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NO. 99815-9

IN THE SUPREME COURT OF THE STATE OF
WASHINGTON

STEPHEN AND SANDRA KLINEBURGER,

Petitioners,

v.

KING COUNTY DEPARTMENT OF PERMITTING AND
ENVIRONMENTAL REVIEW,

Respondent.

KING COUNTY'S ANSWER TO PETITION FOR REVIEW

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I. STATEMENT OF THE FACTS

The appellants/petitioners, Sandra and Stephen Klineburger, own property near the middle fork of the Snoqualmie River, located within several environmental critical areas: a FEMA-designated floodway, a King County-designated conservancy shoreline and a channel migration zone. This appeal, and related litigation, involves the appellants' illegal placement of a mobile home and other activities in the protected area on their property, and the King County Department of Permitting and Environmental Review's (DPER) enforcement of King County Code (KCC) land use regulations against the Klineburgers for code violations for their placement of the mobile home within the above critical areas without permits, inspections, and approvals from the County.

A. The five Klineburger appeals.

The County has brought several code violation cases against the Klineburgers, each which they appealed to the King County Superior Court under Washington's Land Use Petition

Act (LUPA), and then to Division One of the Court of Appeals.

Each case and procedural history are listed here:

1. *Klineburger v. King Cty. Dep't of Dev. & Env't Servs. Bldg.*, 189 Wn. App. 153, 356 P.3d 223 (2015) (Court of Appeals No. 71325-6-I), (*Klineburger I*)

The Klineburgers filed an appeal of a hearing examiner decision in DPER case number E1100560 in King County Superior Court. *Klineburger I, supra., p. 162*. The examiner ruled that the County lacked authority to review or overturn the decision of the Washington State Department of Ecology to deny an application by the Klineburgers for a permit to repair their mobile home because of its placement within a federally (FEMA) mapped floodplain and floodway, and within a County mapped Channel Migration Zone. The superior court reversed the hearing examiner's decision, ruling that the while the County was constrained from reviewing Ecology's denial of the Klineburger application, the court, under LUPA, had jurisdiction to review and overrule Ecology's decision. *Id.* 162-163. DPER appealed and the Klineburgers cross appealed in

Court of Appeals No. 71325-6-I. *Id.*, 163. The Court of Appeals reversed, ruling that the superior court had jurisdiction to review Ecology's decision under Washington's Administrative Procedure Act, not LUPA, affirmed the decision of the hearing examiner, and remanded the case for further proceedings consistent with their ruling. *Id.*, pp. 158-159, 174.

2. *Klineburger v. Wa State Dep't of Ecology*, Court of Appeals No. 76458-6-I, 2018 WL 3853574, 4 *Wn. App.2d* 1077 (2018), (August 13 2018) (unpublished) (*Klineburger II*).

The Klineburgers filed an appeal of the decision of the Washington State Department of Ecology with the Pollution Control Hearings Board (PCHB), which dismissed their appeal on summary judgment. *Klineburger II, supra*, at pp. 4-5. The Klineburgers then filed an appeal in King County Superior Court under Washington's Administrative Procedure Act, and the superior court affirmed PCHB's summary judgment dismissal. *Id.*, at p. 5. The Klineburgers appealed in Court of Appeals No. 76458-6-I. *Id.* The Court of Appeals affirmed the superior court dismissal. *Id.*, at p. 16.

3. *Klineburger v. King County Dep't of Permitting and Env't Review*, Court of Appeals No. 79028-5-I, 2019 WL 5951532, 11 *Wn.App.2d* 1019 (2019), (Nov. 12, 2019) (*Klineburger III*).

The Klineburgers filed an appeal of a hearing examiner decision in King County Superior Court. *Klineburger III*, *supra*, p. 4. The superior court dismissed the appeal with prejudice on summary judgment. *Id.*, pp. 4-5. The Klineburgers appealed in Court of Appeals No. 79028-5-I. *Id.*, p.1. The Court of Appeals upheld the dismissal in part, reversed in part, and remanded the case to superior court. *Id.*, p.7 and p. 9.

4. *Klineburger v. King County Dep't of Permitting and Env't Review*, Court of Appeals No. 81486-9-I), 2021 WL 1530066 (April 19, 2021) (unpublished) (*Klineburger IV*).

