71325-6

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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.

STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY'S OPENING BRIEF

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I. INTRODUCTION

As the recent landslide near Oso illustrates, residential construction in hazardous areas can lead to catastrophic damages and loss of life. The Klineburgers here propose to place a residence (a mobile home) in a hazardous area: the floodway of the Snoqualmie River. Under state law, RCW 86.16.041, residential construction in floodways is generally prohibited. A limited exception to this law permits residential construction in floodways if the Department of Ecology assesses the risk of harm to life and property and recommends that the construction be permitted pursuant to the factors in WAC 173-158-076. In this case, Ecology recommended against the Klineburgers' proposal because the WAC factors are not met: (1) the local government, King County (County), does not have a flood warning system applicable to the site; (2) the Klineburgers' own analysis shows that flood depths on a portion of the site will exceed three feet; and (3) the site is located in the channel migration zone of the River, i.e., in an area where the river channel may move over time. The King County Hearing Examiner relied on this recommendation in denying the Klineburgers' appeal of a code enforcement action taken against them by the County.

On appeal to King County Superior Court by the Klineburgers under the Land Use Petition Act (LUPA), the court overturned the Hearing

Examiner's decision and ordered the County to process a building permit application for the site. In doing so, the superior court committed at least two errors.[1] First, the superior court failed to apply the proper standard of review. The superior court essentially disregarded the WAC criteria and substituted its judgment for Ecology's as to whether the mobile home should be allowed. The superior court concluded, for example, that it did not matter that the County did not have a flood warning system applicable to the property. The superior court also concluded that it did not matter that the property is located in the channel migration zone. Both of these conclusions are erroneous under WAC 173-158-076.

Second, the superior court appears to have concluded that the Klineburger property is not fully subject to regulation under RCW 86.16, because it is allegedly protected from flooding by an adjacent road. This conclusion is erroneous because state law is clear that the federal mapping of the floodway is determinative as to the applicability of the state floodway prohibition, and the federal map unequivocally identifies the property as in the floodway. The court had no jurisdiction in the LUPA proceeding to alter the federal map. The superior court decision should be reversed and the Hearing Examiner decision affirmed.

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[1] The County identifies a third error: that the court did not have jurisdiction to review Ecology's recommendation. Ecology agrees with the County's argument but, to avoid duplication, does not further address it in this brief. For purposes of this brief, Ecology assumes the court had jurisdiction to review Ecology's recommendation.

II. ASSIGNMENTS OF ERROR

1. The superior court erred in remanding the matter to King County with instructions to process a permit application for the mobile home and to regard the criteria in WAC 173-158-076 as met. CP 158. (Issue No. 1).

2. The superior court erred in entering Findings of Fact (FF) Nos. 1–4, and 6–8. CP 155–57 (Issue No. 1).

3. The superior court erred in concluding that 428th Avenue S.E. acts as a flood management device and that the Klineburgers' lot does not need to be reserved because there was no evidence that floodwaters have ever entered onto his lot. CP 157 (Issue No. 2).

III. ISSUES

1. Was the Hearing Examiner's decision to deny the mobile home supported by substantial evidence and consistent with law when (1) the evidence is undisputed that the County lacks a warning system applicable to the property; (2) the evidence is undisputed that the property lies in the channel migration zone of the Snoqualmie River; and (3) there is substantial evidence from the Klineburgers' own consultant that flood depths on a portion of the property exceed three feet?

2. Did the superior court err to the extent it concluded that RCW 86.16 did not apply to the property when the statute states that the

"basis for state and local floodplain management shall be the areas designated as special flood hazard areas on the most recent maps provided by the federal emergency management agency [FEMA] . . . ."?

IV. STATEMENT OF THE CASE

A. The Klineburger Lot Is Located In The Floodway And Channel Migration Zone Of The Snoqualmie River

The Klineburgers' lot is located in the mapped floodway[2] and channel migration zone[3] of the Snoqualmie River near North Bend, King County, Washington. CP 381, 413. A road, 428th Avenue S.E., passes between the site and the River. CP 414. The County has designated the land on the River side of the road as the "severe" channel migration hazard area while the Klineburgers' side of the road is designated as the "moderate" channel migration hazard area. CP 489, 411. According to the most recent map prepared by FEMA, both sides of the road, including the road itself and the entire Klineburger lot, are located in the floodway. CP 413.

