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NO. 96423-8

Court of Appeals Cause No. 76458-6-1

SUPREME COURT OF THE STATE OF WASHINGTON

STEPHEN AND SANDRA KLINEBURGER,

Appellants,

v.

STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY,

Respondent.

**STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY'S
RESPONSE TO KLINEBURGERS' MOTION FOR EXTENSION
OF TIME AND ANSWER TO PETITION FOR REVIEW**

ROBERT W. FERGUSON
Attorney General

KATHARINE G. SHIREY
Assistant Attorney General
WSBA No. 35736

PO Box 40117
Olympia, WA 98504-0117
360-586-6770
kay.shirey@atg.wa.gov
Office ID No. 91024

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I. INTRODUCTION

Petitioners Stephen and Sandra Klineburger seek review of an unpublished Court of Appeals decision rejecting their regulatory takings, substantive due process, and equal protection claims. Because they filed their Petition for Review (Petition) late, they also seek an extension of time. Pursuant to the clerk's letter of November 5, 2018, Respondent Department of Ecology submits this combined response to the Klineburger's motion for extension of time and answer to their Petition.

The Klineburgers' request for an extension of time should be denied because they fail to demonstrate extraordinary circumstances warranting an extension. Their motion establishes nothing more than that their attorney is busy—they make no mention of any particular circumstance or event excusing the late submission of their Petition. As a result, the Court should not consider the Klineburgers' Petition. However, if the Court does consider the Klineburgers' Petition, it should be denied because the Klineburgers do not establish any of the grounds for review in RAP 13.4.

The Klineburgers base their Petition on the claim that the Court of Appeals decision below conflicts with *Powers v. Skagit County*, 67 Wn. App. 180, 835 P.2d 230 (1992). In fact, the Court of Appeals decision here is consistent with *Powers*. The Klineburgers also claim their

takings and substantive due process claims are ripe under *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 112 S. Ct. 2886, 120 L.Ed. 798 (1992). However, they provide no facts or argument to support this claim or to establish that they have been deprived of all economically viable use of their property. The Klineburgers cite no basis for review of their equal protection claim.

Because the Klineburgers fail to identify any viable basis for Supreme Court review, Ecology asks this Court to deny their request for review.

II. THE KLINEBURGERS' MOTION FOR EXTENSION OF TIME SHOULD BE DENIED

The Klineburgers filed their Petition for Review one day late. Under RAP 18.8(b), a late filed petition will be accepted only in extraordinary circumstances and to prevent a gross miscarriage of justice. Here, the Klineburgers have identified no extraordinary circumstances justifying a delay, nor will there be a miscarriage of justice if the Court declines to consider their Petition.

The only explanation the Klineburgers provide for their late filing is that the Klineburgers' attorney had four other matters in process at the time the Klineburgers' Petition was due. Klineburger Motion to Extend Time by Day to File Petition for Review (Motion). This explanation

describes a busy law office, but does not describe extraordinary circumstances justifying a late filing at the Supreme Court.

The Klineburgers do not explain what had to be done for the four matters identified, or when. Nor do they identify any unforeseen, exigent or emergent proceedings in any of the four matters identified. Thus, there is no evidence that anything about the situation constitutes extraordinary circumstances.

One of the matters the Klineburgers cite is a trial scheduled for October 17, 2018. Motion at 2. The Klineburgers do not explain why they were unable to plan to meet the 30-day Supreme Court deadline for filing in the Klineburger case while preparing for the trial or to file a motion for an extension of time with the Supreme Court before the October 15, 2018 deadline.

As discussed below, the Klineburgers do not identify any viable grounds under RAP 13.4 for the Supreme Court to hear this case. Therefore, there will be no gross miscarriage of justice if the Court declines review. Ecology therefore asks the Court to deny the Klineburgers' Motion.

