71325-6

71325-6

NO. 71325-6-I

IN THE COURT OF APPEALS, DIVISION 1
OF THE STATE OF WASHINGTON

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STEPHEN AND SANDRA KLINEBURGER,

Respondents,

v.

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

Appellant.

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# OPENING BRIEF OF APPELLANT KING COUNTY

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## I. INTRODUCTION

This case is about following the proper process to challenge administrative decisions. The Klineburgers want to develop property which is within a federally mapped floodway. Because of this designation, the only way they can build within the floodway is if they meet particular criteria under state and local law that exempt them from limitations on floodway development.

The Washington State Department of Ecology (Ecology) made a decision that the Klineburgers did not meet the necessary state law exemption criteria and therefore could not build within the floodway. King County Department of Permitting and Environmental Review (DPER)[1] consequently declined to accept the Klineburgers' permit application, recognizing that Ecology's decision was binding on the County and that DPER would not be able to approve the permit.

The Klineburgers seek nullification of Ecology's decision and propose two paths to this relief. First, they argue that DPER should ignore Ecology's decision and allow development under local regulations. The King County hearing examiner considered this argument and disagreed, concluding that DPER was bound by Ecology's decision. This

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[1] DPER was previously the Department of Development and Environmental Services (DDES). Older documents in the record may refer to DDES, which for purposes of this appeal is synonymous with DPER.

administrative decision was affirmed by the superior court and is the sole decision within the scope of the Klineburgers' current LUPA appeal.

The second path the Klineburgers pursue is an invitation for the court to override Ecology's decision without any direct appeal of that decision. This request leapfrogs over all necessary administrative process, avoiding exhaustion requirements and the creation of a factual record for Ecology's decision. However unavailing this path seems under state law requirements and basic principles of administrative law, the superior court overturned Ecology's decision, *sua sponte*.

King County respectfully requests that this Court reverse the portion of the superior court's ruling that invalidates Ecology's unappealed administrative decision. Consideration of Ecology's decision in this appeal is improper where: (1) Ecology's decision is not a "land use decision" appealable under LUPA; (2) Ecology did not follow LUPA's strict procedural requirements; (3) Ecology was not a party to the superior court proceedings and no record was created on Ecology's decision, (4) consideration would violate the doctrines of primary jurisdiction and exhaustion of remedies; and (4) Ecology's decision is supported by substantial evidence. The superior court's ruling should be affirmed insofar as it concludes that the County was bound to follow Ecology's decision.

## II. ASSIGNMENTS OF ERROR

1. The Superior Court's ruling was erroneous where Ecology's decision is not a "land use decision" appealable under LUPA.

2. The Superior Court's ruling was erroneous where the Klineburgers failed to follow LUPA's procedural requirements, did not join Ecology as a party, and lacked a factual record of the decision.

3. The Superior Court's ruling was erroneous where consideration of Ecology's decision violated the doctrines of primary jurisdiction and exhaustion of remedies.

4. The Superior Court erred in concluding that the Klineburgers met their burden under RCW 36.70C.130(1) of establishing that Ecology's decision was a clearly erroneous application of the law to the facts.

## III. STATEMENT OF CASE

### A. Procedural History

The procedural history in this case is significant both in what did happen below, and what is glaringly absent. At no point have the Klineburgers appealed Ecology's decision that their property does not meet state requirements for development within a floodway.

This case arose from a September 21, 2011 complaint DPER received for the placement of a mobile home, accumulation of junk and

debris, and inoperable vehicles on the Klineburgers' property. CP 333. King County Code Officer Erroll Garnett visited the site on October 5, 2011. *Id.* He observed an unpermitted mobile home on blocks without a proper foundation located within a designated floodway. CP 262, 362-70.

On January 3, 2012 the Klineburgers participated in a pre-application meeting with DPER to ascertain if they could get a permit for the mobile home. CP 373-75. DPER informed the Klineburgers that their property was within a federally mapped floodway where construction is prohibited.[2] CP 333, 374. DPER could therefore only allow development on the property if the Federal Emergency Management Agency ("FEMA") removed the floodway designation, or if Ecology concluded that an exception allowed development within the floodway.

On January 9, 2012, DPER issued a Notice and Order to the Klineburgers for the placement of an unpermitted mobile home within a floodway. CP 337-39. The Klineburgers appealed the Notice and Order to the King County Hearing Examiner. CP 340.