The lot had been vacant for some years prior to the Klineburgers' acquisition. CP 489. When they bought it, the lot apparently had a mobile

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[2] The "floodway" is the area of the floodplain where flood depths and velocities may reach hazardous levels. *See* 44 C.F.R. § 9.4. The technical definition is that it is the area which provides for the discharge of the base flood so the cumulative increase in water surface elevation is no more than one foot. 44 C.F.R. § 59.1; WAC 173-158-030. King County also defines a "zero rise" floodway that is more stringent than the FEMA floodway, but this is not implicated here. The Klineburgers lot is in the FEMA floodway.

[3] The "channel migration zone" is defined as the area "within which the channel can be reasonably predicted . . . to migrate over time." KCC 21A.06.182.

home illegally located on it. In response to complaints, King County issued a stop work order requiring the Klineburgers to obtain permits for the mobile home. CP 333. As part of the permitting process, the Klineburgers' consultant, Taylor Engineering, completed an analysis of the property according to the criteria in WAC 173-158-076 and King County Code (KCC) 21A.24.260G (Taylor Report). CP 409–418. These criteria require that the base flood depth not exceed three feet, that the base flood velocity not exceed three feet per second, that a flood warning system be applicable to the property, and that there be no evidence of flood related erosion, as determined by reference to the channel migration zone boundary. WAC 173-158-076(1)(a), (b).

With respect to flood depth, the Taylor Report states:

> The base flood depth at the building location is slightly less than 3 feet with the exception of the southeast corner of the building . . . . 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 accompanying map shows a dotted line crossing the site with the flood depth on one side as greater than three feet and on the other side as less than three feet. CP 416. This line passes through the southeast corner of the proposed building site, clearly showing that flood depths exceed three feet in that area. *Id.* Similarly, the attached schematic view shows the ground level dipping below the three foot line at the southeast

corner of the site and says they will "adjust finish grade as necessary" in that area. CP 418. The only way to "adjust finish grade as necessary" to meet the flood depth criterion is to raise the land surface by piling up dirt or fill in that area. However, as subsequently explained by Ecology, allowing fill to meet the flood depth criterion would render the criterion meaningless because fill in theory could be used to meet any depth. *See* CP 384.

With respect to flood related erosion, the Report states:

> The entire site is located in FEMA Zone AE, and a mapped floodway, and the King County GIS (IMAP) shows the property is also located in a moderate channel migration hazard area. Field inspection of the site found no signs of historic erosion, and reports from long-term residents verify this.

CP 409. With respect to velocity, the report calculated a flood velocity less than three feet per second at the site. The report does not mention a flood warning system.

B. Ecology And The County Determined That The Site Does Not Meet The Criteria In WAC 173-158-076 For Residential Development In The Floodway

At the request of the County, Ecology reviewed the Taylor Report pursuant to RCW 86.16.041(4) and the WAC criteria. Ecology wrote a letter to the County dated October 22, 2012 documenting its findings as to each of the WAC criteria. CP 381–82. Ecology agreed with the Taylor

Report regarding the flood velocity. However, Ecology concluded that the other three WAC criteria were not met. With respect to flood depth, Ecology stated that the Taylor Report indicated that the base flood depth would exceed three feet for a portion of the building location. CP 382.

With respect to flood related erosion, Ecology stated that under the WAC, the site's location in the channel migration zone is "by definition" an indication of flood related erosion. *Id.* Ecology also noted that the Taylor Report failed to establish the existence of a flood warning system applicable to the property. Based on these failures to meet the WAC criteria, Ecology recommended that the Klineburger proposal not be allowed.

Taylor responded to Ecology's letter with another report addressing each of the points raised by Ecology. CP 423–24. With respect to flood depth, this second report contended that the base flood depth was three feet or less everywhere on the site. The report did not, however, explain the previous report's statements to the contrary. The report also contended that the property met the requirements under the King County Code for construction in the moderate channel migration zone. Finally, the report attached various materials printed from King County's website regarding the County's flood warning system. According to these materials, the County has a flood warning system for

most locations in the County that provides two hours notice of flooding. CP 430 ("In most locations, the warning system provides at least 2 hours lead time before floodwaters reach damaging levels.").

