

NO. 71325-6

**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.

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**STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY'S
REPLY BRIEF**

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I. INTRODUCTION

In 2011, the Klineburgers purchased property on 428th Avenue SE near North Bend, Washington, on which the home had been destroyed by fire. The Klineburgers seek to rebuild. This case concerns questions raised by the fact that the property is located in a flood zone subject to three types of flood danger. First, the property is located in the designated 100-year floodplain, meaning that a 100-year flood will inundate their property, in their case to a depth of three-plus feet of water. Second, the property is in the designated floodway—that portion of the floodplain where the bulk of floodwaters flow, and which must be kept clear to allow floodwaters to drain. Finally, the property is located in the channel migration zone of the Snoqualmie River—an area over which the river is known to have migrated in the past and is expected to migrate in the future.

Federal, state, and local law limit the types of development that can occur in these designated areas. Federal and King County law also provide procedures and required analyses that can be used to remove property from these designated areas if circumstances warrant. The Klineburgers have neither followed these procedures nor undertaken these analyses.

Nonetheless, in their cross-appeal, the Klineburgers argue that their property is not in the floodway or the floodplain because (1) Mr. Weber, an Army Corps of Engineers (Army Corps) employee, said it was not in the floodway; and (2) 428th Avenue SE acts as a flood control device. Neither of these arguments is valid. First, even if Mr. Weber stated that the property is not in the floodway (he did not), the Army Corps does not have the authority to make that determination. That authority lies with the Federal Emergency Management Agency (FEMA). Second, 428th Avenue SE does not meet federal requirements for a flood control device that could remove the Klineburgers' property from the floodplain or the floodway. The Klineburgers also argue that many other projects have been permitted in the area, so their project should also be permitted. This argument fails because the other cited projects are not similarly situated to the Klineburgers'.

Both Congress and the state Legislature have determined that development in a floodway is not safe and is not in the public interest except in the very narrowest of circumstances. The Klineburgers argue that they fall within these narrow circumstances. The evidence in the record, however, dictates otherwise. As explained in Ecology's Opening Brief, the Klineburgers do not meet the criteria in WAC 173-158-076 for rebuilding a substantially damaged residential structure in the floodway,

and consequently the superior court decision authorizing their project should be reversed.

II. ARGUMENT

A. **The Klineburgers' Property Is Located in an Area That Is Inherently Vulnerable to Flooding**

The Klineburgers' property is located just north of North Bend, in the area where the three forks of the Snoqualmie River (North Fork, Middle Fork, and South Fork) come together. CP 411.¹ More specifically, the Klineburgers' property is located between the Middle Fork and the South Fork, inside a bend where the Middle Fork, running from south to north, takes a turn to the west. CP 411. Before the bend, the Middle Fork runs about 1,000 feet east of the Klineburger property; after the bend, it runs about 800 feet north of the Klineburger property. CP 412, 409. FEMA has determined that the area where the Klineburger property is located is in the 100-year floodplain and in the associated floodway. CP 409, 413.² King County has determined that the

¹ For the Court's convenience, the color version of this document, as it was provided to the Hearing Examiner and Bates stamped KC000081, is included as Appendix A to this brief.

² Clerk's Papers 413 consists of a portion of Panel 744H of the FEMA Flood Insurance Rate Map for King County. CP 413, 409 (stating that portions of the FEMA map are attached). For the Court's convenience, a copy of the entire map shown in Panel 744H is included as Appendix B to this brief. Ecology asks the Court to take judicial notice of this full FEMA map. Judicial notice is appropriate when the judicially

Klineburgers' property is in the channel migration zone of the three forks area of the Snoqualmie River. CP 409, 411, 386. Restrictions on development apply in the floodplain, the floodway, and the channel migration zone. The Klineburgers claim they are not subject to these restrictions because their property is not in the floodplain or the floodway. They also discount the restrictions in the channel migration zone, claiming others have been permitted to develop, so they should be as well.

