71325-6

71325-6

NO. 71325-6-I

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

STEPHEN AND SANDRA KLINEBURGER,

Respondents/Cross-Appellants

v.

KING COUTY DEPARTMENT OF DEVELOPMENT AND ENVIRONMENTAL SERVICES BUILDING AND FIRE SERVICES DIVISON CODE ENFORCEMENT SECTION, and STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY

Appellants/Cross-Respondents

REPLY BRIEF OF RESPONDENTS/CROSS APPELLANTS

ROSS RADLEY
Attorney for Respondents/Cross-Appellants
WSBA #4972
146 N. Canal Street, Suite 350
Seattle, WA 98103
(206) 323-3800
Email: rradley@mindspring.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutes and Court Rules

Washington State

I. REPLY TO THE RESPONSE BRIEF OF APPELANT KING COUNTY

1. Introduction

King County's makes the argument, in the Introduction Section of its Response Brief, the Superior Court "went beyond LUPA's jurisdictional limits by ruling on the merits of Ecology's decision." Reply Brief of Appellant King County, 1. King County attempts to support its jurisdictional argument by asserting the Hearing Examiner's decision was limited and only the limited decision was reviewable before the Superior Court because "the Examiner never reached the merits of Klineburgers argument that they should be able to develop their property" *Id.* King County's claim the Hearing Examiner never reached the merits of the Klineburgers' arguments, however, is erroneous and is contradicted by the Hearing Examiner, the Superior Court Judge, and Ecology's briefs.

King County's jurisdictional argument conflicts with briefs written by its own co-appellant, the Department of Ecology. Ecology, in its Motion to Intervene as a Defendant, explained "the proper resolution of the issues... will benefit from state participation and the presentation of the state's perspective on the merits of the floodway criteria. CP 180, lines 9-11. Ecology explicitly acknowledged in this language that the appellate court has jurisdiction to rule on the merits whether the floodway criteria

has been met and, for that very reason, argued that its intervention in this case was appropriate so that it could present its perspective about the merits of the case at hand.

King County's jurisdictional argument is rebutted not just by the Department of Ecology, but also by the Hearing Examiner and the appellate Superior Court Judge. The Hearing Examiner clearly explained, in his holding from which this appeal was filed, that Mr. Klineburger's next step in trying to receive a permit from King County would be either to convince Ecology it was mistaken or to "challenge Ecology's decision in Superior Court." CP 83, emphasis added. The Hearing Examiner's instruction makes it explicitly clear the Superior Court judge had jurisdiction to review Ecology's decision, an assessment with which the Superior Court judge concurred when he wrote "this Court does have the jurisdiction to review the Ecology determination..." CP 225

In short, by arguing the only appealable decision in these proceedings is whether the Hearing Examiner erred in his decision that he was bound to follow Ecology's decision; King County asks this court to make a ruling that would stand contrary to the assessments of the Hearing Examiner, the Superior Court and its very own co-appellant, the Department of Ecology.

2. Response to King County's Policy Argument

King County's policy argument, that upholding the Superior Court's decision would be "opening the flood gates to collateral review of state and federal agency actions," is unpersuasive because it attempts to re-frame the procedural history of this case in a misleading fashion. While King County seeks to frame this issue by portraying the Superior Court's action as a collateral review of a state agency that supersedes state and/or federal authority, the actual factual situation of this case is much simpler.

The Klineburgers wanted only to apply for a permit from King County, but the County would not accept a permit application because of the advisory letter written by Ecology. The Klineburgers, with only this advisory letter, and not an appealable decision from which they could pursue relief with the PCHB, properly sought relief with first the Hearing Examiner and then the Superior Court, resulting in the Superior Court's ruling the Klineburgers simply be allowed to apply for their permit.

In short, King County's slippery-slope argument that the Superior Court's ruling would overstep jurisdictional, state, and federal boundaries is an inaccurate framing of a much more simple factual situation: the Klineburgers initially simply wanted the chance to apply for a permit from King County. After Ecology advised against issuing a permit, however, they took the next step to challenge Ecology's decision. The Hearing

Examiner made several favorable findings to the Klineburgers but ultimately held he did not have jurisdiction to review the Ecology letter. The Superior Court reviewed the Hearing Examiner's decision, adopted certain findings of fact, and held the court had jurisdiction to review Ecology's advisory letter and held that the Klineburgers be allowed to simply apply for their permit, taking into consideration the adopted findings of fact which indicate the four criteria in WAC 173-158-707(6) (1) (a) (b) and KCC 21A.24.26 (G) (1) (a) (b) have been met.

