

**BEFORE THE HEARING EXAMINER  
FOR THE CITY OF BELLEVUE**

In the Matter of the Appeal by )  
 )  
**FANA GROUP OF COMPANIES,** )  
**INCLUDING FANA FOUR 106 LLC,** )  
**AND FANA KEY LLC,** )  
 )  
 Appellant, )  
 )  
 of Land Use Code Interpretation File No. 19- )  
 131714-DA, referenced as the “FANA Land )  
 Use Code Interpretation” issued on June 11, )  
 2020, by the )  
 )  
**CITY OF BELLEVUE,** )  
**DEVELOPMENT SERVICES DEPARTMENT** )  
**DIRECTOR,** )  
 )  
 Respondent )

**AAD 20-15**

**DECISION**

**I. SUMMARY OF DECISION.**

The appeal is denied. The challenged Land Use Code Interpretation is affirmed.

**II. PROCEDURAL BACKGROUND.**

This is an appeal of a formal Land Use Code Interpretation issued by the City of Bellevue’s Land Use Director, on delegation from its Development Services Department Director, issued and published on or about June 11, 2020 (*Ex. C-1, pages DSD 012-022*), following a written request for an interpretation explained in a letter submitted by Appellant’s counsel, Mr. McCullough, in December of 2019 (*Ex. C-1, pages DSD 024-030*). There is no dispute that the pending appeal was timely, as it was filed on June 24, 2020. (*Ex. C-1, pages DSD 002-010, Appeal submitted on June 24, 2020, typo showing 2018 on file copy*).

1 ***Jurisdiction.***

2 An Interpretation of Bellevue’s Land Use Code is a “Process II” decision, made by  
3 the Development Services Department Director, which is subject to appeal to the Hearing  
4 Examiner. (*LUC 20.35.015.C.5 and .250*). This matter was assigned to the undersigned  
5 Examiner, who conducted a pre-hearing conference with all parties and their representatives  
6 present by telephone on July 23, 2020. At the pre-hearing conference, the City confirmed  
7 that it had no procedural objections that would prevent the appeal from going forward. The  
8 parties worked cooperatively to identify potential witnesses, and to generate notebooks of  
9 potential exhibits.

10 ***Parties of Record, Counsel***

11 The parties to this appeal and their counsel of record are: the FANA Group of  
12 Companies (“FANA”), the appellant in this matter, represented through the appeal hearing  
13 process by counsel, Courtney A. Kaylor, with the McCullough Hill Leary law firm; and the  
14 Respondent, City of Bellevue, Development Services Department, represented by Assistant  
15 City Attorney, Matthew B. McFarland.

16 ***Factors for consideration in making a Land Use Code Interpretation***

17 Part 20.30K of the City’s Land Use Code establishes the procedure and criteria that  
18 the City will use in deciding upon a written request to interpret the provisions of its Land  
19 Use Code. (*LUC 20.30K.110*). In making an interpretation of the provisions of the Land  
20 Use Code, the Director shall consider the following:

- 21 A. The applicable provisions of the Land Use Code including their purpose and context; and
- 22 B. The impact of the interpretation on other provisions of the Land Use Code; and
- 23 C. The implications of the interpretation for development within the City as a whole; and
- 24 D. The applicable provisions of the Comprehensive Plan and other relevant codes and policies.  
(*LUC 20.30K.140*).

25 ***Burden of Proof, Substantial Weight Given to Director’s Decision***

26 The appellant, FANA, bears the burden of proof to establish that the challenged Code  
Interpretation is not supported by a preponderance of the evidence. (*LUC 20.35.250.E*). The  
same provision of the City’s Land Use Code mandates that the Hearing Examiner “*shall  
accord substantial weight*” to the decision challenged in this appeal.

***Hearing Date, Post-Hearing Briefs, Site Visit***

By agreement of the parties, the appeal hearing occurred on a single day, October 1,  
2020, using the Zoom audio/video communication platform, due to the ongoing Covid-19

1 public health emergency. The parties were able to call witnesses of their choosing, and  
2 various individuals were able to observe the proceedings online. None of the parties of record  
3 had any difficulties coordinating the electronic hearing format. Weeks after the hearing, both  
4 parties filed lengthy post-hearing briefs, with a copy of the hearing transcript. The Hearing  
5 Examiner visited the appellant's project site before the hearing, and again after the hearing  
6 to focus on features and surrounding areas discussed during the appeal hearing and post-  
7 hearing briefs.

8  
9 ***Issue Presented***

10 Whether the challenged Land Use Code Interpretation is supported by a  
11 preponderance of the evidence?

12  
13 **III. RECORD.**

14 A list of the complete set of the documentary evidence and pleadings included as part  
15 of the Record are all on file in the Hearing Examiner's Office, at Bellevue City Hall. All of  
16 the documents referenced in the parties' Stipulated Exhibits List submitted before the hearing  
17 were accepted into the record during the appeal hearing. Both parties submitted post-hearing  
18 briefs. Most if not all hearing exhibits are reprinted below, as listed and identified in the  
19 Stipulated Exhibits List.

20 ***Exhibits:***

21 *City of Bellevue, Development Services Department, Exhibits:*

- 22 Exhibit C-1: Permit file No. 19-131714-DA.  
23 Exhibit C-2: DSD Email re Downtown Nonconformity (8.19.19).  
24 Exhibit C-3: E. Stead Email re Downtown Project Phasing (10.1.19).  
25 Exhibit C-4: Amenity Plan and Chart re 19-130426-LD (11.22.19).  
26 Exhibit C-5: Architectural Rendering re 19-130426-LD (1.7.20).  
Exhibit C-6: Building Floor Plan re 19-130426-LD (5.1.20).  
Exhibit C-7: Staff Report, No. 18-124370-LD (Mira II).  
Exhibit C-8: DSD Letter re 19-105108-LP (WA SQ. MDP).  
Exhibit C-9: DSD Letter re 19-109440-DC (Skyline Tower FAR).  
Exhibit C-10: WA Square Towers HOA Comment Letter (4.19.19).

*FANA Exhibits:*

- Exhibit F-1: King County imap 2019 aerial photograph of subject vicinity.  
Exhibit F-2: King County imap 2019 aerial photograph of subject block.  
Exhibit F-3: King County imap 2019 aerial photograph of subject half block.

