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October 17, 2014

Via Hand Delivery

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City of Bellevue Development Services
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Re: Request for Formal Land Use Code Interpretation Concerning Kemper Development Company's Abandoned Helistop

Dear Ms. Helland, Ms. Hamlin and Ms. Drews:

Pursuant to Section 20.30K of the Bellevue Land Use Code (LUC), we are writing on behalf of our client, Mrs. Ina Tateuchi, to request a formal Land Use Code interpretation concerning Kemper Development Company's (KDC) abandoned helistop and its "on hold" application to now make use of the helistop by eliminating a key permit condition imposed by the City Council and Hearing Examiner. More specifically, Mrs. Tateuchi requests that the Director issue a formal code interpretation that:

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- (1) The Conditional Use Permit (CUP) for the helistop approved use of the helistop only by twin engine helicopters. KDC's helistop usage reports confirm that the helistop has not been used since the CUP was approved by the King County Superior Court on November 30, 2011. Accordingly, "[t]he use for which the approval was granted has been abandoned for a period of at least one year" under LUC 20.30B.170.B.1.
- (2) In obtaining its CUP for the helistop, KDC represented that the helistop was designed for twin engine helicopters and would be utilized by twin engine helicopters. However, the helistop has not been utilized by twin engine helicopters and will not be used by twin engine helicopters. In fact, KDC has indicated that if the CUP is not modified to allow single engine helicopter usage, "the practical effect of the twin engine restriction is the Helistop will not be used." Letter from Dearborn to Helland dated February 20, 2013. This confirms abandonment of the approved use. It also demonstrates that "[a]pproval of the permit was obtained by misrepresentation of material fact" under LUC 20.30B.170.B.2.
- (3) In light of (1) and (2) above and consistent with LUC 20.30B.170.B, the Director will initiate revocation proceedings and recommend to the Hearing Examiner that KDC's CUP for the helistop be revoked. Revocation is a Process 1 decision that will proceed consistent with LUC 20.35.100. The Hearing Examiner's decision is ultimately appealable to the City Council.
- (4) In the City's April 10, 2014 Weekly Permit Bulletin, the City published notice that it was putting KDC's application to modify the helistop CUP and a related formal code interpretation initiated by the Director concerning application of LUC 20.30B.170 to the KDC modification proposal "on hold". The notice indicates: "After the March 18, 2014, helicopter crash in Seattle, the applicant submitted a letter dated April 4, 2014, requesting the City suspend review of its application until the National Transportation Safety Board completes its investigation and final report of the March 18, 2014, helicopter crash in Seattle. Safety information from the NTSB's investigation will be relevant to the City's review of this application." The City relied on LUC 20.40.510 for the Director's authority to place the pending applications on hold. However, LUC 20.40.510 does not provide such authority, and there is no legal authority or basis for placing applications "on hold" in this manner.

An interpretation regarding application of LUC 20.30B.170.B.1 to KDC's helistop is necessary to ensure that KDC does not claim the right to make future use of the helistop when it has never been utilized consistent with the approval granted and has been abandoned as a result. An interpretation regarding application of LUC 20.30B.170.B.2 is necessary to ensure that KDC does not claim the right to make future use of the helistop when the CUP was obtained by

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misrepresentation of material fact. In light of the abandonment of the approved CUP usage and the misrepresentations of material fact made to obtain the permit, revocation proceedings consistent with LUC 20.30B.170.B and LUC 20.35.100 are appropriate and necessary to prevent future unlawful use of the helistop. Finally, an interpretation regarding application of LUC 20.40.510 is necessary because there is no factual or legal basis for the Director's decision to put KDC's application to modify the helistop CUP and a related formal code interpretation initiated by the Director concerning application of LUC 20.30B.170 to the proposal "on hold." In each instance, the requested interpretation is necessary to accomplish the purpose of the Code and protect the public interest.

Reasons and material in support of the interpretation are detailed below.

(1) The Use Granted by the CUP Has Been Abandoned.

Ordinance 6000 granting KDC a CUP for a twin-engine helistop was passed by the City Council on May 16, 2011. The CUP was affirmed by King County Superior Court on November 30, 2011. Tateuchi, et al. v. City of Bellevue, Kemper Development, et al., King County Superior Court No. 11-2-20007-8-SEA, Order and Judgment Denying Land Use Petition Relief dated November 30, 2011. Nearly three years have passed since KDC was authorized to land twin-engine helicopters at its helistop. In that time, KDC has not lawfully used the helistop, as confirmed by KDC's own helistop usage reports.¹ And KDC in fact has no plans to utilize the helistop for the landing of twin helicopters in the future, which is the sole use authorized by the CUP. *See* Letter from Dearborn to Helland dated February 20, 2013 ("the practical effect of the twin engine restriction is the Helistop will not be used.").

