FILED
SUPREME COURT
STATE OF WASHINGTON
4/12/2021 1:15 PM
BY SUSAN L. CARLSON
CLERK

NO. 99527-3

SUPREME COURT
OF THE STATE OF WASHINGTON

(Court of Appeals No. 80712-9-I)

INA TATEUCHI
and
HELICOPTERS UNSAFE HERE,
a Washington nonprofit corporation,

Petitioners,

vs.

CITY OF BELLEVUE,
a Washington municipal corporation, and
KEMPER DEVELOPMENT COMPANY,
a Washington corporation,

Respondents.

KEMPER DEVELOPMENT COMPANY'S ANSWER TO PETITION FOR REVIEW

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I. IDENTITY OF RESPONDENT

Kemper Development Company ("KDC") is the holder of the Conditional Use Permit ("CUP") for a private use helistop that Petitioners Ina Tateuchi and Helicopters Unsafe Here sought to have Respondent City of Bellevue ("City") revoke. KDC opposes the petition for review.

II. COURT OF APPEALS DECISION

The decision in *Tateuchi v. City of Bellevue*, 15 Wn. App. 2d 888, 478 P.3d 142 (2020) ("the Opinion") does not raise an issue of substantial public interest under RAP 13.4(b)(4), and the Court should not accept review.[1] Applying long-standing principles of statutory construction, the Court of Appeals properly interpreted the term "abandonment" in the Bellevue Land Use Code ("BLUC") provision governing abandonment of a CUP, applied that definition to the record on review, and concluded that "the record establishes that KDC has been maintaining a 'fully operational' permanent facility for the landing and takeoff of helicopters continually since the CUP issued."[2]

The Court of Appeals properly concluded that Respondents are entitled to a RCW 4.84.370(1) fee award as: (a) Tateuchi's application to

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[1] Notably, Petitioners seek review only under RAP 13.4(b)(4) and not RAP 13.4(b)(1) or (b)(4) (Court of Appeals decision in conflict with the decision of the Supreme Court or published decision of Court of Appeals, respectively).

[2] Opinion at 13.

revoke KDC's CUP is a "similar land use decision" to those enumerated in RCW 4.84.370(1); and (b) Respondents prevailed in all forums below.[3]

III. COUNTER-STATEMENT OF ISSUES FOR REVIEW

KDC re-frames the issues presented by Petitioners to more accurately track the opinion and the substantial public interest ground asserted for discretionary review by the Supreme Court:

1. Does the interpretation of the term "abandonment" in BLUC 20.30B.170(B)(1) present an issue of substantial public interest? **No.**

2. Does the award of attorney's fees on appeal of a land use decision denying a Process I application to revoke a CUP where Respondents prevailed in all prior judicial proceedings relating to that application present an issue of substantial public interest? **No.**

IV. SUMMARY OF THE ARGUMENT

This case is not a matter of substantial public interest. It is the culmination of many unsuccessful efforts by Ina Tateuchi and Helicopters Unsafe Here (collectively "Tateuchi") to force the City to revoke KDC's CUP based on abandonment. Tateuchi's land use application dealt solely with the rights of private parties and a single property.

[3] Opinion at 18.

The matter before the Court of Appeals dealt with the narrow issue of abandonment. The Opinion does not, as Tateuchi asserts, define abandonment in such a way that an approved conditional use can never be abandoned. BLUC 20.30B.170(B)(1) requires that one seeking revocation of a CUP demonstrate "abandon[ment] for a period of at least one year." As the BLUC does not define "abandonment," the Court of Appeals properly interpreted the term "abandonment" by applying the meaning of that term as used in well-settled nonconforming use law, which requires: (a) an intention to abandon; and (b) an overt act or failure to act. *City of University Place v. McGuire*, 144 Wn.2d 640, 652, 30 P.3d 453 (2001).[4]

The Court of Appeals then properly applied that law to the record on review and found that neither element had been met. Under a different record, abandonment might be found.

Tateuchi contends that the award of fees will discourage others from pursuing permit revocation.[5] To the extent the fee statute discourages appeals, it will have no greater effect on revocation permits than on any other kind of land use permit. The fee award presents no substantial public interest issue.

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[4] Cited in Opinion at 9–11.
[5] Petition for Review ("Petition") at 19.

