No. 99527-3

SUPREME COURT
OF THE STATE OF WASHINGTON

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

Appellants,

v.

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

Respondents.

RESPONDENT CITY OF BELLEVUE'S ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

Appellants Ina Tateuchi and Helicopters Unsafe Here's (collectively "Tateuchi") Petition for Review should be denied. Tateuchi's various legal arguments seeking revocation of Respondent Kemper Development Company's (KDC's) Conditional Use Permit (CUP) do not raise any issue of substantial public interest under RAP 13.4(b)(4). Likewise, Tateuchi's opposition to the Court of Appeals award of attorney fees to Respondent City of Bellevue (the City) and KDC under RCW 4.84.370 does not raise any issue of substantial public interest under RAP 13.4(b)(4).

The Court of Appeals' published opinion—along with the underlying decisions of the Hearing Examiner, City Council, and the Superior Court—correctly applied established law and rejected Tateuchi's attempt to revoke KDC's CUP based on abandonment. This is Tateuchi's second request for Supreme Court of review of this matter, but repetition of rejected legal arguments does not satisfy RAP 13.4(b)(4). Accordingly, this Court should deny the Petition and award the City additional attorney fees and expenses for answering the Petition pursuant to RAP 18.1(j).

II. RESTATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Did the Court of Appeals' statutory construction of the term "abandoned" in Bellevue Land Use Code (BLUC) 20.30B.170(B)(1) involve any issue of substantial public interest under RAP 13.4(b)(4)?

2. Did the Court of Appeals' holding that substantial evidence supports the Hearing Examiner's conclusion that KDC did not abandon its private helistop involve any issue of substantial public interest under RAP 13.4(b)(4)?

3. Did the Court of Appeals' award of attorney's fees to the City and KDC under RCW 4.84.370 involve any issue of substantial public interest under RAP 13.4(b)(4)?

III. STATEMENT OF THE CASE

The Bellevue City Council approved KDC's CUP to operate a private helistop on May 16, 2011. *Tateuchi v. City of Bellevue,* 15 Wn. App. 2d 888, 892, 478 P.3d 142 (2020); CP 1250-1257.[1] Ms. Tateuchi lives next to the helistop and has opposed the helistop CUP for many years. *Tateuchi*, 15 Wn. App. at 892-93; CP 7.

Prior to the current action, Ms. Tateuchi filed multiple lawsuits in superior court challenging the City's approval of the helistop CUP and raising procedural challenges to past City actions. *See Tateuchi, et. al. v. City of Bellevue, et. al.*, Case No. 11-2-20007-8 SEA (November 30, 2011); *Tateuchi, et. al. v. City of Bellevue,* Case No. 16-2-13322-3 SEA (December

[1] All citations are to the Court of Appeals' Published Opinion, *Tateuchi v. City of Bellevue,* 15 Wn. App. 2d 888, 478 P.3d 142 (2020), or to the Designated Clerk's Papers (CP).

16, 2016). Neither Tateuchi nor the City ever appealed any of those prior lawsuits, and no appellate court ever considered the merits of Tateuchi's claims. *Tateuchi*, 15 Wn. App. at 907, fn. 18.

The current litigation began in 2016, when Ms. Tateuchi applied to the City to revoke the helistop CUP, claiming KDC abandoned its CUP because there had been no helicopter takeoffs or landings. *Tateuchi*, 15 Wn. App. at 893.[2] The abandonment issue raised by Ms. Tateuchi's revocation application was quite narrow and constrained by the provisions of the BLUC, which states, "an approved permit may be revoked only upon a finding that:

> (1) The use for which approval was granted has been abandoned for a period of at least one year…."

BLUC 20.30B.170(B)(1). Ms. Tateuchi's revocation application never alleged any facts or posited any argument suggesting that adjudication of her abandonment argument would impact the general public. CP 398-407. Instead, Ms. Tateuchi filed her application as an individual who lives next

[2] Ms. Tateuchi also claimed KDC obtained CUP approval "by misrepresentation of material fact." *Tateuchi*, 15 Wn. App. at 893, fn. 2.

to the helistop, and, if granted, her application would have impacted a sole permit holder, KDC. CP 7, 398-407.[3]

The City processed Ms. Tateuchi's application consistent with the provisions in the BLUC. *Tateuchi*, 15 Wn. App. at 893. First, the City considered comments from members of the community about whether to revoke the CUP, and the City's Land Use Director recommended that the City deny Ms. Tateuchi's application. *Id.* Following the Director's recommendation, the City held a March 22, 2018 public hearing before the Hearing Examiner, where the Hearing Examiner considered argument from the City, KDC, and Ms. Tateuchi's attorney. *Id*.