The Klineburgers then obtained an extended continuance of the hearing to request that FEMA remove the floodway designation from their property, and allow time for the Klinebugers to "convince [Ecology] to

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[2] FEMA administers the National Flood Insurance Program and ("NFIP") and publishes Flood Insurance Rate Maps ("FIRM") that official delineate flood zones.

approve the placement of foundation under this mobile home which is the first step in the process of getting permit [sic] for this structure." CP 333-34; CP 396; CP 522. Communications with FEMA were ultimately unsuccessful. The Klineburgers also sought a decision from Ecology that their development would meet exemption criteria for building in the floodway. On October 12, 2012, Ecology issued a decision that the proposed development did not meet the criteria in WAC 173-158-076. CP 421-22.

Unable to get relief from FEMA or Ecology, the Klineburgers proceeded with the hearing before the King County examiner on March 20, 2013. The Klineburgers' primary assertion was that the County was not bound by Ecology's decision and could unilaterally issue a building permit to the Klineburgers. CP 491. On April 3, 2013, the examiner denied the appeal, concluding that DPER was bound by Ecology's decision that the proposed development did not meet the exemption criteria and, therefore, the County could not issue a permit.

The Klineburgers subsequently filed a Land Use Petition Act (LUPA) appeal with the superior court. On November 18, 2013, Judge Rogers issued his written decision concluding that although the County did not have authority to overturn Ecology's decision *he did* have this

jurisdiction and, exercising this *ad hoc* authority, resolved that the Klineburgers' proposal met the state exemption criteria. CP 155.

On December 16, 2013, King County filed a Notice of Appeal to the Washington State Court of Appeals. CP 218-21. Ecology moved to intervene and the motion was granted by this Court on April 2, 2014.

**B. Substantive Facts and Legal Framework**

The Klineburgers purchased the subject property in 2011. Prior to their purchase, a residential structure existed on the property and was destroyed by fire sometime between 2005-2007. CP 583. At all relevant times the property has been within the mapped FEMA floodway and a designated channel migration zone. CP 368-70; CP 381-82.

After the Klineburgers purchased the property, DPER received a complaint regarding an unpermitted mobile home on the property. This led to a code enforcement action against the Klineburgers for an unpermitted structure within the floodway. CP 333-39. The Klineburgers then sought to obtain a permit from DPER to build a foundation for the mobile home and bring it up to code. CP 340. The County and Ecology have treated the Klineburgers' request as a "replacement" of the preexisting structure that was destroyed prior to their purchase of the property. CP 381-89; *see* WAC 173-158-030 (definition of replacement residential structure).

Permitting for a replacement residential structure in the floodway requires compliance with both local and state regulations. *See* KCC 21A.24.260; Ch. 86.16 RCW; Ch.173-158 WAC. Floodplain management is governed by Ch. 86.16 RCW. Through Ecology, the state "assumes full regulatory control" over floodplain management. RCW 86.16.010. "Any person… aggrieved at any order, decision, or determination of the department or director pursuant to this chapter, affecting his or her interest, may have the same reviewed [by the Pollution Control Hearing Board] pursuant to RCW 43.21B.310." RCW 86.16.110.

Through the authority granted in Ch. 86.16 RCW, Ecology facilitates limited repair, replacement or relocation of substantially damaged residential structures within the floodway. WAC 173-158-076. Ecology assesses whether the proposal may pose a "risk of harm to life and property" based on the flood characteristics at the site, including:

> (a) Flood depths can not exceed more than three feet; flood velocities cannot exceed more than three feet per second.
>
> (b) No evidence of flood-related erosion. Flood erosion will be determined by location of the project site in relationship to channel migration boundaries adopted by the local government.
>
> …
>
> Without a recommendation from the department for the repair or replacement of a substantially damaged residential structure located in the regulatory floodway, no repair or replacement is allowed per WAC 173-158-070(1).

WAC 173-158-076(1).

Ecology reviewed the Klineburgers' development proposal and, based on its assessment of the site conditions, concluded that the residence could not be rebuilt on site. CP 422. Ecology specifically stated that its "decision [was] based upon the facts that the flood depth of three feet is exceeded, it is located in a channel migration zone, and no evidence of a 12 hour or greater flood warning system or evacuation plan is provided." CP 422; *see also* CP 436.