Ecology responded to Taylor's second report with a second letter dated December 18, 2012. CP 383–85. In this letter, Ecology explained that fill is not allowed to meet the depth criterion because otherwise the depth criterion would be rendered meaningless. In theory, fill could be used to meet any desired depth–however, the clear intent of the regulation is to assess flood dangers without using fill. CP 384. Also, allowing fill in the floodway would increase flood depths and velocities elsewhere and is not generally allowed by federal regulations. *See* 44 C.F.R. § 60.3(d)(3).

Regarding erosion, Ecology pointed to the language of WAC 173-158-076(1)(b): "flood erosion will be determined by location of the project site in relationship to channel migration boundaries adopted by the local government." Under this language, Ecology concluded that the location of the site in the mapped channel migration zone was by definition evidence of flood related erosion. Ecology stated that "[t]he inquiry need go no further." CP 384. Ecology also rejected Taylor's appeal to the King County Code provisions regarding the moderate channel migration zone, saying "King County regulatory provisions for

the moderate channel migration zone are not relevant . . . ." *Id.* Finally, with respect to the flood warning system, Ecology noted the system did not provide 12 hours notice as generally required by the WAC. For warning systems with less than 12 hours notice, Ecology stated that the WAC requires the County to demonstrate the existence of such a system, which the County had not done. Ecology reiterated its recommendation that the Klineburger proposal not be allowed.

King County's floodplain management section reviewed the Taylor reports and Ecology's letters and concurred in Ecology's conclusions. CP 386–89; *see also* CP 94–96. The County's review added additional details regarding the property's failure to meet the WAC criteria. For example, regarding the channel migration zone, King County stated that the property was at risk due to its presence in the channel migration zone, regardless of the lack of recent evidence of erosion on the ground:

> The Taylor report does suggest there is no evidence of recent erosion on the ground and also notes that the site is located in the Moderate Channel Migration Hazard Area (as opposed to the Severe CHMA). However, this is not the standard established under state or county code, which is intended to reflect the long term hazards rather than just what is readily observable from recent flow events. . . . In addition, our professional opinion based on observations is that the Middle Fork Snoqualmie River has significant channel migration risk, and in fact King County Rivers is currently undertaking significant technical studies and

> plans significant capital investments to address this type of hazard on this river.

CP 387-88.

Regarding the flood warning system, the County indicated that there was no adequate warning system in place because of the lack of a suitable river gage to rely on:

> The Middle Fork Snoqualmie River does not have a dedicated flood warning system as there are no river gages far enough upstream along the Middle Fork to provide early warning for residents. . . It is possible for residents to set up individualized flood alerts with the United States Geologic Survey to receive alerts when river flows at any gage of their choosing meet whatever thresholds they want to set. While this would be possible for the Middle Fork at Tanner gage . . . our estimate is that flood flows from that gage would arrive at the subject location in three hours or less (sometimes much less), depending on the nature of the specific flood event.

CP 388; *see also* CP 95–96. Based on these facts, the County floodplain section concurred in Ecology's recommendation not to allow the Klineburgers' residence.

C. The County Also Concluded That The Klineburgers Did Not Meet FEMA's Requirements To Change The Floodway

In addition to seeking permits from the County for the mobile home, the Klineburgers explored the possibility of asking FEMA to remove the property from the floodway. *See* CP 89–91. Under federal regulations, landowners who believe their property has been incorrectly

designated on the FEMA map may seek a Letter of Map Revision from FEMA to remove their property from the floodway. *See* 44 C.F.R. § 65.7. The process requires completion of an engineering analysis using a hydraulic model to demonstrate that the existing map is erroneous. *Id.* Landowners may also seek a Letter of Map Amendment, which is a process under which a property owner can demonstrate that his or her property is not actually inundated by the base flood. *See* 44 C.F.R. § 65.5(b). However, the Letter of Map Amendment requires the concurrence of the local government. In this case, King County declined to concur because, as discussed above, the County's review indicated the property was properly designated in the floodway and did not meet state regulatory standards for development in the floodway. CP 96. The County explained:

> A LOMA [Letter of Map Amendment], when granted, essentially concludes that an existing structure or parcel of land that has not been elevated by fill would not be inundated by the base flood (also known as the 100-year flood), however, we do not believe that to be the case. A LOMA is to be distinguished from a Letter of Map Revision (LOMR), which essentially reaches the conclusion and officially revises the current effective map to show changes to floodplains, floodways or flood elevations. This latter determination requires a demonstration by a qualified engineer that under current conditions your site is not longer in the FEMA floodway.