A review of the steps the Klineburgers took in this case reveals that no contravention of federal authority has taken place; rather, the Klineburgers diligently pursued the legal steps at their disposal in order to obtain a building permit for their property.

3. Despite King County's Assertions to the Contrary, Four of its Arguments are not Jurisdictional Arguments nor were they Raised at the Lower Court. RAP 2.5 Therefore Precludes Raising these Arguments on Appeal.

King County, in Section B of its Response Brief, claims that Respondents' RAP 2.5 argument "ignores the plain exceptions in RAP 2.5 and the County's trial court briefing." Reply Brief of King County, 7. Contrary to King County's assertion, our opening brief clearly

acknowledged the jurisdictional exceptions in RAP 2.5. by noting it precludes review of arguments not raised by the lower court, "absent exceptions for jurisdiction, constitutional, and FRCP 12(b) (6) motions." Brief of Respondent/Cross-Appellant, 12.

As we acknowledged in our opening brief, we do not argue RAP 2.5 precludes King County from raising its general jurisdictional argument on appeal, as it did in its Introduction Section to its Response Brief. We have responded to and rebutted its jurisdictional argument in the preceding section. King County, however, fallaciously attempts to argue the following four arguments are not jurisdictional in nature: (1) Respondents did not follow LUPA's procedural requirements, (2) erred in not joining Ecology as a party, (3) did not have a factual record of the decision, and (4) Ecology's decision was not a "land use decision" under LUPA.

King County, in its Response Brief, states the jurisdictional exception in RAP 2.5 should allow the preceding four arguments to survive the prohibition of raising an argument for the first time on appeal, but King County fails to clearly establish any of the above arguments are jurisdictional in nature. King County, instead, attempts to tie its LUPA arguments, to jurisdictional issues, by stating "This 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..."

Reply Brief of Appellant King County, 7. We have not argued, however, that jurisdictional arguments should not be before this court, but that King County's procedural arguments should be precluded, if they were not raised at the lower court.

King County's first argument, Respondents did not follow LUPA's procedural requirements, is a procedural argument meant to be raised at the lower court. It is equally unclear how the second argument, Respondents erred in not joining Ecology as a party, can be jurisdictional when Ecology itself argued at the post Judgment Superior Court level that allowing itself to intervene at the Superior Court would give the state an opportunity to argue the merits of the case, therefore no jurisdictional issue would seem to exist concerning the Hearing Examiner's decision. CP 177.

King County does, however, claim it raised the issue of joining Ecology as a party in its briefing to the Superior Court. King County points to language from its Superior Court briefing which stated "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." Reply Brief of Appellant King County, 7, citing CP 138. King County's supporting citation, however,

does not contain the argument the Klineburgers were responsible for joining Ecology as a party, an argument raised only on appeal.

King County does not seem to rebut the RAP 2.5 argument concerning its third argument, that Respondents did not have a factual record of the decision, and Respondents can offer no reason why this should create a jurisdictional issue at the lower court. King County's fourth argument, Ecology's decision was not a "land use decision" under LUPA, is only a jurisdictional issue in the sense it connects to the argument made by King County Respondents should have appealed to the PCHB. Reply Brief of Appellant King County, 10. Respondents have replied to and rebutted this argument in their opening brief.

In short, King County has unsuccessfully attempted to tie the preceding four arguments to jurisdictional issues that would allow them to survive review under RAP 2.5 Only the fourth argument makes a limited jurisdictional connection, and the rest should be precluded on appeal.

III. REPLY TO THE DEPARTMENT OF ECOLOGY'S RESPONSE BRIEF

1. Introduction

The Department of Ecology's argument focuses on rebutting the Klineburgers' assertion their property should not be considered as part of the floodway, and it does so by asserting that (1) FEMA is the sole venue for determining if a property falls within a floodplain designations, (2) the FEMA criteria for adjusting floodplain designations are not met here.

2. Response to Ecology's Erosion Argument:

The language of WAC 173-158-076(1) (b) indicates that one of the requirements to rebuild a substantially damaged building in a floodway is that there must be "no **evidence** of erosion." This language means there needs to be an investigation conducted to determine if there is any evidence of erosion. This section does not say what Ecology claims it says, which is "the location of a building site inside a channel migration zone constitutes *per se* evidence of flood-related erosion." Department of Ecology's Reply Brief, 24.

