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,

v.

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

Respondents.

PETITION FOR REVIEW

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I. IDENTITY OF PETITIONERS

Petitioners Ina Tateuchi and Helicopters UnSafe Here (HUSH) (collectively Tateuchi) seek review of the Court of Appeals decisions designated in Section II below.

II. COURT OF APPEALS DECISION

The Court of Appeals filed its Published Opinion in this case on December 28, 2020, reported at *Tateuchi v. City of Bellevue*, 15 Wn. App. 2d 888, 478 P.3d 142 (2020). A copy of the Published Opinion is Appendix A-1 through A-18.[1] On January 29, 2021, the Court of Appeals filed its Order Denying Motion for Reconsideration. A copy of the order is Appendix at A-19.[2]

III. ISSUES PRESENTED FOR REVIEW

1. Has the Court of Appeals adopted and applied an erroneous test for abandonment, resulting in the incorrect conclusion that a permit obtained in 2011 for a private helistop on top of a downtown skyscraper should not be revoked due to abandonment under the Bellevue Land Use Code when it has never been used for the landing or takeoff of helicopters

[1] Citations to the Published Opinion will be in the following format: Op. at __.
[2] On February 26, 2021, the Supreme Court Clerk extended the time for filing this Petition to March 15, 2021.

since the permit was issued, and the helistop owner has admitted that permit safety conditions preclude its use?

2. Does RCW 4.84.370 authorize an award attorney's fees on appeal from a land use decision that (a) does not involve a governmental decision to "issue, condition or deny a development permit," but instead involves revocation of a previously issued permit, and (b) the parties granted fees did not prevail in "all prior judicial proceedings?"

IV. STATEMENT OF THE CASE

While providing a basic outline, the Court of Appeals decision fails to acknowledge several key facts or place them in proper context.

This Court recognized more than 20 years ago the significant safety concerns associated with helistops: "We agree with the Court of Appeals that safety and noise remain legitimate concerns associated with this helistop (and helistops in general)." *Dev. Servs. v. City of Seattle*, 138 Wn.2d 107, 120, 979 P.2d 387, 393 (1999). Recent events underscore the very real and significant threats to public safety posed by helicopter operations and helistops, including the catastrophic 2014 KOMO News

helicopter crash near the Space Needle and the more recent Kobe Bryant helicopter crash in California.[3]

These threats are even more pronounced in densely populated areas such as downtown Bellevue, which has seen immense growth and development. Downtown Bellevue has been one of the fastest growing neighborhoods in the region, second only to Seattle's South Lake Union. Between 2010 and 2017, the downtown Bellevue population increased by 73 percent. As of mid-2018, there were more than 12,400 people living in downtown Bellevue, with a population density of about 18,000 people per square mile -- similar to South Lake Union.[4] The downtown Bellevue core has exploded skyward in the past decade, with more than two dozen high-rise buildings completed or in development in 2017.[5] Substantial

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[3] *See* https://www.washingtonpost.com/news/post-nation/wp/2014/03/18/helicopter-crashes-near-the-space-needle-in-seattle/; https://www.npr.org/2020/01/28/800399644/kobe-bryants-death-puts-a-focus-on-helicopter-safety; https://www.dailynews.com/2020/01/30/helicopter-crash-that-killed-kobe-bryant-calls-attention-to-mental-state-of-pilots/; https://www.washingtonpost.com/local/trafficandcommuting/kobe-bryant-helicopter-crash-underscores-industrys-long-running-safety-struggles/2020/02/08/42a1aba6-4444-11ea-b503-2b077c436617_story.html.

Tateuchi cited these accidents and articles concerning them before the City, in the Superior Court and in the Court of Appeals below. CP 363-64, 2133-34; Brief of Appellants at 5; Appellants' Reply Brief at 19-20. The hyperlinks provided below concerning development in the City of Bellevue were also previously cited by Tateuchi. Appellants' Reply Brief at 18-19.

[4] https://www.seattletimes.com/seattle-news/data/whats-the-regions-second-fastest-growing-neighborhood-hint-its-not-in-seattle/.

[5] http://www.seattlemag.com/best-neighborhoods/spotlight-bellevue-suburb-thats-city.

development in downtown Bellevue continues with proposed and approved massive office towers up to 600 feet in height in close proximity to the Kemper helistop.[6]

Due to safety concerns, private helistops are no longer permitted in downtown Bellevue. Op. at 2, n.1; CP 313. However, this case concerns the only private use helistop in downtown Bellevue – one approved by the City nearly a decade ago, just before they were prohibited and prior to the immense growth that Bellevue has experience over the last decade.

That approval came on May 16, 2011, when the Bellevue City Council adopted Ordinance No. 6000 granting a Conditional Use Permit (CUP) to respondent Kemper Development Company ("Kemper" or "KDC") for a helistop located atop a high-rise at 10500 NE 8th Street, Bellevue, Washington 98004. *See* CP 1547-54; *see also* Op. at 2. The site overlooks one of the most densely built and heavily used traffic and pedestrian areas in the City where "new development continues to take place." CP 436; *see also* CP 437, 447 and 2111 (figures depicting site and helistop location). The CUP was granted by the City Council with

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[6] *See* "Cloudvue" proposal and approved "600 Bellevue" application on the City's website at https://bellevuewa.gov/sites/default/files/media/pdf_document/2019/8-22-19-Weekly-Permit-Bulletin.pdf; and https://bellevuewa.gov/sites/default/files/media/pdf_document/2021/1-7-21-Weekley-Permit-Bulletin.pdf.

conditions, including one that the helistop could only be used by twin engine helicopters, which are safer than single engine helicopters due to engine redundancy. CP 1550; *see also* Op. at 2.

On February 20, 2013, Kemper applied to the City for removal of the twin engine restriction. CP 2418. The application admitted in no uncertain terms: "the practical effect of the twin engine restriction is the Helistop will not be used." *Id*. Knowing that the helistop could not be used with the twin engine restriction, Kemper nonetheless later affirmatively withdrew its request to modify the permit.[7]

In the nearly ten years since the approval of the CUP in 2011, Kemper has never actually used the helistop. This is confirmed by its ironically titled "Helistop Usage Reports." *See* CP 1454-97.[8] And, it has not had its helistop listed on any official notices or lists of available helistops in the region. *See* CP 2431- 65. Meanwhile, the area around the helistop has exploded with intense development.

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[7] *See* CP 344 ("Before the City issued a decision on the modification request, an accident involving a single-engine helicopter occurred in Seattle. In October 2015, the City cancelled the modification application based on a request by Kemper.").

