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NO. 71325-6-I

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

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KING COUNTY DEPARTMENT OF DEVELOPMENTAL AND ENVIRONMENTAL SERVICES BUILDING AND FIRE SERVICES DIVISION CODE ENFORCEMENT SECTION,

Appellant,

v.

STEPHEN AND SANDRA KLINEBURGER,

Respondent.

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# REPLY BRIEF OF APPELLANT KING COUNTY

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## I. INTRODUCTION

Before reaching any of the substantive factual assertions raised by the Klineburgers, the Court must first address the question of jurisdiction. What is the scope of the administrative decision before the Court?

The administrative decision on appeal in this LUPA proceeding is the King County Hearing Examiner's decision. The Examiner never reached the merits of Klineburgers argument that they should be able to develop their property. The Examiner's narrow conclusion was that the County was bound by Ecology's determination that the Klineburgers' proposed development could not be approved.

Therefore, the only appealable decision in this proceeding is whether, under one of the standards in RCW 36.70C.130, the examiner erred in holding that King County was bound to follow Ecology's decision. The Superior Court upheld the Examiner's decision, but then went beyond LUPA's jurisdictional limits by ruling on the merits of Ecology's decision.

In their response, the Klineburgers conflate the ability to appeal *Ecology's decision* with the ability to appeal the *Examiner's decision.* Their cross-appeal goes further, requesting judicial review and invalidation of federal FEMA floodway mapping. The County asks this

Court to avoid opening the flood-gates[1] to collateral review of state and federal agency actions within the limited purview of a LUPA appeal.

## II. FEDERAL AND STATE AGENCY DECISIONS ARE NOT REVIEWABLE UNDER LUPA.

LUPA provides a very clear statutory framework that limits the scope of reviewable decisions. "A superior court hearing a LUPA petition acts in an appellate capacity and with only the jurisdiction conferred by law." *Knight v. City of Yelm*, 173 Wn.2d 325, 337, 267 P.3d 973, 980 (2011), citing *Conom v. Snohomish County*, 155 Wn.2d 154, 157, 118 P.3d 344 (2005). "As our Supreme Court has declared, 'LUPA applies only to actions that fall within the statutory definition of a land use decision.'" *Durland v. San Juan Cnty.*, 175 Wn. App. 316, 321, 305 P.3d 246, 249 review granted, 179 Wn.2d 1001, 315 P.3d 530 (2013), quoting *Post v. City of Tacoma*, 167 Wn.2d 300, 309, 217 P.3d 1179 (2009).

"Land use decision" is defined as a final determination by a local jurisdiction. RCW 36.70C.020(2). "Local jurisdictions" are limited to counties, cities and incorporated towns. RCW 36.70C.020(3). Ecology's decision is not reviewable under LUPA because Ecology is a "body that is not part of a local jurisdiction." RCW 36.70C.030(1)(a)(i), *see also* RCW 36.70C.030(1)(a)(ii) (review under LUPA precluded where the decision is

[1] Pun intended.

"subject to review by a quasi-judicial body created by state law."). Neither, as the Klineburgers argue in their cross-appeal, is FEMAs inclusion of the Klineburger property within the floodway an appealable issue under LUPA. FEMA is not a local jurisdiction and has not made any "decision" that would be reviewable in any administrative challenge.

### A. The Court does not have jurisdiction to evaluate FEMA's floodway designation in this LUPA appeal.

The singular error assigned by the Klineburgers on cross-appeal is the superior court's refusal to change the FEMA floodway designation assigned to their property. The Klineburgers contend that their lot should not be considered in the floodway. Br. of Respondents/Cross Appellants, at 19. The Klineburgers are asking this Court to supersede the federal authority of FEMA's floodway mapping system and, based on the limited administrative record before the examiner, find that the Klineburger's property is not within the floodway. There are several problems with this approach.

#### 1. FEMA is not a local jurisdiction and there is no "decision" to review.

FEMA is not a local jurisdiction, nor a party in this proceeding. Review of the accuracy of FEMA's floodway mapping in relation to the Klineburger property would violate RCW 36.70C.030 and -.070. There is

also no "land use decision" in the record here that would provide an appeal opportunity. RCW 36.70C.020.

