judge Ramseyer's ruling that the
14 Stipulation is enforceable, the fact that the Code does not provide standing is a moot point.⁴⁵

15 **C. The Hearing Examiner correctly concluded that Tateuchi did not**
16 **meet her initial burden of proving abandonment by a**
17 **preponderance of the evidence.**

18 1. **The Use is a Helistop.**

19 The use in question is a helistop. In his Formal Land Use Code Interpretation, the
20 Director correctly found:

21 ...The use approved is defined in the land use code as a helistop, which is broader than
22 Tateuchi's narrow interpretation of only including the landing and departures of

23 ³⁹ HER, Ex. P-1, VRP, p. 1577, lines 10-12.

24 ⁴⁰ *Mission Springs, Inc. v. City of Spokane*, 134 Wn.2d 947, 962-63, 954 P.2d 250 (1998).

25 ⁴¹ *Id.*, citing *Louthan v. King County*, 94 Wn.2d 422, 428, 617 P.2d 977 (1980).

26 ⁴² HER Ex. C-1, April 6, 2016 letter from Alison Moss ("Moss") to Mike Brennan, pp. 978-0979; HER Ex. P-1, Declaration of Virginia Nicholson, Exhibit B, February 28, 2017 email from Virginia Nicholson to Carol Hamlin and June 23, 2017 letter from Moss to Matt McFarland, pp. 1598-1601; Ex. C-1, September 5, 2017 letter from Moss to Riley Pittman and Elizabeth Stead, pp. 420-431; HER, Ex. C-3, Transcript of June 27, 2017 Public Meeting, p. 1506, lines 2-19; and HER, Ex. P-1, KDC's Motion to Dismiss, pp. 1514-1523.

⁴³ HER, Ex. C-1, Order on Tateuchi's Motion for Summary Judgment, pp. 946-948.

⁴⁴ HER, Ex. P-1, VRP, p. 1575, line 22 - p. 1576, line 6; p. 1575, lines 21-22; and p. 1578, lines 3-6.

⁴⁵ HER, Hearing Examiner's Decision, Conclusion of Law 2, p. 7.

1 helicopters. KDC established its use, a private [helistop], when it received its final
2 inspection and certificate of occupancy from the City and made the facility available
3 for helicopter landings. Helicopter flights are not necessary to establish a helistop.
4 What is necessary to establish a helistop is having infrastructure, maintenance,
5 procedures, processes, and operations established in compliance with the city code and
6 conditions of the CUP. (Emphasis Added).⁴⁶

7 2. Tateuchi Has the Burden of Proof

8 LUC 20.30B.170.B.1 authorizes the Hearing Body, in this case the Hearing Examiner,
9 to revoke a CUP if:

10 The use for which the approval was granted has been abandoned for a period of at least
11 one year.

12 Tateuchi bears the burden of demonstrating abandonment. For Process I applications such as
13 this, LUC 20.35.140 provides:

14 The applicant carries the burden of proof and must demonstrate that a preponderance
15 of the evidence supports the conclusion that the application merits approval or approval
16 with modifications. In all other cases, the Hearing Examiner shall deny the application.

17 The case law also places the initial burden of proof of abandonment on Tateuchi. The
18 Hearing Examiner succinctly summarizes the case law on abandonment in Conclusion of Law
19 3. *Van Sant v. Everett*, 69 Wn. App. 641, 649, 849 P. 2d 1276 (1993), adopted the common
20 law doctrine that, once a nonconforming use is established, it is the burden of the party
21 claiming abandonment to prove such. *Van Sant* held that abandonment of a nonconforming
22 use depends upon the concurrence of two factors: (1) an intention to abandon; and (2) an overt
23 act, or failure to act, which carries the implication that the owner does not claim or retain any
24 interest in the right to the nonconforming use. *Skamania Cy. v. Woodall*, 104 Wn. App. 525,
25 16 P.3d 701, *rev. denied*, 144 Wn.2d 1021 (2001), held that, where an ordinance references a
26 time frame, such as discontinuance for one year, once the person seeking to prove
discontinuance proves that the party claiming a nonconforming use has not used the property
for that time period, a rebuttable presumption arises that he or she intended to abandon the

⁴⁶ HER, Ex. C-1, Formal Land Use Code Interpretation, p. 744.