[8] One "demonstration" or "test" flight was apparently orchestrated by Kemper in January, 2015 in an attempt to avoid a finding of abandonment. *See* CP 1467; Op. at 2. But by January 2015 the helistop had already been unused for many years. And it has not been used in the many years since that "demonstration." *See* CP 347 at ¶9 (parties agree "that the helistop has only been used once since it was approved, and that was a demonstration flight.") (emphasis added).

This is the second of two lawsuits concerning Tateuchi's request that the City revoke Kemper's helistop CUP due to abandonment of the permitted use. Tateuchi prevailed in the first lawsuit, in which the King County Superior Court ordered the City to consider and rule on Tateuchi's revocation request after the City refused to do so, in contravention of its own Stipulation.[9] This second lawsuit concerns the City's decision, which the Court of Appeals affirmed in a published opinion.

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

This Court should grant review under RAP 13.4(b)(4) because this petition involves issues of substantial public interest.

A. The Court of Appeal's Test for Abandonment Ensures That Once Approved Even a Land Use that Poses a Significant Threat to Public Safety Can Never Be Deemed Abandoned.

The effect of the Court of Appeals decision here is to allow Kemper to essentially "bank" in perpetuity a private helistop CUP (a use which is now prohibited) that has never been used by a helicopter, despite the intense changes in downtown Bellevue over the past decade.

Rather than apply the Bellevue Code's clear provision concerning CUP abandonment in a straightforward manner, the Court of Appeals

[9] CP 194-243 (December 16, 2016 Order Denying City of Bellevue's CR 12(c) Motion to Dismiss and Granting Petitioners/Plaintiffs' Motion for Summary Judgment with attached Oral Ruling in *Tateuchi and Helicopters UnSafe Here v. City of Bellevue and Kemper Development Company*, King County Superior Court Cause No. 16-2-13322-3 SEA).

adopted a universal standard for abandonment, advanced by Kemper and the City, that all but ensures that a conditionally approved land use, once approved, can never be deemed abandoned even where the conditional use never occurs. Its published decision has consequences not just for the citizens of Bellevue, but for citizens in all contexts and jurisdictions with codes that include a specific protective provision concerning abandonment, such as the one in the Bellevue Code.

The Bellevue Land Use Code (LUC) establishes two different standards for abandonment, one for conditional uses (CUP) and a distinct and separate one for nonconforming uses (NCU). The LUC provides for revocation of a CUP when "[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. There is no intent requirement. The separate LUC provision that addresses abandonment of nonconforming uses specifically includes intent as an element:

> 2. If a nonconforming use of a structure or land is discontinued for a period of 12 months with the intention of abandoning that use, any subsequent use shall thereafter conform to the regulations of the Land Use District in which it is located. Discontinuance of a nonconforming use for a period of 12 months or greater constitutes prima facie evidence of an intention to abandon.

LUC 20.25A.040.A.2.

Nonetheless, the Court of Appeals held that the term "abandoned" in the LUC provision concerning conditional uses is analogous to the common law definition of "abandoned" in the nonconforming use context and that, regardless of the different LUC standards for CUP (no intent requirement) and NCU abandonment (intent required), proof of intent is always required because that is what abandonment required at common law. Op. at 10. However, this ignores the principles of statutory construction that the Court of Appeals acknowledged, but misapplied,[10] as well as the Bellevue Code.

When a legislative body uses different words and different terminology, a different meaning is intended. *State v. Roggenkamp*, 153 Wn.2d 614, 625-26, 106 P.3d 196 (2005). The more forgiving LUC standard that applies to abandonment of nonconforming uses, which examines intent and only presumes an intention to abandon after one year of nonuse, is not the same standard that applies in the CUP context where no such factors are specified in the Code.

The different treatment in a code, regardless of a generalized common law approach, is not accidental. A conditional use, like the Kemper

[10] *See* Op. at 8 (in determining the plain meaning of a statute, courts look at the statutory context to conclude what the legislature has provided for in the statute and related statutes); Op. at 11 (when a legislative body uses different words or terminology in different parts of a statute, it intends a different meaning).

helistop, is one that was never permitted outright and was instead granted at sufferance and subject to special conditions. "A business attempting to establish a use prohibited by the zoning ordinance must obtain a conditional use permit unless it is a valid nonconforming use. A conditional use permit allows otherwise prohibited activities based on certain restrictions." *Rhod-A-Zalea v. Snohomish Cty.*, 136 Wn.2d 1, 4, 959 P.2d 1024 (1998). In contrast, as *Rhod-A-Zalea* suggests, a nonconforming use is a previously allowed use that was subsequently rendered nonconforming by a zoning change or Code amendment.

Indeed, when it adopted the revocation provision for conditional uses the City Council made clear that cessation of use alone was grounds for revocation regardless of intent: "permits issued for conditional uses which have ceased or been abandoned . . . should be revoked."[11]

The Court of Appeals compounded the error in imposing an intent element not contemplated by the Bellevue Code for conditional use abandonment. It also erroneously concluded that use occurs, *e.g.*, with regard to the Kemper helistop, as long as it could theoretically be used for

[11] Ordinance 4066 at 1 (emphasis added). A copy of Ord. 4066 was attached to Appellants' Reply Brief in the Court of Appeals and can also be accessed via https://bellevue.municipal.codes/LUC/20.30B.170 by clicking on the legislative history link that follows LUC 20.30B.170.

the landing and takeoff of helicopters. *See* Op. at 12-14. The single case the Court of Appeals relied on to support this theory is highly distinguishable.

Rosema v. City of Seattle, 166 Wn.App. 293, 269 P.3d 393 (2012), concerned a Seattle Municipal Code (SMC) provision about discontinuance of NCUs, not CUPs, very different than the Bellevue CUP abandonment provision and even very different from the Bellevue NCU provision. The term "use" was also defined differently in the SMC. *Rosema v. City of Seattle*, 166 Wn. App. 293, 299-300, 269 P.3d 393, 396 (2012) ("Under the SMC 'use' means 'the purpose for which land or a structure is designed, built, arranged, intended, occupied, maintained, let or leased.'")

An owner (Nelson) in *Rosema* sought to change his property's duplex use designation to single family use. Seattle refused to do so unless certain modifications were made. The modifications were not made due to expense, Seattle did not change the designation so the duplex use designation remained, and Nelson continued to pay separate utility bills based on duplex use designation. *Rosema v. City of Seattle*, 166 Wn. App. 293, 296, 269 P.3d 393, 394 (2012). The property was then sold and the question arose whether the duplex use continued or had been discontinued/abandoned due to how Nelson had used the property, *i.e.* for single family use. As explained by the Court:

> DPD [Seattle Department of Planning and Development] determined the evidence was equivocal as to whether the Nelsons abandoned the right to the nonconforming use and as to whether the structure was used for the use allowed. Given that ambiguity and given the heavy burden to prove lapse of nonconforming use, DPD ruled the nonconforming use did not lapse.