Pursuant to RCW 4.84.370(1), KDC is also entitled to its fees and costs in responding to the Petition for Review and asks for an award.

V. COUNTER-STATEMENT OF THE CASE

In 2008, KDC applied for a CUP to activate an existing helicopter landing pad on the roof of the Bellevue Place building.[6] Tateuchi appealed the Hearing Examiner's recommendation of approval to the City Council ("Council"), which denied her appeal.[7] Tateuchi then appealed to King County Superior Court, which upheld the Council.[8] The CUP imposed numerous conditions on the helistop, including frequency of flights, the hours of operation, flight path, limiting the types of helicopters that may use the helistop, and flight reporting requirements.[9]

In 2014, Tateuchi requested a land use code interpretation finding that KDC abandoned its helistop.[10] The City issued a code interpretation, finding no support for the alleged abandonment. Tateuchi appealed the interpretation to the Hearing Examiner.[11] Prior to the hearing, and without

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[6] Opinion at 2; CP 1081, ¶ 2.
[7] CP 1169–95; 1250–57.
[8] Opinion at 2, n. 1; CP 674.
[9] CP 1357–58.
[10] Tateuchi also asked the City to make a finding regarding misrepresentation. Tateuchi did not pursue this claim in her LUPA appeal.
[11] CP 344–46 (Hearing Examiner's review of procedural history).

KDC's knowledge, the City and Tateuchi entered into a stipulation allowing Tateuchi to apply to revoke KDC's CUP ("the Stipulation").[12]

In 2016, Tateuchi filed an application to revoke KDC's CUP, presenting arguments identical to those presented in her code interpretation request.[13] After initially accepting the application, the City determined that Tateuchi lacked standing to file the application[14] and rejected the application.[15] Tateuchi appealed the City's decision to King County Superior Court, alleging breach of the Stipulation.[16] She brought no claim against KDC; the Court dismissed KDC as a party.[17] The Superior Court described the Stipulation as *ultra vires*, as Tateuchi lacked standing, but ultimately determined that the Stipulation could be enforced because it did not mandate a substantive outcome.[18] It ordered the City to perform its obligations under the Stipulation.[19] Tateuchi's 2017 revocation application ensued, raising the arguments presented twice before.[20]

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[12] CP 613–16.
[13] CP 603–12.
[14] Under the BLUC, only the property owner, the property owner's authorized representative, or Sound Transit has standing to revoke a CUP. BLUC 20.30B.170(B) (revocation of an approved CUP is a Process I land use decision); 20.35.030(A)(1) (who may apply for Process I land use decisions).
[15] CP 1729–30.
[16] CP 2289–409.
[17] CP 2349–52.
[18] CP 2400–03.
[19] CP 428–30.
[20] CP 598–622.

The City held an informational meeting and considered the application.[21] The Development Services Director recommended denial.[22] The Hearing Examiner held an open record hearing on March 22, 2018. A few members of the public testified, most with generalized concerns regarding the safety of operating helistops in the downtown core, an issue the Hearing Examiner concluded was addressed in the original CUP approval and was not before her in this matter.[23] She denied Tateuchi's application, concluding:

> [T]he absence of helicopters [sic] landings at the Bellevue Place Helistop is not determinative of discontinuance. As long as KDC has actively maintained and even improved the helistop, it has not committed any overt act evidencing abandonment. Nor does the lack of helicopter landing evidence intent to abandon.[24]

Tateuchi appealed to the Council, which held a closed record hearing. On October 1, 2018, the Council unanimously passed Ordinance 6429, adopting the Hearing Examiner's Findings and Conclusions of Law.[25]

Tateuchi filed a Land Use Petition Act ("LUPA") petition and other claims including one under the Open Public Meetings Act ("OPMA"). The Superior Court denied the LUPA claims and dismissed her OPMA claims.[26]

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[21] Opinion at 3.
[22] *Id.*
[23] CP at 351.
[24] *Id.*
[25] Opinion at 3–4.
[26] Opinion at 4–5.