King County Code (KCC) 21A.24.260, mirrors the state regulations and generally prohibits residential structures in the FEMA floodway. The County's review criteria for replacement structures within the floodway are based, in the first instance, on Ecology's determination of compliance with state law. Under KCC 21A.24.260(G), a replacement residential structure requires the applicant to establish the following:

> a. base flood depths will not exceed three feet;
> b. base flood velocities will not exceed three feet per second;
> c. there is no evidence of flood-related erosion, as determined by location of the project site in relationship to mapped channel migration zones or, if the site is not mapped, evidence of overflow channels and bank erosion; and
> d. a flood warning system or emergency plan is in operation;
>
> 2. The Washington state Department of Ecology has prepared a report of findings and recommendations to the department that determines the repair or replacement will

> not result in an increased risk of harm to life based on the characteristics of the site;
> 3. The department has reviewed the Washington state Department of Ecology report and concurs that the development proposal is consistent with the findings and recommendations in the report;
> 4. The development proposal is consistent with the findings and recommendations of the Washington state Department of Ecology report;

Under the King County Code, the development proposal must be consistent with Ecology's findings and recommendations. KCC 21A.24.260(G). Ecology's decision is, therefore, determinative for purposes of King County's review.

The Klineburgers appealed DPER's code enforcement action, arguing that DPER was not required to accept Ecology's decision. Specifically, they argued that the examiner could assess compliance with KCC 21A.24.260(G) independent of state law and direct DPER to issue a building permit. The examiner concluded that:

> the County's floodway management system is merely an extension and implementation of the State program. ... [If Ecology] has concluded that the proposed floodway development should be denied, the County lacks any authority to overturn such determination. ...Once Ecology had denied the Klineburger request for a floodway exemption, that determination was conclusive and binding on the County.

CP 585 (Conclusion No. 2).

The Klineburgers timely challenged the examiner's decision in a LUPA appeal to the superior court. Of paramount significance in this case are the specific allegations in the Klineburgers' petition. "The decision being appealed is from the King County Hearing Examiner...." CP 1. "The petitioners assign error to hearing examiner's conclusion number 2.... [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." CP 2.

The relief requested by the Klineburgers is that:

> the court order the King County to issue a permit to establish a home on this site. The court should also determine King County has the right and authority to issue a permit contrary to Washington State Department of Ecology's opinion because it is the permitting agency with final authority....In the alternative, the court should remand the matter back to the Hearing Examiner with instructions that King County has the right and the authority to overrule the decision by [Ecology] if the County feels [Ecology's] decision was wrong or the County feels the Petitioners have met all the requirements for exemption.

CP 4-5. The Klineburgers did not include Ecology as a party in the LUPA appeal, nor did they claim to challenge Ecology's decision in their appeal. The sole issue presented for review by the superior court was whether the County had authority to override Ecology's decision.

## IV. ARGUMENT

### A. Standard of Review and Burden of Proof

The County's appeal focuses on the superior court's improper expansion of its jurisdiction to include consideration of an unappealed administrative decision. The issue of whether a court has jurisdiction is a question of law subject to de novo review. *Crosby v. Cnty. of Spokane*, 137 Wn.2d 296, 300-01, 971 P.2d 32, 36 (1999). "Statutory procedural requirements must be satisfied before a superior court's appellate jurisdiction is invoked." *Id.*, *City of Seattle v. Public Employment Relations Comm'n*, 116 Wn.2d 923, 926, 809 P.2d 1377 (1991). If a court lacks jurisdiction, dismissal is the proper result. *Id.*

The underlying issue on appeal, whether the examiner's decision was correct, follows the standards set forth in LUPA, Ch. 36.70C RCW. In a LUPA appeal, the court reviews the "final determination by a local jurisdiction's body ... with the highest level of authority to make the determination, including those with authority to hear appeals[ ] on ... [a]n application for a project permit." RCW 36.70C.020(1)(a). Here, that is the King County Hearing Examiner's Decision. CP 488-494.

The party who filed the LUPA petition bears the burden of establishing one of the errors set forth in RCW 36.70C.130(1), even if that party prevailed on its LUPA claim at the superior court. *See Tahoma*

*Audubon Soc'y v. Park Junction Partners*, 128 Wn. App. 671, 681 116 P.3d 1046 (2005); *citing Pinecrest Homeowners Ass'n v. Glen A. Cloninger & Assoc's.*, 151 Wn.2d 279, 290, 87 P.3d 1176 (2004). Therefore, the burden is on the Klineburgers to establish that the Hearing Examiner's decision was erroneous under one of the RCW 36.70C.130(1) standards.

The Klineburgers have identified RCW 36.70C.130(1)(b) and (d) as the challenged standards:

> ...
> (b) The land use decision is an erroneous interpretation of the law, after allowing for such deference as is due the construction of a law by a local jurisdiction with expertise;
> ...
> (d) The land use decision is a clearly erroneous application of the law to the facts;

RCW 36.70C.130(1)(b) and (d).