Rosema v. City of Seattle, 166 Wn. App. 293, 300, 269 P.3d 393, 396 (2012).[12] The *Rosema* Court noted that it is "DPD practice to assume that a use established by permit remains valid absent clear evidence it has lapsed." *Id.* at fn. 18.[13] Under these facts, and given DPD practice and the unique SMC provisions involved, the *Rosema* Court affirmed DPD, explaining:

> We are not persuaded this conclusion was error. Despite living with their family in the entire structure, the Nelsons maintained the separate basement unit, which was legal only if the structure was a nonconforming duplex or the unit was permitted as an additional dwelling unit. They declined to make the structural changes required by the City for recognition as a single-family home or to seek an additional dwelling unit permit, which would have allowed continued maintenance of a second kitchen in a single-family residence. These failures to act do not fairly imply discontinued interest in the property's use as a duplex. Under the code, the legal status of the property necessarily retained its preexisting nonconforming use as a duplex.

Rosema v. City of Seattle, *supra*, 166 Wn. App. at 300-01.

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[12] None of DPD's factual findings were challenged so they were considered verities on appeal. *Rosema v. City of Seattle*, 166 Wn. App. 293, 298, 269 P.3d 393, 395 (2012).

[13] The City of Bellevue has not established such a practice and the Bellevue LUC provides for no such assumption with regard to CUPs.

Judge Schindler, a former King County Prosecuting Attorney with land use law experience, concurred, highlighting the case's unique nature:

> I . . . write separately to also point out and emphasize the intent of the City to preserve a nonconforming use. A city has the right "to preserve, limit or terminate nonconforming uses subject only to the broad limits of applicable enabling acts and the constitution." *Rhod-A-Zalea & 35th, Inc. v. Snohomish County*, 136 Wn.2d 1, 7, 959 P.2d 1024 (1998). The City of Seattle adopted regulations that favor permitting a nonconforming use and are designed to avoid inadvertently discontinuing a legally established nonconforming use. . . .
>
> The SMC also defines "use" to include what the building is designed for as well as how the building is used. "Use" means the purpose for which land or a structure is designed or maintained. SMC 23.84A.040.

Rosema v. City of Seattle, 166 Wn. App. at 302-03 (emphasis in original).

The Court of Appeals here erred in relying on *Rosema* which involved nonconforming use abandonment and code provisions very different than the ones at issue here under the Bellevue LUC. The Bellevue LUC provides for revocation of a CUP when "[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 (emphasis added). LUC 20.50.050, part of the LUC definitions section, defines the term "use" by reference to the term "Land Use," which in turn is defined as "[t]he use to which an area of land, or building thereon, is put; human activity taking place thereon." LUC 20.50.032 (emphasis added). In other words, the LUC defines use in

common sense terms of how an area is actively put to use – not what an area or structure is designed for unlike in *Rosema*.

This is further confirmed by the LUC definitions of "heliport" and "helistop." The LUC defines "heliport" as:

> . . . .an area of land or water or a structural 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. Refueling, maintenance, repairs or storage of a helicopter is included in this definition.

LUC 20.50.024 (emphasis added). A helistop use, which is specifically at issue in this case, is identical to a "heliport," "except that no refueling, maintenance, repairs or storage of helicopters is permitted." LUC 20.50.024. Therefore, "the landing and takeoff of helicopters," is the key "human activity" or "use" for a helistop.

The LUC CUP abandonment provision is triggered after one year of nonuse. LUC 20.30B.170.B.1. Here, for nearly ten years, the entire lifespan of the Kemper CUP, there has been no actual helicopter use at the helistop site. CP 1454-97 (helistop (non) usage reports); CP 347 at ¶9. And Kemper's has acknowledged the helistop will not be used:

> [T]he practical effect of the twin engine restriction is the Helistop will not be used.[14]

[14] CP 2418.

The Court of Appeals decision concluded:

> Under the plain language of BLUC 20.50.024, KDC is using the helistop if the land operates as a permanent facility for the landing and takeoff of helicopters. We conclude the record establishes that KDC has been maintaining a "fully operational" permanent facility for the landing and takeoff of helicopters continually since the CUP was issued.

Op. at 13. However, this ignores the operative facts and Bellevue LUC provisions: Kemper has not used and is not using the helistop "for the landing and takeoff of helicopters." There is no human activity taking place at the helistop.

The Court of Appeals decision concludes that "human activity" at the helistop "includes those activities necessary to comply with City building code provisions and FAA regulations, constructing and maintaining operational communications systems and the biannual filing of usage reports" and that "these acts are also objective manifestations of KDC's intent not to abandon the helistop." Op. at 14. However, even if intent were a necessary element – which it is not – this ignores Kemper's acknowledgement that the use will not occur and its withdrawal of its application to eliminate the CUP twin engine safety condition so that the

helistop could be used.[15] Since establishing the helistop facility, the record reflects that Kemper has only filed periodic reports confirming that there are no helicopter takeoffs or landings.[16]

The Court of Appeals decision here adopts and applies a universal standard holding that a conditional use occurs and is not abandoned where there exists a theoretical capability, irrespective of the code provisions at issue. Under such a standard, it would be almost impossible to ever establish abandonment of a conditional use. A sand and gravel mine only permitted as a conditional use that *could* be mined, but is not, would not be subject to abandonment. While a local jurisdiction might choose to adopt code provisions narrowly defining abandonment in certain circumstances, such as the City of Seattle adopted in *Rosema*, the Court of Appeals decision has imposed a nearly irrebuttable presumption of use based on theoretical capability, not actual use and has imposed that presumption to override a local code relied upon by the public.

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[15] The Court of Appeals decision states: "Here, the City's restrictions on helicopter activity prevent KDC from currently using its helistop to receive flights." Op. at 13 (emphasis added). It then characterizes the acknowledged non-use of the helistop for a decade as a "temporary cessation," not "abandonment." *Id.* However, the twin-engine restriction which prevents helicopter activity is a permanent condition in the existing CUP. *See* CP 1550.

[16] The Court of Appeals pressed the City and Kemper on this point at oral argument and they were unable to point to anything in the record reflecting any particular active maintenance of or improvements to the helistop over the years. https://www.tvw.org/watch/?eventID=2020091060 at timestamps 9:05-9:52 & 15:49-17:33.