The City may revoke a conditional use permit upon finding that "[t]he use for which the approval was granted has been abandoned for a period of at least one year." LUC 20.30B.170.B.1. Here, the approved "use" has never occurred in nearly three years' time and KDC acknowledges that the approved use will, in fact, never occur. Accordingly, a finding by the City that "the use for which the approval has been granted has been abandoned for a period of at least one year" is compelled under the LUC and failure to make such a finding would be arbitrary and capricious, clearly erroneous, contrary to law, and an abuse of discretion.

In its earlier memorandum dated December 16, 2013, KDC argued against a finding of abandonment under LUC 20.30B.170.B.1 on the theory that "failure to use" the helistop is not the same as abandonment and that KDC did not intend to abandon the helistop as that term is used in nonconforming use cases. Kemper Development Company's Response to Tateuchi's

¹ KDC's monthly usage reports are in the City's files. Copies of the usage reports for April 2013 to November 2013 were also recently provided to the City by KDC as Exhibit A to the document titled "Kemper Development Company's Response to Tateuchi's Opposition dated December 16, 2013."

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Opposition dated December 16, 2013 at 9-10. KDC's argument is illogical and inconsistent with LUC 20.30B.170B.1.

More specifically, LUC 20.30B.170B.1 presumes that lack of the approved usage for a period of at least one year evidences intent to abandon that approved use. If this were not the case, the provision would not contain the language "for a period of at least one year." It instead would simply read: "[t]he use for which the approval was granted has been abandoned." In other words, the interpretation of LUC 20.30B.170B.1 which KDC suggests would render the language "for a period of at least one year" completely superfluous.

In fact, even in the nonconforming use context -- distinguishable from the situation here because those cases involve uses which have actually commenced and been established for some time -- a rebuttable presumption of abandonment arises when the nonconforming use goes unused for period longer than specified by ordinance. As explained by the Washington Court of Appeals in Miller v. City of Bainbridge Island, 111 Wn.App. 152, 164-65, 43 P.3d 1250 (Div.2 2002):

. . . when an ordinance establishes a set time beyond which a nonconforming use cannot remain unused without being forfeited, the burden shifts back to the owner to prove lack of intent to abandon: "If the ordinance references a time frame ... a rebuttable presumption arises that the land occupier has intended to abandon the nonconforming use." Skamania County v. Woodall, 104 Wash.App. 525, 540-41, 16 P.3d 701, review denied, 144 Wash.2d 1021, 34 P.3d 1232 (2001), cert. denied, 70 U.S.L.W. 3444 (U.S. April 1, 2002) (No. 01-958). See also Andrew v. King County, 21 Wash.App. 566, 572, 586 P.2d 509 (1978) (the cessation of a use for the period prescribed by the zoning code is prima facie evidence of an intent to abandon the nonconforming use).

The situation here is not even a close case: the approved usage has never occurred in three years' time and as such the use granted by the CUP has been abandoned per LUC 20.30B.170B.1. To the extent the nonconforming use case cited by KDC and/or KDC's intent are relevant here, KDC has unequivocally indicated that it will not utilize the helistop for the landing of twin engine helicopters, which was the use approved by the CUP.

(2) The CUP Was Obtained by Misrepresentation of Material Fact.

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

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

KDC Second Remand Mem. at 3. KDC also expressly represented to the City Council: “The EC 135 is expected to be the helicopter that is used most frequently. It is a two engine helicopter bur [sic] newer and quieter than either helicopter used in the noise tests. . . . So, the recorded noise levels are higher than those expected in actual operations.” Id. at 4. It was on the basis of these representations that the City Council approved the CUP.

KDC also made these same (mis)representations to the King County Superior Court when the CUP was challenged under the Land Use Petition Act (“LUPA”). KDC affirmatively assured the Court:

One type of twin-engine helicopter is the EC 135. This model is expected to be the one that will most frequently use the Helistop. It was the design helicopter used to size the landing pad. The EC 135 is a new generation of helicopter and is quieter than the models used in the flight tests and also 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.

KDC Motion to Dismiss dated July 5, 2011 at 3. KDC further represented to the Court:

The record is clear that the EC 135 is expected to be a frequent user of the Helistop. Pages 65 and 66 of the June 11, 2009 Hearing Transcript (Exhibit A). Yet the Petitioners [Tateuchi et al] never offered rebutting information that questioned these factual statements.