CP 96; *see also* CP 89 ("We believe the property has been properly included in the mapped regulatory floodway . . . .").

The Klineburgers apparently did not pursue further relief from FEMA. Instead, the Klineburgers argued in the LUPA appeal that the property was not in the floodway due to the presence of 428th Avenue S.E. *See* CP 490–91. To support this argument, the Klineburgers obtained declarations from their consultant, Taylor Engineering, and from an employee of the Army Corps of Engineers, to the effect that 428th Avenue S.E. acts as a flood control device. *See* CP 32, 151–52, 462–65. This information, however, unless presented to FEMA consistent with the requirements in federal regulations, is inadequate to change the regulatory floodway. *See* 44 C.F.R. § 65.7 (specifying information requirements necessary to change the floodway); RCW 86.16.051 (stating that FEMA maps are the basis for state regulation of floodplains).

D. The Hearing Examiner Denied the Klineburgers' Appeal But The Superior Court Reversed

After the various reviews discussed above, the County informed the Klineburgers that they could not get a building permit for the mobile home. As a result, under a code enforcement order issued by the County, the Klineburgers were required to remove the mobile home. CP 333–34. The Klineburgers appealed the code enforcement order to the County

Hearing Examiner. The Hearing Examiner, in his decision, concluded he did not have jurisdiction to review or reverse Ecology's recommendation regarding the WAC criteria and that the County was bound by it. CP 491–92. He also concluded he did not have jurisdiction to revise the regulatory floodway. *Id.* He therefore denied the Klineburgers' appeal.

On appeal to superior court under LUPA, however, the superior court reversed. The court heard no evidence and took no testimony, but entered findings of fact contradicting Ecology's findings regarding the WAC criteria and suggesting that the property is not in the floodway.[4] Regarding the flood depths, the superior court found that the criterion was met:

> because the elevations prepared by a licensed surveyor showed measurements at 426.92 and 423.92 at the southeast corner of the house. There was also a diagram submitted with a Bates number 086 showing the area where it was less than three feet and the entire house is contained within such area.

CP 156 (FF 6). The court did not address the fact that the diagram stamped 086 shows a portion of the site at a depth greater than three feet. CP 418.

The court also found that:

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[4] As discussed below in Section C, the superior court's decision is unclear as to whether it accepted or rejected the Klineburgers' argument that the property is not in the floodway.

> There was testimony from Bill Taylor, the engineer, his reference to "adjust grade slightly" was not intended to mean fill would be added; rather it was a construction directive for the contractor doing the work to make sure if that [sic] dirt was disturbed during construction it was put back to the level pre construction.

CP 156 (FF 7). This finding, however, is based on Mr. Taylor's hearing testimony rather than on what is actually stated in the relevant documents. The phrase "adjust the grade slightly" in those documents clearly means to raise the ground surface elevation to lessen the flood depths. *See* CP 409, 416, 418. At the hearing, Mr. Taylor testified that grading would likely be necessary to meet the depth criterion due to imprecision in the calculations and the vagaries of construction. *See* CP 280–83, 287–88.[5]

Regarding erosion, the court concluded that because there was no visible evidence of recent erosion on the site, the criterion was met. CP 156–57 (FF 8). The court did not address the language of WAC 173-158-076(1)(b) stating that "[f]lood erosion will be determined by location of the project site in relationship to channel migration boundaries . . . ." Regarding the County's flood warning system, the court stated that other projects had been approved in the past without such a requirement.

[5] The surveyor prepared a later survey indicating slightly higher elevations for some of the house corners. CP 462. However, neither Mr. Taylor nor the court appear to have relied on these later elevations in finding that the proposal meets the flood depth criterion.

CP 157 (FF 8). The court apparently concluded that this criterion was therefore not applicable.

Finally, regarding the project's location in the floodway, the court entered some findings and conclusions suggesting that the property is not in the floodway, although the court did not specifically so conclude and crossed out language to that effect in its Order. *Compare* CP 155–56 (FF 1–4) and CP 157 (CL 10) (suggesting the property is not in the floodway) *with* CP 158 (crossing out language that the property is not in the floodway).