The Court of Appeals decision standard will allow conditional uses once authorized, but subsequently prohibited, and which are not actually occurring, to proliferate and live on into the future while the world around them changes. Here, the result is that a highly dangerous and unnecessary activity – a private helicopter taking off and landing on top of a skyscraper in one of the most densely populated areas of the state – is preserved as a possibility into the foreseeable future even though the activity is not currently occurring and has not occurred for nearly a decade, while the environment around the skyscraper becomes more and more heavily developed and populated. As long as Kemper simply reports that the helistop is not being used the possibility of such activity will live on forever into the future. Bellevue's citizens, those doing business in its downtown, and citizens relying on analogous protections in their jurisdictions' codes, are entitled to the assurance that a conditional use, particularly one that involves a hazardous activity, with no track record of operation (let alone safe operation), will be deemed abandoned as the code provides. This petition should be granted as it involves matters of substantial public interest and importance that are appropriately reviewed by this Court.

B. The Court of Appeals Award of Fees Under RCW 4.84.370 Is Also an Issue of Substantial Public Interest and Importance That Should be Reviewed by this Court.

This Court should also accept review because the Court of Appeals

decision, by significantly expanding the scope of RCW 4.84.370, which shifts attorney fees to those who have unsuccessfully challenged certain land use decisions, will deter public pursuit of issues regarding compliance by a City with its own code.

RCW 4.84.370 authorizes a fee award only where the decision on appeal was "a decision by a county, city or town to issue, condition or deny a development permit involving a site-specific rezone, plat, conditional use, variance, shoreline permit, building permit, site plan or similar land use approval or decision." RCW 4.84.370(1)(a) (emphasis added). Further, to obtain an award under RCW 4.84.370, a party must be the "prevailing party in all prior judicial proceedings." RCW 4.84.370(1)(b) (emphasis added). And for a local government to obtain an award, it must be upheld in both superior court and the appellate court. RCW 4.84.370(2).

The Court of Appeals here held that the City's decision denying Tateuchi's application for revocation of Kemper's helistop permit was a "similar land use approval or decision" and that the City and Kemper "prevailed in all forums below" thus entitling them to a fee award under RCW 4.84.370. However, this appeal does not involve a decision "to issue, condition or deny a development permit." The plain language of the statute does not authorize an award of attorney fees in cases involving revocation requests. *See Tugwell v. Kittitas County*, 90 Wn. App. 1, 15, 951 P.2d 272

(1997) (rezoning applicants not entitled to RCW 4.84.370 attorney fees because statute only permits awards in cases involving decisions to issue, condition or deny "development permit," not re-zoning). The statutory language that the Court of Appeals relied on, *i.e.* "or similar land use approval or decision" is the last item in a list identifying various types of development permits – by its plain terms the statute only applies if the matter involves a decision to issue, condition or deny some type of development permit.

The Court of Appeals reliance on the RCW 36.70C.020(2)(b) definition of "land use decision" is entirely inapt. The prefatory language to the definitions in RCW 36.70C.020 makes clear that they apply to Chapter 36.70C RCW, but not elsewhere. RCW 36.70C.020 ("Unless the context clearly requires otherwise, the definitions in this section apply throughout this chapter.").

Division 2 of the Court of Appeals in an unpublished decision has reached a contrary conclusion, holding that fees are not authorized under RCW 4.84.370 in cases involving revocations:

> This case does not involve a decision by the County 'to issue, condition, or deny a development permit;' it involves the revocation of a previously issued unclassified use permit. The plain language of the statute does not require the award of attorney fees in cases involving revocations; this appeal does not involve a decision 'to issue, condition or deny a development permit.' *See Tugwell v. Kittitas County*, 90 Wn.

> App. 1, 15, 951 P.2d 272 (1997) (holding that successful rezoning applicants were not entitled to attorney fees on appeal under RCW 4.84.370 because statute permitted awards in cases involving decisions to issue, condition or deny 'development permit,' not re-zoning). RCW 4.84.370 is inapplicable to this appeal.

Lynch Creek Quarry, LLC v. Pierce Cty., No. 24388-1-II, 2001 Wash. App. LEXIS 25, at *17 (Jan. 5, 2001). Division 2's decision in *Lynch Creek Quarry* illustrates that courts have reached different conclusions on this very issue, which is one of great importance that will arise again.[17]

This Court should accept review because the Court of Appeals published decision awarding fees extends the scope of the deterrent burden imposed by RCW 4.84.370 and will deter individuals from pursuing with local governments revocation of permits due to, *e.g.*, noncompliance with permit terms and/or abandonment. Under the Court of Appeals decision, RCW 4.84.370 is inappropriately extended to matters of enforcement and compliance with respect to previously issued permits. As an issue likely to reoccur and lead to inconsistent and unfair results, it is of substantial public interest and importance that should be reviewed by this Court.

Finally, even if revocation proceedings did fall within the ambit of

[17] Division 1 itself has held in an unpublished decision that RCW 4.84.370 is to be narrowly construed and does not authorize attorney fees in enforcement matters. *Ever-Green Tree Care, Inc. v. City of Kirkland*, No. 78303-3-I, 2019 Wash. App. LEXIS 1712, at *11-12 (Ct. App. July 1, 2019). *Ever-Green* is cited pursuant to GR 14.1.

RCW 4.84.370, the City and Kemper in this case did not prevail in all prior judicial proceedings. The Court of Appeals reached a contrary conclusion, characterizing Tateuchi's first successful lawsuit as "procedural" and "unrelated." Op. at 18, n.18. However, the first King County Superior Court lawsuit was not "unrelated" or merely "procedural;" it was a "prior judicial proceeding" within the plain meaning of "all prior judicial proceedings." It concerned the very same revocation application at issue in this matter, and, but for Tateuchi's successful action challenging the City's decision not to process it, there would have been no City decision at all on the revocation application. *See* CP 348, 344-45 (Hearing Examiner decision acknowledging Tateuchi's successful judicial proceeding as basis for the proceeding). The Court of Appeals decision creates an exception to wording that suggests none, with an outcome that is contrary to the statute's intent.

VI. CONCLUSION

Tateuchi respectfully requests that the Court grant review.

Dated this 15th day of March, 2021.

EGLICK & WHITED PLLC

By 

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CERTIFICATE OF SERVICE

I, Leona Phelan, an employee of Eglick & Whited PLLC, declare that I am over the age of eighteen, not a party to this lawsuit and am competent to testify as to all matters herein.

On March 15, 2021, I filed the foregoing PETITION FOR REVIEW with the Court of Appeals, Division I, of the State of Washington, and served a copy of said document via email on the following parties:

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED: March 15, 2021, at Marysville, Washington.

