NO. 92233-1

SUPREME COURT OF THE STATE OF WASHINGTON

STEPHEN AND SANDRA KLINEBURGER,

Appellants,

v.

KING COUNTY DEPARTMENT OF DEVELOPMENT AND ENVIRONMENTAL SERVICES BUILDING AND FIRE SERVICE DIVISION CODE ENFORCEMENT SECTION and STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY,

Respondents.

STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY'S ANSWER TO PETITION FOR REVIEW

ROBERT W. FERGUSON
Attorney General

KATHARINE G. SHIREY, WSBA #35736
Assistant Attorney General

Office ID No. 91024
P.O. Box 40117
Olympia, WA 98504-0117
(360) 586-6769
KayS1@atg.wa.gov

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I. INTRODUCTION

The Court of Appeals below correctly ruled that a determination by Ecology denying the Klineburgers' request to reconstruct a residence in the floodway was not appealable to superior court under the Land Use Petition Act (LUPA). By statute, RCW 86.16.110 and RCW 43.21B.110, Ecology's determination was instead appealable to the Pollution Control Hearings Board.

The Klineburgers seek review of the Court of Appeals decision. The Klineburgers do not question the Court of Appeals' ruling that Ecology's determination should have been appealed to the Pollution Control Hearings Board. However, they do claim the Court of Appeals' ruling concerning notice conflicts with existing precedent and denies them due process. In fact, the Court of Appeals decision does not conflict with existing precedent. In their Petition for Review, the Klineburgers mischaracterize both the Court of Appeals' holding below and the holding of the prior precedents they rely on. Also, the decision below does not deprive the Klineburgers of due process—the Court of Appeals simply applied existing precedent and statute to rule that the Klineburgers failed to pursue the proper avenue of review. Because the Klineburgers fail to identify any issues of substantial public interest, or any conflict with existing precedent, this Court should deny review.

II. ISSUES

The Klineburgers' petition does not meet the RAP 13.4 criteria for discretionary review. However, if review is granted, the issues would be:

1. Were the Klineburgers denied due process when they had an opportunity to appeal Ecology's determination to the Pollution Control Hearings Board?

2. Did Ecology substantially comply with a requirement to include appeal language in its decision when its decision listed the statutes that provide an appeal right?

3. Can the Supreme Court reach the merits of Ecology's decision when there has never been a hearing on the merits and the Court of Appeals declined to reach the merits?

III. STATEMENT OF THE CASE

The Klineburgers own property located in the flood plain, floodway, and channel migration zone of the Middle Fork of the Snoqualmie River. CP 413, 411. The residence formerly on that property was destroyed, ostensibly by fire. CP 489, ¶ 4. The Klineburgers would like to locate a mobile home on the property. CP 489, ¶ 1. With very few exceptions, state law prohibits residential development, including mobile homes, in the floodway. RCW 86.16.041(2)(a). One of the exceptions authorizes rebuilding of a substantially damaged residence in the floodway if certain conditions are met. RCW 86.16.041(4). Ecology is tasked with making a recommendation to local government concerning whether or not those conditions are met. RCW 86.16.041(4). If Ecology determines the

conditions are not met, the residential structure may not be rebuilt. RCW 86.16.041(4).

In this case, Ecology determined that the conditions had not been met. CP 421-22. On October 22, 2012, Ecology sent a letter to King County and to the Klineburgers explaining its decision. CP 421-22. On October 29, the Klineburgers responded to Ecology's letter with further information supporting their project. CP 423-24. On December 18, Ecology sent a second letter to the County and to the Klineburgers responding to the information provided in the Klineburgers' letter, and reiterating its determination that the Klineburgers' project did not meet the requirements for rebuilding a substantially damaged structure in the floodway. CP 436-38. As a result of Ecology's determination, the County proceeded with a code enforcement action, which the Klineburgers appealed.