1. The Klineburger property is in the 100-year floodplain.

The Klineburgers acknowledge that FEMA is the agency that determines whether a lot is in a flood-prone area. Brief of Respondents/Cross-Appellants (Resp. Br.) at 2. In conjunction with its mission to

noticed material is “not subject to reasonable dispute in that it is . . . (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.” ER 201(b). The court must take judicial notice of an adjudicative fact if requested by a party and supplied with the necessary information. ER 201(d); *In re Disciplinary Proceeding Against Sanai*, 177 Wn.2d 743, 753 n.2, 302 P.3d 864 (2013). An adjudicative fact is one that “helps the court or agency determine how the law applies to [the] parties.” 177 Wn.2d at 753 n.2 (quoting *Black's Law Dictionary* 669 (9th ed. 2009)). Here, the full Panel 744H of the FEMA map provides a view of the entire area where the Klineburger property is located as well as the legend showing what the markings on the map mean. Judicial notice is proper in this instance because Panel 744H of the FEMA map is available from FEMA and is from a source (FEMA) whose accuracy cannot reasonably be questioned. FEMA flood maps may be found on the internet at <https://msc.fema.gov/webapp/wcs/stores/servlet/FemaWelcomeView?storeId=10001&catalogId=10001&langId=-1> (last visited July 24, 2014). In addition, while a portion of this map is part of the record (CP 413), the legend explaining the markings on that map are not in the record.

implement a national flood insurance program (42 U.S.C. § 4011(a)), FEMA has been tasked with identifying areas that are prone to floods. 42 U.S.C. § 4101b(b)(1)(A)(i) (requiring FEMA to “identify, review, update, maintain, and publish” National Flood Insurance Program rate maps of certain flood-prone areas). One type of flood-prone area FEMA must identify and map is the 100-year floodplain. 42 U.S.C. § 4101b(b)(1)(A)(i). The 100-year floodplain is the area inundated by a 100-year flood. 42 U.S.C. § 4004(a)(1). A 100-year flood, also known as a base flood, is a flood that has a one percent chance of being equaled or exceeded in any given year. 44 C.F.R. § 9.4 (entry for *Base Flood*). The level to which water will rise during a 100-year flood is known as the base flood elevation. *See* 44 C.F.R. § 59.1 (entry for *Water Surface Elevation*); King County Code (KCC) 21A.06.085. FEMA prepares maps, called flood insurance rate maps, showing the 100-year floodplain and the base flood elevations (when known) for each flood-prone area. 42 U.S.C. § 4101b(b)(2).

FEMA provides two means for property owners to contest the designations on a flood insurance rate map. First, if the property owner can show that the property is actually higher than the base flood elevation, meaning that the property will not be flooded during a 100-year flood, the property owner may ask for a letter of map amendment. 44 C.F.R. § 70.3

(esp. § 70.3(b)(4)); 44 C.F.R. § 70.4; 44 C.F.R. § 70.5. In all other cases, the property owner must apply for a letter of map revision. 44 C.F.R. § 72.2 (entry for *LOMR [Letter of Map Revision]*).

According to FEMA's map, the Klineburgers' property is in the 100-year floodplain. CP 413. The Klineburgers claim, however, that the map is incorrect, and their property should not be in the floodway because it is not in the floodplain.³ Resp. Br. at 2, 19. They point out that they submitted a request for a letter of map amendment to FEMA, asking FEMA to remove their property from the floodplain. *Id.* They believe King County thwarted this effort by refusing to sign the mandatory local approval. Resp. Br. at 2-3, 19.

The Klineburgers are incorrect. A letter of map amendment may only remove property from the floodplain when the elevation of the natural ground on which a proposed structure is to sit is above the base flood elevation. 44 C.F.R. § 70.3(b)(4); 44 C.F.R. § 70.4; 44 C.F.R. § 70.5. According to the Klineburgers' consultant, the base flood elevation at the Klineburgers' project is 430.5 feet (NAVD 1988 datum).⁴

³ The Klineburgers use the term "floodway," but, as explained below, a letter of map amendment would take their property out of the floodplain. 44 C.F.R. § 70.3(b)(4). As the floodway is a portion of the floodplain, a property not in the floodplain is also not in the floodway.

⁴ In the United States, there are two systems for measuring elevation above sea level: the National Geodetic Vertical Datum

CP 462. The elevations measured near the four corners of the Klineburgers' proposed structure are 428.1 feet, 427.5 feet, 427.6 feet, and 427.7 feet (NAVD 1988 datum). CP 462. The Klineburgers' property is thus several feet below the base flood elevation—not above the base flood elevation. A letter of map amendment therefore cannot be used to change the designation of the Klineburgers' property, regardless of what the County says.