The opening paragraph of the statute, for example, explains "Based upon scientific analysis of... flood-related erosion... the department may exercise best professional judgment in recommending to the local permitting authority repair, replacement or relocation of a substantially damaged structure." WAC 173-158-076

It is obvious that an investigation must be conducted to look for signs of erosion, and it is only common sense, when making such an investigation, one does what is standard in the engineering industry, as Bill Taylor testified, which is to make a visual inspection. CP 293, lines 2-3.Ecology's assertion that the other projects by Taylor and Kemp were not in the migration zone is incorrect. Both men testified their projects were for permits in the migration zone, and none of them were ever denied. CP 278, lines 21-22; CP 308, lines 17-22. If the existence of a migration zone is per se evidence of erosion, then none of these projects should have been approved.

3. Response to Ecology's Argument that Federal Procedures Govern this Case.

Ecology's argument that Mr. Weber, who is employed by The Corp of Engineers, does not have the jurisdiction to change floodway designations misses the point. Weber's Declaration is unrefuted expert testimony 428th Ave SE acts as a flood control device which meets the standards set forth in the Shoreline Management Act. RCW 90.58.030(2)(b), which explains that "regardless of the method used to identify the floodway, the floodway shall not include those lands that can reasonably be expected to be protected from flood waters by flood control devices

maintained by or maintained under license from the federal government, the state, or a political subdivision of the state." RCW 90.58.030(2).

Mr. Weber's testimony is an opinion of an expert, which is unrefuted in the record, and may be considered by the court as to whether the 428th Ave SE property acts as a flood control device, thereby justifying the removal of the Klineburger lot from the floodway designation. Ecology confuses this appeal over whether these standards have been met with the process that one would go through to apply to the government for a revision of the floodway map. Respondents may present a case to the court on whether the criteria in Washington State law, under the Shoreline Management Act, RCW 90.58.030(2)(b) has been met.

Respectfully submitted this 26 day of August, 2014.

Ross Radley

ROSS RADLEY
Attorney for Respondents/Cross-Appellants Klineburger
WSBA #4972
146 N. Canal Street, Suite 350
Seattle, WA 98103
Telephone: (206) 323-3800
Email: rradley@mindspring.com

NO. 71325-6-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

STEPHEN and SANDRA KLINEBURGER, Respondents/Cross-Appellants, v. KING COUNTY DEPARTMENT OF DEVELOPMENT AND ENVIRONMENTAL SERVICES BUILDING AND FIRE SERVICES DIVISION CODE ENFORCEMENT SECTION and STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY, Appellants/Cross-Respondents,	**NO.** NO. 71325-6-I **CERTIFICATE OF SERVICE**

I certify that on the 26 day of August, 2014, I caused to be delivered the Reply Brief of Respondents/Cross-Appellants to the Court of Appeals, Division I, in the above-captioned matter upon the parties herein as indicated below:

DEVON SHANNON
KING COUNTY COURTHOUSE
516 THIRD AVENUE, RM. W400
SEATTLE, WA 98104

[X] U.S. Mail
[ ] State Campus Mail
[ ] Hand Delivered
[ ] Overnight Express
[X] By Email:
devon.shannon@kingcounty.gov

THOMAS J. YOUNG
ATTORNEY GENERAL OF WA
ECOLOGY DIVISION
P.O. BOX 40117
OLYMPIA, WA 98504

[X] U.S. Mail
[ ] State Campus Mail
[ ] Hand Delivered
[ ] Overnight Express
[X] By Email:
tomy@atg.wa.gov
ECYOLYEF@atg.wa.gov

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

DATED this 26 day of August, 2014, in Seattle, Washington.

ERIC REUTTER, Legal Assistant

ROSS RADLEY, INC. P.S.
ATTORNEY AT LAW
146 NORTH CANAL STREET
SUITE 250
SEATTLE WA 98103

ROSS RADLEY
Also admitted in New York

Telephone
(206) 323-3800
Fax
(206) 452-0725

August 26, 2014

Richard D. Johnson, Clerk
Court of Appeals, Division 1
One Union Square
600 University Street
Seattle, WA 98101-1176

RE: Klineburger v. King County
Court of Appeals Case No. 71325-6

Dear Mr. Johnson,

Enclosed for filing are the Reply Brief for Respondents/Cross-Appellants and a Certificate of Service.

Thank you for your attention to this matter,

Sincerely,

Eric Reutter
Legal Assistant
Law Offices of Ross Radley