The case was heard by the King County Hearing Examiner, who ruled that the County was required to follow Ecology's determination. CP 488-92. Because the proceeding before the Hearing Examiner was a local government code enforcement case, Ecology was not a party to that proceeding. The Klineburgers sought review in King County Superior Court under LUPA. CP 577-81. The Klineburgers' petition did not challenge Ecology's determination. CP 578-80. Rather, the Klineburgers

claimed that the County was not bound by Ecology's determination. CP 578, 580. The Superior Court agreed with the Hearing Examiner that the County was required to follow Ecology's determination. CP 158. However, the Superior Court then went on to rule that Ecology's determination was incorrect. CP 158.

King County appealed the Superior Court decision to the Court of Appeals, where Ecology was granted intervention. The Court of Appeals upheld the Superior Court ruling that the County was required to follow Ecology's determination. *Klineburger v. King Cty. Dep't of Dev. & Envt'l Servs. Bldg.*, __ Wn. App. __, 356 P.3d 223, at 230 (2015). The Court of Appeals reversed the portion of the Superior Court decision on the merits of Ecology's determination, holding that the Superior Court erred in considering the merits of the determination because it was not a local government land use decision reviewable under LUPA. *Klineburger*, 356 P.3d at 230, 232. The Court of Appeals held that the Klineburgers should have appealed Ecology's decision to the Pollution Control Hearings Board first, and then thereafter they could have sought review by the superior court under the Administrative Procedure Act. *Klineburger*, 356 P.3d at 231, 232. The Court of Appeals also declined the Klineburgers' request to rule on the merits of Ecology's determination. *Klineburger*, 356 P.3d at 233.

IV. ARGUMENT

A. The Klineburgers' Case Does Not Meet the Requirements for Review by the State Supreme Court

A petition for review will be accepted by this Court only: (1) if the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or (2) if the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals; or (3) if a significant question of law under the Constitution of the State of Washington or of the United States is involved; or (4) if the petition involves an issue of substantial public interest that should be determined by the Supreme Court. RAP 13.4(b).

In an attempt to meet these criteria, the Klineburgers make three primary arguments: first, they claim they were denied due process under the Washington State and United States Constitutions because, under the Court of Appeals' ruling, they allegedly had no available forum to challenge Ecology's arguments. Petition at 8.[1] Second, they argue that the decision of the Court of Appeals in this case conflicts with other Washington appellate decisions in *Felida Neighborhood Association v. Clark County*, 81 Wn. App. 155, 913 P.2d 823 (1996), and *Burt v.*

[1] While the Klineburgers cite to the Washington Constitution article I, section 3 and the U.S. Constitution Amendment V for this proposition, they provide no analysis and cite to no case law demonstrating how their due process rights were allegedly violated.

Department of Corrections, 168 Wn.2d 828, 231 P.3d 191 (2010). Petition at 8, 17. Finally, the Klineburgers assert that the case involves an issue of substantial public interest because the Court of Appeals decision allows state agencies to take final action without giving appropriate statutory notice of a party's right to appeal. Petition at 8. All of these arguments lack merit.

1. The Court of Appeals decision does not deny the Klineburgers due process because they had an opportunity to appeal Ecology's decision to the Pollution Control Hearings Board

The Klineburgers claim that the Court of Appeals deprived them of due process by depriving them of all means of challenging Ecology's determination regarding their request to reconstruct a residence in the floodway. Petition at 1. The Klineburgers mischaracterize the Court of Appeals' decision. The Court of Appeals did not deny the Klineburgers any right of review: the Court of Appeals simply followed existing precedent and statutes to rule that the Klineburgers' efforts to seek review under LUPA were unavailing. The Court of Appeals correctly found that Ecology's decision was not a land use decision by local government appealable to superior court under the LUPA. *Klineburger*, 356 P.3d at 230. The Court of Appeals also correctly determined that, under the

governing statutes, RCW 86.16.110[2] and RCW 43.21B.110,[3] Ecology's decision, like most Ecology decisions, was appealable to the Pollution Control Hearings Board. *Klineburger*, 356 P.3d at 232.