Tateuchi then sought direct review by the Supreme Court under RAP 4.2(a)(4)'s public issue criterion. The purported issues of broad public import included the proper interpretation of abandonment.[27] On November 6, 2019, Department I transferred the case to the Court of Appeals.[28]

On December 28, 2020, the Court of Appeals issued its Opinion, affirming the Superior Court and awarding attorney's fees to the City and KDC, finding that this CUP revocation decision is a "similar land use" decision under RCW 4.84.370(1) and that Respondents prevailed in all forums below.[29] Tateuchi moved for reconsideration of the latter finding only. On January 29, 2021, the Court of Appeals denied the motion for reconsideration.[30] This request for discretionary review followed.

VI. ARGUMENT

Tateuchi's petition for review ("Petition") does little more than recirculate the arguments that were unsuccessfully presented to the Court of Appeals. The Petition fails to establish a basis for review under RAP 13.4(b)(4).

[27] Petitioners' Statement of Grounds for Direct Review § III at 6.
[28] Opinion at 5.
[29] Opinion at 17–18.
[30] A copy of the order is provided in Appendix A to the Petition.

A. **The meaning of "abandonment": The Court of Appeals' construction of the term follows well established construction of the term in the context of a nonconforming use and does not present an issue of substantial public interest.**

The Court of Appeals held that the Hearing Examiner did not erroneously interpret the law in concluding that the BLUC 20.30B.170(B)(1) term "abandoned" requires an overt act and an intention to abandon.[31] Tateuchi contends that this construction presents an issue of substantial public importance because it "all but ensures that a conditionally approved land use, once approved, can never be abandoned …."[32]

Her argument is unpersuasive. The Court of Appeals interpretation does nothing more than apply the long-standing common-law definition. The abandonment elements of an overt act and intent date back at least to the Supreme Court's decision in *King County v. High*, 36 Wn.2d 580, 582, 219 P.2d 118 (1950), cited in *Andrew v. King County*, 21 Wn. App. 566, 572, 586 P.2d 509 (1978), *review denied*, 91 Wn.2d 1023 (1979).[33]

The meaning of abandonment is a question of law that a court reviews *de novo*.[34] When reviewing an ordinance, a court gives considerable

[31] Opinion at 11–12.
[32] Petition at 6–7, 15.
[33] Opinion at 13.
[34] *Id.* at 6 (citing *Phoenix Dev., Inc. v. City of Woodinville*, 171 Wn.2d 820, 828, 256 P.3d 1150 (2011)).

deference to the construction of the challenged ordinance by the official charged with its enforcement, here the Hearing Examiner. *See Phoenix Dev.*, 171 Wn.2d at 830; *see also* RCW 36.70C.130(1)(b) (grounds for relief include erroneous interpretation of the law, after allowing for such deference as it is due the construction of the law by a local jurisdiction with expertise).

Below, and again in the Petition, Tateuchi asserts that the BLUC establishes a hard and fast rule for abandonment that requires the City to revoke a CUP after one year of "nonuse."[35] This argument fails on many fronts.

First, the operative provision does not refer to nonuse, but abandonment. The BLUC nowhere uses the term "nonuse." Second, her contention is simply untrue. The applicable provision of the BLUC provides that the City ***may*** revoke an approved CUP only upon a finding that use for which the approval was granted has been abandoned for a period of at least one year.[36] "May" is discretionary, not mandatory.[37]

Third, the BLUC does not define the abandonment.[38] Consequently, the Court of Appeals appropriately looked to standard English language

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[35] Petition at 13.
[36] BLUC 20.30B.170(B)(1); Opinion at 7.
[37] BLUC 20.50 Definitions ("[T]he word 'shall' is always mandatory, the word 'may' denotes a use of discretion in making a decision.").
[38] Opinion at 8.

dictionaries, *Boeing Co. v. Aetna Cas. & Sur. Co.*, 113 Wn.2d 869, 877, 784 P.2d 507 (1990), Opinion at 9. The definitions of "abandonment" reviewed by the Court of Appeals include the element of intent.[39]

The Court of Appeals also looked to the common law, noting that the common-law definition of "abandoned" appears in many land use related contexts, all of which require intent.[40] It found the common-law definition of "abandoned" most analogous to a CUP is that used in the nonconforming use law: (a) an intention to abandon; and (b) an overt act or failure to act. Opinion at 10–11 (citing *City of University Place v. McGuire*, 144 Wn.2d 640, 652, 30 P.3d 453 (2001)).