The Klineburgers next argue that their property should not be included in the 100-year floodplain because 428th Avenue SE acts as a flood control structure protecting their property from flooding. Resp. Br. at 21-22. To change the designation of their property based on the existence of a flood control structure, the Klineburgers must submit a request to FEMA for a letter of map revision, together with engineering analyses certifying that the flood control device meets FEMA's requirements, including a new hydraulic analysis and flood elevation

established in 1929 (NGVD 29) and the North American Vertical Datum established in 1988 (NAVD 88). Some of the elevation measurements in the record for this case use the 1929 system and others use the 1988 system. To convert NAVD 88 elevations to NGVD 29 elevations at the Klineburgers' location, it is necessary to subtract 3.58 feet from the NAVD 1988 elevation. CP 409.

profiles. 44 C.F.R. § 65.10; 44 C.F.R. § 65.6(c)(2). There is no evidence that the Klineburgers have submitted such information to FEMA.⁵

The Klineburgers claim that Douglas Weber, an employee of the Army Corps of Engineers, has determined that 428th Avenue SE acts as a flood control structure. Resp. Br. at 21-22. This argument fails for several reasons. First, Mr. Weber does not provide the required engineering analyses certifying that 428th Avenue SE meets FEMA's requirements for a flood control structure. CP 399, 401. Second, Mr. Weber does not address a 100-year flood. *Id.* Third, Mr. Weber does not purport to change the status of the Klineburgers' property. *Id.* Mr. Weber's declaration provides the conclusory and non-specific statement that, "for a range of flood events, 428th Street [sic] SE functions as a flood control structure and provides protection to the Klineburger property from flood waters, velocity, and erosion." CP 399. Mr. Weber's e-mail gives only an initial assessment. CP 401. Neither of these statements claims to change the designation of the property. Nor do they constitute the analyses required to remove the property from the 100-year floodplain.

⁵ Section II.C below discusses at length why 428th Avenue SE does not meet the federal requirements for a flood control device.

Finally, the authority to change the status of the Klineburgers' property on the flood insurance rate map lies with FEMA, not with the Army Corps. 42 U.S.C. § 4101b(b)(1)(A)(i). Therefore, even if Mr. Weber stated definitively that the Klineburgers' property was not in the 100-year floodplain, that opinion would not change FEMA's designation—until and unless it was submitted to FEMA with the required supporting engineering analyses, and FEMA concurred.

2. The Klineburgers' property is in the floodway.

The floodway is the area within the floodplain where the depths and velocities of floodwater are the greatest. 44 C.F.R. § 9.4 (entry for *Floodway*). Keeping the floodway clear is necessary because the floodway drains the flood. *Id.* Development in the floodway thus poses two types of problems: first, the development itself is subject to damage by floodwaters; second, the development creates problems for everyone else in the floodplain by obstructing the flow of water and thereby causing floodwaters to rise higher and last longer. FEMA, in conjunction with the local government, determines where the floodway is. 44 C.F.R. § 60.3(d). Likewise, FEMA, in conjunction with a local government, may revise the location of the floodway, but only when the local government determines that no practicable alternatives exist to revising the boundaries of the previously adopted floodway. 44 C.F.R. § 65.7(a). Appropriate

engineering analysis and computer modeling must accompany a request for a floodway revision. 44 C.F.R. § 65.7(c)(1).

The FEMA flood insurance rate map shows the Klineburgers' property in the floodway. CP 413; *see also* the full version of FEMA map Panel 744H included as Appendix B, showing the legend indicating that the cross-hatched area on the map is the floodway). The Klineburgers claim their property should not be included in the floodway. Resp. Br. at 20. Their argument is not based on federal law, but on the definition of "floodway" in the state Shoreline Management Act. Resp. Br. at 20 (citing RCW 90.58.030(2)(b)). The Klineburgers point to the portion of the definition that states:

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)(b). The Klineburgers claim that, because 428th Avenue SE can act as a flood control device, their property should not be included in the floodway. Resp. Br. at 21-22.