1 nonconforming use.

2 Here, the Land Use Code references abandonment for a period of at least one year.
3 Thus, if Tateuchi had shown that, for a period of at least one year, KDC (1) intended to abandon
4 its helistop; and (2) committed an overt act implying that it does not claim or retain any interest
5 in its helistop, the burden would shift to KDC to demonstrate that it had not abandoned its use.

6 3. The Hearing Examiner's Conclusion of Law 3.

7 Applying the code and case law discussed above, the Hearing Examiner concluded:

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

18 Similarly, the absence of helicopters [sic] landings at the Bellevue Place Helistop is
19 not determinative of discontinuance. As long as KDC has actively maintained and
20 even improved the helistop, it has not committed any overt act evidencing
21 abandonment. Nor does the lack of helicopter landings evidence intent to abandon.
(Emphasis added).

22 The Examiner concludes that while Tateuchi correctly cited the law, her argument fails
23 because a lack of helicopter landings does not demonstrate by a preponderance of the
24 evidence abandonment or discontinuance. In this case, the Examiner concludes that
25 the burden does not shift back to KDC, because Tateuchi did not meet the initial burden
26 of proving abandonment by a preponderance of the evidence.⁴⁷

27 In her appeal, Tateuchi argues that the Code does not require the *Van Sant* factors
28 (intent to abandon and an overt act implicating abandonment).⁴⁸ The Code requires that
29 Tateuchi demonstrate abandonment. But the Code does not define the term "abandoned." As
30 the Hearing Examiner concluded, *Skamania Cy., supra*, is on point. In that case, the regulation
31 at issue did not define the term "discontinued." The Court of Appeals looked to state law to

32 ⁴⁷ HER, Hearing Examiner's Decision, Conclusion of Law 3.c, pp. 8-9.

⁴⁸ HER, Appeal, ¶ 6(vi), p. 24.

1 define “discontinued,” applying the *Van Sant* factors. 104 Wn. App. at 540. The Hearing
2 Examiner appropriately followed *Skamania Cy., supra*, and employed the *Van Sant* factors.

3 4. Tateuchi’s “Evidence.”

4 The only “evidence” of abandonment Tateuchi offered in each of her three applications
5 and the related voluminous records was lack of helicopter landings. For the first time at the
6 Hearing Examiner’s hearing on her 2017 CUP revocation application, she speculated that KDC
7 might not have satisfied various conditions of the CUP, such as the requirement to maintain a
8 weather station. Not only did she not present this argument to DSD so that it could evaluate it
9 in its recommendation to the Hearing Examiner, she offered no evidence whatsoever in support
10 of her insinuations.

11 In her appeal, Tateuchi argued that the Hearing Examiner’s conclusion (underlined
12 above) that KDC has actively maintained and even improved the helistop is not supported by
13 substantial evidence.⁴⁹ The record demonstrates otherwise. KDC’s actions in, among other
14 things, obtaining a building permit and completing the improvements required to upgrade the
15 facility to current FAA design standards and city building code, preparing and providing the
16 City with its Operations Manual, maintaining a webpage,⁵⁰ and timely filing of flight logs
17 demonstrate both improvement and maintenance of the helistop. Further, these actions and
18 KDC’s steadfast opposition to Tateuchi’s unrelenting efforts to have its permit revoked
19 demonstrate its intent to maintain its use. The Hearing Examiner correctly concluded that
20 Tateuchi has not borne her burden of proof in demonstrating abandonment. The Hearing
21 Examiner’s Conclusions of Law are supported by material and substantial evidence. The City
22 Council should deny her appeal.

23
24
25
26 ⁴⁹ HER, Appeal, ¶ 6(v), p. 24.

⁵⁰ HER, Ex. C-1, screen shot of webpage, p. 729.

1 **D. The Hearing Examiner correctly concluded that Tateuchi has**
2 **failed to show any material representation of fact that would**
3 **support revocation.**

4 LUC 20.30B.170.B.2 authorizes the Hearing Body to revoke a CUP if approval of the
5 permit was obtained by misrepresentation of material fact.