Leona Phelan, Paralegal

FILED
12/28/2020
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

INA TATEUCHI and HELICOPTERS UNSAFE HERE, a Washington non-profit corporation, Appellants, v. CITY OF BELLEVUE, a Washington municipal corporation, and KEMPER DEVELOPMENT COMPANY, a Washington corporation, Respondents.	)	No. 80712-9-I DIVISION ONE PUBLISHED OPINION

BOWMAN, J. — Ina Tateuchi and Helicopters UnSafe Here (HUSH) petitioned under the Land Use Petition Act (LUPA), chapter 36.70C RCW, seeking to revoke Kemper Development Company's (KDC's) conditional use permit authorizing use of a rooftop in the city of Bellevue (City) as a helistop. Tateuchi and HUSH argued that KDC abandoned the land use because it had no flight activity. They also claimed that the Bellevue City Council (Council) acted contrary to the Open Public Meetings Act of 1971 (OPMA), chapter 42.30 RCW, when it discussed their appeal from the City's land use decision in executive session. The superior court denied the LUPA petition and dismissed the OPMA claim under CR 12(b)(6). Because KDC has continually used the rooftop as a

helistop and the Council acted as a quasi-judicial body under the OPMA, we affirm.

FACTS

In 2008, KDC applied for a conditional use permit (CUP) to construct a private helistop on the rooftop of the Bellevue Place Bank of America Building. Tateuchi urged the City to reject KDC's application, arguing that helicopter activity in the downtown corridor is a public safety danger. In the alternative, Tateuchi advocated to restrict flights to only twin-engine helicopters. After several public hearings, the City issued the CUP in May 2011 with the twin-engine limitation.[1]

KDC then obtained a building permit to upgrade the rooftop to meet Federal Aviation Administration (FAA) design standards and City building code requirements. In 2013, the site became operational. The CUP required an active communications system and website for residents, which KDC has continually maintained. As a condition of the CUP, KDC also files routine usage reports with the City, attesting that the helistop remains "fully operational." KDC reported no helicopter landings or takeoffs at the helistop, except for one flight in 2015.

In 2016, Tateuchi applied to the City to revoke the CUP, claiming KDC abandoned its conditional use because there had been no helicopter takeoffs or

[1] Tateuchi appealed the CUP approval to King County Superior Court. The court affirmed the CUP. The City has since adopted Bellevue Ordinance 6277 (March 2016), which prohibits future CUPs for private helistops, and allows only government and hospital "heliports" used exclusively for emergency purposes.

landings.[2] In response, the City held an informational meeting and considered comments from members of the community about whether to revoke the CUP. After hearing public comment, the Bellevue Development Services Department director recommended that the City deny Tateuchi's application. The City set a public hearing before a hearings examiner for March 2018 on Tateuchi's application to revoke KDC's CUP.

At the March 22, 2018 public hearing, the hearing examiner considered argument from the City, KDC, and Tateuchi. After the hearing, she issued written findings of fact and conclusions of law denying Tateuchi's 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.

Tateuchi and HUSH (collectively Tateuchi) appealed the hearing examiner's decision to the Council.[3] The Council considered an extensive written record and held a "limited" public hearing after their regular meeting on June 18, 2018. Before hearing argument, the mayor explained that the hearing was "confined to the issues decided by the Hearing Examiner" and

> [a]s noted earlier at oral communication, the Council has not been able to take public comment on this matter because it is a quasi-judicial proceeding and does not follow Council's normal process[.] Because the record of this matter officially closed with the issuance of the Examiner's decision, no additional evidence or

[2] Tateuchi also claimed KDC obtained CUP approval "by misrepresentation of material fact."

[3] HUSH was not a party until the appeal of the hearing examiner's decision.

> public comment can be considered by Council in rendering a decision on the Examiner's decision.

Tateuchi's attorney urged the Council to review the record carefully. He told the Council, "I hope you folks are not going to make a decision tonight because I hope you will go back and look at the record." The mayor responded:

> I do not anticipate we will make a decision tonight[.] We are planning to go into Executive Session to discuss the merits of the case and . . . adjourn from the Executive Session without making a decision[.] We would come back at a later date to have a discussion about what our decision would . . . be.[4]

After the hearing, the mayor reiterated that the Council was "planning to go into an Executive Session to discuss the merits of the case."[5] The Council began its deliberations in executive session that night and then adjourned to a later date for further consideration.

Three months later, the Council addressed Tateuchi's appeal at their September public meeting. The Council voted on the record to deny Tateuchi's appeal and to adopt the hearing examiner's findings and conclusions denying the application to revoke KDC's CUP. The City codified the Council's decision as Bellevue Ordinance 6429 (Oct. 2018).

Tateuchi filed a LUPA petition in King County Superior Court, claiming the City erred in determining KDC had not abandoned its use of the rooftop. In the alternative, Tateuchi alleged the City violated the OPMA because the Council

[4] Neither side objected to this procedure.

[5] Again, no one objected.

"deliberated in secret."[6] The superior court affirmed the City's denial of Tateuchi's appeal and denied "in full" Tateuchi's LUPA petition. The superior court also granted the City's motion to dismiss Tateuchi's LUPA petition and the OPMA claim under CR 12(b)(1) and (6) with prejudice.[7] Tateuchi sought direct review before the Supreme Court, which transferred review to this court.

ANALYSIS

LUPA

Tateuchi argues the term "abandoned" in Bellevue Land Use Code (BLUC) 20.30B.170(B)(1) can be satisfied by showing only that property is not being used for the purpose contemplated by a CUP. They claim the City erred by concluding that a property owner must also express an intent to abandon the conditional use. Tateuchi also argues the City erred by concluding KDC continually used the rooftop as a helistop after the CUP issued.

LUPA governs judicial review of land use decisions. RCW 36.70C.030. In reviewing a land use decision, we stand in the same position as the superior court. Phoenix Dev., Inc. v. City of Woodinville, 171 Wn.2d 820, 828, 256 P.3d 1150 (2011). We review a LUPA petition using the administrative record admitted before the trial court. Isla Verde Int'l Holdings, Inc. v. City of Camas, 146 Wn.2d 740, 751, 49 P.3d 867 (2002), abrogated on other grounds by Yim v. City of Seattle, 194 Wn.2d 682, 451 P.3d 694 (2019).

[6] Tateuchi also filed alternative claims for statutory and constitutional writs of review, a writ of mandamus, and declaratory and injunctive relief that the superior court dismissed. Tateuchi does not appeal the dismissal of those claims.

[7] The court later amended the order granting the City's motion to dismiss the OPMA claim pursuant to only CR 12(b)(6).