Furthermore, the record has not been developed on the Klineburgers' attempt to obtain a map designation change. The Klineburgers are correct that "[t]he decision on whether [their property] should be removed from the floodway map is a factual matter." CP 20. It is, however, a factual matter to be considered and resolved by FEMA, not *ad hoc* by this Court.

**2. There is an established federal administrative process for review and appeal of floodway designations.**

The Klineburgers acknowledge that the only way to change the floodway designation is through a map amendment process with FEMA. CP 39-42. This is a federal agency process with a federal administrative appeal opportunity. *See* 44 CFR 60.3; 44 CFR 65; 44 CFR 67. Any complaints or challenges the Klineburgers have to the federal floodmap designation on their property must be addressed through the appropriate federal process. The Klineburgers cross-appeal issue is not appropriate for review by state court in a LUPA proceeding.

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### 3. The Klineburgers failure to obtain a LOMA from FEMA does not create an appealable LUPA decision.

The Klineburgers were unsuccessful in their attempt to obtain a Letter of Map Amendment (LOMA)[2] from FEMA which would have designated their property outside of the floodplain. The Klineburgers insinuate that the County thwarted their efforts to obtain a redesignation from FEMA. Br. of Respondents/Cross Appellants, at 19. The intention of King County has never been to thwart the Klineburgers development goals. However, King County is bound by the floodway mapping applied by FEMA and bound to accurately attest to the information required by FEMA in its consideration of a LOMA.[3] If the Klineburgers have concerns with the LOMA process and the County's involvement in that process, those concerns are properly raised with FEMA, not with this Court. *See* 44 CFR 60.3; 44 CFR 65; 44 CFR 67.

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[2] A LOMA is only available where a property has been *inadvertently* included in the floodway map. It does not apply where some alteration in the property has resulted in a change that would warrant taking the property out of the floodway. The latter process for a map amendment is called a Letter of Map Revision (LOMR). Notably, the Klineburgers only applied for a LOMA. CP 39.

[3] In a LOMA application, the local jurisdiction is required to attest that it believes the property was "inadvertently included in the regulatory floodway," that no "fill has or will be placed in the regulatory floodway" and that the proposed project "meets the community's floodplain management requirements." CP 41. King County could not attest to these things because they were not true. The inclusion of the property in the floodplain was not inadvertent, and the proposed project would not meet state or local floodplain management requirements. CP 42.

Nothing in the examiner proceedings addressed the Klineburgers LOMA process. Nor could it have, since this is a federal regulatory scheme that is completely outside the examiner's jurisdiction. Nevertheless, because the Klineburgers were unsuccessful with the established administrative process to take their property off of the FEMA floodway map, they now seek to bypass and override this process through judicial review by this Court. The doctrines of finality and exhaustion of administrative remedies are violated by untimely judicial intervention. *See* King County's Opening Br. at 16-20.

### B. The superior court did not have jurisdiction over Ecology's floodway exemption decision.

The County's sole appeal issue before this Court is whether the superior court erred when it went beyond its jurisdiction to review and invalidate Ecology's administrative decision. This was improper where Ecology's decision is not an appealable decision under LUPA, Ecology was not a party to the proceeding, and there was no record before the superior court on the Ecology decision. King County's Opening Br. at 13-16. The superior court's decision to overturn Ecology should be reversed.

#### 1. RAP 2.5 does not preclude this Court's review of the County's jurisdictional appeal issue.

The thrust of the Klineburgers' Response Brief is that King County failed to raise its jurisdictional appeal issue before the superior court and

now this Court should deny review based on RAP 2.5. Br. of Respondents/Cross Appellants, at 10-11. This argument ignores the plain exceptions in RAP 2.5 and the County's trial court briefing.

Under RAP 2.5, issues pertaining to "lack of trial court jurisdiction" may be raised at any time. This exception to the general rule precluding new issues on appeal is designed precisely to capture the jurisdictional issues at bar. The trial court overstepped its jurisdiction by reviewing and overruling a state agency decision that was not on appeal. This question of superior court jurisdiction is exactly the type of question that can and should be resolved by the appellate court.