6 CUP Condition A.3⁵¹ limits use of the helistop to light turbine, twin-engine helicopters.
7 Tateuchi's counsel argued to the Hearing Examiner that KDC "sold"⁵² or "insisted on"⁵³ this
8 condition. In her applications for a Formal Land Use Code Interpretation and her two
9 applications to revoke KDC's CUP her counsel variously argued that she "advocated"⁵⁴ for or
10 "explicitly relied"⁵⁵ on this condition to obtain the CUP. The evidence demonstrates
11 otherwise, and certainly Tateuchi knows better, yet Tateuchi continues to present these
12 unsupported and unsupportable statements in her numerous and repetitive appeals.

13 1. Misrepresentation of material fact.

14 A "knowing misrepresentation of a material fact" is synonymous with "fraud." Fraud
15 is "a knowing misrepresentation or knowing concealment of a material fact made to induce
16 another to act to his or her detriment." Black's Law Dictionary (10th ed. 2014).

17 Thus, Tateuchi bears the burden of proof that KDC (1) misrepresented a fact and (2)
18 that fact induced the Hearing Examiner to recommend that the City Council approve the CUP
19 and the City Council to approve the CUP.

20 2. CUP Condition A.3.

21 In 2008, KDC applied for a CUP to activate and use an existing helicopter landing pad

22 ⁵¹ HER, Ex. C-1, Ordinance 6000, p. 644.

23 ⁵² Tateuchi's counsel argued to the Hearing Examiner that "[KDC], to sell this to the city council, obtained a
24 condition, which they supported throughout the approval process and then the court process for twin-engine
25 helicopters only of a certain type, and that was explicitly for safety. HER, Transcript, p. 170, lines 5-9.

26 ⁵³ Tateuchi's counsel argued to the Hearing Examiner that "Kemper insisted on that condition as one – or
 insisted that the condition was one that made the Council decision supportable, approvable..." HER, Transcript,
 p. 175, lines 12-15.

⁵⁴ In her appeal, Tateuchi argues that KDC "advocated" for the twin-engine condition. HER, Appeal, p. 17,
 lines 3-6.

⁵⁵ February 4, 2016 Letter from Peter Eglick and Joshua Whited to Chad Barnes, Carol Hamlin and Carol
 Helland, p. 4, attached to 2016 and 2017 Revocation Applications, HER, Appeal, pp. 56-65 at p. 59.

1 located on the roof of the Bank of America building.⁵⁶ The Eurocopter EC-135, a twin-engine
2 helicopter, was the design helicopter used to size the landing pad.⁵⁷ After a two-day public
3 hearing, on July 20, 2009 the Hearing Examiner issued his decision approving the CUP. The
4 Hearing Examiner's Decision limited use of the helistop to light turbine helicopters:

5 **Type of Helicopter.** Only light turbine helicopters, examples of which are the
6 Eurocopter EC-135, the Eurocopter AS-350B, and the Bell Jet Ranger, shall be
approved to land at this Helistop....⁵⁸

7 The referenced Eurocopter models are twin-engine helicopters; the Bell Jet Ranger is a single-
8 engine helicopter.

9 Tateuchi and others appealed the Hearing Examiner's July, 2009 Decision to the City
10 Council, which held two evenings of hearings.⁵⁹ The City Council remanded the matter to the
11 Hearing Examiner to receive a "no objection" letter from the FAA and testimony and other
12 evidence from the other parties regarding FAA's review. On remand, the Hearing Examiner
13 held two evenings of hearings and issued a recommendation that the City Council remand the
14 matter to the DSD to contact the FAA. The City Council again remanded the matter to the
15 Hearing Examiner for the limited purpose of accepting new evidence, primarily related to the
16 FAA's review. The Hearing Examiner held a final day of hearings and issued his final
17 recommendation on December 16, 2010.⁶⁰

18 In the last hour on the Hearing Examiner's last day of hearings, he received evidence
19 from Tateuchi regarding helicopter accidents. That evidence presented data of civil helicopter
20 safety trends over the period 2005-2009 for all phases of flight; all categories of uses, including
21 off-shore oil, heavy lift, and emergency medical services; at all hours.⁶¹ Tateuchi argued that
22 single-engine helicopters would create a significant risk to people and property because, if an

23 ⁵⁶ HER, Ex. C-1, HE July, 2009 Decision, ¶ 2; Finding 6, pp. 484-485; Finding 35, pp. 490-491.