After the hearing, the Hearing Examiner issued written findings of fact and conclusions of law denying Ms. Tateuchi's revocation application. The Hearing Examiner concluded:

> [T]he absence of helicopters 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 landings evidence intent to abandon.

Id. The Hearing Examiner also found that generalized concerns regarding helicopter safety were not relevant because Ms. Tateuchi's revocation

[3] Appellant Helicopters Unsafe Here (HUSH), formed by Ms. Tateuchi and her family to oppose KDC's helistop, was not a party to Ms. Tateuchi's revocation application. *See Tateuchi*, 15 Wn. App. at 893, fn. 3.

application only raised the narrow issue of abandonment but did not reopen the entire approval process for the CUP. CP at 25.

Tateuchi then appealed the Hearing Examiner's decision to the Bellevue City Council. *Tateuchi*, 15 Wn. App. at 893. The Council considered an extensive written record; held a "limited" appeal hearing after their regular meeting on June 18, 2018; and, thereafter, formally adopted the Hearing Examiner's decision and denied Tateuchi's application for revocation of KDC's CUP. *Id.* at 894; CP 269-270.[4]

Tateuchi then filed a lawsuit in superior court pursuant to the Land Use Petition Act (LUPA), Chapter 36.70C RCW, claiming the City erred in determining KDC had not abandoned its use of the helistop. *Tateuchi*, 15 Wn. App. at 894-95.[5] The Superior Court denied Tateuchi's LUPA petition, and Tateuchi sought direct review before the Supreme Court, which transferred review to the Court of Appeals. *Id*.

[4] Like the Hearing Examiner, the City Council explained to Tateuchi that it was "interested in and expecting to hear arguments tonight about the revocation of the CUP pertaining to the issues of abandonment and misrepresentation, and not the relative safety of these types of heliports or helicopters in general." CP at 2872-2873.

[5] Tateuchi also challenged the City's land use decision under the Open Public Meetings Act (OPMA), Chapter 42.30 RCW, but the Petition for Review does not mention that claim.

The Court of Appeals issued its Published Opinion on December 28, 2020. In its Opinion, the court applied well-settled rules of statutory construction and reviewed common law to determine the meaning of the term "abandoned," which is not defined in BLUC 20.30B.170(B)(1). *Id*. at 897-901. The court held that the Hearing Examiner's conclusion that the term "abandoned" in BLUC 20.30B.170(B)(1) means an overt act and an intent to abandon was not an erroneous interpretation of the law. *Id*.

The court also held that substantial evidence supports the Hearing Examiner's conclusion that KDC did not abandon the helistop. *Id*. at 901-903 The court then awarded attorney fees to the City and KDC as the prevailing parties under RCW 4.84.370. *Id*. at 906-907. Tateuchi filed a motion for reconsideration of the court's attorney fee award, which was denied.

Tateuchi now argues that each of the above holdings, along with the award of attorney fees to the City and KDC, warrant review by the Supreme Court under RAP 13.4(b)(4).

IV. ARGUMENT

Discretionary review by the Supreme Court of a Court of Appeals decision is available only in limited circumstances. Here, Tateuchi argues grounds for review under RAP 13.4(b)(4), which permits discretionary

review "[i]f the petition involves an issue of substantial public interest that should be determined by the Supreme Court…." For the reasons discussed below, direct review under RAP 13.4(b)(4) is not warranted, and Tateuchi's request for direct review should be denied.

A. The Court of Appeals' Statutory Construction of the Term "Abandoned" in BLUC 20.30B.170(B)(1) Does Not Involve Any Issue of Substantial Public Interest.

Tateuchi first argues that Supreme Court review is warranted based on the Court of Appeals' construction of the term "abandoned" in BLUC 20.30B.170(B)(1). Petition at 7-13. Tateuchi believes the Court of Appeals' construction of the term "abandoned" is erroneous because "[t]he [BLUC] establishes two different standards for abandonment, one for [CUPs] and a distinct and separate one for nonconforming uses…." *Id*. at 7. This is the same legal argument that was rejected by the Land Use Director, Hearing Examiner, Superior Court, and Court of Appeals. *See, e.g.*, *Tateuchi*, 15 Wn. App. at 900-901.