"Under LUPA a court may grant relief from a local land use decision only if the party seeking relief has carried the burden of establishing that one of the six standards listed in RCW 36.70C.130(1) has been met." Wenatchee Sportsmen Ass'n v. Chelan County, 141 Wn.2d 169, 175, 4 P.3d 123 (2000). RCW 36.70C.130(1) provides:

> The superior court, acting without a jury, shall review the record and such supplemental evidence as is permitted under RCW 36.70C.120. The court may grant relief only if the party seeking relief has carried the burden of establishing that one of the standards set forth in (a) through (f) of this subsection has been met. The standards are:
>
> (a) The body or officer that made the land use decision engaged in unlawful procedure or failed to follow a prescribed process, unless the error was harmless;
>
> (b) The land use decision is an erroneous interpretation of the law, after allowing for such deference as is due the construction of a law by a local jurisdiction with expertise;
>
> (c) The land use decision is not supported by evidence that is substantial when viewed in light of the whole record before the court;
>
> (d) The land use decision is a clearly erroneous application of the law to the facts;
>
> (e) The land use decision is outside the authority or jurisdiction of the body or officer making the decision; or
>
> (f) The land use decision violates the constitutional rights of the party seeking relief.

Tateuchi seeks relief under subsections (a),[8] (b), (c), and (d).

Whether the hearing examiner erroneously interpreted the law is a question that we review de novo. Phoenix Dev., 171 Wn.2d at 828. When reviewing a challenge to the sufficiency of evidence, we view facts and inferences " 'in a light most favorable to the party that prevailed in the highest

[8] Tateuchi claims error under subsection (a) because the hearing examiner refused to let them provide more evidence of abandonment. Because Tateuchi cites no legal authority in support of this claim, we do not consider their argument. See RAP 10.3(a)(6) (A brief must contain "citations to legal authority and references to relevant parts of the record" for each assignment of error.).

forum exercising fact finding authority' "—here, the City and KDC. Woods v. Kittitas County, 162 Wn.2d 597, 617, 174 P.3d 25 (2007)[9] (quoting Benchmark Land Co. v. City of Battle Ground, 146 Wn.2d 685, 694, 49 P.3d 860 (2002)). Under the substantial evidence standard, there must be sufficient evidence in the record to persuade a reasonable person that the declared premise is true. Wenatchee Sportsmen, 141 Wn.2d at 176. A finding is "clearly erroneous" only when the reviewing court "is 'left with the definite and firm conviction that a mistake has been committed.' " Cougar Mountain Assocs. v. King County, 111 Wn.2d 742, 747, 765 P.2d 264 (1988)[10] (quoting Polygon Corp. v. City of Seattle, 90 Wn.2d 59, 69, 578 P.2d 1309 (1978)).

I. Definition of "Abandoned"

Tateuchi argues the hearing examiner erred by concluding that the term "abandoned" in BLUC 20.30B.170(B)(1) means an "overt act" as well as an "intent to abandon" conditional use of property.

BLUC 20.30B.120 defines the purpose of a CUP:

> A Conditional Use Permit is a mechanism by which the City may require special conditions on development or on the use of land in order to ensure that designated uses or activities are compatible with other uses in the same land use district and in the vicinity of the subject property.

Under the BLUC, the City may revoke a CUP only upon a finding that

> 1. The use for which the approval was granted has been abandoned for a period of at least a year; or
> 2. Approval of the permit was obtained by misrepresentation of material fact; or

[9] Internal quotation marks omitted.

[10] Internal quotation marks omitted.

3. The permit is being exercised contrary to the terms of approval.

BLUC 20.30B.170(B).

"The same rules of statutory construction apply to the interpretation of municipal ordinances as to the interpretation of state statutes." City of Seattle v. Green, 51 Wn.2d 871, 874, 322 P.2d 842 (1958).

> In interpreting a statute the "fundamental objective is to ascertain and carry out the Legislature's intent. [I]f the statute's meaning is plain on its face, then the court must give effect to that plain meaning as an expression of legislative intent."

Seattle Hous. Auth. v. City of Seattle, 3 Wn. App. 2d 532, 538, 416 P.3d 1280 (2018)[11] (quoting Citizens All. for Prop. Rights Legal Fund v. San Juan County, 184 Wn.2d 428, 435, 359 P.3d 753 (2015)).

We determine the plain meaning of a statute by looking to " 'the ordinary meaning of words, the basic rules of grammar, and the statutory context to conclude what the legislature has provided for in the statute and related statutes.' " Seattle Hous. Auth., 3 Wn. App. 2d at 541 (quoting In re Forfeiture of One 1970 Chevrolet Chevelle, 166 Wn.2d 834, 838-39, 215 P.3d 166 (2009)). "When construing an ordinance, a 'reviewing court gives considerable deference to the construction of the challenged ordinance by those officials charged with its enforcement.' " Phoenix Dev., 171 Wn.2d at 830[12] (quoting Ford Motor Co. v. City of Seattle, Exec. Servs. Dep't, 160 Wn.2d 32, 42, 156 P.3d 185 (2007)).

The BLUC does not define the term "abandoned." To determine the ordinary meaning of an undefined term, we look to standard English language

[11] Alteration in original.

[12] Internal quotation marks omitted.

dictionaries. Boeing Co. v. Aetna Cas. & Sur. Co., 113 Wn.2d 869, 877, 784 P.2d 507 (1990). Webster's Third New International Dictionary 2 (2002) defines "abandoned" as "to cease to assert or exercise an interest, right, or title to esp[ecially] with the intent of never again resuming or reasserting it." Likewise, Black's Law Dictionary 2 (10th ed. 2014) defines "abandonment" as "[t]he relinquishing of a right or interest with the intention of never reclaiming it."

We may also look to the common law to determine the meaning of undefined terms. See Ralph v. Dep't of Nat. Res., 182 Wn.2d 242, 248, 343 P.3d 342 (2014) (quoting N.Y. Life Ins. Co. v. Jones, 86 Wn.2d 44, 47, 541 P.2d 989 (1975)). The common law definition of "abandoned" appears in many land use related contexts. See State v. Kealey, 80 Wn. App. 162, 171, 907 P.2d 319 (1995) ("Property is abandoned when the owner intentionally relinquishes possession and rights in the property."); Wash. Sec. & Inv. Corp. v. Horse Heaven Heights, Inc., 132 Wn. App. 188, 196-97, 130 P.3d 880 (2006) ("The issue of whether there has been an abandonment at common law depends on the intention of the owner of the right-of-way. A right-of-way may be abandoned by unequivocal acts showing a clear intention to abandon. Mere nonuse of a portion of a railroad's easement does not itself constitute an abandonment.") (citing Neitzel v. Spokane Int'l Ry., 80 Wn. 30, 34-36, 141 P. 186 (1914); Jensen v. Dep't of Ecology, 102 Wn.2d 109, 115, 685 P.2d 1068 (1984) (abandonment under the common law must show the water user intended to abandon, and actually did relinquish, all or a portion of the water right); City of University Place v. McGuire, 144 Wn.2d 640, 652, 30 P.3d 453 (2001) (nonconforming use of

property deemed abandoned if the municipal authority shows an intent to abandon and an overt act or failure to act).