The Klineburgers' reliance on the Shoreline Management Act in this case is misplaced. This case concerns the prohibition on construction

in the floodway found in RCW 86.16.041.⁶ By statute, this prohibition applies to all areas in the FEMA floodway designated on the FEMA map. RCW 86.16.051. The FEMA floodway cannot be changed except by FEMA pursuant to the procedures set forth in federal regulations. 44 C.F.R. § 65.7. Therefore, the Shoreline Management Act definition of the floodway is not relevant.

The Klineburgers' argument also ignores the larger context of the Shoreline Management Act definition. State law requires floodplain management in Washington to at least equal the minimum federal requirements for the national flood insurance program. RCW 86.16.020. County comprehensive flood hazard management plans are also required to meet the minimum requirements of the national flood insurance program. RCW 86.12.200. The Shoreline Management Act requires Ecology to adopt guidelines for shoreline master programs. RCW 90.58.060. Local shoreline master programs must follow these guidelines. RCW 90.58.090(3). In recognition of the state law concerning floodplain management, Ecology's shoreline master program guidelines (codified at WAC 173-26) require development in the floodplain to be consistent with the local government's comprehensive flood hazard

⁶ RCW 86.16.041 is not part of the Shoreline Management Act. The Shoreline Management Act is codified at RCW 90.58.

management plan adopted pursuant to RCW 86.12.⁷ WAC 173-26-221(3)(c)(i). Thus, shoreline master programs must comply with the state law requirement that floodplain management in Washington be at least as stringent as federal requirements for the national flood insurance program. Federal requirements for the national flood insurance program include minimum requirements for flood control devices. 44 C.F.R. § 65.10. As discussed in section II.C below, 428th Avenue SE does not meet the federal requirements for a flood control device. Therefore, 428th Avenue SE does not qualify as a flood control device under the Shoreline Management Act, and does not remove the Klineburgers' property from the floodway.

If the Klineburgers wish their property to be removed from the floodway, they will need to work with King County and FEMA to follow the FEMA procedures for revising the location of the floodway. To comply with these requirements, they must convince King County that no practicable alternatives exist, and must make sure the required engineering analysis and computer modeling are completed and submitted to FEMA. 44 C.F.R. §§ 65.7(a), (c)(1). There is no evidence that the Klineburgers have taken any steps to invoke this process.

⁷ Ecology's guidelines state that the definition of "Flood plain" is "synonymous with one hundred-year flood plain" WAC 173-26-020(17).

3. The Klineburgers' project is subject to the restrictions on development in the channel migration zone.

Unlike the 100-year floodplain and the floodway, channel migration zones are identified solely by local governments. WAC 173-26-201(3)(c)(vii), -221(3)(b). King County's regulations separate channel migration zones into two types: areas with severe channel migration hazard and areas with moderate channel migration hazard. KCC 21A.06.181E, .181G. Both the severe channel migration hazard area and the moderate channel migration hazard area are part of the channel migration zone. *Id.* In mapping a channel migration zone, King County may exclude areas that lie behind a lawfully established flood protection structure. KCC 21A.24.274.C.4. A property owner who questions the inclusion of a piece of property in the channel migration zone may submit a critical area report to King County. KCC 21A.24.230.C. Finally, if a project lies in both the channel migration zone and the floodway, the more stringent limits on development in the floodway apply. KCC 21A.24.020.D.

King County has identified the channel migration zone for the area where the three forks of the Snoqualmie River meet. The Klineburgers' property is located in the moderate channel migration area of this channel migration zone. CP 411; *see also* the color version of this document

provided as Appendix A. As the map indicates, King County does not recognize 428th Avenue SE as a flood control structure sufficient to remove the area behind it from the channel migration zone. CP 411.

The Klineburgers point to testimony in the record claiming that many other property owners have been permitted to build in the channel migration zone in the floodway. Resp. Br. at 6 (citing CP 293, lines 1-7; CP 278, lines 1-4; CP 278, lines 21-22; CP 308, lines 17-22). This argument fails, first, because, as pointed out in Ecology's Opening Brief, an alleged failure of a local government to enforce land use laws in the past does not preclude their enforcement in the present case. *State ex. rel. Miller v. Cain*, 40 Wn.2d 216, 225-26, 242 P.2d 505 (1952); *City of Mercer Island v. Steinmann*, 9 Wn. App. 479, 483, 513 P.2d 80 (1973).