In reaching its decision, the Court of Appeals was guided by an analogous case decided by this Court, *Stafne v. Snohomish County*, 174 Wn.2d 24, 271 P.3d 868 (2012). *Klineburger*, 356 P.3d at 232-33. In *Stafne*, a landowner challenged a city's decision about a comprehensive plan amendment by filing a petition under the Land Use Petition Act. *Stafne*, 174 Wn.2d at 28-29. Under the Growth Management Act, a challenge to a comprehensive plan amendment must first be appealed to the Growth Management Hearings Board. RCW 36.70A.280(1)(a); *Stafne*, 174 Wn.2d at 34. In *Stafne*, the Court ruled that the case could not be appealed to superior court under LUPA, stating, "[e]ven if the chances for successful review before the growth board are slim, that cannot change a nonland use decision into a land use decision under LUPA." *Stafne*, 174 Wn.2d at 34; *see also Klineburger*, 356 P.3d at 232. The Court of Appeals decision below is consistent with *Stafne*.

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[2] RCW 86.16.110 states, "Any person . . . feeling aggrieved at any order, decision, or determination of the department [of Ecology] . . . pursuant to this chapter, affecting his or her interest, may have the same reviewed [by the Pollution Control Hearings Board] pursuant to RCW 43.21B.310."

[3] RCW 43.21B.110(1)(b) provides that the Pollution Control Hearings Board has jurisdiction over Ecology decisions made under RCW 86.16.

The Klineburgers also contend that their due process rights were violated because Ecology did not include language in its letter determinations notifying them of their right to appeal to the Pollution Control Hearings Board. They claim the 30-day period for appealing to the Pollution Control Hearings Board should be tolled until proper notice is given. Petition at 2.

As a threshold matter, this issue is not properly before this Court as it has never before been raised in this case. RAP 2.5. The issue was not raised to the Hearing Examiner, to the Superior Court, or to the Court of Appeals. "As a general matter, an argument neither pleaded nor argued to the trial court cannot be raised for the first time on appeal." *Washington Fed. Sav. v. Klein*, 177 Wn. App. 22, 29, 311 P.3d 53, 56 (2013), *review denied*, 179 Wn.2d 1019 (2014).

Beyond that, the issue fails to raise a constitutional question. RCW 43.21B.310(4) does require appealable decisions to include language stating that the decision may be appealed only by filing an appeal at the Pollution Control Hearings Board. RCW 43.21B.310(4). However, case law is clear that substantial compliance with such notice requirements is sufficient. *Leson v. Ecology*, 59 Wn. App. 407, 799 P.2d 268 (1990) (noting that substantial compliance with notice requirements is sufficient to invoke court jurisdiction); *Felida Neighborhood Ass'n*, 81

Wn. App. 155 (remanding to determine whether the County Board of Commissioners substantially complied with the notice requirements). Here, the Klineburgers received Ecology's determination letters and those letters referenced requirements in Chapter 86.16 RCW. CP 421-22; 436-38. The table of contents of Chapter 86.16 RCW includes the entry, "RCW 86.16.110 Appeals." RCW 86.16.110 states that appeals of Ecology determinations made under RCW 86.16 are appealable to the Pollution Control Hearings Board. The Court of Appeals properly determined that this notice was sufficient. *See Klineburger*, 356 P.3d at 231, 232. The Klineburgers were not denied due process.

In addition, as the Court of Appeals noted (*Klineburger*, 356 P.3d at 231), the Pollution Control Hearings Board has held that the presence or absence of the statutory appeal language in an Ecology decision is not dispositive of whether that decision is appealable to the Board: "[t]he failure to include [appealability] language does not divest the Board of its jurisdiction or impact whether the decision may be appealed." *Hagman v. Ecology*, Pollution Control Hearings Bd. No. 14-016c, Order on Motions at 14 n.4 (Dec. 3, 2014). The appealability of Ecology's determinations rests on the language of the relevant statutes that govern the Board's jurisdiction, not on whether Ecology includes appeal language. Because the Court of Appeals ruled correctly on this issue that the Klineburgers

received and could have appealed Ecology's determinations, there is no constitutional issue warranting review by this Court.