Id. at 5-6. In other words, KDC made a point of criticizing the LUPA Petitioners, including Mrs. Tateuchi, for questioning Kemper’s repeated reassurance that the twin engine EC 135 would be the primary craft landing at the site. Yet again, KDC lawyer told the court:

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

Response Memorandum of KDC dated October 31, 2011 at 16-17.

Not surprisingly, faced with the barrage of unequivocal assurances from KDC, the superior court upheld the Council CUP and denied the LUPA Petition. The Court’s November 30, 2011 Order concluded, “The Bellevue City Council’s denial of Petitioners’ administrative appeal and approval with conditions of the CUP application as contained in Ordinance No. 6000 is hereby upheld.” Id. at 3 (emphasis added). A thirty day period then followed with no appeals

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being filed; KDC fully accepted the newly issued CUP including the twin engine condition that it had so strongly advocated for and represented would be the operational norm.

However, little more than a month after the Court's decision became final, on February 19, 2012, KDC suddenly reversed course. KDC counsel e-mailed the City's Lacey Hatch "we will be bringing the helistop back soon requesting that the twin engine restriction be modified." Subsequently, KDC counsel sent this February 27, 2012 e mail to City staff:

From: Keith Dearborn [mailto:kdearborn@dearbornmoss.com]
Sent: Monday, February 27, 2012 8:30 AM
To: Helland, Carol
Cc: David Ketchum; 'Bill Brooks'; 'Jim Hill'
Subject: Meeting

Hi Carol. Hope all is well. KDC wants to amend the Helistop CUP to eliminate the 2 engine helicopter restriction. I discussed this with Lacy before she went on maternity leave. We have prepared several research memos that we think support our request.² We would like to meet in the next 10 days to discuss our request. I suspect you thought this matter was behind you. Sorry...Keith

Keith W Dearborn
Dearborn & Moss PLLC

On February 28, 2012, KDC sent another e-mail to Ms. Hatch explaining, "Meeting with CH later this week to start a Helistop CUP amendment. Turns out there is only one twin engine helicopter in the region and it is owned by Microsoft." Per City records, the meeting requested by Kemper's counsel was scheduled for March 1, 2012 with the following staff notation: "Helistop CUP (please do not put on reader board)". (Emphasis added).

The "research memos" referred to by KDC's counsel in his February 27, 2012 email were obtained from the City through a Public Record Act request. One memorandum to KDC counsel from KDC consultant David Ketchum is dated January 22, 2012, less than thirty days after the Court's decision became final. Another is dated February 8, 2012. These "research memoranda" were not prepared overnight. Judging from their content, they went through multiple drafts and may well have been in preparation in 2011.

In any event, despite KDC's indications in early 2012 that it would be requesting that the twin-engine requirement that was central to the issuance of the CUP be dispensed with, it submitted no such application in 2012. Instead, on May 18, 2012, KDC proceeded to submit a building permit application to make modifications to the helistop even though it knew full well that it would not be using the helistop as authorized under the CUP. The work to modify the

² Emphasis added.

helistop was purportedly completed in February or March of 2013 and the first (non) usage report submitted by KDC was for the month of March 2013.³

At approximately the same time, on February 22, 2013, KDC submitted an application to dispense with the twin engine requirement that was central to the CUP's issuance. The application, about which the public was not notified until June 27, 2013, pretends that KDC had only just learned that the helistop would never be used by twin engine helicopters even though it had known that for more than a year but had chosen to proceed with work on the helistop anyway:

In its preparation to activate the approved Helistop, KDC has learned there is only one twin engine helicopter in the region that could potentially use the Helistop. This helicopter is corporately owned and is used only for corporate business. If not modified, the practical effect of the twin engine restriction is the Helistop will not be used.

Letter from Mr. Dearborn to Ms. Helland dated February 20, 2013.

KDC misrepresented to the Hearing Examiner, City Council, and Superior Court that the helistop would be used by twin engine helicopters. In fact, the helistop has not been used by twin engine helicopters. Further, KDC has repeatedly stated that the condition requiring twin engine helicopters, which it invited and supported in order to obtain the CUP, ensures that the helistop will never be used.

The CUP was obtained by egregious misrepresentation of material fact. Even more egregious is that KDC knew that the helistop would not be used by twin engine helicopters, but it advocated for that condition and accepted the permit with that condition. KDC then proceeded to make modifications to the helistop as if it was a foregone conclusion that it could obtain deletion of the key twin engine condition after the work was done.⁴

(3) Proceedings to Revoke the CUP Should Be Commenced.