Tateuchi's argument that the Court of Appeals erred does not create any issue of substantial public interest under RAP 13.4(b)(4). As discussed above, Ms. Tateuchi's revocation application was premised on her belief that KDC's helistop CUP had been abandoned. Because the term "abandoned" is not defined in BLUC 20.30B.170(B)(1), the Court of Appeals was required to determine the ordinary meaning of this undefined

term. *Id*. at 897-901. The court concluded, quite reasonably, that the standard English language meaning of the term "abandoned" is "to cease to assert or exercise an interest, right, or title to esp[ecially] with the intent of never again resuming or reasserting it," or "[t]he relinquishing of a right or interest with the intention of never reclaiming it." *Id.* at 898 (quoting Webster's Third New International Dictionary 2 (2002); Black's Law Dictionary 2 (10th ed. 2014)).

After establishing the plain meaning of "abandoned," the court turned to the common law, including the Supreme Court's two-pronged definition of the term— "'(a) [a]n intention to abandon; and (b) an overt act, or failure to act.'" *Id*. at 899.[6] The court addressed Tateuchi's argument that "abandonment" in the nonconforming use context is distinguishable from "abandonment" in the CUP context, as well as the related argument that the City intended to treat revocation of nonconforming use status differently than revocation of a conditional use. *Id*. at 900-901. Following this discussion, the court held that "the hearing examiner's conclusion that the

[6] Citing to and/or quoting from *State v. Kealey*, 80 Wn. App. 162, 171, 907 P.2d 319 (1995); *Wash. Sec. & Inv. Corp. v. Horse Heaven Heights, Inc.*, 132 Wn. App. 188, 196-97, 130 P.3d 880 (2006) (citations omitted); *City of University Place v. McGuire*, 144 Wn.2d 640, 652, 30 P.3d 453 (2001); *Van Sant v. City of Everett*, 69 Wn. App. 641, 648, 849 P.2d 1276 (1993); and *Rhod-A-Zalea & 35th, Inc. v. Snohomish County*, 136 Wn.2d 1, 6, 959 P.2d 1024 (1998).

term ‘abandoned’ in BLUC 20.30B.170(B)(1) means an overt act and an intent to abandon was not an erroneous interpretation of the law.” *Id*. at 901.

The Court of Appeals’ holding, along with the statutory construction and legal analysis contained therein, is very straightforward. Tateuchi disagrees with the court’s holding, just as she disagreed with comparable analysis and the same conclusion reached by all prior decisionmakers who adjudicated her revocation application. Nevertheless, her opposition to KDC’s private helistop remains a land use dispute between individual parties who live next to each other, and her ongoing complaints do not create any issue of substantial public interest that warrants review by this Court under RAP 13.4(b)(4).

B. The Court of Appeals Holding that Substantial Evidence Supports the Hearing Examiner’s Conclusion that KDC Did Not Abandon Its Private Helistop Does Not Involve Any Issue of Substantial Public Interest.

Tateuchi next argues, incorrectly, that the Court of Appeals decision “ensures that a conditionally approved land use, once approved, can never be deemed abandoned even where the conditional use never occurs.” Petition at 7. Tateuchi also argues that Supreme Court review is warranted because the Court of Appeals’ decision will preserve “a highly dangerous and unnecessary activity” forever into the future. *Id.* at 16.

Again, Ms. Tateuchi's revocation application was premised on her belief that KDC's helistop CUP had been abandoned because there had been no helicopter takeoffs or landings. *Tateuchi*, 15 Wn. App. at 893; CP 398-407. Because this is a land use dispute governed by LUPA, the Court of Appeals was required to consider the substantial evidence standard under RCW 36.70C.130(1)(C) when evaluating Ms. Tateuchi's appeal. *Tateuchi*, 15 Wn. App. at 895-897. The court applied this standard 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." *Id.* at 902.

Tateuchi argues that the court's application of the substantial evidence standard and attendant holding somehow mean that a CUP can never be abandoned through nonuse. This is not correct. In holding that the City's land use decision was supported by substantial evidence, the court providing a lengthy discussion of the applicable law and the relevant facts that considered the following:

- The BLUC 20.30B.170(B)(1) provision concerning abandonment of a CUP;
- The BLUC 20.50.032 and 20.50.024 definitions of "land use," "heliport," and "helistop;"
- Applicable common law, including *Skamania County v. Woodal*, 104 Wn. App. 525, 540, 16 P.3d 701 (2001); *Miller v. City of Bainbridge Island*, 111 Wn. App. 152, 164, 43 P.3d 1250 (2002);

Rosema v. City of Seattle, 166 Wn. App. 293, 299, 269 P.3d 393 (2012); and

- The "human activity" taking place at the KDC helistop.