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III. THE KLINEBURGERS' PETITION FOR REVIEW SHOULD BE DENIED ON ITS MERITS

A. STATEMENT OF ISSUES

The Klineburgers' Petition is untimely and does not meet the RAP 13.4 criteria for discretionary review. Therefore, it should be denied.

However, if review is granted, the issues would be:

1. Does the application of state laws designed to protect the public from the hazards of flooding violate the Klineburgers' substantive due process rights and constitute an impermissible regulatory taking of the Klineburgers' property?
2. Does the consistent application of state laws designed to protect the public from the hazards of flooding deny the Klineburgers equal protection under the law?

B. COUNTERSTATEMENT OF THE CASE

1. Statutory Background

In order to protect the public from flood hazards, state law prohibits, with a few exceptions, residential development in a Federal Emergency Management Agency (FEMA) floodway.

RCW 86.16.041(2)(a). The reason for this prohibition is that the FEMA floodway is the area where the depths and velocities of floodwater are the greatest. 44 C.F.R. § 9.4 (2009) (entry for *Floodway*); *see also*

Administrative Record 472 (diagram showing the relative locations of the

floodway, floodplain, and the base flood elevation).¹ The statute allows repairs, reconstruction, or improvements to a residential structure in the floodway only if the cost of the repairs, reconstruction, or improvements does not exceed 50 percent of the market value of the structure.

RCW 86.16.041(2)(a). However, there is an exception that allows a property owner to rebuild a substantially damaged residential structure in the floodway under certain circumstances. RCW 86.16.041(4). This exception requires Ecology “to assess the risk of harm to life and property posed by the specific conditions of the floodway” and determine when, in its best professional judgment, the risks are low enough to allow a substantially damaged structure in the floodway to be rebuilt. *Id.* In its assessment, Ecology is required to make a “scientific analysis of depth, velocity, and flood-related erosion.” RCW 86.16.041(4). The law also requires Ecology to adopt rules guiding the assessment procedures and criteria to be used. RCW 86.16.041(5).

Ecology adopted WAC 173-158-076, which sets forth the conditions that must be met before Ecology will recommend that a

¹ The Index to the Clerk’s Papers for Cause No. 76458-6-1 identifies the administrative record that was provided by the Pollution Control Hearings Board to the Superior Court as one document with no separate page numbers. For the convenience of the court, and to avoid confusion, at the Court of Appeals for Cause No. 76458-6-1, both Ecology and the Klineburgers used the page numbers in that record. For consistency’s sake, that is how the documents are cited in this brief.

substantially damaged residential structure in the floodway be rebuilt. WAC 173-158-076(1)(b) provides that a substantially damaged residential structure in the floodway may only be rebuilt if there is no evidence of flood-related erosion. It further provides that the location of a project inside both a floodway and a channel migration zone² constitutes evidence of flood-related erosion. WAC 173-158-076(1)(b).

Relevant here, FEMA has determined that the area where the Klineburger property is located is in the 100-year floodplain and in the associated floodway.³ AR 56, 153, 157. King County has determined that the Klineburgers' property is in the channel migration zone of the three-forks area of the Snoqualmie River. AR 149, 153, 155, 205.

2. Procedural History

The Klineburgers seek to rebuild a substantially damaged residence in the floodway and channel migration zone of the Snoqualmie River. They have been through two separate rounds of litigation in this

² The channel migration zone is the area where over which river is known to have migrated in the past and is expected to migrate in the future. AR 65, 149, 151, 165. Unlike the FEMA floodway, channel migration zones are identified solely by local governments. WAC 173-26-201(3)(c)(vii), -221(3)(b).