Standard (b) presents a question of law that this court reviews *de novo*, giving deference to the examiner's specialized knowledge and expertise. *Pinecrest*, 151 Wn.2d at 288. Standard (d) requires application of a "clearly erroneous" test, wherein the land use decision is overturned only if the Court applies the facts to the law and has a "definite and firm conviction" that the examiner committed a mistake. *Quality Rock Products, Inc. v. Thurston Cnty.*, 139 Wn. App. 125, 133, 159 P.3d 1, 5 (2007).

## B. LUPA is Not the Proper Mechanism for Appeal of Ecology's Decision.

The heart of the parties' dispute here is the scope of the court's jurisdiction in a LUPA appeal. The County argues herein that LUPA defines and limits the scope of this appeal, and the only challengeable land use decision in this proceeding is the King County hearing examiner's decision. As a matter of law, Ecology's decision is not appealable under LUPA. Moreover, even if Ecology's decision were appealable under LUPA, the Klineburgers did not follow LUPA's procedural requirements to include Ecology's decision within the scope of the appeal.

### 1. Ecology's decision is not a "land use decision" appealable under LUPA.

LUPA was designed to "reform the process for judicial review of land use decisions made by local jurisdictions, by establishing uniform, expedited appeal procedures and uniform criteria for reviewing such decisions, in order to provide consistent, predictable, and timely judicial review." RCW 36.70C.010. LUPA's strict statutory requirements limit the scope of review and make it inapplicable for review of Ecology's decision.

A "land use decision" is defined as: "a final determination by a local jurisdiction's body or officer with the highest level of authority to make the determination...." RCW 36.70C.020(2). "Local jurisdiction" is

also defined, and is limited to "a county, city, or incorporated town." RCW 36.70C.020(3). To further drive the message home, LUPA explicitly states that it "does not apply to [judicial review of] land use decisions made by bodies that are not part of a local jurisdiction...." RCW 36.70C.030(1)(a)(i). And, as our Supreme Court reiterated, the LUPA definition of "local jurisdiction" "does not include state agencies such as Ecology." *Samuel's Furniture, Inc. v. State, Dep't of Ecology*, 147 Wn.2d 440, 453, 54 P.3d 1194, 1200 (2002). There can be no dispute on this point: Ecology is not a "local jurisdiction" and its decision is not appealable under Ch. 36.70C RCW.

**2. The Klineburgers did not follow statutorily required process to include Ecology's decision within their LUPA appeal.**

Even if the court were to treat Ecology as a "local jurisdiction" whose decision were appealable under LUPA, the Klineburgers did not properly appeal Ecology's decision in this proceeding. LUPA has very specific requirements for proper appeal of a land use decision. *See* RCW 36.70C.040-.070. If the Klineburgers wished to include the Ecology decision within the scope of their LUPA appeal, they would have had to:

1) timely serve Ecology with their land use petition;

2) make Ecology a party to the LUPA proceeding;

3) include Ecology's name, mailing address and a copy of Ecology's decision with the land use petition;

4) allege errors, supporting facts, and relief requested from Ecology's decision.

*See* RCW 36.70C.040-.070. The Klineburgers did none of these things. Where LUPA's strict procedural requirements are not met, the court lacks jurisdiction to hear the appeal. *Lakeside Industries v. Thurston County*, 119 Wn. App. 886, 83 P.3d 433 (2004).

The fact that the Klineburgers did not seek to make Ecology a party is perhaps the most glaring problem in this proceeding. As the appellant, the Klineburgers are charged with joining the decision-maker for the challenged land use decision. RCW 36.70C.040. The absence of Ecology as a party in the proceeding reinforces the conclusion that Ecology's decision is not the subject of this appeal. More to the point, however, the failure to join a necessary party is fatal to any relief sought against that party. *See Woodfield Neighborhood Homeowner's Ass'n v. Graziano*, 154 Wn. App. 1, 225 P.3d 246 (2009). Without Ecology at the table, the superior court had no jurisdiction to invalidate Ecology's decision.

In addition to neglecting LUPA's basic procedural requirements, the Klineburgers failed to raise any claim against Ecology or include

Ecology's decision within the scope of their requested relief. CP 1-5. "Issues not raised before the agency may not generally be raised on appeal." *King County v. Washington State Boundary Review Bd.*, 122 Wn.2d 648, 668, 860 P.2d 1024 (1993), *quoting* RCW 34.05.554. The Klineburgers' LUPA petition appealed only the examiner's decision stating that he "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." CP 2. The relief requested was for the court to "determine King County has the right and authority to issue a permit contrary to Washington State Department of Ecology's opinion." CP 4. There was no request for relief from Ecology's decision.