24 ⁵⁷ HER, Ex. C-1, HE July, 2009 Decision, Finding 19, p. 487 and Finding 25, p. 488.

25 ⁵⁸ HER, Ex. C-1, HE July, 2009 Decision, Condition 3, p. 497.

26 ⁵⁹ HER, Ex. C-1, HE Final Recommendation, ¶ 2, p. 563.

⁶⁰ HER, Ex. C-1, HE Final Recommendation, pp. 563-589.

⁶¹ HER, Ex. C-1, KDC's Motion to Dismiss ("Motion to Dismiss LUPA Petition"), Ex. B, Five-Year
Comparative U.S. Civil Helicopter Safety Trends, stamped "dated received 8/25/10," p. 665.

1 engine stalls, there would be no way to prevent an accident, which would not be the case with
2 a twin-engine helicopter.⁶² Her expert, Gordon Jones, testified to the Hearing Examiner that
3 there was a “plethora of twin engine helicopters available.”⁶³

4 Based on this last minute information, the Hearing Examiner modified his
5 recommended conditions of approval, explaining:

6 Based on new evidence received during the remand hearings, it is recommended that
7 the following conditions for approval of the applicant’s Conditional Use Permit ...
8 application be slightly modified:...[A.3] Type of helicopter...(Emphasis added)⁶⁴

9 The Hearing Examiner revised recommended Condition A.3 as follows (added language is
10 underlined; deleted language is stricken through):

11 **Type of Helicopter:** Only light turbine, twin engine helicopters, (examples of which
12 ~~are the~~ include Eurocopter EC-135, Eurocopter AS-350355B Ecureuil 2, and the Bell
~~Jet Ranger 206 models~~); shall be approved to land at ~~this~~ the Helistop....⁶⁵

13 The City Council approved the CUP, adopting Hearing Examiner Conclusion of Law 3 (stating
14 that Condition A.3 had been slightly modified) and the modified condition of approval.⁶⁶

15 Tateuchi then appealed the CUP to Superior Court arguing, in part, that: (1) the Hearing
16 Examiner and City Council engaged in unlawful procedure by imposing Condition A.3 without
17 giving the parties notice and an opportunity to be heard; and (2) the record contained no
18 evidence that twin-engine helicopters were capable of meeting the City noise standards
19 because the tests that were conducted were conducted with single-engine helicopters. In other
20 words, she sought to have the Superior Court overturn the CUP based on the imposition of a
21 condition she requested.

22
23
24 ⁶² HER, Ex. C-1, HE Final Recommendation, Finding 48, p. 576.

25 ⁶³ HER, Ex. C-1, Transcript of August 25, 2010 Remand Hearing, p. 550.

26 ⁶⁴ HER, Ex. C-1, HE Final Recommendation, Conclusion of Law 3, p. 584.

⁶⁵ HER, Ex. C-1, HE Final Recommendation, Condition A.3, p. 585.

⁶⁶ HER, Ex. C-1, Ordinance 6000, Section 1 (adoption of Conclusion of Law 3), p. 641, and Section 4.a
(Condition 3.A, Type of Helicopter), p. 644.

1
2 KDC moved to dismiss her claims for failure to exhaust administrative remedies.⁶⁷ Its
3 motion included the portion of the August 25, 2010 hearing transcript in which Tateuchi's
4 expert testified, in response to a question from her counsel, that "there's a plethora of twin
5 engine helicopters available."⁶⁸ In her response to KDC's motion, Tateuchi:

- 6
- 7 • Explained that "after all opportunities for public testimony were completed, the
8 Hearing Examiner added a condition requiring the use of dual engine helicopters;"
 - 9 • Conceded that KDC "is correct that the question of single-engine versus dual-engine
10 helicopter's safety arose during the second remand hearing;"
 - 11 • Conceded she had been the one to present evidence on this topic;
 - 12 • Pointed out that, after the City Council received the Hearing Examiner's Final
13 Recommendation which contained the condition limiting use to twin-engine
14 helicopters, no party had the opportunity to present testimony or argument to the City
15 Council; and
 - 16 • Observed that the issue of twin-engine versus single-engine helicopters arose many
17 months after the City issued its environmental threshold determination.⁶⁹