This appeal by King County followed the superior court's decision. Ecology intervened in the appeal to protect the public interest in minimizing and preventing flood damages, and to ensure proper implementation of RCW 86.16.041.

V. AUTHORITY AND ARGUMENT

A. Floodplains Are Regulated At The Federal, State, And Local Level

Floodplain regulation is a combination of federal, state, and local law. At the federal level, floodplain regulation occurs through the National Flood Insurance Program (NFIP) administered by FEMA. *See* 44 C.F.R. § 59.2 (description of program). FEMA maps floodplains and floodways using detailed hydraulic models and designates various "special

flood hazard areas" within them. *See* 44 C.F.R. § 59.1 (defining "special flood hazard areas"). FEMA also adopts minimum criteria that local governments must meet in order to participate in the NFIP. 44 C.F.R. § 60.3. Local governments participate in the NFIP by adopting floodplain regulations sufficient to meet those minimum standards. 44 C.F.R. § 59.2(b). Participation in the NFIP allows developers in the floodplain to obtain federally subsidized insurance.

Under federal regulations, the floodplain has two components: the floodway and the flood fringe. *See* 44 C.F.R. § 9.4 (definitions). Both of these are defined by reference to the "base flood," which is the 100 year flood. *Id.*

The "floodway" is the most hazardous part of the floodplain:

> *Floodway* means that portion of the floodplain which is effective in carrying flow, within which this carrying capacity must be preserved and where the flood hazard is generally highest, i.e. where water depths and velocities are the greatest. It is that area which provides for the discharge of the base flood so the cumulative increase in water surface elevation is no more than one foot.

44 C.F.R. § 9.4; *see also* 44 C.F.R. § 59.1 (defining "regulatory floodway" for purposes of the NFIP).

FEMA's minimum criteria for participation in the National Flood Insurance Program require local governments to generally prohibit development in the regulatory floodway. 44 C.F.R. § 60.3(d)(3). As

discussed above, local governments may allow development in the floodway only through a map revision or amendment process. *See* 44 C.F.R. § 60.3(d)(4); 44 C.F.R. § 65.12. The regulations set forth stringent data requirements that must be met in order for FEMA to accept a map amendment or revision. *See* 44 C.F.R. §§ 65.5, 65.6, 65.7. In this case, King County participates in the National Flood Insurance Program and has adopted floodplain regulations consistent with the NFIP criteria.

State law also regulates floodplains. *See* RCW 86.16. The basis of state regulation is the public interest in "the alleviation of recurring flood damages to public and private property and to the public health and safety . . . ." RCW 86.16.010. The statute requires Ecology to approve local floodplain regulations, RCW 86.16.031(1), and to adopt minimum state standards for such regulations in addition to those adopted by FEMA. RCW 86.16.031(6), (8). The statute requires local governments to regulate floodplains and floodways as designated "on the most recent maps provided by [FEMA] . . . .". RCW 86.16.051. Within the floodway, local governments must prohibit residential development, subject to limited exceptions. RCW 86.16.041. This prohibition on residential construction in the floodway has been repeatedly upheld against constitutional challenge. *Cradduck v. Yakima Cnty.*, 166 Wn. App. 435, 448, 271 P.3d 289 (2012); *Powers v. Skagit Cnty.*, 67 Wn. App. 180, 835

P.2d 230 (1992); *Maple Leaf Investors, Inc. v. Dep't of Ecology*, 88 Wn.2d 726, 565 P.2d 1162 (1977).

Pertinent here, RCW 86.16.041(4) contains a limited exception to the general prohibition on residential development in the floodway. It states that residential reconstruction in the floodway may be allowed only if recommended by Ecology:

> For all substantially damaged residential structures other than farmhouses that are located in a designated floodway, the department, at the request of the town, city, or county with land use authority over the structure, is authorized to assess the risk of harm to life and property posed by the specific conditions of the floodway, and, based upon scientific analysis of depth, velocity, and flood-related erosion, may exercise best professional judgment in recommending to the permitting authority, repair, replacement, or relocation of such damaged structures.

RCW 86.16.041(4).[6]

Ecology's regulation implementing this statutory exception sets forth the criteria that must be met for Ecology to recommend approval of residential construction in the floodway. WAC 173-158-076. The regulation states:

> Recommendation to repair or replace a substantially damaged residential structure located in the regulatory floodway shall be based on the flood characteristics at the site. In areas of the floodway that are subject to shallow

[6] The County apparently determined that because a residence had been located on the site historically, and was destroyed, the Klineburgers could invoke this exception on the grounds that the mobile home would essentially replace the original home. *See* CP 508–10.