1 Exhibit F-4: Google maps street view photograph of alley adjacent to KeyBank building looking north.

2 Exhibit F-5: Google maps street view photograph of alley adjacent to KeyBank building looking south.

3 Exhibit F-6: Google maps street view photograph of KeyBank building.

4 Exhibit F-7: KeyBank plan set (selected sheets).

5 Exhibit F-8: 2018.10.10 Preapplication Packet.

6 Exhibit F-9: 2019.06.12 DC Meeting Minutes.

7 Exhibit F-10: 2019.06.12 Plan Set.

8 Exhibit F-11: 2019.07.18 DC Meeting Minutes.

9 Exhibit F-12: 2019.07.18 Plan Set.

10 Exhibit F-13: 2019.08.02 Four106 Comment.

11 Exhibit F-14: 2019.08.15 Plan Set.

12 Exhibit F-15: 2019.08.15 Response to Comments.

13 Exhibit F-16: 2019.10.10 Email string re Downtown Project Phasing.

14 Exhibit F-17: 2019.11.22 MDP Plan Set.

15 Exhibit F-18: 2019.12.12 Letter from E. Stead re Project Phasing.

16 Exhibit F-19: 2020.01.17 Key Bank Pavilion.

17 Exhibit F-20: 2020.02.25 Correction Letter.

18 Exhibit F-21: 2020.05.01 Cycle 1 Response Letter.

19 Exhibit F-22: 2020.05.01 MDP Cycle 2 Set (selected pages).

20 Exhibit F-23: 2020.06.25 DC Meeting Minutes.

21 Exhibit F-24: 2020.07.30 LD-LP Meeting Minutes.

22 Exhibit F-25: 2020.08.28 Cycle 3 MDP Plan Set (selected pages).

23 Exhibit F-26: 2020.08.28 Cycle 2 Response Letter.

24 Exhibit F-27: 2017 FanaFour106 MDP Decision, MDP Plans & FAR Calculations.

25 Exhibit F-28: Washington Square MDP Decision & Selected MDP Plans.

26 Exhibit F-29: Resume of Mark Woerman.

Exhibit F-30: Resume of Tim Bissmeyer.

Exhibit F-31: Resume of Cameron Darr.

Exhibit F-32: Resume of John Schwartz.

Exhibit F-33: Resume of Kay Compton.

Exhibit F-34: Resume of Gary Wakatsuki.

*Joint Exhibits:*

Exhibit J-1: Preapplication Conference Letter re 18-125373-DB (11.7.18).

Exhibit J-2: 2019.07.29 Non-Conformance List.

Exhibit J-3: 2019.08.15 DC Meeting Minutes.

Exhibit J-4: DSD Email re FANA Four106 Nonconformity (8.30.19).

Exhibit J-5: J. Powers Letter to E. Stead (10.10.19).

Exhibit J-6: 2019.10.30 Interim Phase Condition.

Exhibit J-7: LUC 20.25A.040.

Exhibit J-8: Former LUC 20.25A.025.

1 Exhibit J-9: LUC 20.25A.020, Downtown LUC Definitions.  
2 Exhibit J-10: Part 20.30V LUC.  
3 Exhibit J-11: LUC 20.50.016, “Development” Definition.  
4 Exhibit J-12: LUC 20.50.036, Nonconforming Site, Structure & Use Definitions.  
5 Exhibit J-13: Ordinance 5727.  
6 Exhibit J-14: Ordinance 6377.

7 **Witnesses.** The following individuals presented testimony under oath and were  
8 subject to cross-examination by counsel for the other party during the appeal hearing:

- 9 1. Tim Bissmeyer – for the appellant, FANA; architect with the CollinsWoerman  
10 firm, project manager for FANA on this project, served as appellant’s primary  
11 point of contact with City staff, resume included in the record as *Ex. F-30*;
- 12 2. John Schwartz – for the appellant, FANA; architect by profession, now owns  
13 his own business called The Schwartz Company, hired as owners  
14 representatives by FANA, resume included in the record as *Ex. F-32*;
- 15 3. John Powers – FANA President of Real Estate, oversees FANA’s portfolio of  
16 properties; and
- 17 4. Elizabeth Stead – Land Use Director for the Bellevue Development Services  
18 Department, issued and signed the Land Use Code Interpretation challenged  
19 in this appeal.

20 The Examiner has had a full and fair opportunity to consider all evidence and  
21 testimony submitted as part of the record; has visited the project site and numerous other sites  
22 in downtown Bellevue before and after the appeal hearing, and on many occasions over the  
23 last several years in connection with other applications and appeals; has reviewed and  
24 researched relevant codes and caselaw; has considered all arguments included in the parties’  
25 post-hearing briefs; and is fully advised. Accordingly, this Decision is now in order.

#### 26 **IV. FINDINGS OF FACT.**

- 27 1. Any statements of fact or findings set forth in previous or subsequent portions of this  
28 Decision that are deemed to be findings of fact are hereby adopted and incorporated herein  
29 as such.
- 30 2. The appellant is the FANA Group of Companies, hereinafter referenced as “FANA.”
- 31 3. This appeal challenges a formal Land Use Code Interpretation issued by the City’s  
32 Land Use Director under authority granted in Part 20.30K of the City’s Land Use Code  
33 (LUC). The appeal is limited to consideration of the challenged Land Use Code

1 Interpretation, assigned File No. 19-131714-DA, issued and published on or about June 11,  
2 2020. (Ex. C-1, pages DSD 012-022). The Code Interpretation includes the following  
3 Conclusion:

4 FANA's intended utilization of Phase 2 site's available FAR is development of that site  
5 under the LUC. Such development of Phase 2 is a fundamental change to the entirety of the  
6 Phase 2 site. A nonconforming site in Downtown may be changed only if the change  
7 conforms to the requirements of the applicable code. LUC 20.25A.040.C. Therefore, this  
8 development of the entire Phase 2 site requires that FANA bring all Phase 2 site  
9 nonconformities into conformance at the time this fundamental change occurs. (Ex. C-1,  
10 page DSD 019).

11 4. FAR is short for "Floor Area Ratio," a measure of development intensity available on  
12 sites throughout the City's Downtown area. (See LUC 20.25A.020.A, definitions specific to  
13 Downtown, for complete definition of "Floor Area Ratio (FAR)").

14 5. The City confirms that this is the first formal code interpretation that the Department  
15 has ever issued involving LUC 20.25A.040.C, captioned "Nonconforming Sites," and Master  
16 Development Plan (MDP) provisions also found in LUC. (Opening Argument by Counsel for  
17 the City, TR 15:17-21).

18 6. FANA owns three tax parcels located at the corner of 106th Avenue NE and NE 4th  
19 Street in downtown Bellevue ("Property"). FANA refers to the two parcels on 106th Avenue  
20 NE as the "Four 106 Site" and the parcel to the east, currently developed with the KeyBank  
21 building, as the "KeyBank Site." (Bissmeyer Testimony, TR 24:25-25:22). Together, the  
22 three properties total 2.08 acres in size, and they are all within the City's Downtown-Office  
23 2 South (DT-O-2-S) Land Use District. (Ex. C-1, page DSD 014).

24 7. The Four106 Site is currently improved with two low-rise office buildings and surface  
25 parking. (Exs. F-2, F-25, p. 27; Bissmeyer Testimony, TR 25:12-18). FANA plans to  
26 demolish all buildings on its Four106 site during "Phase 1" of its proposed Master  
27 Development Plan.