The argument also fails because none of the testimony or exhibits cited by the Klineburgers identifies properties in the floodway for which permits were granted. Clerk's Papers 293 lines 1-7 refer to a discussion of erosion and do not identify developments in the floodway. Clerk's Papers 278 lines 1-4 refer to Mr. Taylor's resume, which does not identify any permits obtained for building in the floodway or the channel migration zone. Clerk's Papers 278 lines 21-22 refer to a portion of Mr. Taylor's resume that lists the fact that he has been the project manager for projects

within the mapped *floodplain* but does not mention projects in the *floodway* or in the channel migration zone.

The Klineburgers do point to eight specific permits authorizing construction on the North Fork of the Snoqualmie River. Resp. Br. at 6 (citing CP 308, lines 17-22). They mistakenly claim these permits authorized the construction of houses in the moderate channel migration zone of the floodway. *Id.*; CP 443-45. The eight properties in question are long, thin lots, bisected by the floodway boundary. CP 444, 445.⁸ On each of these lots, the area closest to the river is in the floodway but the area farther from the river is not. *Id.* There is no evidence in the record that the houses permitted on these lots are on the portions of the lots in the floodway. In fact, adding a layer to the King County map provided by the Klineburgers as Clerk's Papers 445 shows that all the houses built on these properties are on the portions of the lots that are not in the floodway.⁹

⁸ For the Court's convenience, color versions of these maps, as they were provided to the Hearing Examiner and Bates stamped KC000114 and KC000115, are provided as Appendix C and D to this brief.

⁹ See Appendix D (CP 445) with the King County 2009 aerial photograph layer showing the locations of the houses on the lots in question. This version of CP 445 shows that all the houses on the identified lots are outside the floodway. Ecology asks the Court to take judicial notice of this version of CP 445. Judicial notice is proper in this instance because CP 445 with the additional layer is available on King County's website and is from the same source (King County iMAPs) as CP 445, whose accuracy cannot reasonably be questioned. King County

Finally, the Klineburgers claim that their neighbors directly to the north, also in the channel migration zone and the floodway, were permitted to demolish and replace their house in 2005. Resp. Br. at 21; CP 405-06. Unlike the Klineburgers, who are proposing to rebuild a residence after substantial damage, the neighbors to the north were making improvements to an *existing* structure. Substantial improvements to an *existing* structure in the floodway are allowed if the project meets state requirements. RCW 86.16.041(2)(a), (b), (c); WAC 173-158-070; KCC 21A.24.260.E. The record contains no evidence that the neighbors' project did not meet these requirements.

B. 428th Avenue SE Is Not a Federally or Locally Recognized Flood Control Structure

1. 428th Avenue SE does not meet the federal requirements for a federally recognized flood control structure.

The Klineburgers claim that 428th Avenue SE is a flood control device. Resp. Br. at 21-22. In order to be recognized as a flood control structure for the purposes of FEMA floodplain mapping, a flood control structure must meet minimum design, operation, and maintenance standards set by FEMA to assure protection from a base flood (100-year flood). 44 C.F.R. § 65.10(a), (b). First, the flood control structure must be

iMAPS can be found at <http://www.kingcounty.gov/operations/GIS/Maps/iMAP.aspx> (last accessed July 24, 2014).

at least two feet higher than the water surface level of the 100-year flood. 44 C.F.R. § 65.10(b)(1)(ii). Next, to ensure that the design of the flood control structure meets federal standards, a number of engineering analyses must be completed and submitted to FEMA demonstrating that no appreciable erosion of the embankment can be expected during a 100-year flood, evaluating embankment and foundation stability, and assessing the potential and magnitude of future losses of freeboard as a result of settlement of the flood control structure. 44 C.F.R. § 65.10(b)(3), (4), (5). The flood control structure must also be maintained in accordance with an officially adopted maintenance plan, a copy of which must be provided to FEMA. 44 C.F.R. § 65.10(d). “This plan must document the formal procedure that ensures that the stability, height, and overall integrity of the levee and its associated structures and systems are maintained. At a minimum, maintenance plans shall specify the maintenance activities to be performed, the frequency of their performance, and the person by name or title responsible for their performance.” *Id.*

The Klineburgers have provided no evidence that 428th Avenue SE meets any of these federal requirements. The Klineburgers have, however, provided evidence that 428th Avenue SE does not meet at least one requirement: the requirement that the flood control structure be at least two feet higher than the water level of the base flood. The water

level of the base flood (the base flood elevation) at the Klineburgers' property is 430.5 feet (NAVD 88). CP 462. The elevation of 428th Avenue SE as it runs along the Klineburgers' property is, at most, 430.4 feet (NAVD 88). CP 463. According to this data, 428th Avenue SE does not quite reach the water level of the 100-year flood, and will therefore be covered with water during a 100-year flood. The evidence is clear that 428th Avenue SE does not extend two feet above the water level of the 100-year flood, and therefore cannot be a federally recognized flood control structure.