> and low velocity flooding, low flood-related erosion potential, and adequate flood warning time to ensure evacuation, the department may recommend the replacement or repair of the damaged structure. . . . Flood warning times must be twelve hours or greater, except if the local government demonstrates that it has a flood warning system and/or emergency plan in operation. For purposes of this paragraph, flood characteristics must include:
>
> (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.

WAC 173-158-076(1). This regulation is at issue here.

B. The Superior Court Failed To Apply The Proper Standard Of Review And Erroneously Reversed Ecology's Findings And Recommendation

1. Standard of review.

Under LUPA, the petitioner bears the burden of establishing one of the bases for relief in RCW 36.70C.130. On appeal, the appellate court stands in the shoes of the superior court and reviews the administrative record for factual or legal error under the statutory standards. *HJS Dev., Inc. v. Pierce Cnty.*, 148 Wn.2d 451, 468, 61 P.3d 1141 (2003); *Satsop Valley Homeowners Ass'n v. Nw. Rock*, 126 Wn. App. 536, 541, 108 P.3d 1247 (2005). The appellate court does not review the findings of fact or conclusions of law entered by the superior court. *Humbert/Birch Creek*

Constr. v. Walla Walla Cnty., 145 Wn. App. 185, 192 n.3, 185 P.3d 660 (2008).

In this case, the Klineburgers did not allege any of the statutory bases for relief in their petition for review, *see* CP 1–5, nor did the superior court cite any of these bases in its decision. The grounds that seem potentially applicable are:

> (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;
> (c) The land use decision is not supported by evidence that is substantial when viewed in light of the whole record;
> (d) The land use decision is a clearly erroneous application of the law to the facts . . . .

RCW 36.70C.130(1).

Review under subsection (b) of the statute presents purely legal questions that the appellate court reviews de novo. Under subsection (c), the court must view the facts in the light most favorable to the party that prevailed at the highest level below that exercised fact-finding authority. *Phoenix Dev., Inc. v. City of Woodinville*, 171 Wn.2d 820, 828–29, 256 P.3d 1150 (2011). Substantial evidence exists to support the decision if there is a sufficient quantum of evidence in the record to convince a reasonable person that the declared premise is true. *Id.* Under subsection (d), the appellate court may grant relief only if it reaches a "definite and

firm conviction" that a mistake has been committed. *Quality Rock Prod., Inc. v. Thurston Cnty.*, 139 Wn. App. 125, 133, 159 P.3d 1 (2007).

2. None of the grounds for relief in the statute exist.

Here, review of the record demonstrates that none of the grounds for relief in the statute exist. The County's decision, which was based on Ecology's recommendation, properly interpreted and applied the relevant WAC criteria to the Klineburgers' lot, and the decision was supported by substantial evidence, including the analyses conducted by the Klineburgers' own consultant.

The four criteria in the WAC are, in summary: (1) flood depth must not exceed three feet; (2) flood velocity must not exceed three feet per second; (3) there must be no evidence of flood related erosion, determined by reference to the property's location relative to the channel migration zone; and (4) there must be a 12 hour flood warning system applicable to the property. As clearly spelled out in the letters written by Ecology and the County, discussed in detail above, these criteria were not met here with the exception of the flood velocity.

3. The flood depth criterion is not met.

The flood depth, according to the original Taylor report, exceeds three feet at the southeast corner of the building site where Taylor proposed to "adjust the grade slightly" to meet the flood depth. CP 409.