28 8. The KeyBank Site is currently improved with one 9-story office building over  
29 structured parking. The structured parking extends beyond the base of the office building the  
30 entire length of the site. Due to the site topography, the structured parking creates a wall  
31 along the sidewalk, taller at the alley on the northwest corner, lower at the main entryway on  
32 NE 4<sup>th</sup>. (Exs. F-2, F-4, F-5, F-6, F-25, p. 27; Bissmeyer Testimony, TR 25:19-25; Site visits).

33 9. The KeyBank Site is separated from the Four106 site by an alley running north/south  
34 from NE 4<sup>th</sup> to NE 2<sup>nd</sup>. Some online maps reference the alley as 106<sup>th</sup> Place NE. (Site Visits;  
35 Area maps). The 2-block length of the alley is consistent with the "superblocks" that now  
36 exist throughout Downtown Bellevue. Together, the FANA properties generally form the  
37 northwest corner of the "superblock" where they are situated, which is bound by NE 4<sup>th</sup> on

1 the north, 108<sup>th</sup> Ave NE on the east, NE 2<sup>nd</sup> Street on the south, and 106<sup>th</sup> Ave NE on the  
2 west.

3 10. As discussed during the appeal hearing, the City’s new Downtown Code includes  
4 provisions and strategies seeking to make the Downtown area more attractive to pedestrians,  
5 and generally “break-up” superblocks. (*Testimony of Mr. Schwartz, TR 77:24-25, 78:1-3,*  
6 *85:1-7; Testimony of Ms. Stead, TR 232:7-18 – “The City's been trying to [ ] break up the*  
7 *superblocks for years and year and years. As we all know, we have very, very big blocks in*  
8 *Bellevue. And so by breaking those down and adding the pedestrian connections through*  
9 *them, we create easier pedestrian pass [paths?] so people can get to and through where they*  
10 *need to be without having to walk an additional area. It also becomes a more intimate*  
11 *experience versus the large streets that we have -- the multilane roads. So these through-*  
12 *block connections are very, very successful and add a lot to the city.”*)

13 11. The KeyBank building, parking structure and related site improvements were built in  
14 approximately 1971. (*Ex. F-7*). There is no dispute that the City’s development regulations  
15 for downtown properties have changed significantly since the 1970s, making the FANA  
16 property nonconforming with respect to current standards and requirements. There is also no  
17 dispute that substantive provisions of the City’s Land Use Code for properties in its  
18 Downtown area were last updated in October of 2017. (*See LUC 20.25A.010; Testimony of*  
19 *Ms. Stead, pages 229-233*). As a result, Mr. Powers explained that many Downtown  
20 properties are now nonconforming with respect to various new Downtown Land Use Code  
21 development regulations. (*Testimony of Mr. Powers, paged 135-136*).

22 12. There is no dispute that when the City Council adopted the new Downtown Code, it  
23 added a new section addressing Master Development Plans (MDPs), now codified as LUC  
24 20.25A.030.B.1. (*Ex. J-14, copy of Ord. No. 1611, dated 10/12/2017*). This new section  
25 explains that MDP review, which was already addressed in Part 20.30V LUC, “is a  
26 mechanism by which the City shall ensure that the site development components of multiple  
buildings or phased single building proposals are consistent with the Comprehensive Plan  
and meet all applicable development standards and guidelines.” (*LUC 20.25A.030.B.1*  
*(emphasis added)*). All means all.

13. The key code provision at issue in this appeal is a portion of LUC 20.25A.040.C.1,  
found in the section of the updated Land Use Code captioned “Nonconforming uses,  
structures and sites,” which reads in relevant part as follows:

“A nonconforming site may not be changed unless the change conforms to the  
requirements of this Code, [...]” (*LUC 20.25A.040.C.1*).

14. Both post-hearing briefs from the parties appropriately turn to Webster’s dictionary  
for the plain, ordinary meaning of the word “change” – which defines the verb “change” as  
meaning: to make different in some particular, or to become different (among other

1 definitions). The noun “change” is defined to mean: the act, process or result of changing.  
2 (*Department’s Post-Hearing Brief, on pages 4-5; FANA’s Closing Brief, on page 25*).

3 15. Throughout this appeal, the parties differ on what sort of “change” might be required  
4 to trigger the need for a nonconforming site to bring site nonconformities into conformance  
5 with the current Downtown Code.

6 16. Site visits and the Examiner’s familiarity with properties in the Downtown Bellevue  
7 area confirm that some properties have been improved more recently than the KeyBank site,  
8 some are now under construction, and that some appear to be a bit older or from the same  
9 time period as the KeyBank building.

10 17. All properties are unique, with varying degrees of possible non-conformities. But, as  
11 Ms. Stead’s testimony credibly established – something that may seem obvious – properties  
12 that have been improved in more recent years are likely to have fewer non-conformities than  
13 those built out decades ago. (*Testimony of Ms. Stead, on page 226, describing “a very similar  
14 situation in that there were two parcels. The difference being that in this case, the first parcel  
15 -- what they considered Phase I – had already been developed but just very recently. And so  
16 it was a lot closer to the new code. But what they had wanted to do was, with the new  
17 Downtown Code, they had additional development intensity that they had not taken  
18 advantage of on Phase I, and they wanted to harvest that for Phase II. So they were required  
19 to bring the whole site -- so that Phase I site -- into compliance with the new Land Use Code  
20 so that they could go ahead and take that density over. So they went ahead and did that.  
21 There were few -- few items that they had to take care of. It was successful there. I think  
22 they're under construction right now, if not complete. They kind of moved right to and through  
23 this process. Q. And -- and did the applicant bring the Phase I site into compliance with  
24 the current Downtown Code? A. Yes. The applicant did.”*).

25 18. FANA is in the process of applying for Master Development Plan (“MDP”) approval  
26 for a two-phase project on its properties, and an Administrative Design Review (“ADR”) approval for Phase 1 of the MDP. (*Bissmeyer Testimony, TR 27:2-28:10; Ex. C-1, the challenged code interpretation, on page DSD 013*).

19 19. Phase 1 is located on the Four106 Site. Phase 1 would demolish all existing low-rise  
20 buildings now on the site, replacing them with a 21-story, 428,000 square foot office tower  
21 with ground floor retail, common space, and eight levels of below grade parking. The  
22 southern portion of the site contains a partial through-block connector, from 106th Avenue  
23 NE on the west to the alley on the property’s east side. (*Bissmeyer Testimony, TR 27:6-15; Ex. F-25, pp. 3, 63; Ex. C-1, page DSD 014*).