The Klineburgers failure to follow the statutorily mandated LUPA appeal process left the superior court without jurisdiction to review the state agency's decision.

**C. Consideration of Ecology's Decision in this Proceeding Oversteps Necessary Administrative Process and Violates the Doctrines of Primary Jurisdiction and Exhaustion of Remedies.**

Once we conclude that LUPA is not the proper appeal tool for a challenge to Ecology's decision, the next logical question is: what administrative or judicial relief could the Klineburgers employ to appeal Ecology's decision? The County argues herein that Ecology's decision should have been appealed administratively to the PCHB, where Ecology

would have been a party and a factual record would have been created for Ecology's decision.

**1. Flood management decisions by Ecology are appealable to the PCHB under RCW 86.16.110.**

The proper administrative process for the Klineburgers to challenge Ecology's decision was an appeal to the PCHB. Chapter 86.16 RCW outlines state law for floodplain management and directs Ecology to administer floodplain regulations. Ecology's regulations for determining whether a proposal meets criteria for floodplain development are found in WAC 173-158-076, as authorized pursuant to Ch. 86.16 RCW. Under RCW 86.16.110, "Any person... aggrieved at any order, decision, or determination of the department or director pursuant to this chapter, affecting his or her interest, may have the same reviewed [by the Pollution Control Hearing Board] pursuant to RCW 43.21B.310." *See also* RCW 43.21B.110(1)(b) (establishing jurisdiction of PCHB over Ecology decisions under Ch. 86.16 RCW).

Ecology's October 22, 2012 letter concluding that the Klineburgers did not meet the criteria in WAC 173-158-076 for development in the floodway is made pursuant to authority established in Ch. 86.16 RCW. The letter is a "decision" that effectively limits the Klineburgers' rights to develop their property. CP 422. They were aggrieved by this decision

and should have appealed to the PCHB as authorized under RCW 86.16.110.[3]

The Klineburgers have not pursued a PCHB appeal, attempting instead to collaterally challenge Ecology's decision through a LUPA appeal of a County land use decision. "A party may not collaterally challenge a land use decision for which the appeal period has passed via a challenge to a subsequent land use decision." *Habitat Watch v. Skagit County*, 155 Wn.2d 397, 410–11, 120 P.3d 56 (2005); *Durland v. San Juan Cnty.*, 174 Wn. App. 1, 13, 298 P.3d 757, 763 (2012). Not only is this clearly impermissible under basic principles of administrative law, it negates the finality and reliability of agency decision-making in an indeterminable number of future cases. *See infra* at 24-26.

**2. Consideration of Ecology's decision in this LUPA appeal violates the doctrine of primary jurisdiction.**

The doctrine of primary jurisdiction requires the Klineburgers to bring their appeal of Ecology's decision to the PCHB before seeking relief in the superior court.

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[3] In the alternative, Ecology's determination would be appealable directly to the superior court under the Administrative Procedures Act (APA), Ch. 34.05 RCW. Under RCW 34.05.570(4), state agency actions may be appealed if they constitute "other agency action." Where no alternative appeal option applies, relief may be granted under this section where an agency action is: "(i) Unconstitutional; (ii) Outside the statutory authority of the agency or the authority conferred by a provision of law; (iii) Arbitrary or capricious; or (iv) Taken by persons who were not properly constituted as agency officials lawfully entitled to take such action." RCW 34.05.570(4). Presumably the Klineburgers would identify arguments under at least one of these sub-sections.

> Under this doctrine claims must be referred to an agency if (1) the administrative agency has the authority to resolve the issues that would be referred to it by the court; (2) the agency has special competence over all or some part of the controversy which renders the agency better able than the court to resolve the issues; and (3) the claim before the court involves issues that fall within the scope of a pervasive regulatory scheme creating a danger that judicial action would conflict with the regulatory scheme.

*Tenore v. AT & T Wireless Servs.*, 136 Wn.2d 322, 345, 962 P.2d 104, 115 (1998). This is precisely the situation at bar.

The regulatory scheme for administrative appeals of Ecology's floodplain management decisions is well established. RCW 86.16.110; RCW 43.21B.310. The PCHB has special competence to hear appeals of land use decisions for development in the floodway, rendering it better able to resolve the dispute. The particular issues here involve technical analysis of site criteria and understanding of the regulatory scheme for floodplain management. The superior court's decision to by-pass this administrative process not only conflicts with the regulatory scheme, but creates a cognizable risk that future regulation will be jeopardized. *See infra*, at 24-26.