In context, the phrase "adjust the grade slightly" means to raise the ground surface elevation, presumably by using fill. The attached schematic diagram submitted with the report shows that the land surface must be elevated in order to meet the fill depth criterion. CP 418. The overhead view shows the land contours as exceeding three feet at both southern corners of the building area. CP 416. Although the survey elevations show the depth to be exactly three feet at the southern corners of the proposed mobile home, the areas immediately adjacent thereto have a flood depth in excess of three feet and the original Taylor Report identified a need to raise the surface elevation in these areas. CP 418. While Taylor in his later testimony sought to discount the statement in his original report, there is substantial evidence to support Ecology's finding that the criterion is not met.[7]

Moreover, Ecology correctly concluded that fill could not be used to meet the depth criterion. Under federal regulations, fill is not allowed in the FEMA floodway. 44 C.F.R. § 60.3(d)(3). Allowing fill to meet the

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[7] In his hearing testimony, Mr. Taylor emphasized that the survey elevations at the building corners show a depth of exactly three feet. *See* CP 280–83. However, he conceded that some fill would likely be necessary to maintain those depths because of the inherently imprecise nature of construction. As he put it:

> [W]e realize that the world is not black and white and that judgment comes into play in every project, we put a statement in our report saying that we would direct the contractor to—in their placement of the house—to do any sort of minor adjustment in grading necessary to maintain the three feet.
>
> CP 280; *see also* CP 287–88.

depth criterion in the WAC would render the criterion meaningless, since fill could in theory be used to meet any depth criterion. Clearly, the intent of the WAC is to assess the hazards of flooding at the location without the use of fill.

4. The erosion criterion is not met because the property is located in the channel migration zone.

Regarding flood-related erosion, the WAC is unambiguous in stating that erosion "will be determined" by reference to the project's location relative to the channel migration zone. Here, because the property is located in the channel migration zone, there is by definition evidence of flood related erosion. While Taylor may be correct that no recent erosion is visible on the land surface, that is not the relevant standard. As the County pointed out in its letter concurring with Ecology, the location of the site in the channel migration zone indicates a long term erosion risk regardless of whether recent erosion is currently visible. CP 388.

Like the floodway, the channel migration zone is a hazardous area within which the river channel may move, either suddenly or gradually. *See Olympic Stewardship Found. v. W. Wash. Growth Management Hearings Bd.*, 166 Wn. App. 172, 274 P.3d 1040 (2012) (discussing local regulations designating channel migration zones as "geologically

hazardous areas" under the Growth Management Act). The process by which the river channel moves is through erosion of its bed and banks. This process can put people at risk:

> The dynamic physical processes of rivers, including the movement of water, sediment and wood, cause the river channel in some areas to move laterally, or "migrate," over time. This is a natural process in response to gravity and topography and allows the river to release energy and distribute its sediment load. . . . Scientific examination as well as experience has demonstrated that interference with this natural process often has unintended consequences for human users of the river and its valley such as increased or changed flood, sedimentation and erosion patterns. . . . Failure to recognize the process often leads to damage to, or loss of, structures and threats to life safety.

WAC 173-26-221(3)(b) (discussing channel migration zones in the context of regulation under the Shoreline Management Act). Rapid erosion and migration of the river channel during a flood event, known as "avulsion," can present significant hazards to residential property. *See, e.g., Fitzpatrick v. Okanogan Cnty.*, 143 Wn. App. 288, 292–93, 177 P.3d 716 (2008).

As King County's regulations recognize, this risk may vary from place to place within the channel migration zone. Areas closer to the existing channel may be at higher risk than areas farther away. King County's regulations acknowledge this variation by designating some areas as at "severe" risk and others at "moderate" risk. *See*

KCC 21A.06.181E, G. The WAC criterion, however, requires that flood related erosion potential be "low." It then goes on to require "*[n]o* evidence of flood related erosion," which it defines with reference to the channel migration zone boundary. WAC 173-158-076(1)(b)(emphasis added). According to the WAC, therefore, a property's location in the channel migration zone means that it has a risk of flood related erosion that is not "low." Because here, the Klineburgers' property is located in the channel migration zone, it is subject to a level of erosion risk that is higher than the WAC permits. As Ecology stated, it does not matter that the property is in the "moderate" rather than the "severe" channel migration hazard zone, or that erosion is not visible on the site. Ecology did not misinterpret or misapply the WAC.