24 20. Phase 2 is located on the KeyBank Site. Phase 2 would demolish the old KeyBank  
25 building and parking structure, replacing it with a 5-story, 115,000 sf office building with  
26 three levels of below grade parking. The ground floor will mostly consist of active uses along



1 NE 4th Street with service uses along the alley. A “through-block connector” will continue  
2 along the southern portion of the site. (*Bissmeyer Testimony, TR 27:16-22; Ex. F-15, pp. 3,*  
3 *29*).

4 21. As part of its MDP application, FANA plans to utilize (or harvest) FAR available on  
5 its nonconforming KeyBank (Phase 2) site and move it to its Phase 1 site. (*Ex. C-1, page*  
6 *DSD 014*).

7 22. The appellant’s witnesses believe that their project maximizes development at the  
8 corner parcel as it is a better urban design solution because it engages the pedestrian  
9 environment at the corner, allows for more separation between towers on the block, and  
10 respects the neighbors to the north. (*Bissmeyer Testimony, TR 29:6- 29:14; Powers*  
11 *Testimony, TR 285:23*).

12 23. As explained in the appellant’s closing brief, one of the key features of an MDP is the  
13 ability to allocate Floor Area Ratio (“FAR”), which is a measure of development capacity,  
14 across multiple parcels and to phase development of multiple buildings. With an MDP, all  
15 parcels are considered to be within one “project limit.” FAR from the entire project limit can  
16 be allocated anywhere in the project limit. This gives flexibility to design a better overall  
17 project. (*Bissmeyer Testimony, TR 28:14-25; Schwartz Testimony, TR 77:21-78:3; Stead*  
18 *Testimony, TR 212:10-12, an MDP “does give you the ability to spread FAR across the site.*  
19 *That’s absolutely part of what an MDP can do,” TR 216:12-13*). There is no dispute that  
20 shifting FAR is a business decision, which is heavily dependent on unique aspects of any  
21 development proposal and properties at issue. One set of facts do not apply to all parcels in  
22 Downtown Bellevue.

23 24. FANA’s proposed Phase 1 would include the largest, tallest new building, and would  
24 utilize FAR allocated from the Phase 2 portion of the project limit. City staff refer to this  
25 reallocation as “utilization of FAR” or “harvesting” FAR. (*Testimony of Ms. Stead, page*  
26 *246; Ex. C-1, the challenged Land Use Code Interpretation, using term “utilization of FAR”*  
*throughout document*). For purposes of this Decision, when used in connection with the  
City’s development capacity yardstick known as “FAR”, the terms allocation, movement,  
reallocation, shifting, utilization, and harvesting, all mean the same thing.

27 25. While it may never happen, it is possible for an MDP to propose reallocation,  
28 utilization, or harvesting, of all available FAR from some lots to just one lot. (*Testimony of*  
29 *Ms. Stead, pages 246-47, “Q. is it possible that, if I came in with an MDP application and I*  
30 *had three parcels -- and let's just say they're all roughly equivalent in development potential*  
31 *-- that I might just choose to -- hey, I want to allocate the entirety of the development potential*  
32 *on the corner lot, and the other two, I'm going to take all their development opportunity*  
33 *away. It's possible I could propose that? Not saying you would approve it, but as the code*  
34 *exists today, I could propose that? Ms. Stead: Yes, you could.”*)

1 26. In this appeal, the Department credibly explained that while a property owner could  
2 utilize *all of the development capacity* available for one MDP phase for a different MDP  
3 phase, thereby rendering the depleted phase undevelopable, such utilization is considered and  
4 should be considered development of the harvested phase under Part 20.30V LUC.

5 27. There is no dispute that FANA may obtain approval of an MDP that moves available  
6 FAR from its Phase 2 site to its proposed Phase 1 site.

7 28. This appeal is the result of a disagreement between the parties, as to whether moving  
8 available FAR from FANA's Phase 2 (KeyBank) site to its Phase 1 site is a "change" to the  
9 site that triggers the requirement for an applicant to bring nonconformities on the Phase 2 site  
10 into compliance with current downtown codes when it starts to build-out Phase 1, without  
11 waiting until Phase 2 is constructed, if ever.

12 29. Following extensive communications with reviewing staff, involving obvious  
13 differences of opinion between applicant and Department representatives, FANA submitted  
14 a written request for a formal Land Use Code Interpretation, as explained in a letter from  
15 Appellant's counsel, Mr. McCullough, in December of 2019 (*Ex. C-1, pages DSD 024-030*).  
16 The requested Land Use Code Interpretation was issued by the City of Bellevue's Land Use  
17 Director, Elizabeth Stead, on delegation from the Development Services Department  
18 Director, and published on or about June 11, 2020 (*Ex. C-1, pages DSD 012-022*). There is  
19 no dispute that the pending appeal of such code interpretation was timely, as it was filed on  
20 June 24, 2020. (*Ex. C-1, pages DSD 002-010, Appeal submitted on June 24, 2020, typo  
21 showing 2018 on file copy*).

22 30. As explained above, the contested Land Use Code Interpretation expressly concluded  
23 that: "*FANA's intended utilization of its Phase 2 site's available FAR is development of that  
24 site under the LUC. Such development of Phase 2 is a fundamental change to the entirety of  
25 the Phase 2 site. A nonconforming site in Downtown may be changed only if the change  
26 conforms to the requirements of the applicable code. LUC 20.25A.040.C. Therefore, this  
27 development of the entire Phase 2 site requires that FANA bring all Phase 2 site  
28 nonconformities into conformance at the time this fundamental change occurs.*" (*Ex. C-1,  
29 page DSD 019*).

30 31. In its written appeal statement, FANA alleges that the challenged Code Interpretation:  
31 incorrectly summarized its question presented for interpretation; erroneously concluded that  
32 utilization of FAR is "development" and a "change" to the site; generally relied on  
33 speculation that nonconformities might remain indefinitely; mistakenly concluded that  
34 unchanged aspects of the site must be brought into conformity with current code; that the  
35 interpretation does not align with the City's regulatory framework; that the interpretation  
36 relies on caselaw addressing termination of nonconformities; that the interpretation did not  
37 properly consider the factors for a code interpretation listed in LUC 20.30K.140; that the  
38 interpretation violates principles of statutory interpretation; that the interpretation is

1 inconsistent with prior decisions; and that the interpretation is not entitled to deference. (*Ex.*  
2 *C-1, Notice of Appeal, pages DSD 003-010*).

3 32. This appeal does NOT include any underlying decision regarding a Master  
4 Development Plan, Administrative Design Review, or other approval needed from the City  
5 of Bellevue in order to proceed with any project on the appellant's properties.

6 33. During the appeal hearing and in its closing brief, FANA failed to meet its burden of  
7 proof. Instead, the record includes more than a preponderance of evidence demonstrating  
8 how the challenged Code Interpretation was correct.