The Klineburgers filed an appeal of a hearing examiner decision which assessed civil penalties against the Klineburgers in King County Superior Court. *Klineburger IV*, pp. 2-3. The superior court dismissed the appeal on summary judgment. *Id.*, p. 3. The Klinebergers appealed. *Id.* On April 19, 2021 the Court of Appeals affirmed the dismissal. *Id.*, p.1 and p.5. The

Klineburgers filed a separate petition for discretionary review of *Klineburger IV* in this Court.

5. *Klineburger v. King County Dep't of Permitting and Env't Review*, King Superior Court Number 18-2-09782-7 SEA, Court of Appeals No. 80928-8-I, 2021 WL 1701267 (April 26, 2021) (*Klineburger V*).

This is the matter for which the Klineburgers are seeking review in this petition. The Klineburgers filed a motion for order consolidating King County Superior Court case number 18-2-09782-7 SEA, after its remand from the Court of Appeals in case number 79028-5-I, with King County Superior Court No. 19-2-22857-1 SEA. *Klineburger V, supra, p. 1-2*. On December 6, 2019, the superior court denied the motion to consolidate and dismissed the remanded case with prejudice. *Id., at p. 2*. The Klineburgers appealed in Court of Appeals No. 80928-8-I. The Court of Appeals affirmed the dismissal. *Id., p. 2, and p. 8*. This petition follows.

B. The Klineburgers' arguments.

King County disputes several facts in the petition, each which bear critical relevance to this case. The Klineburgers'

assertion that a hearing on King County’s Notice and Order in the underlying case for this petition was held on July 11, 2019 (see page 2 of their petition) is incorrect. The July 2019 hearing pertained to an entirely different, unrelated matter. The Clerk’s Papers for the underlying superior court LUPA appeal in this case documents that the hearing on the County’s Notice and Order was actually held on February 27, 2018. See *Petitioner’s LUPA Petition, CP 2, “IV IDENTIFICATION OF THE DECISION MAKING – BODY OR OFFICER,” ln. 12-19.*

The July 11, 2019 hearing the Klineburgers errantly reference in their petition was for a different matter, i.e., the administrative appeal of the County’s assessment of civil penalties in February of 2019 for the Klineburgers’ illegal placement of their mobile home in 2012. The hearing examiner’s decision following the July 11, 2019 hearing was issued on August 9, 2019. See *Klineburger IV, supra, pp. 2-3.*

The Klineburgers omit from their fact statement that while their 2018 LUPA appeal was dismissed with prejudice by

the trial court, one of the several bases of the trial court's dismissal was that the Klineburgers lacked the required standing under LUPA because they failed to exhaust available administrative remedies. *CP 341-343, ¶¶ 2 and 7*. Further, the petition fails to acknowledge that Division One affirmed the trial court's dismissal on this ground. *Klineburger III, supra, 2019 WL 5951532, pp. 7 and 9*.

Following the *Klineburger III* panel's remand, the Klineburgers filed a motion with the trial court to consolidate the remanded LUPA appeal (filed under King County Superior Court Cause Number 18-2-09782-7 SEA) with an unrelated LUPA appeal they filed with superior court in under King County Superior Court Cause Number 19-2-22857-1 SEA. *CP 362-366*. The Klineburgers errantly filed their CR 42 motion to be heard before the trial judge assigned to hear their 2019 LUPA appeal. The trial judge for that department transferred the Klineburgers' motion to be heard before the Chief Civil Judge of the superior court, in accordance with King County

Local Civil Rule (KCLCR) 42. *CP 365-366, and Klineburger V, Amended Appendix A to Petition for Discretionary Review, pp.1-2.*

Respondent King County opposed the Klineburgers' motion to consolidate their LUPA appeals. *CP 362-554.* The County's opposition included the administrative record which was considered by the hearing examiner. The Klineburgers failed to file a reply to the County's opposition. See *Klineburger V, supra*, at 7-8. ("And on remand, they [the Klineburgers] chose not to respond to King County's arguments on RCW 36.70C.130(1) presented in [King County's] opposition to the motion to consolidate or the request for dismissal.").