Because the usage approved by the CUP has been abandoned for more than one year and the CUP was obtained by misrepresentation of material fact in the first place, revocation

³ An April 2, 2014 email from Ms. Helland indicates that construction was actually completed a couple months earlier in December 2012.

⁴ At the most recent noise testing orchestrated by KDC in Kent, KDC consultant Ketchum discussed the single engine condition with participating helicopter crew members. The gist of Ketchum's conversation was that KDC was aware from the start that the permit condition requiring twin engine helicopters was problematic. But KDC decided it was better to not disclose that and instead first obtain permit approval and then circle back and have the City staff change the twin engine condition imposed by the Hearing Examiner and City Council and accepted by KDC.

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proceedings are appropriate per LUC 20.30B.170.B and must proceed in accordance with the requirements for a Process I decision specified in LUC 20.35.100.

(4) If the CUP is Not Revoked, the Pending Applications Should Be Processed Without Further Delay.

Citing LUC 20.40.510, the City has placed KDC's application to modify the CUP and the related formal code interpretation initiated by the Director concerning application of LUC 20.30B.170 "on hold" "until the National Transportation Safety Board completes its investigation and final report of the March 18, 2014, helicopter crash in Seattle." Weekly Permit Bulletin dated April 10, 2014. The stated premise for doing so is that "[s]afety information from the NTSB's investigation will be relevant to the City's review of this application." *Id.* However, there is no legal or factual basis to place the pending on applications "on hold" and, if the CUP is not ultimately revoked (which it should be), the pending applications should be processed by the City.

LUC 20.40.510 does not authorize putting an application on an indefinite hold pending the outcome of a future event. The provision, titled "Cancellation of land use applications" provides only:

Applications for land use permits and approvals may be canceled for inactivity if an applicant fails to respond to the Department's written request for revisions, corrections, or additional information within 60 days of the request. The Director may extend the response period beyond 60 days if within that time period the applicant provides and subsequently adheres to an approved schedule with specific target dates for submitting the full revisions, corrections, or other information needed by the Department.

The provision is aimed at situations where the Department requests specific information which exists and can be obtained in the present, but where the applicant needs additional time to gather that information and proposes a specific timeframe for doing so. It is simply not applicable to the pending KDC applications. It does not authorize allowing KDC or any other applicant to leave an application hanging over the City and citizens' heads indefinitely, until the coast is clear for pushing it through.

The Seattle helicopter crash of course highlights the potential dangers of helicopters -- particularly single engine helicopters -- flying and landing in a heavily populated urban area. But even if it turns out when the NTSB someday finally issues a report that the type of helicopter was not a causative factor for the Seattle tragedy, that would not support removing the twin engine condition imposed by the Hearing Examiner and the City Council for the KDC helistop. Moreover, there have been other helicopter crashes since the Seattle crash. Will these cause further indefinite delays in proceeding to address the KDC application? And would reliance on

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these pretexts for delay only stop when an NTSB report to KDC's liking was issued on some random helicopter crash event?

Even if the outcome of the investigation of one helicopter crash were relevant, KDC has not in fact committed to provide any specific additional information to the City. As indicated in its letter, KDC is simply keeping open the option of submitting whatever KDC determines is necessary:

Within 60 days of NTSB's publication of its accident report, we will submit any revisions we believe may be necessary to address the NTSB findings.

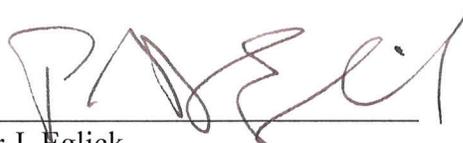
Letter from Mr. Dearborn to Ms. Helland dated April 4, 2014.

It appears that the City and KDC have agreed to place the pending KDC application on hold to buy time for the public's awareness of the application to fade, to tread water while seeking Code changes by the Council, and to allow the memory of the Seattle crash to fade. This is contrary to the City's Comprehensive Plan which explicitly calls for the City to "continue active community involvement in planning decisions." It is further inconsistent with Comprehensive Plan Policies for implementing this paramount goal.

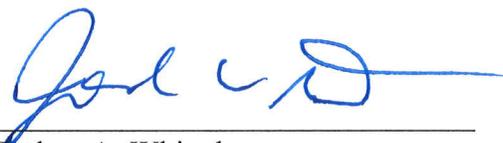
It is time for City staff to address the KDC application and issue the interpretation requested in this letter. In the event that the City fails to do so, all rights are reserved.

Sincerely,

EGLICK KIKER WHITE PLLC



Peter J. Eglick



Joshua A. Whited