9 34. Ms. Stead credibly testified regarding her experience working on large development  
10 projects in Downtown Bellevue, her familiarity with and regular use of Land Use Codes as  
11 part of her daily work responsibilities, how she is responsible for issuing Type II land use  
12 decisions, like MDPs, her active involvement as a subject matter expert for the City Council  
13 and public review process that led to the adoption of the new Downtown Code, and how she  
14 weighed all relevant considerations before issuing the Code Interpretation on appeal herein.  
15 Based on Ms. Stead's testimony, the Examiner finds and concludes that she issued her Code  
16 Interpretation honestly and following due consideration of relevant codes, facts, and policies.  
17 While FANA disagrees with her interpretation, it did not offer sufficient factual evidence to  
18 rebut her testimony or controlling legal authority sufficient to grant the relief requested in  
19 this appeal.

20 35. While understandable, much of FANA's witness testimony and evidence focused on  
21 its goals and preferences, placing its internal assessment of feasibility and penciling-out a  
22 project over the goals and policies identified in the Code Interpretation that are consistent  
23 with the City's vision for Downtown Bellevue. (*Testimony of Mr. Schwartz, page 76;*  
24 *Department's Post-Hearing Brief, on page 16, additional references to testimony from Mr.*  
25 *Bissmeyer, Mr. Powers, and Mr. Schwartz*).

26 36. Much of the appellant's evidence generally criticizes City staff for allegedly  
conducting themselves in a manner that led FANA to believe that harvesting FAR from one  
site to another would not trigger the need to bring the "donor" site – i.e. the KeyBank site –  
into conformity with new Downtown Codes. To support their argument, FANA alleges that  
their prior MDP approved in January of 2017 for a different project on most of the same site  
did not require upgrades at the same time Phase 1 would occur, and that staff initially  
discussed 'mitigation' for nonconformities, but later changed their mind and informed FANA  
that 'mitigation' was not allowed under the code, and that site nonconformities on a  
nonconforming site would need to be brought into conformance with current codes if the site  
is changed. The Department responded by directing attention to the new language included  
in the City's Downtown Code, discussed above, which explicitly states that MDP review  
under Part 20.30V LUC, "is a mechanism by which the City shall ensure that the site  
development components of multiple buildings or phased single building proposals are

1 consistent with the Comprehensive Plan and meet all applicable development standards and  
2 guidelines.” (LUC 20.25A.030.B.1 (emphasis added)). Again, LUC 20.25A.040.C.1 is  
3 among the applicable development standards that apply to all MDPs in the Downtown area,  
4 and it provides in relevant part that “A nonconforming site may not be changed unless the  
5 change conforms to the requirements of this Code, [...]” (LUC 20.25A.040.C.1).

6 37. FANA also argues that previous informal interpretations of the Land Use Code did  
7 not require applicants to bring their projects into compliance with current codes when they  
8 moved FAR from one site to another. Thus, they assert that the Director should not be  
9 allowed to change course and mandate upgrades on nonconforming sites. As discussed  
10 below, FANA’s argument is not supported by the evidence or a plain reading of code  
11 language. It is also not in accord with applicable caselaw.

12 38. The City’s position is very clear, as stated by Ms. Stead, the current Land Use Director  
13 for the Development Services Department – she believes that any prior informal  
14 interpretations of the codes at issue were wrong: “Q. Is it your position that that former  
15 informal interpretation was wrong? A. That is my position, yes.” (Testimony of Ms. Stead,  
16 page 222).

17 39. Again, prior to issuance of the Land Use Code Interpretation at issue in this appeal,  
18 neither Ms. Stead or any of her predecessors has ever issued a formal code interpretation of  
19 LUC 20.25A.040 or similar language previously found in the City’s former Land Use Code  
20 at LUC 20.25A.025. (Testimony of Ms. Stead, TR 199: 7-14; Opening Argument by Counsel  
21 for the City, TR 15:17-21).

22 40. After carefully reviewing applicable City codes, the Examiner finds and concludes  
23 that nothing in the Bellevue Land Use Code precludes the Director from enforcing or formally  
24 interpreting codes even though they may have been improperly enforced or informally  
25 interpreted in the past. FANA did not produce any evidence to the contrary.

26 41. Instead, formal Land Use Code Interpretations are expressly authorized to clarify  
conflicting or ambiguous wording, or the scope or intent of the provisions of the Code; have  
the same effect as any provision of the Land Use Code; and remain in effect until rescinded  
in writing by the Director. (LUC 20.30K.120, .150, and .155).

42. With respect to the MDP issued for FANA’s previous proposal, it vested to provisions  
of the City’s former Land Use Code and was issued and approved by the City’s previous  
Land Use Director in January of 2017, before the City’s new Downtown Code took effect in  
October of 2017, and before Ms. Stead became the Land Use Director earlier in that same  
year. (Ex. F-27, previous MDP; Testimony of Ms. Stead, on page 195, “I have been with the  
City since 2008 and have been the Land Use Director for just over three years now so 12  
years with the City.”).

1 43. There is no dispute that FANA’s 2017 MDP is still vested to the City’s old code  
2 provisions for Downtown, that FANA is still able to move forward with development under  
3 its 2017 MDP, but that FANA made a business decision to pursue a new MDP, under the  
4 new Downtown Code. (*Testimony of Mr. Powers, page 140, lines 7-11; page 151, lines 5-*  
5 *23*).

6 44. The challenged Code Interpretation clearly explains that the Land Use Code does not  
7 require a future phase of FANA’s project to be brought into conformance ahead of the actual  
8 development of the future phase, if FANA was not actually proposing to utilize FAR from  
9 its Phase 2 site as part of its Phase 1 development. (*Ex. C-1, page DSD 018*). FANA has  
10 made a business decision to harvest FAR from its KeyBank (Phase 2) nonconforming site to  
11 its Phase 1 site. Such an act will change the KeyBank site by reducing available development  
12 capacity on such site. FANA’s general claims or arguments that the City is somehow forcing  
13 them to build ‘interim’ improvements on a site before they are ready to fully develop such  
14 site are without merit and must be rejected. Business decisions are business decisions, and  
15 the facts in this matter clearly show that FANA holds properties that can be redeveloped  
16 under various options available to them. For its own business reasons, in this instance, FANA  
17 has made a business decision to shift a substantial amount of FAR from one site to another.  
18 Such a change has consequences.

19 45. A change in the available FAR for a particular site is a change to such site. FAR is a  
20 site development regulation tool that is highly valued and of tremendous significance in the  
21 review and approval of project applications under the City’s new Downtown codes. For  
22 instance, a separate part of the Land Use Code details an “amenity incentive system” linked  
23 to floor area ratio assigned to sites. (*See LUC 20.25A.070*). And, there is no credible dispute  
24 that property values are impacted by development capacity that is available on a particular  
25 site. Thus, FAR has value. FAR is a valuable asset. Harvesting FAR from one  
26 nonconforming site to another is a change, and such change must conform to all applicable  
development regulations, which expressly include the key code provision at issue in this  
appeal – LUC 20.25A.025.C.1.