The common law definition of "abandoned" most analogous to conditional land use is that used in the context of nonconforming land use. A "nonconforming use" is one that was permitted under a prior zoning scheme that has since been prohibited. Rhod-A-Zalea & 35th, Inc. v. Snohomish County, 136 Wn.2d 1, 6, 959 P.2d 1024 (1998).

In McGuire, a tract of land zoned for mining operations became nonconforming after the county passed zoning ordinances requiring permits for future mining operations. McGuire, 144 Wn.2d at 644. Several years later, a developer bought the land and intended to mine a section for fill material. McGuire, 144 Wn.2d at 646. The city denied the developer's request to mine, finding the former owner abandoned the mining use because no mining operations previously occurred in that particular area of the property. McGuire, 144 Wn.2d at 645-46. While the city's municipal code did not define the term "abandoned," the Supreme Court applied the two-prong common law definition of the word—" '(a) [a]n intention to abandon; and (b) an overt act, or failure to act.' " McGuire, 114 Wn.2d at 652 (quoting Van Sant v. City of Everett, 69 Wn. App. 641, 648, 849 P.2d 1276 (1993)).

Tateuchi argues that nonconforming use case law is distinguishable because their challenge here is to a conditional use. They claim that nonconforming uses are vested property rights entitled to greater protection under the law than conditional limited uses. But Tateuchi's 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, 69 Wn. App. at 649; Christianson v. Snohomish Health Dist., 133 Wn.2d 647, 663, 946 P.2d 768 (1997), abrogated on other grounds by Yim, 194 Wn.2d at 682; Anderson v. Island County, 81 Wn.2d 312, 323, 501 P.2d 594 (1972); Open Door Baptist Church v. Clark County, 140 Wn.2d 143, 150, 995 P.2d 33 (2000). "[U]nless their continuation is necessary to avoid injustice, the nonconforming use will be prohibited." Choi v. City of Fife, 60 Wn. App. 458, 462, 803 P.2d 1330 (1991) (citing Andrew v. King County, 21 Wn. App. 566, 586 P.2d 509 (1978)).

Tateuchi also points to the language of the BLUC nonconforming use ordinance, arguing that it shows the City's intent to treat revocation of nonconforming use status differently than revocation of a conditional use. While the conditional use ordinance BLUC 20.30B.170(B)(1) allows revocation on a showing of abandonment alone, a nonconforming use may be revoked only if the use is "discontinued . . . with the intention of abandoning that use." BLUC 20.25A.040(A)(2). Tateuchi argues that when a legislative body uses different words or terminology in different parts of a statute, it intends a different meaning.[13]

Even so, 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.' " Ralph, 182 Wn.2d at 248 (Jones, 86 Wn.2d at 47). The hearing examiner's conclusion that the term "abandoned" in

[13] See State v. Roggenkamp, 153 Wn.2d 614, 625-26, 106 P.3d 196 (2005).

BLUC 20.30B.170(B)(1) means an overt act and an intent to abandon was not an erroneous interpretation of the law.

II. Evidence of Abandonment

Tateuchi claims KDC abandoned its helistop because it did not use the rooftop for helicopter takeoffs or landings over the course of a 12-month period. We disagree.

A party seeking revocation of a land use permit bears the burden of proving that a landowner abandoned its permitted use. Skamania County v. Woodall, 104 Wn. App. 525, 540, 16 P.3d 701 (2001). "But when an ordinance establishes a set time beyond which a . . . use cannot remain unused without being forfeited, the burden shifts back to the owner to prove lack of intent to abandon." Miller v. City of Bainbridge Island, 111 Wn. App. 152, 164, 43 P.3d 1250 (2002). Here, Tateuchi bears the burden to show that KDC abandoned its use of the CUP for "a period of at least one year." BLUC 20.30B.170(B)(1). The burden then shifts to KDC to produce objective evidence it did not intend to abandon the use.

BLUC 20.50.032 defines "land use" as "[t]he use to which an area of land, or building thereon, is put; human activity taking place thereon."[14] The City granted KDC a CUP to use the rooftop of the Bellevue Place Bank of America Building as a helistop. A "heliport" is "an area of land or water or a structural surface which is used as a permanent facility for the landing and takeoff of

[14] A semicolon is used to show a stronger separation between the parts of a sentence than does a comma. Dep't of Labor & Indus. v. Slaugh, 177 Wn. App. 439, 448, 312 P.3d 676 (2013). A semicolon separates phrases, clauses, or enumerations of almost equal importance, especially when such phrases or clauses contain commas within themselves. Slaugh, 177 Wn. App. at 448.

helicopters," and a "helistop" is "the same as a heliport, except that no refueling, maintenance, repairs or storage of helicopters is permitted." BLUC 20.50.024. 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. We conclude 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.

In Rosema v. City of Seattle, 166 Wn. App. 293, 299, 269 P.3d 393 (2012), homeowners disputed whether their structure or a portion of their structure was being used for the use allowed by the most recent permit for a period of more than 12 consecutive months under the Seattle Municipal Code. Neighbors alleged that the owners abandoned the permitted use of the home—a duplex—because they did not use the basement unit as a separate household for over a decade. Rosema, 166 Wn. App. at 296-97. We concluded that "failure to use the basement unit of their property to house an independent household" was not an overt act of abandonment or evidence of "discontinued interest" in use because the owners "maintain[ed] the structural capability to do so." Rosema, 166 Wn. App. at 300-01.[15]

Here, the City's restrictions on helicopter activity prevent KDC from currently using its helistop to receive flights. But a "temporary cessation" does not equate with "abandonment." Andrew v. King County, 21 Wn. App. 566, 571, 586 P.2d 509 (1978) (citing 8A E. MCQUILLIN, THE LAW OF MUNICIPAL

[15] The owners maintained a separate entrance, kitchen, and address for the unit. Rosema, 166 Wn. App. at 296.

CORPORATIONS § 25.196 (3d ed. rev. 1976)). Like the basement unit in Rosema, KDC has maintained the "structural capability" of the land to operate as a permanent facility for helicopters if flights can lawfully resume. Rosema, 166 Wn. App. at 300. KDC constructed the facility, established the necessary communication systems, continues to comply with FAA regulations, and submits biannual reports to the City attesting that the helistop remains "fully operational."