2. The Court of Appeals decision in *Klineburger* does not conflict with the Court of Appeals decision in *Felida Neighborhood Association*

The Klineburgers argue that the decision of the Court of Appeals Division 1 in *Klineburger* conflicts with the decision of the Court of Appeals Division 2 in *Felida Neighborhood Association*. Petition at 8-16. The Klineburgers note that the Court of Appeals in *Felida* ruled that the period for appealing Clark County's decision under the State Environmental Policy Act was tolled because the County failed to give timely notice of its action. Petition at 9. The Klineburgers' argument misses the mark. In this case, Ecology provided notice to the Klineburgers of its decision by sending them its decision letters. Petition at 4-5; *Klineburger*, 356 P.3d at 227.

The Klineburgers do not claim that they did not receive Ecology's letters. Rather, the Klineburgers claim Ecology's letters provided inadequate notice because they did not include language explaining how to appeal Ecology's decision. Petition at 10. The Klineburgers fail to note that *Felida* holds that substantial compliance with notice requirements is sufficient. *Felida*, 81 Wn. App. at 161. Here, the Klineburgers received Ecology's determination letters. *Klineburger*, 356 P.3d at 232. The Court

of Appeals in *Klineburger* found that the notice provided by Ecology's letters was sufficient. *Klineburger*, 356 P.3d at 231-32. In so holding, the Court of Appeals determined that Ecology's notice constituted substantial compliance. This ruling is entirely consistent with *Felida*.

The Klineburgers also argue that the Court of Appeals in this case, in conflict with the Court of Appeals in *Felida*, determined that the Superior Court lacked subject matter jurisdiction because the underlying decision had not been timely appealed. Petition at 9 n.1 (citing to *Klineburger*, 356 P.3d at 232). The Klineburgers misstate the reasoning used by the Court of Appeals in this case. The question in this case was not whether Ecology's decision had been timely appealed. The question was whether the superior court could consider the Ecology determination under the Land Use Petition Act. *Klineburger*, 356 P.3d at 230, 232. The Court of Appeals' answer was no. *Id.* The court also looked at whether the Superior Court could review Ecology's determination under the Washington State Administrative Procedure Act. *Klineburger*, 356 P.3d at 231, 232. The Court of Appeals' answer was again, no under the circumstances presented. *Id.* The Court of Appeals stated, "Here, the [superior] court had the authority under [the Washington Administrative Procedure Act] to review an Ecology determination following a [Pollution Control Hearings Board] decision, with a more complete factual record to

do so. But by reaching the merits of Ecology's decision before the Klineburgers had exhausted their administrative remedies, the court exercised its jurisdiction prematurely and exceeded its authority under LUPA." *Klineburger*, 356 P.3d at 232. This determination does not concern timeliness and, thus, contrary to the Klineburgers' assertions, does not conflict with the decision on timeliness in *Felida*.

3. There is no conflict between the Court of Appeals decision in *Klineburger* and the case law on the remedy for failure to join a necessary party

The Klineburgers also argue that, according to prior cases, the proper remedy when a necessary party is not joined by the trial court is vacation of the judgment with remand to the trial court for proceedings after proper joinder. Petition at 17 (citing *Burt*, 168 Wn.2d at 836-37). The Klineburgers contend that the decision below is at odds with that case law because the Court of Appeals did not vacate the Superior Court's judgment with remand for proceedings after proper joinder. Petition at 17. The Klineburgers are mistaken. In this case, the Court of Appeals determined that the trial court could not review Ecology's determination under LUPA because Ecology's determination was not a land use decision by a local government. *Klineburger*, 356 P.3d at 230, 232. The Klineburgers have not contested that ruling. Given that the superior court cannot rule on Ecology's determination, remand to superior court in this

case would be useless, and would not provide the Klineburgers with the remedy they seek—a decision on Ecology's determination.

