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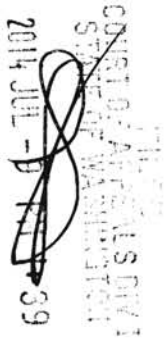
NO. 71325-6-I

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



STEPHEN AND SANDRA KLINEBURGER,

Respondents/Cross-Appellants

v.

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

Appellants/Cross-Respondents

BRIEF OF RESPONDENTS/CROSS APPELLANTS

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

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I. INTRODUCTION

Appellants Department of Ecology ("DOE") and King County have each submitted opening briefs which contain a broad variety of issues and assignments of error. The parties' respective assignments of error do not align themselves with one another and, on the contrary, the parties pursue explicitly distinct legal grounds. DOE's brief, for example, attacks the findings of fact and substantive analysis of the Superior Court, while King County leaves the Superior Court's finding of fact completely unchallenged, and instead focuses its arguments exclusively on procedural and jurisdictional grounds.

The non-alignment of issues by the two appellants has the effect of, to borrow from hyperbole, "throwing the kitchen sink" at this court in terms of the content and focus of the arguments.

The argument section of this brief will be split into two distinct parts. The first part will be responding to the Department of Ecology's Brief and the second part will be responding to King County's brief. Our cross-appeal will be in a separate document.

II. STATEMENT OF THE CASE

For the purposes of this cross appeal, the Klineburgers generally agree with the statement of the case within the Department of Ecology's Opening Brief, except for the section beginning on page 10, in which the Department of Ecology discusses the Klineburger's attempt to have their lot excluded from the floodway. *Department of Ecology's Opening Brief, p. 10.*

The Klineburger's attempt to have FEMA issue a LOMA, indicating their lot was not in the floodway was thwarted by King County's refusal to concur, which was based upon King County's erroneous interpretation the Klineburger lot was in the floodway. FEMA is the agency, which determines these issues of location and Bill Taylor has successfully convinced FEMA to take lots out of the floodway map on two occasions. CP 419; *See also* CP 284-285.

The Klineburgers were faced with the same circular reasoning of King County when it decided the Klineburgers could not apply for a permit because their house was in the floodway, and applied the same circular reasoning to FEMA's request for King County concurrence by refusing to concur because King County had determined the Klineburger lot was in the floodway. This effectively prevented the federal agency in control of mapping from reaching a decision on the merits.

Ecology's Opening Brief, at page 12, indicates the Klineburgers "apparently did not pursue further relief from FEMA." *Department of Ecology's Opening Brief, p. 12.* The Klineburgers were effectively prevented from pursuing further relief from FEMA because, once King County refused to concur, the process was stopped and no decision was ever rendered by FEMA as to whether this lot should be removed from the floodway

III. PART I: RESPONSE TO THE DEPARTMENT OF ECOLOGY'S BRIEF

Ecology has challenged the lower court decision basically on the merits of the decision, rather than on the procedural grounds upon which King County has based its appeal.

1. Are the Flood Depths on the Respondents' Property At Or less Than Three Feet?

The reason Ecology was initially, and still is, challenging whether or not this criterion has been met is due to an unfortunate misinterpretation of language by the Department of Ecology. In the Taylor Engineering report, there is language on one of the attachments which said "adjust finished grade as necessary to maintain 426.92 elevation." CP 409.

Mr. Taylor testified before the Hearing Examiner this language was meant as a "construction directive" to the contractor to adjust the grading to return it to its pre-existing condition before construction. CP 280, lines 12-18. Unfortunately, Ecology interpreted the language of the Taylor Engineering Report to mean the engineer was recommending fill be brought in, which caused Ecology to claim the criterion had not been met, because fill is not allowed. The Hearing Examiner even jokingly recommended substitute language next time to be "adjust grade slightly to achieve a margin of safety," to which Mr. Taylor readily agreed. CP 288, lines 12-14.