³ The Klineburgers use the terms "floodway" and "floodplain" interchangeably. However, the terms are different and refer to different areas. The floodway is the area within the floodplain where the depths and velocities of floodwater are the greatest. 44 C.F.R. § 9.4 (2009)(entry for *Floodway*); *see also* AR 472 (diagram showing the relative locations of the floodway, floodplain, and the base flood elevation). Keeping the floodway clear is necessary because the floodway drains the flood. *Id.* For these reasons, development in the floodway is more strictly regulated than development in the floodplain.

effort. In their current Petition for Review, the Klineburgers confuse these two efforts. Both cases are described below to provide a complete history and to clarify the issues and the record that are before the Court in this second round from the issues and record that were litigated in the first round.⁴

The Klineburgers' first round of litigation began as a code enforcement action brought by King County against the Klineburgers for illegally placing a mobile home on their property. AR 222 ¶ 1. The previous residence on the property had been destroyed. *Id.* ¶ 4. When the Klineburgers sought to obtain the required permits for the mobile home, the County, on the recommendation of Ecology, determined that the Klineburgers' project did not meet the requirements under RCW 86.16.041 and WAC 173-158-076 for rebuilding a substantially damaged residential structure in the floodway. AR 223 ¶¶ 6, 7. The Klineburgers appealed this determination to the King County Hearing Examiner, who found that the County was bound by Ecology's recommendation. AR 224 ¶ 2, AR 225 ¶ 3.

⁴ For example, the citations to Clerk's Papers in the Klineburgers' Petition to the Clerk's Papers from the first round at the Court of Appeals; they are not to the Clerk's Papers from this case. The documents the Klineburgers cite are in the record for this case, and appended to this brief in a table cross referencing the first round Clerk's Papers citations used by the Klineburgers in their Petition and the citations to those same documents in this litigation.

The Klineburgers appealed the Hearing Examiner's decision to King County Superior Court. The King County Superior Court agreed that Ecology's recommendation governed the County, but overruled Ecology's determination and found that the Klineburgers' project met the requirements for rebuilding a substantially damaged residential structure in the floodway. AR 227–31. Ecology was not a party to either the County Hearing Examiner proceeding or the superior court proceeding. AR 217 ¶ 4.

King County appealed the superior court decision to the Court of Appeals (AR 233–34), and Ecology intervened. AR 241–42. The Court of Appeals ruled that the superior court did not have jurisdiction to review Ecology's determination, and that the Klineburgers should have appealed that determination to the Pollution Control Hearings Board (Board). AR 244–64. The Klineburgers sought review of that decision in this Court. AR 266–89. However, the Klineburgers withdrew their petition for review and ended the first round of litigation when Ecology agreed to reissue its determination concerning their project, and provide the Klineburgers with the opportunity to appeal Ecology's determination to the Board. AR 332–37.

The current round of litigation began when the Klineburgers appealed Ecology's reissued determination to the Board. The Board

upheld Ecology’s determination, finding on summary judgment that the undisputed location of the Klineburgers’ property in both the FEMA floodway and the channel migration zone of the Snoqualmie River provided evidence of flood-related erosion under WAC 173-158-076(1)(b) and barred their project. AR 501–13. The Board denied the Klineburgers’ Petition for Reconsideration. AR 611–13.

The Klineburgers appealed the Board’s decision to King County Superior Court, adding the claim that the application of the erosion standard denied them equal protection under the law. CP 4–23.⁵ The Superior Court upheld the Board’s decision and determined that the application of WAC 173-158-076(1)(b) did not deny the Klineburgers equal protection under the law. CP 1–3. At the Court of Appeals, the Klineburgers no longer questioned the determination that RCW 86.16.041 and WAC 173-158-076 prohibited them from rebuilding a residence on their property. Instead, they claimed the application of WAC 173-158-076(1)(b) constituted a regulatory taking of private property, violated their substantive due process rights, and violated their right to equal protection. *See Klineburger v. Ecology*, 4 Wn. App. 2d 1077 (2018) (Klineburger II) (unpublished). The Court of Appeals ruled that the

⁵ This reference to Clerk’s Papers is to the Clerk’s Papers designated in this second round of litigation.

takings and substantive due process claims were not ripe, and found that the Klineburgers had not been denied equal protection. *Klineburger II*, 4 Wn. App. 2d at *6. The Klineburgers now seek review by this Court.