18 The Superior Court ultimately denied Tateuchi's appeal.

19 These facts make clear that KDC did not "advocate" for or "explicitly rely" on, "sell,"
20 or "insist on" the twin-engine helicopter limitation before the Hearing Examiner, the City
21 Council, or Superior Court. Rather, the Hearing Examiner imposed this limitation in response
22 to evidence Tateuchi submitted at the end of the fifth day of five days of hearings held over
23 the span of 15 months. In a Conclusion of Law, the Hearing Examiner described the revision
24 as a "slight modification." The City Council adopted his Conclusion of Law and the Superior
25 Court denied Tateuchi's appeal. Contrary to her assertions, the limitation to twin-engine
26 helicopters was not central to the City Council's approval of the CUP or the Superior
Court's denial of her appeal.

27
28
29
30
31
32
33
34
35
36
37
38
39
40
41
42
43
44
45
46
47
48
49
50
51
52
53
54
55
56
57
58
59
60
61
62
63
64
65
66
67
68
69
70
71
72
73
74
75
76
77
78
79
80
81
82
83
84
85
86
87
88
89
90
91
92
93
94
95
96
97
98
99
100
101
102
103
104
105
106
107
108
109
110
111
112
113
114
115
116
117
118
119
120
121
122
123
124
125
126
127
128
129
130
131
132
133
134
135
136
137
138
139
140
141
142
143
144
145
146
147
148
149
150
151
152
153
154
155
156
157
158
159
160
161
162
163
164
165
166
167
168
169
170
171
172
173
174
175
176
177
178
179
180
181
182
183
184
185
186
187
188
189
190
191
192
193
194
195
196
197
198
199
200
201
202
203
204
205
206
207
208
209
210
211
212
213
214
215
216
217
218
219
220
221
222
223
224
225
226
227
228
229
230
231
232
233
234
235
236
237
238
239
240
241
242
243
244
245
246
247
248
249
250
251
252
253
254
255
256
257
258
259
260
261
262
263
264
265
266
267
268
269
270
271
272
273
274
275
276
277
278
279
280
281
282
283
284
285
286
287
288
289
290
291
292
293
294
295
296
297
298
299
300
301
302
303
304
305
306
307
308
309
310
311
312
313
314
315
316
317
318
319
320
321
322
323
324
325
326
327
328
329
330
331
332
333
334
335
336
337
338
339
340
341
342
343
344
345
346
347
348
349
350
351
352
353
354
355
356
357
358
359
360
361
362
363
364
365
366
367
368
369
370
371
372
373
374
375
376
377
378
379
380
381
382
383
384
385
386
387
388
389
390
391
392
393
394
395
396
397
398
399
400
401
402
403
404
405
406
407
408
409
410
411
412
413
414
415
416
417
418
419
420
421
422
423
424
425
426
427
428
429
430
431
432
433
434
435
436
437
438
439
440
441
442
443
444
445
446
447
448
449
450
451
452
453
454
455
456
457
458
459
460
461
462
463
464
465
466
467
468
469
470
471
472
473
474
475
476
477
478
479
480
481
482
483
484
485
486
487
488
489
490
491
492
493
494
495
496
497
498
499
500
501
502
503
504
505
506
507
508
509
510
511
512
513
514
515
516
517
518
519
520
521
522
523
524
525
526
527
528
529
530
531
532
533
534
535
536
537
538
539
540
541
542
543
544
545
546
547
548
549
550
551
552
553
554
555
556
557
558
559
560
561
562
563
564
565
566
567
568
569
570
571
572
573
574
575
576
577
578
579
580
581
582
583
584
585
586
587
588
589
590
591
592
593
594
595
596
597
598
599
600
601
602
603
604
605
606
607
608
609
610
611
612
613
614
615
616
617
618
619
620
621
622
623
624
625
626
627
628
629
630
631
632
633
634
635
636
637
638
639
640
641
642
643
644
645
646
647
648
649
650
651
652
653
654
655
656
657
658
659
660
661
662
663
664
665
666
667
668
669
670
671
672
673
674
675
676
677
678
679
680
681
682
683
684
685
686
687
688
689
690
691
692
693
694
695
696
697
698
699
700
701
702
703
704
705
706
707
708
709
710
711
712
713
714
715
716
717
718
719
720
721
722
723
724
725
726
727
728
729
730
731
732
733
734
735
736
737
738
739
740
741
742
743
744
745
746
747
748
749
750
751
752
753
754
755
756
757
758
759
760
761
762
763
764
765
766
767
768
769
770
771
772
773
774
775
776
777
778
779
780
781
782
783
784
785
786
787
788
789
790
791
792
793
794
795
796
797
798
799
800
801
802
803
804
805
806
807
808
809
810
811
812
813
814
815
816
817
818
819
820
821
822
823
824
825
826
827
828
829
830
831
832
833
834
835
836
837
838
839
840
841
842
843
844
845
846
847
848
849
850
851
852
853
854
855
856
857
858
859
860
861
862
863
864
865
866
867
868
869
870
871
872
873
874
875
876
877
878
879
880
881
882
883
884
885
886
887
888
889
890
891
892
893
894
895
896
897
898
899
900
901
902
903
904
905
906
907
908
909
910
911
912
913
914
915
916
917
918
919
920
921
922
923
924
925
926
927
928
929
930
931
932
933
934
935
936
937
938
939
940
941
942
943
944
945
946
947
948
949
950
951
952
953
954
955
956
957
958
959
960
961
962
963
964
965
966
967
968
969
970
971
972
973
974
975
976
977
978
979
980
981
982
983
984
985
986
987
988
989
990
991
992
993
994
995
996
997
998
999
1000