The primary jurisdiction doctrine applies when "enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body; in such a case the judicial process is suspended

pending referral of such issues to the administrative body for its views." *Dioxin/Organochlorine Ctr. v. Dep't of Ecology*, 119 Wn. 2d 761, 775-76, 837 P.2d 1007, 1015 (1992). The court in *Dioxin* goes on to state that a court "should refrain from exercising its jurisdiction" until the PCHB has concluded its review. *Id.*

The foundation for prioritizing administrative review, as noted by the Court, is the Board's expertise and training on matters within its jurisdiction. Courts rely upon, and give deference to, the decisions of administrative bodies such as the PCHB because of their expertise in applying the relevant law to the facts of the case. The absence of a decision by the administrative tribunal charged with review of Ecology's floodway regulation makes any review of Ecology's decision by this Court premature.

**3. Consideration of Ecology's decision in this LUPA appeal violates the exhaustion of remedies doctrine.**

In addition to the doctrine of primary jurisdiction, seeking review of Ecology's decision in this proceeding violates the exhaustion of remedies doctrine. RCW 34.05.534 requires that a person exhaust "all administrative remedies available within the agency whose action is being

challenged, or available within any other agency authorized to exercise administrative review."[4] *Id.* at 776.

Where an administrative proceeding can solve the grievance complained of, "a litigant must first pursue that remedy before the courts will intervene." *Smoke v. City of Seattle*, 132 Wn. 2d 214, 223-24, 937 P.2d 186, 190 (1997); *citing Simpson Tacoma Kraft Co. v. Department of Ecology,* 119 Wn.2d 640, 646, 835 P.2d 1030 (1992). "The doctrine applies in cases where a claim is originally cognizable by an agency which has clearly defined mechanisms for resolving complaints by aggrieved parties and the administrative remedies can provide the relief sought." *Id.*

As with the doctrine of primary jurisdiction, the exhaustion doctrine is based on the benefits of deferring to an administrative body that has expertise:

> outside the conventional experience of judges, so that the administrative process will not be interrupted prematurely, so that the agency can develop the necessary factual background on which to reach its decision, so that the agency will have the opportunity to exercise its expertise and to correct its own errors, and so as not to encourage individuals to ignore administrative procedures by resorting to the courts prematurely.

*Phillips v. King Cnty.*, 87 Wn. App. 468, 479-80, 943 P.2d 306, 313-14 (1997); *citing South Hollywood Hills Citizens Ass'n,* 101 Wn.2d at 73–74,

[4] Judicial review of a decision by the PCHB is made under the APA, ch. 34.05 RCW. *See* RCW 43.21B.180.

677 P.2d 114 (1984); *see also* RCW 36.70C.060(2)(d) (LUPA's exhaustion requirement). The exhaustion doctrine "is more than simply a technical rule of appellate procedure; instead, it serves an important policy purpose in protecting the integrity of administrative decisionmaking." *King Cnty. v. Washington State Boundary Review Bd. for King Cnty.*, 122 Wn.2d 648, 668-69, 860 P.2d 1024, 1035-36 (1993). Requiring exhaustion of administrative remedies is intended to have the benefits of:

> (1) discouraging the frequent and deliberate flouting of administrative processes; (2) protecting agency autonomy by allowing an agency the first opportunity to apply its expertise, exercise its discretion, and correct its errors; (3) aiding judicial review by promoting the development of facts during the administrative proceeding; and (4) promoting judicial economy by reducing duplication, and perhaps even obviating judicial involvement.

*Id., citing Fertilizer Institute v. United States Environmental Protection Agency,* 935 F.2d 1303, 1312–13 (D.C.Cir.1991) (quoting *Cutler v. Hayes,* 818 F.2d 879, 890–91 (D.C.Cir.1987)).

One of the primary benefits of the exhaustion doctrine is the creation of an administrative record. Under RCW 43.21B.100, the PCHB is charged with making findings of fact and issuing written decisions on each case considered, including those reviewing Ecology's decisions on floodplain management.

> And as the doctrine of exhaustion requires, we must give the PCHB an opportunity to first develop an appropriate

> and intelligible factual record based upon its specialized familiarity with the subject matter at hand. The PCHB should be given the opportunity to clarify and elucidate issues that are necessarily within its expertise, particularly where the case involves matters that are not within the conventional knowledge of the courts.

*Watershed Def. Fund v. Riveland*, 91 Wn. App. 454, 460, 959 P.2d 130, 133 (1998) (internal citation omitted). *See also* RCW 34.05.562 (APA record creation); RCW 36.70C.120 (LUPA record creation).