4. This case does not involve an issue of substantial public interest because whether appeal language is included in an appealable decision does not affect a party's underlying right of appeal

The Klineburgers claim that this case involves an issue of substantial public interest that should be determined by this Court because the Court of Appeals decision allows state agencies to take final action without giving appropriate statutory notice of a party's right to appeal. Petition at 8. They claim it is a matter of substantial public interest to determine whether, in the absence of appealability language, a document sent by an agency is or is not a final appealable order. Petition at 16. The Klineburgers overstate the importance of the appealability language. In fact, this issue is not of substantial public interest because the presence or absence of appeal language has no bearing on the recipient's rights. The recipient's rights of appeal to the Pollution Control Hearings Board are governed entirely by the statute specifying the types of agency decisions over which the Pollution Control Hearings Board has jurisdiction. *See* RCW 43.21B.110(1).

Consistent with this analysis, Pollution Control Hearings Board rulings have found that the grant of jurisdiction found in the Board's

enabling statute governs. *See Sylvia Ridge Developers, LLC v. Ecology*, Pollution Control Hearings Bd. No. 07-139, Order Granting Summary Judgment to Ecology (Mar. 14, 2008) (Ecology noncompliance notification was not an appealable order because RCW 90.48.120(1) expressly provides that a noncompliance determination does not constitute an order or directive under RCW 43.21B.310); *Steensma v. Ecology*, Pollution Control Hearings Bd. No. 11-053, Order Denying Reconsideration (Oct. 4, 2011) (finding Ecology letter was not an appealable decision, noting, "[t]he key point, however, which the Board already addressed in its summary judgment order, is that Ecology did not make a decision and therefore there can be no appeal to this Board").

Thus, the presence of appealability language cannot give the Board jurisdiction over an agency decision when the Board's enabling statute has not given the Board that jurisdiction. Likewise, where the Board's enabling statute has given the Board jurisdiction, the lack of appeal language cannot take that jurisdiction away. *Hagman*, PCHB No. 14-016c, Order on Motions (finding that Ecology's denial of a request for termination of coverage under the Construction General Stormwater Permit was an appealable action even though the denial did not include the statutory appeal language). The Klineburgers offer no reason for this

Court to revisit these principles or the Board decisions embodying them. Thus, this issue also does not constitute grounds for review.

B. The Merits of Ecology's Decision Are Not Suitable for Supreme Court Review Because the Court of Appeals Did Not Reach the Merits, nor Did the Superior Court Have Authority Under LUPA to Reach the Merits

The Klineburgers' petition includes a description of the evidence they presented to the hearing examiner to contest Ecology's decision. Petition at 18, 19. The Klineburgers also claim that "[t]he Court of Appeals erred when it found the Klineburger property was in the floodway." Petition at 19. In fact, the Court of Appeals did not find that the Klineburger property was in the floodway.[4] Rather, the Court of Appeals properly declined to rule on the question. *Klineburger*, 356 P.3d at 233.

Ecology was not a party to the hearing before the King County Hearing Examiner, and has not had the opportunity to present evidence on the merits of its determination. In briefing to the Court of Appeals, Ecology pointed out the undisputed fact that official maps include the Klineburgers' property in the flood plain, the floodway, and the channel

[4] The Court of Appeals did note that the Klineburgers' property was included in the floodway on the Federal Emergency Management Agency (FEMA) maps. *Klineburger*, 356 P.3d at 226. The Court of Appeals also determined that, because the Superior Court could not rule on Ecology's determination under LUPA, the Superior Court did not err in declining to order the County to process the Klineburgers' permits "as if the lot was not in the floodway." *Id.* at 233. Neither of these determinations constitutes a ruling that the Klineburgers' property is in the floodway.