⁶⁷ HER, Ex. C-1, Motion to Dismiss LUPA Petition, pp. 649-668.

⁶⁸ HER, Ex. C-1, Motion to Dismiss LUPA Petition, 666.

⁶⁹ HER, Ex. C-1, Petitioner's Response to Respondents' Motion to Dismiss, p. 669, lines 22-24; p. 674, lines 22-23; p. 675, lines 4-6; p. 671, lines 8-14; p. 676, line 22 – p. 677, line 2 ("Petitioners were not required to appeal issues which do not exist.")

1 In the course of discovery for Tateuchi's appeal of the Formal Land Use Code
2 Interpretation, KDC provided Tateuchi with several emails in which KDC's counsel and
3 consultant discussed the number of twin-engine helicopters available and whether to seek
4 amendment of Condition A.3. Tateuchi offered these emails as evidence of misrepresentation
5 in her 2016 application to revoke KDC's CUP. In rejecting the application, the Land Use
6 Services Director advised that she had considered the correspondence Tateuchi provided as
7 well as the staff report, project file, hearing records for the original CUP application and the
8 Superior Court proceedings and found no evidence to support Tateuchi's allegation of
9 misrepresentation.⁷⁰

10 In her 2017 application to revoke KDC's CUP, Tateuchi presented the same handful
11 of emails. These emails occurred from April 18, 2011 (some 4 months after the Hearing
12 Examiner's Final Recommendation) to November 22, 2011, a few days before the Superior
13 Court's order denying her appeal. It is evident from these emails that KDC, its consultant, and
14 counsel were trying to understand the effect of a condition that was imposed at literally the
15 eleventh hour and which it did not seek. The emails demonstrate that, at that time, the
16 predominant charter helicopters in the region were single-engine helicopters, but that,
17 increasingly, corporate operators, such as Microsoft, were upgrading to light, twin-engine
18 helicopters. Thus, the condition might limit charter helicopters, but would accommodate
19 corporate operators.

20 After observing that the 2017 application presented arguments regarding
21 misrepresentation that were identical to the arguments previously raised in the Request for
22 Formal Land Use Code Interpretation and the 2016 application to revoke the CUP,⁷¹ DSD
23 provided the following recommendation to the Hearing Examiner:
24
25

26 ⁷⁰ HER, Ex. C-1, Rejection Letter, pp. 751-752.

⁷¹ HER, DSD Land Use Staff Report, p. 93.