Tateuchi argues that nonconforming use case law is distinguishable because her challenge is to a CUP. As she did below, Tateuchi claims that nonconforming uses are vested property rights entitled to greater protection under the law than conditional uses.[41] But as the Court of Appeals found, her argument is not persuasive. While nonconforming uses are "vested property rights which are protected," they are also disfavored, and the policy of zoning legislation is to phase out a nonconforming use. *Van Sant v. City of Everett*, 69 Wn. App. 641, 649, 849 P.2d 1276 (1993).[42] In contrast, under

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[39] *Id.* at 9.
[40] *Id.*
[41] Opinion at 10; Petition at 8–9.
[42] Opinion at 11.

the BLUC, a CUP is a mechanism by which the City may require special conditions on development or the use of land in order to ensure that the use or activity is compatible with other uses in the same land use district and in the vicinity of the subject property.[43] In other words, a CUP is not disfavored but tailored to the particular circumstances.

As she did below, Tateuchi argues that a comparison of the BLUC nonconforming use provisions with the CUP revocation provisions shows the City's intent to treat revocation of these uses differently.[44] In essence, Tateuchi argues that, based on these specific BLUC provisions, Bellevue may consider a landowner or permit holder's intent only in the context of abandonment of a nonconforming use and not a CUP. The Court of Appeals appropriately held that when "the legislature uses a term well known to the common law, it is presumed that the legislature intended [it] to mean what it was understood to mean at common law." Opinion at 11 (citing *Ralph v. Dep't of Nat. Res.*, 182 Wn.2d 242, 248, 343 P.3d 342 (2014)). For these reasons, the Court of Appeals properly held that the Hearing Examiner did not erroneously interpret that law in concluding that the term "abandoned" in BLUC 20.30B.170(B)(1) means an overt act and an intent to abandon.

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[43] BLUC 20.30B.120.
[44] Petition at 7–9.

B. The record on review demonstrates that its construction of "abandonment" does not ensure that a conditional use CUP can never be abandoned.

The Court of Appeals Opinion does not, as Tateuchi contends, "all but ensure[] that a conditionally approved land use, once approved, can never be abandoned …."[45] Rather, it upheld the Hearing Examiner's conclusion that, *based on the evidence before her*, Tateuchi had not borne her burden of demonstrating either prong of abandonment. A different record might support a finding of abandonment; this one did not. There is simply no issue of substantial public importance presented.

Tateuchi further argues that discretionary review is warranted to prevent conditional use permit holders from "banking" their permits for years.[46] There is simply no evidence to support this speculative argument. Nor does Tateuchi explain what the harm from such "banking" may be or how it rises to a substantial public interest under RAP 13.4(b)(4). Speculation does not warrant discretionary review.

Relief may be granted under LUPA if the land use decision is not supported by evidence that is substantial when viewed in light of the whole record before the court, RCW 36.70C.130(1)(c), or if the land use decision

[45] Petition at 6–7, 15.
[46] Petition at 6.

is a clearly erroneous application of the law to the facts, RCW 36.70C.130(1)(d). When reviewing the sufficiency of evidence, the court views the facts and inferences in the light most favorable to the party that prevailed in the highest forum exercising fact-finding authority. *Phoenix Dev.*, 171 Wn.2d at 828. In this case, the highest forum exercising fact-finding authority was the Hearing Examiner before whom the Respondents prevailed. A finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the record is left with the definite and firm conviction that a mistake has been committed. *Phoenix Dev.*, 171 Wn.2d at 829, (citing *Wenatchee Sportsmen Ass'n. v. Chelan County*, 141 Wn.2d 169, 176, 4 P.3d 123 (2000)).

Tateuchi bore the burden of proving that KDC abandoned its permitted use for a period of at least one year. *Skamania County v. Woodall*, 104 Wn. App. 525, 540, 16 P.3d 701 (2001). The burden of proof is not an easy one. *City of University Place v. McGuire*, 144 Wn.2d 640, 647, 30 P.3d 453 (2001), (citing *Van Sant*, 69 Wn. App. at 647–48). If Tateuchi had borne her burden, the burden would then have shifted to KDC to produce objective evidence it did not intend to abandon the use. *Miller v. City of Bainbridge Island*, 111 Wn. App 152, 164, 43 P.3d 1250 (2002).