The superior court by-passed all of these opportunities. By skipping over the administrative review process, the factual record for the agency's decision is wholly absent, leaving this Court without comprehensive facts from which to reach a decision. While there was a record of the County's actions created before the hearing examiner, this cannot be equated with the record that may have developed from an examination of the facts supporting Ecology's decision.

The superior court incorrectly relied on the record before the examiner to assess the validity of a wholly different administrative decision that had not been appealed. This same scenario has the potential to play out in the future if the superior court is affirmed and appellants are led to believe they can skip the administrative record-making process and look to the courts to fill in the gaps.

The Klineburgers' argument that Ecology's decision is erroneous is cognizable in the first instance by the PCHB, wherein a clear process exists for the resolution of this type of complaint. RCW 86.16.110, RCW 43.21B.310. The PCHB is able to provide meaningful relief to the Klineburgers and this administrative remedy must be employed prior to resorting to the court.

**D. Including Ecology's Decision within the Scope of this LUPA Appeal will have Significant and Long-Term Adverse Repercussions.**

On a practical level, there are significant consequences associated with allowing the process suggested by the Klineburgers and adopted by the superior court. If this Court were to entertain the Klineburgers' invitation to review Ecology's decision in this proceeding, what would the impact be to future administrative and subsequent judicial proceedings?

The first concern that is immediately apparent is the ability for applicants to "forum shop." If an applicant receives an unfavorable decision from a local jurisdiction that relies on or is dictated by a state or federal agency decision, an appellant would now have an option to avoid administrative review of the state or federal decision by choosing a forum that does not have jurisdiction to review this type of decision. In this case, the Klineburgers have bypassed the administrative process that they acknowledge is the "first step" in getting their proposal permitted. CP

522. They have obtained a favorable ruling on an agency decision that they never appealed. Upholding this ruling will lead to further attempts to avoid established administrative process before tribunals that have specialized expertise in these matters.

Another practical problem with reviewing Ecology's decision in this proceeding is that it creates uncertainty and lack of finality for agency and municipality decision-making. "Judicial review on a piecemeal basis is generally disfavored." *Stientjes Family Trust v Thurston Cnty.*, 152 Wn. App. 616, 622-23, 217 P.3d 379, 383 (2009); *see Fox v. Sunmaster Prods., Inc.*, 115 Wn.2d 498, 503–04, 798 P.2d 808 (1990). "Indeed, courts have 'long recognized the strong public policy evidenced in LUPA, supporting administrative finality in land use decisions' before courts of law review administrative decisions of local jurisdictions." *Id.*; *James v. Kitsap County,* 154 Wn.2d 574, 589, 115 P.3d 286 (2005) (citing *Chelan County v. Nykreim,* 146 Wn.2d 904, 931–32, 52 P.3d 1 (2002)). The same principal holds true for all administrative appeal opportunities available prior to judicial review.

If the superior court's ruling is upheld, the court is effectively saying that in any LUPA appeal, a party can collaterally attack a separate administrative decision and get a ruling from the court on that unappealed decision, with no record created for the decision, no inclusion of the

administrative decision-maker as a party, and no adherence to the relevant administrative process available for that decision. The decision could be read to apply more broadly outside the LUPA context to leap-frog established administrative processes where appellants believe they can collaterally attack agency decisions in a separate proceeding.

Courts have acknowledged the importance of "protecting the integrity of administrative decision making." *King County v. Washington State Boundary Review Bd.*, 122 Wn.2d 648, 668, 860 P.2d 1024 (1993); *Motley-Motley, Inc. v. State*, 127 Wn. App. 62, 73, 110 P.3d 812, 818 (2005). "[R]eversal of an agency on grounds not raised before the agency could have a seriously demoralizing effect on administrative conduct. Knowing that even decisions made with the utmost care might be reversed on heretofore undisclosed grounds, administrative agencies could become careless in their decisionmaking." *Id.*

The superior court's ruling invokes the opposite philosophy by doing away with established administrative process, the factual record that comes with that process, and also the basic participation of the agency decision-maker in the proceeding. These are all necessary components of a just adjudication.

**E. Substantial Evidence Supports Ecology's Decision.**

If this Court in not swayed by the procedural bases for overturning the superior court's ruling, the evidence supporting Ecology's decision provides an alternative reason to uphold the hearing examiner's decision. Under LUPA, the applicable standard employed by the superior court was whether Ecology's decision was an erroneous interpretation of the law or a clearly erroneous application of law to the facts of this case. RCW 36.70C.130. Under either standard, Ecology's decision should be upheld.