1 ...Here, KDC's application underwent a lengthy and robust review, including the
2 Council directing two remands to the Hearing Examiner for additional fact-finding and
3 recommendations to the Council before the Council finally approved KDC's
4 application. The Hearing Examiner's Final Recommendation contains over 80 findings
5 and 22 conditions of approval. The topics included evaluation of the helistop by the
6 Federal Aviation Administration, consideration of prevailing winds and obstructions
7 (such as buildings) in relation to the flight path, selection of the approach and departure
8 path, and the flight path [footnote omitted]. The type of helicopter allowed to use the
9 facility is but one factor relevant to that decision.

6 The evidence in the record does not support the applicant's argument that the City
7 Council's approval of KDC's CUP was obtained through misrepresentation of a
8 material fact. KDC's intent was to establish a helistop regardless of the engines used
9 by the helicopter landing on it.

9 KDC's actions by applying to modify an approved CUP is permitted by the Land
10 Use Code and does not show an intent to deceive or otherwise establish that KDC
11 obtained its CUP by misrepresentation. This is the process required by the Land Use
12 Code to modify or amend an approved CUP.⁷²

11 3. The Hearing Examiner's Conclusion of Law 4.

12 The Examiner concluded:

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

17 An applicant has the legal ability under the code to seek modification of a CUP at any
18 time after approval. LUC 20.30B.170.A. The emails offered by to Tateuchi show no
19 more than an applicant's experts discussing possible strategies to support their client.
20 Tateuchi has failed to show any material representation of fact that would support
21 revocation.⁷³

20 The Hearing Examiner correctly concluded that the referenced emails show no more
21 than an applicant's experts discussing possible strategies to support their client. As discussed
22 in § V.D.2, her Conclusion of Law is supported by material and substantial evidence. The
23 Council should deny the appeal.

25 ⁷² HER, DSD Land Use Staff Report, p. 97.

26 ⁷³ HER, Hearing Examiner's Decision, Conclusion of Law 4, pp 9-10.

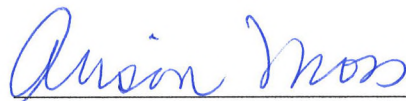
1 **VI. Conclusion**

2 Tateuchi's opposition to the helistop has been ongoing for nearly seven years. KDC
3 has been forced to pay the costs of defense of meritless claims over these years in many forums,
4 hearings, administrative proceedings, and lawsuits. The Hearing Examiner's Conclusions of
5 Law are correct and supported by material and substantial evidence in the record. The City
6 Council should deny Tateuchi's appeal.

7 Dated this 13th day of June, 2018.

8 SCHWABE, WILLIAMSON & WYATT, P.C.

9
10 By:



Alison Moss, WSBA #12767
Virginia Nicholson, WSBA #39601
*Attorneys for Kemper Development
Company*

CERTIFICATE OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on the 13th day of June, 2018, I arranged for service of the foregoing KEMPER DEVELOPMENT COMPANY'S MOTION TO DENY TATEUCHI's APPLICATION to the parties to this action by email:

Peter Eglick
Josh Whited
Eglick & Whited PLLC
1000 Second Ave., Ste. 3130
Seattle, WA 98104
whited@ewlaw.net
eglick@ewlaw.net
schmidt@ewlaw.net

Matt McFarland
Assistant City Attorney
City of Bellevue
450 110th Ave. NE
P.O. Box 90012
Bellevue, WA 98009
mmcfarland@bellevuewa.gov

City of Bellevue
City Clerk
450 11th Avenue, NE
P.O. Box 90012
Bellevue, WA 98009
cityclerk@bellevuewa.gov

Cheryl Zakrzewski
City of Bellevue
450 110th Ave. NE
P.O. Box 90012
Bellevue, WA 98009
czakrzewski@bellevuewa.gov

Nicholas Melissinos
City of Bellevue
450 110th Ave. NE
P.O. Box 90012
Bellevue, WA 98009
nmelissino@bellevuewa.gov

Karen Hohu
Hearing Examiner Program
Coordinator
City Clerk's Office
450 110th Ave. NE
P.O. Box 90012
Bellevue, WA 98009
khohu@bellevuewa.gov


Tara Laing, Legal Assistant