Mr. Taylor explained the methods by which they calculated the flood depths and referred specifically to CP 416, in which the flood depth of 423.92 is shown at the northwest corner of the structure and the flood depths are on the FEMA maps show the flood depth at that location is 426.92, which is a depth of 3.00 feet. CP 416. The squiggly lines which Mr. Taylor refers to are the ones which go from the numbers on the far right side of the paper to the number at the northwest corner of the house. *Id.* These elevations were confirmed three times by a surveyor, and Mr. Taylor testified the reason for this triple confirmation was Ecology kept challenging their figures, and Mr. Taylor wanted to be sure these were accurate and reliable figures. CP 292, lines 1-5.

The dashed line on CP 416 is the dividing line between the flood depth that exceeds three feet and that which is less than three feet. He also pointed out all of the house is in the area which is less than three feet. CP 283, lines 4-13. Mr. Taylor explained the evaluations and reports should be based on the record and the analysis, which was done using figures from the FEMA map as well as the results from a land survey from a licensed surveyor, rather than Ecology's misreading of the language from the Taylor Engineering report leading them to believe fill was going to be added to the site. *Id.*

The Base Flood Depth Plan CP 416 has a dashed line which shows that to the left of that dashed line is less than three feet, which is where the house is, and to the right of that line is greater than three feet, which is an area upon which no part of the house extends. CP 283, lines 8-13. CP 280, lines 17-21

2. No Evidence of Flood-Related Erosion

In Ecology's October 22, 2012 letter, Ecology determined there was a hazard of erosion by merely referring to WAC 173-158-076(1)(b), stating a channel migration zone indicates a high probability of erosion, and concluding because the map indicates the house is within the channel migration zone, there must be erosion . CP 381-382.

If, in determining whether a building site is subject to erosion, one could merely say the building is within the floodway map and is therefore in danger of erosion, there would never be any houses built in the floodway. CP 293, lines 1-7. Mr. Taylor has had over 27 residential projects build in the floodway, all of which were granted permits. CP 278, lines 1-4. In fact, this is the only riverside project Mr. Taylor has worked on where the request was denied. CP 278, lines 21-22.

Jim Kemp, the self-educated designer, also had at least 16 riverside residential permits granted, all of which were located in the moderate migration zone of the floodway on the north fork of the Snoqualmie River. CP 308, lines 17-22.

Mr. Taylor testified making a visual inspection of the site is the standard in the industry, and he has never done a project where he did not make a visual inspection to investigate for signs of erosion. CP 285, lines 10-15. In cases where erosion is present, one would see signs of movement of earth, in case of embankments, or changes in the terrain, or damage to vegetation. CP 285, lines 19-22. He explained "when we are talking about erosion, it usually refers to soil, so we would be looking for damages to vegetative surfaces and indications that would cause movement of soil as a result of water flow." CP 286, lines 2-4.

Mr. Taylor talked with property owners, neighbors, and other people living in the area, including Ms. Stoppard, who lived across from the property for 53 years and had never seen any floodwaters on the Klineburger's lot. Mr. Taylor concluded, as a result of the conversations he had with the area property owners and the numerous projects his team has worked on in the Snoqualmie River Valley and the Middle Fork, he has never seen any erosion problems in the vicinity of the Klineburger's lot. CP 283, lines 19-22; CP 284, lines 1-3.

The requirement is "no evidence" of flood-related erosion, not whether the land is in a mapped area where there might be erosion. WAC 173-158-076(1)(b); *See also* CP 381. Ecology made its decision without making a site visit or checking any data for flooding or river activity around this lot. It merely cited the definition of a channel migration zone which took sixty seconds worth of effort, and determined this project did not meet the criterion of "no evidence" of erosion.