Tateuchi, 15 Wn. App. at 901-903.

Importantly, the court specifically acknowledged and referenced the activities undertaken by KDC—compliance with City building code provisions and Federal Aviation Administration (FAA) regulations, the construction and maintenance of operational communications systems, and the biannual filing of usage reports with the City. *Id.* Based on this record, the court concluded that the Hearing Examiner's decision was supported by substantial evidence. *Id*. Contrary to Tateuchi's arguments in her Petition, a different record may have led the court to a different result.

Further, the court did not make a policy decision on helicopter safety in general or pass judgment on the validity of the City's original CUP land use approval from 2011. Ms. Tateuchi's revocation application was premised on her belief that a lack of helicopter takeoffs or landings constitutes abandonment as a matter of law. *Tateuchi*, 15 Wn. App. at 893; CP 398-407. Her application required the City, the Superior Court, and the Court of Appeals to apply the revocation criteria in the BLUC to the facts in the record. *Tateuchi*, 15 Wn. App. at 895-903. All

of these decisionmakers explained to Tateuchi that her revocation application did not reopen the approval process for the 2011 CUP. *Tateuchi*, 15 Wn. App. at 905; CP at 25, 2872-2873.[7]

The Court of Appeals ultimately found that substantial evidence supported the Hearing Examiner's conclusion that KDC did not abandon its helistop and that the Hearing Examiner decision was not a "clearly erroneous application of the law to the facts." *Tateuchi*, 15 Wn. App. at 903 (citing RCW 36.70C.130(1)(d)). These findings and holdings do not mean, as Tateuchi claims, that a CUP can never be deemed abandoned or that operation of KDC's helistop will continue forever into the future. While Tateuchi may disagree with the Court of Appeals' decision, her hostility to the court's analysis does not create any issue of substantial public interest that warrants review by the Supreme Court.

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[7] Tateuchi's challenge the City's original CUP approval in 2011 was rejected by the superior court many years ago, and Tateuchi did not appeal that superior court decision. *See Tateuchi, et. al. v. City of Bellevue, et. al.*, Case No. 11-2-20007-8 SEA (November 30, 2011). In turn, the Bellevue City Council does not make a public safety policy decision when adjudicating Tateuchi's appeal of the Hearing Examiner's quasi-judicial decision denying her revocation application. *Tateuchi*, 15 Wn. App. at 905.

C. The Court of Appeals' Award of Attorney Fees to the City and KDC under RCW 4.84.370 Does Not Create Any Issue of Substantial Public Interest that Warrants Direct Review.

Tateuchi's argument that the Court of Appeals' award of attorney fees under RCW 4.84.370(1) creates an issue of substantial public interest has no merit. The City and KDC were prevailing parties on appeal before the Court of Appeals, and the City's denial of Tateuchi's revocation application was a "land use" decision under both RCW 4.84.370(1) and LUPA, RCW 36.70C.020(2)(b). *Tateuchi*, 15 Wn. App. at 906-907. In addition, the City is entitled to attorney fees under RCW 4.84.370(2) because the City's decision was "'upheld at superior court and on appeal.'" *Id.* at 906 (citing *Durland v. San Juan County*, 182 Wn.2d 55, 76, 340 P.3d 191 (2014) (quoting RCW 4.84.370(2)).

Tateuchi has objected repeatedly to any fee award under RCW 4.84.370(1) by arguing that her appeal was not from a decision "to issue, condition, or deny a development permit" under RCW 4.84.370(1).[8] The court specifically considered this objection and explained that RCW 4.84.370(1) authorizes fee awards to prevailing parties from decisions to issue, condition, or deny permits, "or similar land use approval or decision." *Id*. at 906 (emphasis in original). The court also confirmed that LUPA's

[8] Tateuchi did not and cannot submit any credible argument that the City is not entitled to recover attorney fees under RCW 4.84.370(2).

definition of "land use decision"—which includes "[a]n interpretative or declaratory decision regarding the application to a specific property of zoning or other ordinances or rules regulating the improvement, development, modification, maintenance, or use of real property"—is broad enough to encompass the City's land use decision in this particular case. *Id.* (quoting RCW 36.70C.020(2)(b)). The court's ruling that the City and KDC were entitled to attorney fees under RCW 4.84.370(1) is consistent with the applicable statutes and does not involve any issue of substantial public interest.