The Hearing Examiner found that substantial evidence in the record demonstrates that KDC did not abandon the helistop. The CUP authorizes

KDC to prepare and activate the helistop. KDC prepared and activated the helistop, as evidenced by KDC's obtaining the permits for and upgrading the facility to current FAA standards and City building code requirements.[47] In 2013, the site became operational.[48] KDC has continually maintained the communications systems and website required by the CUP.[49] It filed required flight reports attesting that the helistop is *fully operational*.[50] The Court of Appeals properly found that these actions constitute substantial evidence in the record supporting the Hearing Examiner's conclusion that KDC had not abandoned its use.

As she did below, Tateuchi makes much of the BLUC definition of "land use" as "[t]he use to which an area of land, or building thereon, is put; human activity taking place thereon."[51] Tateuchi focuses on the reference to "human activity," largely ignoring the initial definition as the use to which an area of land is put. In footnote 14, the Court of Appeals noted that a semicolon is used to show a stronger separation between the parts of a sentence than a comma can accomplish.

The Court of Appeals first looked to the area of land to be put to the permitted use. The CUP authorizes a helistop, defined as "a structural

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[47] Opinion at 2.
[48] *Id.*
[49] *Id.*
[50] Opinion at 2.
[51] Petition at 12–13 (citing BLUC 20.50.032).

surface which is used as a permanent facility for the landing and takeoff of helicopters, and any appurtenant areas which are used for heliport buildings and other facilities."[52] The Court of Appeals properly found that under the plain language of BLUC 20.50.024, KDC is using the land as a helistop if the land operates as a permanent facility for the landing and takeoff of helicopters.[53] It properly concluded that the record establishes that KDC has been maintaining a "fully operational" permanent facility for the landing and takeoff of helicopters continually since the CUP issued.[54]

The Court of Appeals could have ended its inquiry there, but it went on to address the alternative definition of land use: "human activity taking place [on an area of land]." It properly found that the human activity required to maintain the operational status of the heliport consists of more than aircraft landing and taking off. KDC's actions to establish and maintain the helistop, construct and maintain operational communications systems, and file usage reports constitute "human activity taking place" on the land.[55]

C. **The fee award does not present an issue of substantial public interest.**

The Court of Appeals awarded to Respondents fees pursuant to RCW 4.84.370, which provides that reasonable attorney's fees and costs:

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[52] BLUC 20.50.024 (definition of "heliport" used interchangeably with "helistop").
[53] Opinion at 13.
[54] *Id.* at 13.
[55] *Id.* at 14.

> shall be awarded to the prevailing party or substantially prevailing party on appeal before the court of appeals or the supreme court of a decision by a county, city, or town to issue, condition, or deny a development permit involving a site-specific rezone, zoning, plat, conditional use, variance, shoreline permit, building permit, site plan, or **similar land use approval or decision**.[56]

The fee statute was enacted with LUPA, providing for attorney's fee awards under LUPA for land use decisions. *All. Inv. Grp. of Ellensburg, LLC v. City of Ellensburg*, 189 Wn. App. 763, 744, 358 P.3d 1227 (2015), *modified by, reconsideration denied by*, 2015 Wash. App. LEXIS 2519 (2015).

1. Tateuchi's Process I land use application comes within RCW 4.84.370(1).

Tateuchi brought a LUPA petition. It characterizes the decision at issue as a land use decision. It is unquestionably site-specific, affecting a single property. Yet, as she did below, Tateuchi contends that the City's decision to deny her application is not a "decision by a county, city, or town to issue, condition, or deny a development permit."[57]

As the asserted issue of substantial public interest, she contends that the fee award will deter individuals from pursuing permit revocation.[58] It will not. Tateuchi pursued her revocation request with Respondents bearing the cost of defending the CUP before the Hearing Examiner, the Council,

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[56] Emphasis added.

[57] Petition at 17.

[58] *Id.* at 19.

and the Superior Court. As with any of the land use decisions subject to the fee statute, a fee award may serve to deter "third strike" appeals. That is the intent of the statute, not an issue of substantial public interest.