46. The value of FAR is bolstered by a situation described in Mr. Powell’s testimony,  
where he explained that the condo association at Washington Square would not agree to allow  
transfer of FAR on land beneath its building onto another site. (*“Ultimately, that MDP  
[Washington Square] didn't go forward for unrelated reasons. One was we were transferring  
development rights over zoning codes, and the other one was the -- the owner over there, the  
seller to us, controlled the land under the condo buildings, but the condo association objected  
to him transferring the FAR, and he decided that it wasn't worth his time to try to fight so we  
moved on. (emphasis added).”* Testimony of Mr. Powell, bottom portion of page 122).

47. FANA witnesses clearly recognize the value of FAR, and how much it means to their  
analysis regarding the financial viability of the proposed phases in its proposed MDP. For  
instance, Mr. Powell testified that FANA moved additional FAR from the KeyBank site to

1 the Phase 1 site to help cover the costs of bringing site nonconformities on the  
2 KeyBank/Phase 2 site into conformance with the new Downtown Code, as explained in the  
3 challenged Code Interpretation. (*"You know, and ironically, this -- this City's position has*  
4 *caused us to transfer even more FAR around the site. We originally allocated -- I can't*  
5 *remember the exact number, but it resulted in the number that John Schwartz mentioned this*  
6 *morning of the 166,000 FAR remaining on Key Bank site. Once these additional*  
7 *improvements we're told we have to do them, we had to figure out a way to try to pay for*  
8 *them so we transferred -- we transferred -- reallocated more FAR to the Phase I site in trying*  
9 *to pay for it with the improvements."* Testimony of Mr. Powell, page 137, lines 9-24.).

10 48. The challenged Land Use Code Interpretation includes the following explanation:  
11 *"While FANA is correct that the utilization of available Phase 2 FAR in its Phase 1*  
12 *development will reduce the development capacity, i.e. development right, of the Phase 2 site,*  
13 *the outcome is not net-neutral. Rather, this reduction is a fundamental change to the entire*  
14 *Phase 2 site. Available FAR of a site is a function of the physical area of that site and a*  
15 *necessary ingredient of development. Simply put, if there is no available FAR on a site, no*  
16 *additional development can take place."* (Ex. C-1, Land Use Code Interpretation, Analysis,  
17 on page 6, DSD 017).

18 49. A fair portion of the appeal hearing and written arguments direct attention to the site  
19 improvements that will be required on the KeyBank site during Phase 1, if FANA ultimately  
20 chooses to harvest FAR from such site for their other property. Comparisons were made to  
21 other recent projects. However, as explained above, all properties are unique. And,  
22 properties that were developed under more recent codes and policies are less likely to have  
23 as many site nonconformities as a project built in or around 1971, like the KeyBank site. Ms.  
24 Stead's testimony and evidence presented at the hearing establish that since the new  
25 Downtown Code took effect in late 2017, MDP proposals that seek to move FAR from one  
26 site to another needed to upgrade site nonconformities on the donor site.

17 50. FANA also generally argued that other projects may have moved forward before the  
18 new Downtown Code took effect without any requirement to address site nonconformities,  
19 so it should not be required today. On the other hand, the record includes extensive discussion  
20 of how staff worked with applicants, even FANA, to "mitigate" nonconformities in some  
21 cases. Evidence was inconclusive to establish that nonconformities were ever truly ignored.  
22 Instead, the significance of site nonconformities has come into more focus, as Downtown  
23 Bellevue is quickly redeveloping under new codes, which include a clear vision and strategies  
24 seeking to make the Downtown area more attractive to pedestrians, and generally "break-up"  
25 superblocks. (*Testimony of Mr. Schwartz, TR 77:24-25, 78:1-3, 85:1-7; Testimony of Ms.*  
26 *Stead, TR 232:7-18). The challenged Land Use Code Interpretation appropriately applies*  
current codes, and essentially leaves choices for applicants to consider. As the record shows,  
under the new Downtown Code, some applicants have made upgrades to a site in order to  
harvest FAR from such site; some applicants were not able to get a Condo Association to  
agree to transfer FAR from the site under their building; some applications were abandoned.

1 51. This is not unusual in any development arena. Downtown Bellevue is not unique in  
2 this regard. Subdivision, retail shopping center, suburban office parks, and other  
3 development proposals come forward all the time, away from downtown areas, and some  
4 projects happen, while others are changed in process, and others are abandoned. It comes  
5 with the risks and business choices associated with development in any market. FANA  
6 witnesses firmly established the risks, complexities, and unknowns that can impact  
7 development proposals. In this instance, the challenged Code Interpretation cannot and  
8 should not be rejected based on how it might apply to one site, with more nonconformities  
9 than others.

10 52. Based on well-established common law, the proper action on a land use decision  
11 cannot be foreclosed because of a possible past error or failure to apply or enforce a provision  
12 of applicable codes. The City's Downtown Code provisions and their full effect should not  
13 be forfeited by the action or inaction of a staff member that may have been in disregard or  
14 oversight of an ordinance or code provision. The public has an interest in zoning that cannot  
15 thus be set at naught. (See analysis provided in *Dykstra v. Skagit County*, 97 Wn. App. 670,  
16 985 P.2d 424 (Div. 1, 1999), petition for rvw. denied, 140 Wn.2d 1016, 5 P.3d 8 (2000);  
17 citing *City of Mercer Island v. Steinmann*, 9 Wn. App. 479, 483, 513 P.2d 80 (1973), and  
18 *Buechel v. Department of Ecology*, 125 Wn.2d 196, 211, 884 P.2d 910 (1994). The  
19 Washington Supreme Court even applied this rationale in the context of water rights, where  
20 the Department of Ecology originally acted ultra vires in measuring a water right, it did not  
21 act arbitrarily and capriciously in abandoning unlawful practice and switching to new  
22 practice. See *Department of Ecology v. Theodoratus*, 135 Wn.2d 582, 957 P.2d 1241 (1998).

23 53. The Examiner finds and concludes that the plain meaning of the code mandates that  
24 when a property owner chooses to change a Phase 2 nonconforming site during Phase 1 of  
25 their MDP process, LUC 20.25A.030.B.1 requires compliance with "applicable development  
26 standards and guidelines" and, therefore, requires compliance with LUC 20.25A.040.C.1 –  
which is the key code provision at issue in this appeal.

54. There is no credible dispute that FAR is a highly valuable measure of development  
capacity on a particular site. The Examiner expressly finds and concludes that the act of  
permanently reducing the available development capacity on a site is a "change" to such site.