C. THE KLINEBURGER CASE DOES NOT MEET THE REQUIREMENTS FOR REVIEW BY THE SUPREME COURT

A petition for review will be accepted by this Court only: (1) if the decision by the Court of Appeals is in conflict with a decision of the Supreme Court; (2) if the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals; (3) if a significant question of law under the Constitution of the State of Washington or of the United States is involved; or (4) if the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

RAP 13.4(b). None of the issues raised by the Klineburgers meet this criteria.

1. The Court of Appeals decision is consistent with *Powers*

The Klineburgers assert that the Court of Appeals' decision conflicts with *Powers v. Skagit County*, 67 Wn. App. 180, 835 P.2d 230 (1992). Petition at 4. The Klineburgers are mistaken. The two decisions are consistent.

Both the *Powers* court and the *Klineburger* court applied the

takings analysis articulated in *Guimont v. Clarke*, 121 Wn.2d 586, 854 P.2d 1 (1993), and the substantive due process analysis developed in *Presbytery of Seattle v. King County*, 114 Wn.2d 320, 787 P.2d 907 (1990).

In *Powers*, the Court of Appeals ruled that there were insufficient facts in evidence to determine whether the application of RCW 86.16.041 to Mr. Powers' property deprived him of all economically viable use of his property. *Powers*, 67 Wn. App. at 191–92. The court did not review the application of the statute to the property in question. Rather, it assumed the statute precluded residential development on his property and then analyzed whether this prohibition violated Mr. Powers' constitutional rights. *Id.* at 183–84. The court found there were insufficient facts in evidence to determine whether Mr. Powers had been deprived of all economically viable use of his property. *Id.* at 195. Likewise, the court found there was insufficient information to engage in the balancing process required to determine whether Mr. Powers' substantive due process rights had been violated. *Id.* It therefore remanded the matter for the trial court to make that determination. *Id.*

Similarly, in the Klineburgers' case, the Court of Appeals did not evaluate whether RCW 86.16.041 and WAC 173-158-076 applied to the Klineburgers' property. Rather, the court looked at whether the application

of those laws violated the Klineburgers' constitutional rights.

Klineburger II, 4 Wn. App. 2d at *2–3. As an initial matter, the Court of Appeals determined that the issue was not ripe because the Klineburgers had not presented any evidence they had been deprived of *all* economically viable use of their property. *Klineburger II*, 4 Wn. App. 2d at *3. The court also found the substantive due process claim unripe because evidence in the record was not sufficient to engage in the required balancing test. *Id.* at *5.

The Court of Appeals went on to hold that no taking had occurred because the regulations at issue provided only a public benefit and had not impaired all uses of the Klineburgers' property. *Id.* at *4. The court also found no violation of the Klineburgers' substantive due process rights because the Klineburgers had failed to show the regulation was unduly oppressive. *Id.* at *5.

The fact that the *Powers* court remanded the case and the *Klineburger* court did not does not constitute a conflict between the two cases. Both cases apply the same legal principles and reach similar conclusions. The difference in the resolution of the two cases arises from the difference in their procedural postures: The Klineburgers combined their appeal of the underlying permitting decision with their constitutional claims, while Powers filed a separate takings lawsuit in superior court.

This difference does not establish a basis for review by this Court because there is no disputed legal principle at stake for this Court to resolve.

As noted above, the Court of Appeals decision in this case is also consistent with the takings analysis articulated in *Guimont*, and the substantive due process analysis developed in *Presbytery of Seattle*.

Thus, there is no basis for this Court to grant review.

2. The Court of Appeals' decision does not conflict with the United States Supreme Court's decision in *Lucas v. South Carolina Council*

The Klineburgers make the conclusory statement that WAC 173-158-076(1)(b) is unconstitutional under *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 12 S.Ct. 2886, 120 L.Ed. 798 (1992). Petition at 5. *Lucas* provides that a regulation depriving a property owner of all economically viable uses of property is a taking of private property that requires compensation. *Lucas*, 505 U.S. at 1027–28. As the Court of Appeals found, *Klineburger II* at 3, the Klineburgers provide no facts or argument to establish that they have been deprived of all economically viable uses of their property.