On December 6, 2019, the superior court denied the motion and dismissed the remanded LUPA appeal with prejudice. On April 26, 2021, Division One rejected the Klineburgers' arguments that the trial court failed to review their LUPA assignments of error, finding, inter alia, that:

. . . In its order denying consolidation, the trial court ruled that the hearing examiner had not erroneously interpreted the KCC [King County Code], that substantial evidence supported the findings, conclusions, and decision, and that the ruling was not a clearly erroneous application of the law. The order also dismissed the remanded matter with prejudice.

The Klineburgers appeal, saying that the trial court improperly dismissed the remanded case without considering whether the hearing examiner's ruling complied with RCW 36.70C.130(1)(b), (c), and (d). We disagree and affirm.

Klineburger V, Amended Appendix A to Petition for Discretionary Review, at 2.

The facts in the Klineburgers' petition as to the procedural context of and the bases for the dismissal by the trial court are incorrect and misleading. Beginning at page 5 of the petition, the Klineburgers' purport to raise an issue that the 28-day notice required for summary judgment under Superior Court Civil Rule 56 applied in their motion to consolidate, but was not provided to them. They further assert that the alleged

lack of notice violated their due process right to a meaningful opportunity to be heard. *Petition*, pp. 5-7.

The Clerk's Papers for this appeal demonstrate beyond reasonable question that the matter before the trial court was not a motion for summary judgment, but rather, the Klineburgers' own motion for an order consolidating their two unrelated superior court LUPA appeals pursuant to Civil Rule 42. *CP 349-360, 362-554.* Thus, contrary to the Klineburgers' allegations and arguments, no summary judgement motion was involved in the dismissal of their remanded LUPA appeal.

II. ISSUES PRESENTED

1. Should this Court conclude that the standards for discretionary review mandated by RAP 13.4 (b) (3) and (b) (4) are not met, where the bases for review are based on misrepresentations of the record, e.g., the Klineburgers argue that the trial court failed to consider their assignments of error under Washington's Land Use Petition Act, and the Order on their petition for review and the record below explicitly demonstrate that their assignments of error were in fact duly considered?

2. Should this Court deny a petition for discretionary review that is based upon the Klineburgers' allegation that the dismissal of their case failed to satisfy the 28-day notice requirement of CR 56, but the motion before the trial court was not a motion for summary judgment, but rather, the Klineburgers' motion to consolidate two unrelated LUPA appeals, and the Klineburgers failed to file any reply or objection to the Respondent's opposition to their motion?

III. AUTHORITIES AND ARGUMENT

A. This case does not meet the standard for discretionary review.

A petition for review will be accepted by this Court only:

(1) if the decision by the Court of Appeals is in conflict with a decision of the Supreme Court; (2) if the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals; (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). The Klineburgers summarily assert that the decision by Division One satisfies RAP 13.4 (b) (3) and (b) (4).

The Klineburgers’ “Issue Presented for Review” is whether Division One erred by affirming the trial court’s dismissal of their LUPA appeal, without giving consideration to their false allegation that the trial court failed to review three assignments of error the Klineburgers alleged in their 2018 LUPA petition. *Petition, “Issue Presented for Review, p. 4*. As King County has shown based on the record, the Klineburgers’ allegation that their assignments of error were not reviewed by the trial court is false, making their petition frivolous.

Further, the Klineburgers’ issue statement, by itself, does not satisfy the criteria specified under either RAP 13.4 (b) (3) or (b) (4). No constitutional issues, or matters of significant public interests, are involved here. Moreover, the Klineburgers’ petition fails to concretely make clear how the issue they present relates directly to this Court’s review criteria under

RAP 13.4. For these reasons, this Court should deny the Klineburger petition.

B. As the order of dismissal documents, the superior court reviewed the merits of petitioners' assignments of error in deciding to dismiss their LUPA petition with prejudice.

King County opposed the appellants' motion to consolidate by demonstrating to the superior court that the King County Hearing Examiner did not error in the course of reaching her decision to deny the Klineburgers' administrative appeal. CP 362-554. The County's opposition presented the administrative record for review and consideration by the superior court, which included the evidence admitted by the Hearing Examiner, and the examiner's interpretations and application of the relevant land use code provisions to the evidence.

The superior court reviewed the administrative record submitted in the County's opposition, and agreed with the County that its opposition conclusively proved that the Hearing Examiner properly interpreted the code and based its decision

on competent and substantial evidence. The County's showing to the superior court was unopposed by the Klineburgers, who failed to file a reply to the County's opposition to their motion to consolidate.