55. As the Department's closing brief explains, to the extent that there exists tension  
between the LUC 20.50.016 definition of "development" and what constitutes a "change" to  
and "development" of a nonconforming site under LUC 20.25A.040.C.1, it is important to  
remember that the purpose of a formal LUC Interpretation under Part 20.30K LUC is to  
"clarif[y] conflicting or ambiguous wording, or the scope or intent of the provisions of the  
Code." LUC 20.30K.120. As the Code Interpretation explains, "FANA's argument would  
be sound if FANA was not actually proposing to utilize the FAR from, and thereby develop,  
the Phase 2 site. This intended development of Phase 2 constitutes a fundamental change to  
this site, which requires bringing all Phase 2 site nonconformities into conformance at the

1 time this change occurs.” Ex. C-1 at DSD 018. The Interpretation, which “balance[s] the  
2 ability to retain a nonconformity indefinitely with thresholds for when conformance remedies  
3 would be required,” is consistent with the LUC, construes LUC 20.50.016 consistent with  
LUC 20.25A.040.C.1, and provides the clarity that Part 20.30K LUC demands. *Id.* at DSD  
019.

4 56. Changes to a property can include changes to physical improvements on property, but  
5 other changes that you cannot see – such as platting property on paper for future development  
6 and construction of physical improvements on the site, or in this case permanently assigning  
FAR to properties – is another form of developing a property.

7 57. Washington’s vested rights doctrine strongly protects the right to develop property.  
8 The doctrine was adopted because the state’s supreme court recognized that development  
9 rights are “valuable property interests.” *Town of Woodway v. Snohomish County*, 180 Wn.2d  
10 165, 322 P.3d 1219 (2014), citing *Abbey Rd. Grp., LLC v. City of Bonney Lake*, 167 Wn.2d  
11 242, 251, 218 P.3d 180 (2009), and *Hull v. Hunt*, 53 Wn.2d 130, 331 P.2d 856 (1958).  
12 *Id.* RCW 64.4.010(3) defines "Property interest" to mean “any interest or right in real  
13 property in the state.”

14 58. The Examiner finds and concludes that the appellant’s argument that removing  
15 substantial FAR (which is a highly valued development right in Downtown Bellevue) from  
16 one site to another does not constitute a “change” is not supported by evidence in this record,  
17 and it is not credible. Instead, substantial evidence in the record, more than the preponderance  
18 required, establishes that a transfer of FAR from one site to another constitutes a “change” to  
19 both sites, the FAR donor site and the FAR receiving site.

20 59. In this matter, there is no dispute that the FAR receiving site, known as Phase 1, has  
21 been designed to fully conform with the new downtown code requirements, so it does not run  
22 afoul of the Land Use Code mandate that “[a] nonconforming site may not be changed unless  
23 the change conforms to the requirements of this Code” (*LUC 20.25A.040.C.1*). The  
24 challenged Code Interpretation correctly concludes that “utilization of Phase 2 site’s available  
25 FAR is development of that site under the LUC. Such development of Phase 2 is a  
fundamental change to the entirety of the Phase 2 site. A nonconforming site in Downtown  
may be changed only if the change conforms to the requirements of the applicable code. LUC  
20.25A.040.C. Therefore, this development of the entire Phase 2 site requires that FANA  
bring all Phase 2 site nonconformities into conformance at the time this fundamental change  
occurs.”

26 60. Given that “development rights” are subject to special protection as “valuable  
property interests,” it would be illogical and stretch credibility to assert that any action by the  
government to greatly reduce development rights on a given site should not be viewed as a  
“change” just because it is not a physical change. Similarly, a choice made by a private  
property owner to greatly reduce the development rights available on a given site clearly



1 impacts ‘valuable property interests’ and must be viewed as a fundamental change to such  
2 site.

3 61. In many respects, FAR is the “new acreage” or currency used for property  
4 development in Downtown Bellevue. The higher the FAR, the more development  
5 opportunities there are on a given site, and thus, it presumably commands a higher value on  
6 the open market. As noted above, Mr. Powell explained the FANA has “*reallocated more  
7 FAR to the Phase I site in trying to pay for it with the improvements.*” (*Testimony of Mr.  
8 Powell, page 137, lines 9-24.*)

9 62. This not unlike values paid for properties in an agricultural area, where water rights  
10 are needed to grow thriving crops – or for purposes of redeveloping previous farm land for  
11 urban purposes. So, where regular rainfall is not a given, the need for water rights to irrigate  
12 crops is more important than the size of land available for planting. For instance, 100 acres  
13 with a small allocation of available water rights in a region is likely less valuable than a much  
14 smaller parcel of land that holds guaranteed water rights, for irrigation, to draw well water  
15 and the like. Similarly, a landowner may find it worthwhile to reallocate water rights from  
16 one parcel of land to another where she believes the crops will be more desirable to  
17 customers, or easier to harvest, or more likely to redevelop for urban purposes, or any number  
18 of reasons. The parcel left with reduced water rights will most likely hold a lower value in  
19 the eyes of potential buyers, whereas the parcel to which the valuable water rights were  
20 transferred will most likely be worth far more than it was without such rights. Growing a  
21 crop of Giant Sunflowers on a corner parcel next to a highway that leads to nearby markets,  
22 or redeveloping farmland to urban uses, may be attractive projects for a farmer, but to achieve  
23 that objective, they may end up transferring water rights away from a large tract of land,  
24 leaving it fallow for many years, possibly turning into a dust hazard for surrounding  
25 properties.

26 63. Here, we have no dust bowl. But – we do have similar motivations by the property  
owner, which is to shift its available development rights away from a less-desirable  
development site onto a corner site fronting two downtown streets. The Director’s concern,  
that the remaining “donor” site (Phase 2, KeyBank site) is not likely to be redeveloped in the  
life of the MDP is not misplaced, and it is supported by her professional experience and  
knowledge of current and pending development projects under construction or undergoing  
review by her Department staff.

64. More significantly, the appellant’s witnesses did not offer compelling evidence that  
Phase 2 of their project is more likely than not to occur within the 10-year life of the MDP.  
On the one hand, they testified that development projects are always uncertain, subject to  
unexpected events and changes, and on the other hand, they emphasized the high value of the  
KeyBank site, how increased rents will cause current tenants to leave downtown Bellevue for  
suburban sites, that undesirable floor-plates, elevator systems, cooling systems, electrical

1 service, or other building feature, will eventually make the existing KeyBank property a  
feasible redevelopment site.

2 65. Weighing all witness testimony, evidence, and life experience, the Examiner finds  
3 that no one knows the future. No one has the magic 8-ball to forecast development, as Ms.  
4 Stead commented. But, the City's Land Use Director is entitled to deference, based on her  
5 professional experience working on projects at the City, not simply because the code  
6 mandates such deference. She is not an interested investor or paid agent of an applicant.  
7 Instead, she is a neutral official tasked with interpreting codes and coordinating review of  
8 countless project applications and development inquiries throughout the city's Downtown  
9 area and other special districts. Her opinions are based on experiences and first-hand  
10 knowledge of situations, including those where project applicants might pledge one thing,  
11 but then the project collapses and the project is never fully developed.