3. It must be Determined There is a Flood Warning System or Emergency Plan in Operation.

Mr. Taylor testified of the 27 floodplain permits he has successfully obtained in the past, never has there ever been any requirement there be a County warning system or a flood warning system in place. CP 295, lines 14-22; CP 296, lines 1-7. This was not an issue needed to be addressed on

any of his previous residential projects in the floodway. *Id.* Mr. Kemp testified likewise, in the dozens of houses he has worked on in the area, he has never had to prove there was a flood warning system in place or there was a 12-hour warning system in place. CP 309, lines 12- 22.

In response to the indication in Ecology's October 22, 2012 letter at CP 381, stating there was no indication of any flood-warning system or emergency plan in operation on the Middle Fork of the Snoqualmie River, Taylor Engineering submitted a second report on October 29, 2012. CP 423-424.

In this report, Taylor Engineering attached a number of documents indicating what kind of flood warning system was in place in King County. CP 425-435. The document which begins at CP 433 specifically details warning services on the Snoqualmie River, both on the Middle and North Fork. There are numerous emergency warning systems in place for the Snoqualmie River, which include public broadcast through King County's monitoring and gauging stations, which send text messages to one's cell phone as an advance warning of a flood. CP 296, lines 1-7.

The idea of a 12-hour warning system is something done on the Mississippi River, because that river allows for such an early warning system. *Id.* lines 11-19. Such a system could not apply to the Snoqualmie River because flood prediction for the Snoqualmie River is based on

weather forecasts and rainfall events, which means implementation of a 12-hour warning system is impossible for the Klineburger's lot or for any lot on the Snoqualmie River. *Id.*

In a second letter, on December 18, 2012, Ecology acknowledged the material supplied by Taylor Engineering may demonstrate the existence of a flood warning system applicable to this case. CP 384.

Mr. Klineburger, furthermore, testified before the Hearing Examiner he subscribes to the King County and Floodzilla flood warning services, which provide him with periodic water level updates throughout the day. *See* CP 319 – 320. To support his testimony he was subscribed to flood warning services, Mr. Klineburger submitted a copy of his Floodzilla printout, marked Exhibit 31. CP 487.

4. Standard of Review

The Klinburgers, in their Superior Court brief, cited to RCW 36.70.C.130(b),as the Standard of Review which applied to this case, which states "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." CP 103. Such language was in the Klineburgers' proposed order. CP 158 The Superior Court judge, however, explicitly crossed out the above language and replaced it by inter-delineating the County's decision "was constrained by the law applicable

to such decisions, and this Court does have the jurisdiction to review the Ecology decision..." CP 158, lines 1-4. The judge left the language which stated the court was left with a "definite and firm conviction a mistake has been made." *Id.*

5. Ecology Misinterprets the Superior Court Order in Claiming the Superior Court Judge Ruled the Klineburger Lot Was Not in the Floodway

The Klineburgers' proposed order had a conclusion of law and alternative order indicating the court found the Klineburger lot was not in the floodway because there was a flood control device, namely, 428th Ave SE, which prevented floodwaters from entering the Klineburger lot. CP 157, lines 13-19. The judge crossed out those words in his final order and indicated he was not making such ruling. CP 158, lines 5-7. Our cross appeal will address such decision by the court to reject our Conclusion of Law and not include it in the Order which we believe was error.

PART IV: RESPONSE TO KING COUNTY'S BRIEF

1. King County's Arguments Raised for the First Time on Appeal.

Appellant King County's first and second Assignments of Error contain four distinct arguments: (1) Respondents did not follow LUPA's

procedural requirements, (2) erred in not joining Ecology as a party, (3) did not have a factual record of the decision, and (4) Ecology's decision was not a "land use decision" under LUPA. None of these arguments were raised by either King County at the Superior Court level.

2. Response to King County's First Assignment of Error:

a. Under RAP 2.5 and clear Washington case-law, this court should refuse to review King County's LUPA argument because it was neither pleaded nor argued at the Superior Court.

Appellant King County argues in its first Assignment of Error "The Superior Court's ruling was erroneous where Ecology's decision is not a "land use decision" appealable under LUPA." *Opening Brief of Appellant King County, 3.* King County, however, did not make this argument at the Superior Court level.