Also, the County's briefing to the superior court explicitly stated that Ecology's determination was not properly before the Court. CP 138 ("Any complaint petitioners' have against Ecology is not proper in this appeal. Ecology is not a party to this appeal. Any challenge to Ecology's decision is beyond the scope of this litigation."). The County did not brief the court's lack of jurisdiction in detail at the trial court level, as it seemed to be blatantly outside the scope of the Klineburgers' LUPA Petition and the beyond the clear limits of the superior court's jurisdiction. Nonetheless, because the superior court did take the *ad hoc* step to review and invalidate Ecology's decision, the County and Ecology now find themselves before this Court.

### 2. Ecology's decision is not a "final determination by a local jurisdiction."

The Klineburgers continue to conflate the examiner's decision with Ecology's decision and the scope of each of these proceedings. Br. of Respondents/Cross Appellants, at 11-12. The examiner did not have jurisdiction to make a ruling on the merits of Ecology's decision. In fact, that was the cornerstone of his conclusion: the examiner "lacks any authority to overturn [Ecology's] determination." CP 9. The only issue reached by the examiner was that "he had no independent authority to review, modify or vacate the findings of the Department of Ecology with respect to floodway issues." CP 10. Thus, this is the only conclusion that can be appealed under LUPA.

In fact, this was the only issue identified by the Klineburgers in their Petition for Review. CP 3-4 (The examiner "erred in determining that the county has no independent authority to review, modify, or vacate the findings of the Department of Ecology with respect to floodway issues."). RCW 36.70C.070 requires that a land use petition include a "statement of each error alleged to have been committed." The Klineburgers did not allege any error by Ecology. CP 1-5. If it had, the County would have had the opportunity to challenge this jurisdictional issue at the initial hearing. RCW 36.70C.080. Because the Klineburgers'

petition did not allege an error with the merits of Ecology's decision, the superior court should not have taken up the issue *sua sponte*.

King County agrees that the superior court and this Court have jurisdiction to review the *hearing examiner's decision* that the County was bound by Ecology's decision. However, the reviewing court cannot take the extra step of invalidating a state agency's administrative decision in a LUPA appeal.

### 3. The Klineburgers' failure to join Ecology exemplifies the inapplicability of LUPA to Ecology's decision.

The Klineburgers make the strained argument that, should the Court find that Ecology's decision can be reviewed under LUPA, they did not need to serve or join Ecology as they failed to do below. Br. of Respondents/Cross Appellants, at 14-15. LUPA's focus on serving the "local jurisdiction" as the decision-maker only exemplifies why Ecology's decision cannot be shoe-horned into the LUPA framework.

As discussed above, LUPA does not facilitate review of state agency decisions. RCW 36.70C.020, -.030. LUPA's limitation to review of decisions by local jurisdictions and the requirement to include the local jurisdiction in the appeal process go hand-in-hand. Under LUPA, the only "decision-maker" is the local jurisdiction. RCW 36.70C.040. The requirement to serve the local jurisdiction ensures that the decision-maker

is at the table in any litigation calling its decision into doubt. If the Court treats Ecology as a local jurisdiction, then the requirements for serving the local jurisdiction should be imposed on Ecology.

The County's "failure to serve" argument in its Opening Brief was primarily to illustrate the number of LUPA requirements that would need to be overlooked to facilitate judicial review of Ecology's decision. King County's Opening Br. at 14. Because Ecology is not a local jurisdiction and was not joined as a decision-maker, the superior court's consideration of Ecology's decision was in err.

**4. Ecology's decision is appealable to the PCHB.**

The Klineburgers argue that Ecology's letter was an "'advisory recommendation,' not a decision." Br. of Respondents/Cross Appellants, at 16. But this quote is not supported by any citation. In contrast, the Ecology letter itself refers to their determination as a "decision." CP 382. Significantly, Ecology has not argued otherwise.