2. The Klineburgers' arguments that 428th Avenue SE is a flood control device are without merit.

The Klineburgers argue that 428th Avenue SE is a flood control structure because Douglas Weber from the Army Corps of Engineers said that it is. Resp. Br. at 21. They also point to photographs of flood events in the area showing that, while other properties have flooded, the Klineburgers' property has not. Resp. Br. at 21, 23; CP 270-72. In addition, the Klineburgers point to drawings indicating that three feet of riprap supports 428th Avenue SE. Resp. Br. at 23. Finally, the Klineburgers invoke their consultant's finding that the crown of the road in front of the Klineburgers' property is two and a half feet above the surrounding floodplain. Resp. Br. at 24.

None of these arguments provides the evidence necessary to qualify 428th Avenue SE as a flood control structure for FEMA's purposes. First, Mr. Weber's declaration does not state that 428th Avenue SE protects the Klineburgers' property from a 100-year flood. Rather, it states, "for a range of flood events, 428th Street [sic] functions as a flood control structure and provides protection to the Klineburger property from flood waters, velocity, and erosion." CP 399. Even if Mr. Weber had stated that the road protects the Klineburgers from a 100-year flood, that statement would not be determinative since, as noted previously, the authority to determine what is or is not in the 100-year floodplain lies with FEMA, not with the Army Corps.

Second, the Klineburgers' evidence of past floods is beside the point. To be a federally recognized flood control structure, 428th Avenue SE must protect the Klineburgers from a 100-year flood. 44 C.F.R. § 65.10(a), (b). The Klineburgers have provided no evidence that the floods depicted in the testimony and photographs concerning past floods are 100-year floods. In fact, the indication is that they were not 100-year floods. None of the floods mentioned topped 428th Avenue SE at the Klineburgers' property. CP 275:10–276:15. As discussed above, 428th Avenue SE lies slightly below the elevation of the 100-year flood, and therefore would be inundated during a 100-year flood. Therefore, the

testimony and photographs of past floods provide no evidence that 428th Avenue SE should be a federally recognized flood control device.

Next, while the inclusion of riprap in the design of 428th Avenue SE provides some evidence of the strength of the embankment, it does not constitute the required engineering analyses of (1) expected erosion of the embankment during a 100-year flood, (2) embankment and foundation stability, or (3) the potential and magnitude of future losses of freeboard as a result of settlement of the flood control device. 44 C.F.R. § 65.10(b)(3), (4), (5). Finally, as discussed above, even though the road may be two and a half feet above the surrounding floodplain, it is still below the base flood elevation. This means that 428th Avenue SE will still be covered with water during a 100-year flood, and cannot therefore be a federally recognized flood control structure. 44 C.F.R. § 65.10(1).

3. King County does not recognize 428th Avenue SE as a flood control structure.

King County's flood ordinance specifies that King County may exclude from the channel migration zone areas that lie behind a "lawfully established flood protection structure." KCC 21A.24.274.C.4. A lawfully established flood protection structure must either be "built above the elevation of the one hundred-year flood" or be supported by scientific or technical information otherwise demonstrating that it is not within the

channel migration zone. *Id.* Here, King County included the Klineburgers' property lying behind 428th Avenue SE in the channel migration zone. CP 411. Therefore, King County determined that 428th Avenue SE is not a lawfully established flood protection structure. This determination is appropriate because, as discussed above, 428th Avenue SE is built just below the elevation of the 100-year flood—not above the elevation of the 100-year flood. If the Klineburgers wish to change the County's determination, they can submit a critical area report to King County. KCC 21A.24.230.C. Their report will need to provide scientific or technical information demonstrating that their property is not within the channel migration zone. KCC 21A.24.274.C.4. Until that happens, 428th Avenue SE is not a recognized flood control structure in King County.