migration zone of the Middle Fork of the Snoqualmie River. Ecology also noted that the Klineburgers have not taken the steps necessary under federal, state, and local laws to remove their property from the floodway, the flood plain, or the channel migration zone. Finally, Ecology explained why, under the regulatory requirements applicable to a property in a floodplain, floodway, and channel migration zone, the Klineburgers' property does not meet the requirements for rebuilding a substantially damaged residence in the floodway. In making these arguments, Ecology pointed out that 428th Avenue SE does not meet the federal and local regulatory requirements for a flood control structure. Ecology also asked the Court of Appeals to take judicial notice of the Federal Emergency Management Agency (FEMA) map that includes the Klineburgers' property, as well as a King County map showing the floodway and channel migration zone in the area. The Court of Appeals did not rule on any of these issues. *Klineburger*, 356 P.3d at 233. Neither should this Court.

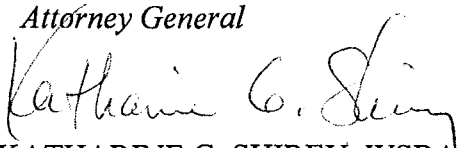
V. CONCLUSION

The Court of Appeals decision in this case is consistent with previous case law, does not raise any constitutional issues, and does not involve any issues of substantial public interest that should be determined

by the Supreme Court. Ecology, therefore, asks the Court to deny the Klineburgers' Petition for Review.

RESPECTFULLY SUBMITTED this 16th day of October 2015.

ROBERT W. FERGUSON
Attorney General



KATHARINE G. SHIREY, WSBA #35736
Assistant Attorney General
Office ID No. 91024
P.O. Box 40117
Olympia, WA 98504-0117
(360) 586-6769
KayS1@atg.wa.gov

NO. 92233-1

SUPREME COURT OF THE STATE OF WASHINGTON

STEPHEN AND SANDRA KLINEBURGER, Appellants, v. KING COUNTY DEPARTMENT OF DEVELOPMENTAL AND ENVIRONMENTAL SERVICES BUILDING AND FIRE SERVICES DIVISION CODE ENFORCEMENT SECTION, and STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY, Respondents.	CERTIFICATE OF SERVICE

Pursuant to RCW 9A.72.085, I certify that on the 16th day of October 2015, I caused to be served State of Washington, Department of Ecology's Answer to Petition for Review in the above-captioned matter upon the parties herein as indicated below:

ROSS A. RADLEY ROSS RADLEY INC PS 146 N CANAL ST, SUITE 350 SEATTLE, WA 98103-8651	[ ] U.S. Mail [ ] Hand Delivered [ ] Overnight Express [x] By Email: rradley@mindspring.com
DEVON N. SHANNON KING COUNTY PROSECUTOR'S OFFICE KING COUNTY COURTHOUSE 516 THIRD AVENUE, ROOM W400 SEATTLE, WA 98104-2388	[ ] U.S. Mail [ ] Hand Delivered [ ] Overnight Express [x] By Email: devon.shannon@kingcounty.gov

the foregoing being the last known addresses.

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 16th day of October 2015, in Olympia, Washington.

Teresa L Trippel

TERESA L. TRIPPEL
Legal Assistant

OFFICE RECEPTIONIST, CLERK

To: Trippel, Teresa (ATG)
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Cc: Shirey, Kay (ATG) <KayS1@ATG.WA.GOV>
Subject: E-filing for Cause No. 92233-1

Please find attached for filing in *Stephen and Sandra Klineburger v. King County Department of Development, et al.*, Supreme Court No. 92233-1, State of Washington, Department of Ecology's Answer to Petition for Review, and a Certificate of Service.

The foregoing documents are filed on behalf of Katharine G. Shirey, WSBA #35736; phone number (360) 586-6769 and e-mail kays1@atg.wa.gov.

Thank you,

Teresa Trippel | Legal Assistant to Kay Shirey, AAG | WA Attorney General's Office | Ecology Division
P.O. Box 40117, Olympia, WA 98504-0117 | ☎ 360.586.4618 | Teresa.Trippel@atg.wa.gov

E-Mail Address for E-Service: ecyolyef@atg.wa.gov