Tateuchi argues that the helistop must actively receive helicopter flights to be operational because the BLUC contemplates "human activity taking place" on the land. BLUC 20.50.032. But the "human activity" required to maintain the operational status of a heliport consists of more than aircraft landing and taking off. The "human activity" at the KDC helistop includes those activities necessary to comply with City building code provisions and FAA regulations, constructing and maintaining operational communications systems, and the biannual filing of usage reports.[16]

Substantial evidence supports the hearing examiner's conclusion that KDC did not abandon its use of the rooftop as a helistop, and the decision is not a "clearly erroneous application of the law to the facts." RCW 36.70C.130(1)(d).

OPMA

Tateuchi argues the trial court erred in granting the City's motion to dismiss the OPMA claim under CR 12(b)(6). They assert that the Council violated the OPMA when it discussed their appeal from the hearing examiner's decision in a closed-door executive session. We disagree.

[16] These acts are also objective manifestations of KDC's intent not to abandon the helistop.

Under CR 12(b)(6), a trial court may dismiss a complaint if it fails "to state a claim upon which relief can be granted." State ex rel. Pub. Disclosure Comm'n v. 119 Vote No! Comm., 135 Wn.2d 618, 623, 957 P.2d 691 (1998). Dismissal is appropriate only where "it appears beyond doubt that the plaintiff cannot prove any set of facts which would justify recovery." Tenore v. AT&T Wireless Servs., 136 Wn.2d 322, 330, 962 P.2d 104 (1998). When deciding whether to dismiss under this standard, the court assumes all the plaintiff's factual allegations are true and "may consider hypothetical facts supporting the plaintiff's claims." Kinney v. Cook, 159 Wn.2d 837, 842, 154 P.3d 206 (2007).

We review dismissal under CR 12(b)(6) de novo as a question of law. West v. Seattle Port Comm'n, 194 Wn. App. 821, 825, 380 P.3d 82 (2016). While we presume that all facts alleged in the complaint are true, we "are not required to accept the complaint's legal conclusions as true." West v. Wash. Ass'n of County Officials, 162 Wn. App. 120, 128, 252 P.3d 406 (2011).

"The legislature enacted the OPMA as part of a nationwide effort to make government affairs more accessible and transparent." West, 162 Wn. App. at 131 (citing LAWS OF 1971, ch. 250).

> The OPMA declares that the governing bodies of "all public commissions, boards, councils, committees, subcommittees, departments, divisions, offices, and all other public agencies" are to take their actions and conduct their deliberations openly.

West, 162 Wn. App. at 131 (quoting RCW 42.30.010). But RCW 42.30.140(2) exempts "[t]hat portion of a meeting of a quasi-judicial body which relates to a quasi-judicial matter between named parties as distinguished from a matter having general effect on the public or on a class or group." We determine

whether an action is quasi-judicial by applying a four-part test: (1) whether a court could have been charged with the decision; (2) whether the courts historically have performed that action; (3) whether the action involves applying the law to particular facts for purposes of determining liability; and (4) whether the action is similar to the ordinary business of the courts, rather than that of legislators or administrators. Wash. Fed'n of State Emps. v. Pers. Bd., 23 Wn. App. 142, 145-46, 594 P.2d 1375 (1979).

BLUC 20.35.100, entitled "Process I: Hearing Examiner quasi-judicial decisions," governs appeals from City land-use decisions. Under the ordinance:

> The decision of the Hearing Examiner on a Process I application is appealable to the City Council. The City Council action deciding the appeal and approving, approving with modifications, or denying a project is the final City decision on a Process I application.

BLUC 20.35.100(C).

As directed by BLUC 20.35.100, the Council's actions here mirrored judicial appellate review, applying the law to specific facts and using legal standards of review. Historically, these functions are reserved to our courts. Indeed, the evidence and argument provided to the Council were nearly identical to that relied on by Tateuchi later in the superior court. Acting in that capacity, the Council adjudicated a dispute between specific parties; and its decision implicated only KDC's interest in the CUP, not the public at large. This action is more like the ordinary business of the courts than that of legislators.

Tateuchi argues that the Council acted as legislators because its decision impacts helicopter activity in heavily populated areas, which implicates public safety concerns. But the Council did not address the public safety issue in

executive session. They made that legislative decision in public session in 2011 as part of the CUP application process. The superior court did not err in concluding that the City was acting in a quasi-judicial capacity when it considered in executive session Tateuchi's application to revoke the CUP. The court properly dismissed the OPMA claim.

Attorney Fees

KDC and the City request attorney fees on appeal. RCW 4.84.370(1)[17] authorizes attorney fees

> 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.

And we may award fees to a county, city, or town if its decision was " 'upheld at superior court and on appeal.' " Durland v. San Juan County, 182 Wn.2d 55, 76, 340 P.3d 191 (2014) (quoting RCW 4.84.370(2)). The fee award is limited to proceedings before the Court of Appeals or Supreme Court. Baker v. Tri-Mountain Res., Inc., 94 Wn. App. 849, 854, 973 P.2d 1078 (1999).

Tateuchi objects to any fee award because their appeal was not from a decision "to issue, condition, or deny a development permit" under RCW 4.84.370(1), but the denial of an application to revoke such a permit. But RCW 4.84.370(1) authorizes fee awards to prevailing parties from decisions to issue, condition, or deny permits, or a "similar land use approval or decision." A "land

[17] Emphasis added.

use decision" 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.

RCW 36.70C.020(2)(b).

Tateuchi appealed the City's denial of the application to revoke a CUP—a "similar land use" decision. RCW 4.84.370(1). The City and KDC prevailed in all forums below[18] and are the prevailing parties on this appeal. They are entitled to a fee award subject to compliance with RAP 18.1.

We affirm the orders denying Tateuchi's land use petition and dismissing the OPMA claim under CR 12(b)(6).

Brennan, J.

WE CONCUR:

Verellen, J.

Appelwick, J.

[18] Tateuchi claims that because she prevailed on a procedural question under a separate cause of action in a prior judicial proceeding, the City and KDC were not the prevailing parties in every forum below. RCW 4.84.370(1)(b). This misinterprets the statute because the decision before us on appeal does not include these unrelated events.

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

INA TATEUCHI and HELICOPTERS UNSAFE HERE, a Washington non-profit corporation, Appellants, v. CITY OF BELLEVUE, a Washington municipal corporation, and KEMPER DEVELOPMENT COMPANY, a Washington corporation, Respondents.	)	No. 80712-9-I DIVISION ONE ORDER DENYING MOTION FOR RECONSIDERATION

Appellants Ina Tateuchi and Helicopters UnSafe Here (HUSH) filed a motion for reconsideration of the opinion filed on December 28, 2020. A majority of the panel has determined that the motion should be denied. Now, therefore, it is hereby

ORDERED that the motion for reconsideration is denied.

FOR THE COURT:

Judge

EGLICK & WHITED PLLC

March 15, 2021 - 1:56 PM

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