C. The Klineburgers' Project Does Not Meet the State and Local Criteria for Building in the Floodway After Substantial Damage

As explained in Ecology's Opening Brief, the County has determined that the Klineburgers wish to rebuild a residential dwelling in the floodway after substantial damage. CP 489.¹⁰ In order to rebuild a

¹⁰ It is worth noting that state statute prohibits the construction of new residential development in a floodway. RCW 86.16.041(2)(a). Thus, if the Klineburgers' property had *not* had a previous residence on it, the Klineburgers would be prohibited from building a new residence.

dwelling in the floodway after substantial damage, a project must meet at least four conditions. All parties agree the Klineburgers meet the first condition—the velocity of floodwaters at the project will be less than three feet per second. WAC 173-158-076(1)(a); CP 382. Ecology has determined that the project does not meet the remaining three conditions.

1. Flood depth will be greater than three feet.

A substantially damaged residential dwelling in a floodway may not be rebuilt if waters from a 100-year flood would exceed a depth of three feet at the dwelling site. WAC 173-158-076(1)(a); *see also* KCC 21A.24.260.G.1.a (base flood depths must not exceed three feet). The base flood elevation (elevation to which water will rise during a 100-year flood) at the Klineburgers' site is 426.92 feet (NGVD 29).¹¹ CP 415, 416. A 100-year flood will therefore reach a depth greater than three feet anywhere on the property with an elevation lower than 423.92 feet (NGVD 29). The Klineburgers' consultant, Mr. Taylor, had the elevation of the Klineburgers' property measured, and found that much

¹¹ Flood elevations elsewhere in this brief and in the record give the base flood elevation at the Klineburgers' site as 430.5 feet, NAVD 88. As noted in footnote 4 above, at the Klineburgers' location, to convert NAVD 88 elevations to NGVD 29 elevations, it is necessary to subtract 3.58 feet from the NAVD 88 elevation. CP 409.

of the property lies below 423.92 feet (NGVD 29). CP 414.¹² As discussed in Ecology's Opening Brief, Mr. Taylor's report is clear that, although most of the area where the dwelling is located lies at or above 423.92 feet (NGVD 29), the southeast corner does not. CP 409. Mr. Taylor's report states: "We propose to adjust the grade slightly in that area to achieve compliance with the Base Flood Depth requirements of the code." CP 409.

The Klineburgers attempt to explain away these findings by claiming Ecology misunderstood the meaning of the language in Mr. Taylor's report. Resp. Br. at 3-4. The Klineburgers urge the Court to go back to the actual data on the diagrams. Resp. Br. at 5. Ecology agrees. The two relevant diagrams show the need to add fill to ensure the elevation at the house site is above the required elevation. CP 416, 418. Both federal law and King County law prohibit the construction of residences on fill placed in the floodway. 44 C.F.R. § 60.3(d)(3); KCC 21A.24.260.C ("A residential structure cannot be constructed on fill placed within the mapped FEMA floodway."). Therefore, the

¹² The data on CP 414 is shown as NAVD 88. Using NAVD 88, the base flood elevation is 430.5 feet ($426.92 + 3.58 = 430.5$), and ground elevations must therefore be no lower than 427.5 feet ($423.92 + 3.58 = 427.5$).

Klineburgers may not add fill to achieve compliance with WAC 173-158-076(1)(a).

The Klineburgers also point to the dashed line on Clerk's Papers 416, which divides the property into areas where the flood depth will exceed three feet and areas where the flood depth is less than three feet. Resp. Br. at 5. As can be seen on Clerk's Papers 416, a portion of the residence lies on the side of the dashed line where the flood depth is less than three feet. CP 416.

2. The project lies in an area with flood-related erosion.

State regulations provide that a substantially damaged dwelling in a floodway cannot be rebuilt if there is evidence of flood-related erosion at the site. WAC 173-158-076(1)(b). The location of a building site inside a channel migration zone constitutes *per se* evidence of flood-related erosion at the site. *Id.* Only if the site is not in a channel migration zone is flood erosion determined by gathering evidence at the site. *Id.* King County's regulations state: there must be "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." KCC 21A.24.260.G.1.c (emphasis added).