King County, to the contrary, made the opposite assertion at the Superior Court by stating in its Response to Petitioner's Opening Brief that "[The Klineburgers] appeal the King County Hearing Examiner's final decision on a land use matter, therefore review is granted by the Land Use Petition Act (LUPA)." CP 133 (emphasis added). In short, King County not only failed to plead or raise this "land use decision" argument at the Superior Court level, it instead claimed the opposite position.

Washington Rule of Appellate Procedure 2.5 governs an appellate court's scope of review and, absent exceptions for jurisdiction, constitutional, and FRCP 12(b)(6) motions, states that "The appellate court may refuse to review any claim of error which was not raised in the trial court." RAP 2.5. The language of RAP 2.5 permits this court to refuse to review King County's "land use decision" argument, because it was not raised in the lower court.

Washington case-law, furthermore, goes beyond the permissive language of RAP 2.5 and establishes "As a general matter, an argument neither pleaded nor argued to the trial court cannot be raised for the first time on appeal." *Washington Fed. Sav. v. Klein*, 177 Wn. App. 22, 29, 311 P.3d 53, 56 (2013).

Applying both RAP 2.5 and Washington case law to the issue at hand, this court should refuse to review King County's first Assignment of Error, as it contains an argument neither pleaded nor argued to the Superior Court.

b. Arguing in the Alternative

In the alternative, should this court decide to review King County's first Assignment of Error, the argument nonetheless fails on the merits. It is worth again noting King County plainly conceded at the Superior Court

level the Superior Court's review of the Hearing Examiner's decision was governed by LUPA. CP 133.

The Klineburgers appealed to the Superior Court a final decision of a land use matter made by the King County Hearing Examiner and, as such, the Land Use Petition Act (LUPA) governs the matter. RCW Ch. 36.70C *et seq.*

King County's LUPA argument is essentially that, since DOE is not a "local jurisdiction," its decision to deny the Klineburgers a chance to apply for a permit cannot be appealable under LUPA. This argument, however, misses the mark. The Klineburgers appealed to the Superior Court *the land use decision made by the King County Hearing Examiner*, which was a "final determination by a local jurisdiction's body or officer with the highest level of authority to make the determination..." RCW 36.70C.020(2). Because Ecology denied the Klineburgers a chance to even apply for a permit (which then could have been appealable to another agency), the only avenue for a final determination was with the King County Hearing Examiner, whose final decision was properly appealed to the Superior Court under LUPA.

3. Response to Appellant King County's Second Assignment of Error

a. Under RAP 2.5 and clear Washington case-law, this court should refuse

to review King County's second assignment of error because the arguments within were neither pleaded nor argued at the Superior Court.

King County similarly failed to raise any of the arguments within its second assignment of error at the Superior Court level. For the same reasons listed above, this court should refuse to consider such arguments on appeal.

b. Arguing in the Alternative

King County argues three things in its second assignment of error, namely, that "the Klineburgers failed to follow LUPA's procedural requirements, did not join Ecology as a party, and lacked a factual record of the decision." *Opening Brief of Appellant King County, 3.*

King County cites to RCW 36.70C.040 and asserts that, "the Klineburgers are charge with joining the decision-maker for the challenged land use decision." *Id.* at 15. Contrary to King County's assertion, however, the language of RCW 3670C.040 *does not* require the petitioner to join the decision maker[1]. The statute's language, in fact,

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[1] (2) A land use petition is barred, and the court may not grant review, unless the petition is timely filed with the court and timely served on the following persons who shall be parties to the review of the land use petition:

(a) The local jurisdiction, which for purposes of the petition shall be the jurisdiction's corporate entity and not an individual decision maker or department....