On review, the burden lies with the Klineburgers to establish one of these standards. While a full record has not been created, Ecology's rationale for its decision is apparent in its reasoned evaluation of the site characteristics, the decision letters written by Ecology, and in the County's parallel interpretation of its own regulations. *See* CP 421-22; CP 436-442.

The Legislature designated Ecology to interpret and administer Washington's floodplain regulations. Ch. 86.16 RCW. Therefore, Ecology's determination that the Klineburger proposal did not meet the state regulations warrants judicial deference. There is no indication that this deference was afforded by the superior court. On the contrary, because Ecology was not a party, and because there was no record presented to the superior court establishing the basis for Ecology's

decision, there was very little that the superior court could have deferred to. *See Sackett v. E.P.A.*, 132 S. Ct. 1367, 1371-72, 182 L. Ed. 2d 367 (2012). As Ecology is now a party, the County defers to Ecology in its explanation of the facts related to its decision.

### F. The Superior Court Correctly Held that the County is Bound by Ecology's Decision.

The single issue that is properly before the court is also the only decision that should be affirmed: The superior court correctly concluded that the County was bound by Ecology's decision. Under Ch. 86.16 RCW, Ecology has full regulatory control over floodplain management. RCW 86.16.010. Ecology is charged with determining whether a development proposal for replacement of a structure meets certain site-specific criteria. WAC 173-158-076. "Without a recommendation from the department for the repair or replacement of a substantially damaged residential structure located in the regulatory floodway, **no repair or replacement is allowed** per WAC 173-158-070(1)." WAC 173-158-076(1) (emphasis added).

Here, Ecology concluded that the Klineburger proposal did not meet state law criteria and recommended against allowing the proposed development. CP 422. Ecology stated that "unless all of the standards [under WAC 173-158-076(1)] are met, Ecology cannot recommend

approval, and the residence cannot be rebuilt on the site." CP 421. After review of the relevant criteria, Ecology made a decision to disallow the Klineburgers' proposal.

There is no latitude in Ecology's decision, in state law, or in local regulations for the County to diverge from Ecology's conclusion. The County is bound by Ecology's decision as to whether state law exemption criteria are met. In addition to the limitations of WAC 173-158-076 and Ecology's written decision, the County code is also clear on this point.

Under KCC 21A.24.260(G), the County cannot proceed with review of a development application unless:

> 2. [Ecology] has prepared a report of findings and recommendations to the department that **determines the repair or replacement will not result in an increased risk** of harm to life based on the characteristics of the site;
> 3. [DPER] has reviewed the [Ecology] report and concurs that the development proposal is consistent with the findings and recommendations in the report;
> 4. The development proposal is consistent with the findings and recommendations of the Washington state Department of Ecology report;

(emphasis added). Although DPER has authority under the King County Code to disallow development in the floodway where Ecology's criteria are met, the reverse is not true. KCC 21A.24.260(G)(3). Ecology's decision supporting the development proposal is a precursor to any County review authority. KCC 21A.24.260(G)(2). Because Ecology's report

determined that the development proposal did not meet the regulatory criteria, DPER had no authority to approve the Klineburgers' proposal. *See* CP 421-22; CP 436-438.

In the Klineburgers' administrative appeal of DPER's conclusion, the examiner was asked to review whether the County could allow the Klineburgers' development proposal in spite of Ecology's decision. The examiner correctly concluded that the County was obligated to follow Ecology's decision. He aptly stated that:

> the County's floodway management system is merely an extension and implementation of the State program. ... [If Ecology] has concluded that the proposed floodway development should be denied, **the County lacks any authority to overturn such determination**. ...Once Ecology had denied the Klineburger request for a floodway exemption, **that determination was conclusive and binding on the County**.

CP 585 (emphasis added). The Examiner went on to define the scope of his review authority noting that he has "no independent authority to review, modify or vacate the findings of the Department of Ecology with respect to floodway issues." *Id.* at 5. The examiner has no ability to disregard state agency decisions and he correctly recognized the codes limitations on DPER's regulatory authority.

The superior court's decision upheld the examiner's conclusion and should be affirmed by this Court.

## V. CONCLUSION

Based on the foregoing argument, the superior court's decision should be reversed as to the court's ability to consider Ecology's decision in this LUPA appeal. The superior court's decision should be affirmed as to its conclusion that the King County hearing examiner did not have jurisdiction to consider, modify or overrule Ecology's decision precluding the Klineburgers' proposed development.

DATED this 30th day of April, 2014.

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