It is uncontested that the Klineburgers' property is located in the channel migration zone of the Middle Fork of the Snoqualmie River. CP 409, 411; *see also* discussion in section II.A.3 above. Ecology determined that the location of the Klineburgers' property inside the channel migration zone constitutes evidence of flood-related erosion at the site. CP 382, 384. The Klineburgers argue that this analysis must be incorrect because many others have been permitted to build in the channel migration zone in the floodway. Resp. Br. at 6. As discussed in section II.A.3 above, this argument fails for several reasons, including the fact that none of the permits actually cited by the Klineburgers authorized building in the channel migration zone in the floodway.

The Klineburgers next argue that their consultant, Mr. Taylor, walked the property and talked with neighbors, and found no erosion problems on the Klineburgers' property. Resp. Br. at 7. The Klineburgers object that Ecology's determination was made without a site visit. Resp. Br. at 7. These arguments are beside the point. Because the property is mapped as lying inside the channel migration zone, Mr. Taylor's observations at the site are irrelevant. WAC 173-158-076(1)(b); KCC 21A.24.260.G.1.c. Similarly, because the property is mapped as lying inside a channel migration zone, there was no need for Ecology staff to visit the site.

3. The flood warning system is inadequate.

In order to rebuild after substantial damage in a floodway, flood warning times must be 12 hours or greater, unless the local government demonstrates that it has a flood warning system and/or emergency plan in operation. WAC 173-158-076(1). Ecology's first letter noted that the Klineburgers had provided no indication that an appropriate flood warning system existed. CP 382. Ecology's second letter, in response to additional information from the Klineburgers, noted that the County would need to confirm the adequacy of the flood warning systems the Klineburgers identified. CP 384. The County determined that these flood warning systems were inadequate. CP 388.

The Klineburgers argue that their consultants have never needed to address the flood warning requirement before. Resp. Br. at 7-8. This argument, which is really no argument, fails, because there is no evidence the Klineburgers' consultants have ever before dealt with rebuilding a substantially damaged structure in the floodway. The Klineburgers then reiterate the information concerning flood warning systems that they presented in response to Ecology's first letter, and note that Ecology acknowledged this information might demonstrate the existence of a flood warning system. Resp. Br. at 9. This argument also fails. The state rule requires a flood warning system that provides at least 12 hours' warning

unless the local government demonstrates that it has a flood warning system in operation. WAC 173-158-076(1). No one has identified a system that would provide the Klineburgers with 12 hours warning of a flood. Nor has the local government (the County) demonstrated that it has a flood warning system in operation. After reviewing all the flood warning information provided by the Klineburgers as well as Ecology's two letters, the County determined that the warning systems identified by the Klineburgers do not meet County requirements, stating, "there is no established flood warning mechanism that is applicable to this site." CP 388. The County noted that, although there are river gages on the three forks of the Snoqualmie River, "these gages don't really provide any meaningful flood warning" on the three forks themselves. *Id.* Finally, the County stated that the gage on the Middle Fork of the Snoqualmie River would provide the Klineburgers with, at most, three hours warning of a flood, which, the County declared, was inadequate. *Id.*

The Klineburgers claim that, while a 12-hour warning system is appropriate for the Mississippi River, it is not appropriate for the Snoqualmie River. Resp. Br. at 8. The problem with this argument is that the regulation requiring a 12-hour warning system has been adopted here, in Washington, and applies here in Washington. The regulation provides a way to handle situations where a 12-hour warning system is not feasible:

the local government can demonstrate that it has a flood warning system in place. The County has declined to do so. Therefore, the Klineburgers' project fails to meet the requirement for an adequate flood warning system.

III. CONCLUSION

The Klineburgers' property lies in the designated 100-year floodplain, in the designated floodway of the 100-year floodplain, and in the channel migration zone of the Snoqualmie River. The Klineburgers have not taken the steps required to change these designations. Under these circumstances, the Klineburgers may only rebuild if they meet

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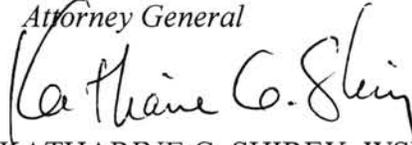
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rigorous state requirements, which they have not met. Therefore, Ecology asks the Court to reverse the decision of the superior court and affirm the decision of the King County Hearing Examiner.

RESPECTFULLY SUBMITTED this 25th day of July 2014.

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