12 66. In the end, FANA's witness testimony – while sincere, professional, and respectful –  
13 was not as credible as that provided by Ms. Stead. The key issue in this appeal is what the  
14 code says and what it means. And on that subject, Ms. Stead performed her duties and issued  
15 the Code Interpretation in a manner fully consistent with applicable codes, particularly LUC  
16 20.30K.140. *(See all "Factors for Consideration" listed and addressed in the challenged*  
17 *Code Interpretation, Ex. C-1, pages DSD 019-021; Testimony of Ms. Stead, pages 231-235,*  
18 *discussion of how her interpretation is consistent with the City's vision for Downtown, other*  
19 *relevant portions of the City's code, and its Comprehensive Plan). Even without the*  
20 *substantial weight to be given to the challenged interpretation under LUC 20.35.25.E, the*  
21 *appellant failed to present a preponderance of credible evidence to rebut Ms. Stead's reading*  
22 *of the code, or controlling legal authority that would serve as a basis to grant the relief*  
23 *requested.*

24 67. Appellant's arguments and evidence seeking to show how expensive, difficult, or  
25 potentially wasteful it might be to undertake improvements to address nonconformities on its  
26 Phase 2 site with its Phase 1 development (mostly because FANA believes that such  
improvements will be torn down whenever Phase 2 moves forward) do not serve as a factual  
basis to grant this appeal. The City closing brief acknowledges this concern, understanding  
that FANA must make development decisions based on the feasibility of its project,  
appropriately observing that the City is required to focus on the impact of a code  
interpretation across all project sites in Downtown Bellevue, not just the appellant's.

68. FANA's testimony on feasibility was speculative and included more than a small  
measure of bias favoring FANA's financial prospects over City goals for Downtown  
Bellevue. A code interpretation applies to development activity within the City as a whole,  
and cannot be based on how the code might impact just a single site. Further, FANA will  
have the right to appeal any conditions of approval that it believes may not be supported by  
facts or based on applicable development regulations, or are not proportionate or appropriate,

1 if inappropriate conditions are included in its potential MDP or Design Review Approvals.  
2 (See LUC 20.35.015.C.3 and .9).

3 69. If FANA wants to allow a nonconforming site to remain as-is indefinitely, even after  
4 substantial development rights are stripped from the site and used on an abutting site, then it  
5 can petition the Bellevue City Council to amend the City's Land Use Code accordingly. The  
6 Bellevue City Council, not the hearing examiner or any court, is in the best position to  
7 effectuate this change. As the Washington Supreme Court recently observed: "[i]t is our duty  
8 to effectuate the legislature's intent, not rewrite the words the legislature used." *State v. Gray*,  
9 189 Wn.2d 334, 343, 402 P.3d 254 (2017).

10 70. Another option would be to redesign the so-called "interim" measures needed to  
11 correct site nonconformities on the KeyBank site, so that they are less expensive; or so that  
12 they can be incorporated into the future Phase II design for the site, without need for complete  
13 demolition, and perhaps re-purposed or even maintained as-built the first time. The use of  
14 "Administrative Departures" was discussed during the hearing, but Ms. Stead indicated that  
15 none have been requested so there were none to review. While FANA has been dismissive  
16 of the "Departure" option, calling it a red herring, it may be worth exploring.

17 71. Finally, the City's code includes authority to require or allow a "performance or  
18 assurance device" when the City determines that the device is necessary, including where it  
19 is needed "[t]o assure that all work or actions required by a permit or approval are  
20 satisfactorily completed in accordance with approved plans, specifications, requirements,  
21 conditions, regulations, and policies." (See LUC 20.40.490, captioned "Assurance  
22 device," particularly subsection B.1.a, for circumstances where the Director can  
23 require an assurance device, and subsection B.1.b, for circumstances where the  
24 Director may allow use of an assurance device). In fact, the submittal of "assurance  
25 devices" as may be required is specifically mentioned as part of any Design Review  
26 or Master Development Plan approval. (See LUC 20.25A.030.A.2). The Director has  
discretion and authority to allow use of an assurance device, which may be worth  
exploring.

## 19 V. CONCLUSIONS OF LAW.

20 1. Based evidence in the Record, including without limitation all findings set forth  
21 above, the Examiner concludes that the Director's challenged Land Use Code Interpretation  
22 is fully supported by a preponderance of evidence and controlling legal authority. The  
23 challenged interpretation was not a mistake.

24 2. The appellant failed to satisfy its burden of proof to prevail in this appeal.

25 3. For the specific reasons articulated in the Director's challenged Land Use Code

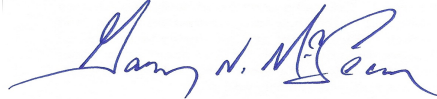
1 Interpretation, and for the additional reasons set forth herein, all as thoroughly supported by  
2 the record established in this appeal, the FANA Land Use Code Interpretation, File No. 19-  
131714-DA, should be and is hereby affirmed in its entirety.

3 4. Any legal conclusions or other statements made in previous or following sections of  
4 this document that are deemed conclusions of law are hereby adopted as such and are  
incorporated herein by this reference.

5 **VI. DECISION.**

6 Based on evidence included in the record for this appeal, the appellant failed to meet  
7 its burden of proof. Accordingly, the pending appeal is respectfully denied and the Director's  
8 challenged Land Use Code Interpretation, File No. 19-131714-DA, is affirmed.

9 ISSUED this 7<sup>th</sup> Day of December, 2020

10 

11 \_\_\_\_\_  
12 Gary N. McLean  
13 Hearing Examiner

14 **Notice of Rights**  
15 **to Request Clarification or Reconsideration,**  
16 **and to Appeal**

17 **Request for Clarification or Reconsideration** – As provided in Rule 1.25 and 1.26 of the  
18 Bellevue Hearing Examiner Rules of Procedure, a party may file a written request for  
19 clarification or reconsideration of this Decision within five (5) working days after the date of  
issuance. Additional requirements and procedures concerning Requests for Clarification or  
Reconsideration are found in Rule 1.25 and 1.26 of the Hearing Examiner Rules of Procedure.

20 **Appeal to Superior Court** –

21 This decision is the final administrative decision of the City; it may be appealed to  
22 Superior Court as set forth in LUC 20.35.070. A petition to review the decision of the  
23 Hearing Examiner must be filed with the Superior Court and served on all parties as required  
24 by applicable law within 21 days of issuance of the Hearing Examiner's decision. For appeals  
25 to Superior Court of land use decisions of the Hearing Examiner, see Chapter 36.70C RCW.