Tateuchi believes that because she prevailed in a separate superior court lawsuit, *Tateuchi, et. al. v. City of Bellevue*, Case No. 16-2-13322-3 SEA (December 16, 2016), which neither Tateuchi nor the City appealed, that the City and KDC should not recover of attorney fees for successfully defending against Tateuchi's current appeal. As the Court of Appeals explained, the City decision denying Ms. Tateuchi's revocation application, which Tateuchi chose to challenge in superior court and at the Court of Appeals, does not include unrelated events and lawsuits filed by Tateuchi in the past. *Tateuchi*, 15 Wn. App. at 907, fn. 18. Tateuchi's novel interpretation of RCW 4.84.370 is neither a valid legal argument nor an issue of substantial public interest.

Tateuchi now claims in her Petition for Review that an unpublished Court of Appeals decision from Division 2, *Lynch Creek Quarry, LLC v. Pierce Cty.*, No. 24388-1-II, 2001 WL 13261, (Jan. 5, 2001), "reached a different conclusion on this very issue" and, therefore, Supreme Court review is warranted. However, and contrary to Tateuchi's argument, the unpublished *Lynch* case never discusses the "similar land use approval or decision" language in RCW 4.84.370(1) or the broad LUPA definition of "land use decision." *See Tateuchi*, 15 Wn. App. at 906 (emphasis in original). Therefore, the unpublished decision referenced by Tateuchi does not address the statutory bases for the Court of Appeals' analysis of the attorney fees issue at all, and Tateuchi's Petition fails to raise any issue of substantial public interest based on this unpublished opinion.[9]

Finally, Tateuchi's argument that the Court of Appeals fee award to the City and KDC will chill public participation in the land use process willfully ignores Tateuchi's own behavior. Tateuchi has chosen to challenge every single decision in this matter, including her two separate requests for Supreme Court review of lower court decisions. When the Hearing Examiner rejected her revocation application, she appealed to the

[9] Tateuchi does not claim that the Court of Appeals decision in this matter conflicts with any Supreme Court decision or any published decision of the Court of Appeals under RAP 13.4(b)(1) or (b)(2), respectively.

City Council; when the City Council denied her appeal, she appealed to the superior court; when the Superior Court denied her LUPA appeal, she requested direct review from the Supreme Court; when the Supreme Court denied her request for direct review, she pursued her appeal at the Court of Appeals; and when the Court of Appeals rejected her appeal, she again requested Supreme Court review.

By refusing to accept each and every decision issued in this matter and continuing to pursue her unsuccessful legal arguments in every available forum, Tateuchi assumed the risk that she would, eventually, be liable for the City and KDC's attorney fees and costs. Any other appellant who chooses to challenge a local land use decision through the litigation path that Tateuchi has chosen would be liable for Respondents' attorney fees, and Tateuchi's fee liability under RCW 4.84.370 does not involve any issue of substantial public interest.

D. The City Requests Attorney Fees for Time Spent Answering Tateuchi's Petition for Review.

Pursuant to RAP 18.1(j), the City respectfully requests an award of attorney fees and expenses for preparing and filing this Answer to the Petition for Review. If this Court denies the Petition, then the City, as a party who prevailed at the Court of Appeals and was awarded attorney

fees and expenses, is entitled to an additional fee award for time spent answering the Petition.

V. CONCLUSION

The City respectfully requests that the Court deny Tateuchi's Petition for Review because this case does not involve any issue of substantial public interest and Supreme Court review is not available under RAP 13.4(b)(4). The City also respectfully requests an award of reasonable attorney fees and costs under RAP 18.1(j) for time spent preparing and filing this Answer to the Petition for Review.

Dated this 14th day of April, 2021.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies under penalty of perjury of the laws of the State of Washington that he/she caused to be served in the manner indicated below a true correct copy of the RESPONDENT CITY OF BELLEVUE'S ANSWER TO PETITION FOR REVIEW on the party or parties below stated:

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DATED this 14th day of April, 2021, at Bellevue, WA.

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BELLEVUE CITY ATTORNEY'S OFFICE

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