(d) Each person named in the written decision who filed an appeal to a local jurisdiction quasi-judicial decision maker regarding the land use decision at issue, unless the person has abandoned the appeal or the person's claims were dismissed before the quasi-judicial decision was rendered. Persons who later intervened or joined in the appeal are not required to be made parties under this subsection. RCW 36.70C.040

mentions the term decision maker to clarify the petitioner must serve the local jurisdiction, which "shall be the jurisdiction's corporate entity *and not an individual decision maker or department.*" RCW 36.70C.040 (emphasis added).

In short, King County's allegation the Klineburgers were required to join Ecology is without merit, and should be rejected.

4. Response to King County's Third Assignment of Error

In its third assignment of error, King County argues "consideration of Ecology's decision violated the doctrines of primary jurisdiction and exhaustion of remedies." *Opening Brief of Appellant King County, 3.*

a. The Primary Jurisdiction Argument

King County's argument may be summarized as follows: (1) Ecology's October 22, 2012 letter was a decision appealable to the Pollution Control Hearings Board (PCHB) under RCW 86.16.110, and (2) the Klineburgers' failure to appeal to the PCHB means review of their case by this court violates the doctrine of primary jurisdiction.

The Washington Supreme Court has explained that the doctrine of primary jurisdiction "applies where a claim is originally cognizable in the courts, and comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been

placed within the special competence of an administrative body; in such a case the judicial process is suspended pending referral of such issues to the administrative body for its views." *In re Real Estate Brokerage Antitrust Litig.*, 95 Wn. 2d 297, 302, 622 P.2d 1185, 1188 (1980).

King County's first point of contention, that Ecology's letter was a decision appealable to the PCHB, is clearly erroneous when examined in light of the language of RCW 43.21B.310(4), which explains that "[a]n appealable decision [under RCW 86.16.110] or order *shall be identified as such and shall contain a conspicuous notice* to the recipient that it may be appealed only by filing an appeal with the hearings board and serving it on the issuing agency within thirty days of the date of receipt." RCW 43.21B.310(4) (emphasis added). Ecology's letter was an **"advisory recommendation**," not a decision.

An examination of Ecology's October 22, 2012 letter reveals Ecology's letter is completely devoid of any identification of an appealable decision, nor does it contain a conspicuous notice to the Klineburgers on how it may be appealed. CP 381-382. The sole direction for future action given by the letter reads, "If you have further questions, please contact me at...." *Id.*

Ecology's letter, in short, is *not* an appealable decision under RCW 86.16.110, and therefore the Klineburgers could not have appealed to the

PCHB. The Klineburgers, instead, were left only one course: to challenge Ecology's letter through the Hearing Examiner in order to request they be allowed to apply for a permit, *so that they could receive an appealable decision*, as opposed to the Ecology's letter, which denied them the chance to apply for a permit and did not contain notice on how to appeal.

The Superior court, therefore, did not violate the doctrine of primary jurisdiction when it reviewed this case. The case at hand is clearly distinguishable from the case-law cited by King County. For example, *Dioxin/Organochlorine Ctr. v. Dep't of Ecology* is clearly distinguished from the Klineburgers case because the appellants in *Dixon* were challenging National Pollutant Discharge Elimination System permits (an appealable decision to the PCHB), whereas the Klineburgers have challenged an advisory recommendation letter denying them the opportunity to apply for a permit (not an appealable decision to the PCHB). *Dioxin/Organochlorine Ctr. v. Dep't of Ecology*, 119 Wn. 2d 761, 837 P.2d 1007 (1992)

4. Response to King County's Fourth Assignment of Error

King County, in its fourth assignment of error, argues that the "Superior Court erred in concluding that the Klineburgers met their burden under RCW 36.70C.130(1) of establishing that Ecology's decision was a clearly erroneous application of the law to the facts. This final assignment

of error seems to challenge the merits of the Superior Court judge's decision. We have addressed this challenge to the merits in our Part I: Response to Ecology's Brief and, for the same reasons, believe that the decision of the Superior Court judge, in this regards, should be affirmed.