The unopposed showing by the County that the Hearing Examiner correctly interpreted the code provisions cited in the underlying Notice and Order, and based its findings on substantial admissible evidence in the record, convincingly proved that the alleged assignments of error in the Klineburgers' 2018 LUPA petition lacked merit. Based upon this showing, both the trial court and Division One concluded that consolidation of the *Klineburger III* LUPA appeal with the *Klineburger IV* LUPA appeal was unnecessary and inappropriate. See *Order Denying Petitioner's Motion for Order Consolidating LUPA Appeals*, CP 350-351, ¶¶ 5-7. See also, *Klineburger V*, *supra* at pp. 2, 4, and 6-8.

The Klineburgers further argue that the alleged failure of the trial court to consider their LUPA assignments of error

violated their constitutional rights to due process. *Petition, p. 7.*

Because the superior court's order of dismissal documents that the court *did* in fact review the assignments of error against the administrative record before the hearing examiner, the Klineburgers' constitutional claims have no basis in fact, are unsustainable, and are therefore frivolous. For this reason, their petition should be denied.

C. The superior court's order denying the Klineburgers' motion to consolidate was within its sound discretion, and should be affirmed on appeal.

Washington cases hold that appellate courts must affirm a lower court's decision to deny a motion to consolidate, where there is no showing by the appellant of: (1) a clear abuse of the trial court's discretion in its denial of the motion; and (2) prejudice to the appellant:

Consolidation of claims for trial is within the sound discretion of the trial court. *State ex rel. Sperry v. Superior Court, 41 Wn.2d 670, 251 P.2d 164* (1952). Such decision not to consolidate will be final unless there has been a clear abuse of discretion, and if the moving party can show

prejudice. *Hawley v. Mellem*, 66 Wn.2d 765, 405 P.2d 243 (1965); *In re Maypole*, 4 Wn. App. 672, 483 P.2d 878 (1971).

National Bank of Washington v. Equity Investors, 86 Wn.2d 545, 560–61, 546 P.2d 440 (1976).

The Klineburgers failed to file a reply/rebuttal to the County's opposition or raise any objection at the superior court level. The superior court's decision to deny the Klineburgers' motion to consolidate on the basis of King County's unchallenged opposition was therefore clearly within its sound discretion.

The order of the superior court, and the conclusion and decision reached by Division One in its review of the record on appeal, demonstrably and inarguably prove that the Klineburgers' assignments of error were fairly and duly considered. Division One's approval of the superior court's exercise of judicial discretion and its disposition of the Klineburgers' LUPA appeal should not be held subject to

further review by this Court solely on the bases of the unproven and false assertions by the Klineburgers in their petition.

D. The Klineburgers' CR 56 allegation is groundless and irrelevant.

The Klineburgers also make a hollow assertion in their petition that their motion to consolidate their two unrelated LUPA appeals was governed by CR 56 (as opposed to CR 42), and that their constitutional right to due process was violated by the failure of the superior court and King County to provide them with notice 28 days prior to the motion hearing date, as is required under CR 56. *Petition, pp. 3, and 5-7.* This assertion is frivolous.

The Clerk's Papers and *Klineburger V* herein prove beyond any reasonable question that the Klineburgers' motion was brought under CR 42, and not CR 56. It is therefore axiomatic that the 28-day notice requirement under CR 56 had no application or relevance to the Klineburgers' motion pursuant to CR 42 or its calendaring in accordance with

KCLCR 42. It also follows from the above that their constitutional claims based upon the notice requirement of CR 56 are frivolous, and should not be considered in support of their request for review by this Court.

CONCLUSION

The premise of this appeal, i.e., that the trial court did not review the Klineburgers' three assignments of error in their April 16, 2018 LUPA petition is false and unsupported by the record. There have now been two independent and impartial judicial reviews of the merits of the assignments of error remanded by the *Klineburger III* panel, and the result of each review sustained and upheld the correct findings, conclusions, and decision of the King County Hearing Examiner in the underlying case. For these reasons, and based upon the foregoing, the Klineburgers' petition should be denied.

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DATED this 25th day of June, 2021.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

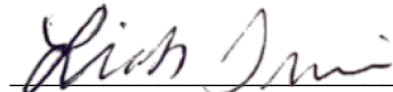
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