With regard to the merits of her argument, in a plurality opinion with Justice Chambers concurring in the result and the fee award, the Supreme Court explained that the statute extends not only to the actions expressly listed but to "similar land use approval[s] or decision[s]." Accordingly, a moratorium denying permit applications fell within the statute. It also observed that the City's moratorium was initiated through a site-specific determination. *Biggers v. City of Bainbridge Island*, 162 Wn.2d 683, 701, 702, 169 P.3d 14 (2007), *overruled in part on other grounds by Chong Yim v. City of Seattle*, 194 Wn.2d 682, 702, 451 P.3d 694 (2019).

Tateuchi seeks to revoke an existing CUP. The effect of such an action would be tantamount to the denial of the CUP in the first instance, an action expressly enumerated in the statute and one that she was not able to accomplish before the City Council or in her challenge of the CUP to the Superior Court. The Court of Appeals properly found that the decision on an application to revoke a CUP is a "similar land use approval."

The sole reported case Tateuchi sites for the proposition that a CUP revocation is not a land use decision subject to the fee statute is *Tugwell v. Kittitas County*, 90 Wn. App. 1, 951 P.2d 272 (1997). In *Tugwell*, the Court

of Appeals evaluated a rezone of property that was *not* accompanied by a specific project proposal and concluded that a rezone unaccompanied by any specific project plan is not a development permit. *Id.* at 23. *Tugwell* is easily distinguished.

To initiate her application for revocation of KDC's CUP, Tateuchi completed an Application for Land Use Approval, which requires the applicant to identify the type of land use approval sought. She checked the box for Conditional Use noting "revocation."[59] Revocation of a CUP is a Process I decision, *the same process applicable to a CUP*.[60] The process begins with a public notice of the application, a period for public comment, and a public meeting.[61] The Development Services Director then issues a recommendation to the Hearing Examiner. The Hearing Examiner, after holding a public hearing, issues her decision.[62] The Hearing Examiner's decision may be appealed to the City Council, which must accord substantial weight to the decision of the Hearing Examiner.[63] Tateuchi availed herself of that appeal.

The City processed Tateuchi's application as a site-specific land use application and, ultimately, denied the application. The Court of Appeals

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[59] CP 598.
[60] BLUC 20.30B.170(B); 20.35.100.
[61] BLUC 20.35.120–20.35.127.
[62] BLUC 20.35.130–20.35.140.
[63] BLUC 20.35.150(A)(7)(a).

properly found that the application constitutes a "similar land use approval or decision" under the fee statute.

2. KDC prevailed in all prior judicial proceedings.

KDC prevailed before the Superior Court and the Court of Appeals.[64] Tateuchi argues that KDC, having vigorously defended its CUP at its own cost through all of these steps, should not be awarded its attorney's fees before the Court of Appeals and Supreme Court because it did not prevail in a lawsuit that she brought to enforce the Stipulation. As explained above, KDC was not a party to the Stipulation. The Superior Court dismissed KDC from that litigation. The Superior Court ordered the City to perform its obligations under the Stipulation by reinstating and fully processing the revocation application, expressly not mandating a substantive outcome.[65]

As counsel for Tateuchi explained to King County Superior Court Judge Judith Ramseyer, the Stipulation is a contract between two parties: Tateuchi and the City.[66] It was *not* a land-use decision. Nor was the suit that Tateuchi brought to enforce it a Land Use Petition, but rather a Complaint & Petition for Injunctive, Declaratory, Mandamus and Other Relief.[67]

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[64] CP 342–52; CP 262–63; CP 3139–43; CP 3144–48.
[65] CP 2400–03; CP 428–30.
[66] CP 2173, line 12 and lines 20–21.
[67] CP 2289–409.

The City has now fully processed that application. It is that Process I application to which RCW 4.84.370 applies, not an (*ultra vires*) stipulation that does nothing more than require a process. The Court of Appeals properly found that, under RCW 4.84.370, KDC is entitled to its fees an

d costs.

VII. CONCLUSION

Tateuchi's grounds for discretionary review simply do not meet the RAP 13.4(b)(4) substantial public interest criterion for discretionary review. This Court should decline discretionary review and award KDC its fees and costs incurred in answering to her Petition pursuant to RCW 4.84.370.

Dated: April 12, 2021.

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April 12, 2021 - 1:15 PM

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