5. The flood warning criterion is not met.

Similarly, because the undisputed evidence shows that there is no flood warning system in place for the property, Ecology properly concluded this criterion was not met. *See* CP 388. The Klineburgers' argument on this point seems to be that, because other landowners in the area have not had to demonstrate the presence of such a warning system, the criterion should not apply to them. This argument is contrary to established precedent, which states that an alleged failure of the 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). Even if the Klineburgers are correct that King County has not in the past required other landowners to demonstrate a 12 hour warning system before building in the floodway, that does not mean the criterion does not apply.[8]

Under the WAC, this criterion could be met with warning times less than 12 hours if the County "demonstrated that it has a flood warning system and/or emergency plan in operation." The County, however, stated that it did not have such a system or plan in operation for the Middle Fork of the Snoqualmie River. CP 388 ("The Middle Fork Snoqualmie River does not have a dedicated flood warning system as there are no river gages far enough upstream along the Middle Fork to provide early warning for residents. . . ."). The County explained that it has a flood warning system applicable to the Snoqualmie Basin below the point at which the three forks of the River join, but this system does not work on the forks themselves. According to the County, due to the absence of any suitable gauges on the Middle Fork, it is not possible to have adequate warning of

[8] In his hearing testimony, Mr. Klineburger noted that the County had denied permits to a number of his neighbors, suggesting that the County has enforced its ordinances in some instances. *See* CP 319.

a flood at the location of the Klineburger property. *Id.* As a result, this criterion is not met.

The superior court essentially ignored or discounted the flood warning criterion, the flood-related erosion criterion and the flood depth criterion. The court gave no adequate reasoning or bases for these conclusions. By discounting the WAC criteria, the court's decision puts the public at potential risk of damages from flooding.[9] It should be reversed.

C. The Superior Court Erred To The Extent It Concluded That The Property Is Not In The Regulatory Floodway

As noted above, the superior court entered some findings and conclusions suggesting that the Klineburgers' property is not actually in the floodway, although the court did not enter a specific conclusion to that effect. *See, e.g.*, CP 155–58 (FF 1 and CL 10) (stating that the Klineburgers' property is protected from flooding by the adjacent road, 428th Avenue S.E.). To the extent these findings and conclusions hold that the Klineburgers' property is not in the regulatory floodway, they are erroneous and should be reversed.

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[9] If the mobile home is allowed, the Klineburgers may someday sell it, and a new owner could purchase it without ever knowing it is in a dangerous location. In addition, in a large flood the mobile home or a portion of it could become dislodged and cause damages to other property downstream.

Under RCW 86.16.051, the basis for state and local regulation of the floodplain is the most recent map provided by FEMA. This means that the floodway prohibition in RCW 86.16.041 applies to the floodway as mapped by FEMA on the most recent map. *See Cradduck*, 166 Wn. App. 441–42. As discussed above, the only way to change the FEMA map is through the processes specified in the federal regulations for doing so. 44 C.F.R. §§ 65.6, 65.7. These regulations require that extensive engineering analysis and other documentation be submitted to support such a request. *Id.* For example, to support a floodway revision, hydraulic modeling must be submitted using a computer model. 44 C.F.R. § 65.7(b)(4)(i).

The superior court did not have jurisdiction to revise the FEMA map in this proceeding. Moreover, since state law directs state and local governments to use the FEMA map, and since it is undisputed that the Klineburgers' property is located in the FEMA floodway, the court had no legal basis upon which to conclude otherwise. In any case, the evidence submitted by the Klineburgers during the hearing was not adequate to demonstrate that the property is not in the floodway. No hydraulic modeling was submitted. The declaration from the Corps of Engineers employee—who did not actually testify at the hearing—states merely that the road "for a range of flood events . . . helps to protect the Klineburger

property from flood waters . . . ." CP 32. While this may be true, it is not a scientifically rigorous demonstration that the property is not in the floodway. The report from the surveyor clearly indicates that the road surface elevations are below the base flood depth, meaning that flood waters in a 100 year flood would overtop the road. CP 464–65. There was also testimony at the hearing of extensive flooding in the vicinity of the site. CP 271, 275. In the absence of rigorous scientific analysis meeting FEMA standards, and a map revision or amendment approved by FEMA, the Klineburgers' argument that they are not in the floodway cannot be accepted.

VI. CONCLUSION

For the reasons stated above, the Court should reverse the decision of the superior court and affirm the decision of the King County Hearing Examiner.

RESPECTFULLY SUBMITTED this 2 day of May, 2014.

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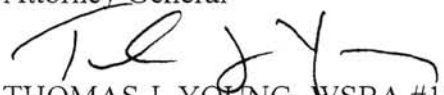

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CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the state of Washington that on May 2, 2014, I caused to be served the Department of Ecology's Opening Brief in the above-captioned matter upon the parties herein as indicated below:

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