Under Ch. 86.16 RCW, Ecology is charged with "full regulatory control" over floodplain management regulation. Ecology denied the Klineburgers' proposed development under RCW 86.16.041. CP 381. Under RCW 86.16.110, any challenge to an Ecology "order, decision or determination" made under the authority in Ch. 86.16 is reviewable by the PCHB. This is the applicable process for appeal of Ecology's decision

regarding the Klineburgers' proposed development. Ecology has not disputed this.

While the Ecology decision does not explain that it is an appealable decision, this is only one factor the PCHB would review to determine whether an agency action is appealable. *See Steensma v. Ecology,* PCHB No. 11-053 (Order Granting Summary Judgment); *Sylvia Ridge Developers, LLC v Ecology*, PCHB No. 07-139 (Order Granting Summary Judgment, March 14, 2008)(noting that the failure to include this language is an *indicator* that a document is not an appealable order). This approach is logical, as it avoids potential manipulation by an agency seeking to avoid an appeal by simply omitting the language in RCW 43.21B.310(4). Because this language is for the benefit of the property owner, an appeal should not be disallowed based on the agency's error if other indicators show the agency action to be an appealable decision.

Ecology's omission of the appeal language in its decision may create a notice issue between Ecology and the Klineburgers, but it does not obviate the established statutory framework for flood management appeals under RCW 86.16.110. Any dispute as to the appeal process for Ecology's decision is a dispute that is rightly between Ecology and the Klineburgers to be reviewed by the PCHB.

Moreover, the appealability of the Ecology decision is not germane to whether it is reviewable *in this* proceeding. Ecology's decision does not become appealable under LUPA simply because Ecology did not include the requisite appealability clause in its letter. LUPA explicitly precludes review of land use decisions that are subject to review by a quasi-judicial body created by state law. RCW 36.70C.030(1)(a)(ii); *Harrington v. Spokane Cnty.*, 128 Wn. App. 202, 213, 114 P.3d 1233, 1240 (2005), *Somers v. Snohomish Cnty.*, 105 Wn. App. 937, 944, 21 P.3d 1165, 1168 (2001). LUPA may not be used to challenge decisions for which an alternative administrative process applies. *Stafne v. Snohomish Cnty.*, 174 Wn. 2d 24, 271 P.3d 868 (2012). And RCW 86.16.110 explicitly facilitates review of this particular type of floodway development determination.

While it might be easier in the short-term for the Klineburgers if the Court overlooked LUPA's statutory limitations, the long-term repercussions for applicants, local jurisdictions, as well as state and federal agencies would be significant. Allowing the superior court's decision to stand opens the door for applicants to by-pass statutorily required administrative process in other quasi-judicial tribunals. It also facilitates the collateral attack of agency decisions without allowing the decision-

maker to create a record supporting its decision, or even be a party to the proceeding.

**C. King County is bound by Ecology's decision.**

The Klineburgers take issue with the County's "refusal" to facilitate their development proposal by disregarding the authority of FEMA and Ecology. Br. of Respondents/Cross Appellants, at 19. While we can empathize with the frustration associated with the County's inability to override the state and federal regulations, the County cannot ignore the clear federal and state directives in this matter. The County has consistently communicated to the Klineburgers that their property was within the FEMA mapped floodway and that without a FEMA floodmap redesignation, they would need to obtain an exemption from Ecology to allow development within the floodway. Without this exemption, the County's hands are tied. Ecology has not disputed the finality of their decision or its determinative effect on the County's decision-making process.

The Klineburgers have attempted to use the hearing examiner process to challenge every road block they encountered for development of their property. The process they chose was not the route that could afford them the relief they seek. In order to challenge the application of federal and state regulations to their property, the Klineburgers need to

work with the agencies imposing those regulations. Any other result here has serious implications for finality and reliance on agency decisions by applicants and local jurisdictions. *See James v. Cnty. of Kitsap*, 154 Wn.2d 574, 589, 115 P.3d 286, 294 (2005) ("this court has long recognized the strong public policy evidenced in LUPA, supporting administrative finality in land use decisions.").

## III. CONCLUSION

Based on the argument above, King County requests that the Court reverse the superior court's ruling nullifying Ecology's decision that the Klineburgers's development proposal cannot be approved.

DATED this 30 day of July, 2014.

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