IV. CROSS APPEAL ARGUMENT

1. Introduction:

This floodway case in the moderate migration zone does not compare to the Oso landslide in any regard. At issue in this case is whether a homeowner should be allowed to build a foundation under his mobile home when the lot is located in the moderate migration zone of the Middle Fork of Snoqualmie Floodway. In the Middle Fork and the North Fork of Snoqualmie, there have been dozens of homes permitted in the last 14 years, and both Bill Taylor, the Klineburgers' engineer and Jim Kemp, the designer, testified they have never been denied a building permit for a residential structure in the Middle or North Fork of the Snoqualmie.

The neighbor to the north of the Klineburgers, on the same side of the road, was allowed to demolish and reconstruct a house in approximately 2005, and the neighbor across the street, Judith Stoddard,

submitted photos of the path through which she was allowed to construct and remain in her house even though it is located in the *severe* migration zone of the floodway.

The Klineburgers attempted to apply to FEMA for a Letter of Map Amendment (hereinafter LOMA). Bill Taylor indicated in his declaration he has successfully pursued two of these LOMAs, where in fact the official floodway map is not revised or redrawn, rather, a letter is issued for that particular property saying that it should not be in the floodway and amounts to basically an asterisk on the floodway map. CP 43-44. The Klineburger's attempt to secure a LOMA was thwarted by King County's refusal to concur. The county fell back on its original position, which was the Klineburgers could not apply for a permit because their property was in the floodway. This refusal to concur effectively ended the process for the Klineburgers because FEMA would not go forward to the next step without King County's concurrence.

The Superior Court's decision clearly denied the Klineburger's request a determination be made the Klineburger's lot should not be considered in the floodway, even though the Superior Court judge indicated, through a handwritten paragraph on the last page of his decision, he had given weight to the Hearing Examiner's reference to the

fact the Klinburgers had made a good case 428th Ave SE acts as a dyke protecting the Klineburgers' lot from floodwaters. CP 159.

2. Assignment of Errors

The Superior Court erred in not ruling the Klineburgers had successfully demonstrated their lot should not be considered in the floodway and the Klineburgers be allowed to apply for a building permit without any regard to floodway regulations, because the lot was not in the floodway.

3. Authority and Argument:

The decision on whether this lot should be removed from the floodway map is a factual matter.

a. The Consensus of the Neighborhood is Floodwaters Have Never Reached the Klineburgers' Lot.

RCW 90.58.30(2) (b) defines a "floodway," however, the last sentence in this section provides "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 90.58.30(2) (b).

Judith Stoddard testified extensively before the Hearing Examiner and by declaration, that in the 53 years she has lived across the street from the Klineburgers, she has never observed any floodwater on the Klineburger's lot. CP 269-270. The first flood she observed was in 1959, right after she moved to her property, and there was another flood in 2006. CP 271, lines 1-7.The Klineburger lot was visible from her house, and she merely needed to look out the window to see it. *Id.* lines 4-12.

The property to the north of the Klineburgers, on the Klineburger's side of the street, was demolished and a replacement house was constructed in 2005. CP 405-406. The house to the north experienced flooding in 2006 and 2008, to the depth of several feet deep. CP 405. Ms. Stoddard had an additional eight people review her declaration and sign it as being accurate, regarding the floodwaters never having entered the Klineburger lot. CP 407. These eight neighbors have lived in the area for time periods ranging from beginning in 1936 – 1999. *Id.*

b. The Core of Engineers Declared 428th Ave. SE functioned as a Flood Control Device, Effectively Diking the Klineburger lot

Douglas Webber, chief of the emergency management branch, Seattle District Army Core of Engineers, was contacted by the Klineburgers to review the studies conducted on the property and provide an assessment of the data. The Core of Engineers reviewed the

engineering document prepared by Taylor Engineering and historical data provided by Mr. Klineburger. CP 399. Along with the Seattle District Army Core of Engineers Hydraulic Engineering Section, the documents were reviewed by Mr. Webber. The conclusion was the Taylor Engineering documents appeared to be sound. *Id.*

The Core of Engineers declared, for a range of flood events, 428th Ave. SE functions as a flood control structure and provides protection to the Klineburger property from floodwaters, velocity, and **erosion.** *Id. (emphasis added)*

This means the Taylor Engineering study about flood depth is correct as far as the Core of Engineers is concerned and the issue of fill, which the Department of Ecology misinterpreted the report to be requiring, is not an issue in the Core of Engineers Determination. The survey information submitted by the Taylor Engineering report shows the depth of the corners of the house, which were calculated three times by a surveyor in order to counter the Department of Ecology's reluctance to accept these figures. CP 292, lines 1-5.

c. No Evidence of Flood Related Erosion was found by Either Taylor Engineering or the Core of Engineers.

The Core of Engineers also accepted the Taylor Engineering Study Finding about no evidence of flood-related erosion existing. This

conclusion was based primarily on a site inspection by Mr. Webber to the Klineburger's property, as explained in the email on February 14, 2013. CP 401. Mr. Webber declared the Klineburger property should not be in the floodway. *Id.* Pictures of flood and building plans on file with King County for 428th Ave SE qualify it as a flood control device.

d. Pictures of Flooding in the Area and Building Plans on File with King County on 428th Ave SE qualify it as a Flood Control Device.

Mr. Klineburger obtained photographs from various flood events on the Snoqualmie River, which were submitted at the Hearing. Mr. Klineburger submitted photographs of various flood events, wherein his property was indicated by a red square on the photos. CP 454-458; *See also* CP 312, lines 13-22; CP 313 lines 1-19. None of these flood events resulted in any floodwater on the Klineburger's lot.

Mr. Klineburger also secured drawings of when 428th Ave SE was going to be straightened and repaired, which indicate there was three feet of riprap supporting the road mainly to prevent the road from being washed out by flood events. CP 484 (very small print on the exhibit). The small print reads "3' 0'' Heavy Loose." *Id.*

The function of 428th Ave SE as a berm is further supported by the technical memorandum from Bill Taylor on February 15, 2013, stating his

survey showed the crown of the road in front of the Klineburger property is two and a half feet above the surrounding floodplain. CP 464. Mr. Taylor further concluded the transportation infrastructure of the road embankment functions as a berm protecting the Klineburger property.

V. CONCLUSION

King County's appeal should be denied because it did not raise the position this was not a proper LUPA appeal in the Court below. King County's appeal should also be denied because its principle of primary jurisdiction does not apply. This was an appeal of a County decision made by the Hearing Examiner.

Ecology's appeal should be denied because the overwhelming weight of the evidence supports the conclusion all four of the criteria to develop in a floodway were met, and there is no reputable evidence refuting the testimony in support of this. RCW 90.58.030(2)(b); WAC 173-158-030.

This court should reverse the decision of the Superior Court wherein the court did not hold 428th Ave SE functions as a flood control device protecting the Klineburger's lot from floodwaters entering it. The matter should be remanded to King County with instructions to process

the Klineburger's permit with the Ruling the property is not in a floodway therefore, the floodway regulations do not apply.

Respondents respectfully request their costs incurred pursuant to RAP 14.1, RAP 14.2, and RAP 14.3.

Respectfully submitted this 8 day of July, 2014.

Ross Radley

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

NO. 71325-6-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

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

I certify that on the 8 day of July, 2014, I caused to be delivered the Brief of Respondents/Cross-Appellants, in the above-captioned matter upon the parties herein as indicated below:

CALVIN G. RAPADA and DEVON SHANNON
KING COUNTY COURTHOUSE
516 THIRD AVENUE, RM. W400
SEATTLE, WA 98104

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

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

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

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

DATED this 8 day of July, 2014, in Seattle, Washington.

ERIC REUTTER, Legal Assistant