The only statement in the Klineburgers' Petition concerning the remaining possible uses of their property is the assertion that on December 18, 2012, Ecology issued a letter stating that no development should be allowed on the Klineburger property. Petition at 2. However, the

letter in question addresses only the rebuilding of a substantially damaged residential structure on the Klineburger property. AR 201–03. The letter makes no representations about other possible uses, and does not state that no development should be allowed. AR 201–03. As the Court of Appeals noted, “no government entity has made a decision about any other possible use” of the Klineburgers’ property. *Klineburger II* at 3. Therefore, there has been no showing that the “total taking” standard in *Lucas* applies to the Klineburgers’ property.

3. The Klineburgers’ issues of fact do not support their constitutional claims

Instead of providing facts concerning uses of their property, the Klineburgers raise three other purported issues of fact that they claim show their substantive due process violations and taking claims are ripe. Petition at 6. Those issues of fact concern (1) the flood depths at the Klineburger property, (2) the Klineburgers’ expert’s evaluation of flood-related erosion on their property, and (3) the flood warning times for their property. Petition at 6–11. None of these factual issues are relevant to the question of whether the application of the state’s flood laws deprives the Klineburgers of all economically viable uses of their property. Rather, they go to the underlying question of how the flood laws should apply to the Klineburgers’ project in the first instance.

In fact, the Pollution Control Hearings Board considered these three issues, and agreed with the Klineburgers that there are issues of fact concerning the flood depths⁶ and flood warning times at their property, and therefore did not grant summary judgment on those issues.

AR 509–10. However, on the question of flood-related erosion, the Board determined that the location of the property in both the FEMA floodway and the channel migration zone constituted evidence of flood-related erosion.⁷ AR 512. This conclusion meant that the Klineburgers had failed to establish all the criteria necessary under WAC 173-158-076 to allow their construction to proceed. On that basis, the Board dismissed the Klineburgers' appeal. The factual issues that the Klineburgers raise here are irrelevant.

4. This case does not involve any significant question of law under the Constitution of the State of Washington or of the United States

The Klineburgers assert that this case involves a significant question of law under the Fourteenth Amendment of the Constitution of

⁶ The Klineburgers claim the Board misconstrued their evidence concerning flood depths. Petition at 7. In fact, the Board did not address the evidence concerning flood depths, noting only that there were facts in dispute on that issue that precluded summary judgment. AR 510.

⁷ The Klineburgers claim the resume of their expert, William Taylor, shows that he worked on 27 other projects in the floodway, none of which were denied. Petition at 7. In fact, Mr. Taylor's resume says that he has worked on 27 projects in the floodplain—not the floodway. AR 556. There is no indication that he has ever worked on a project in the floodway. *Id.*

the United States. Petition at 4. However, this Court should not consider that assertion as the Klineburgers provide no argument to support their claim. *State v. Hill*, 123 Wn.2d 641, 648, 870 P.2d 313 (1994) (court will not address constitutional arguments unsupported by adequate briefing); *Havens v. C&D Plastics, Inc.*, 124 Wn.2d 158, 169, 876 P.2d 435 (1994) (appellate court will not consider constitutional arguments that are not supported by adequate briefing).

In addition, resolving the constitutional issues the Klineburgers raise involves the routine application of settled case law, and does not raise any new or significant questions of law. *See, e.g.*, for takings claims: *Maple Leaf Investors, Inc. v. Dep't of Ecology*, 88 Wn.2d 726, 733, 565 P.2d 1162 (1977) (the prohibition on construction for human habitation within the floodway is not a taking or damaging of private property for public use in violation of the Washington Constitution Article 1, Section 16 and the Fifth Amendment of the U.S. Constitution); for substantive due process claims: *Cradduck v. Yakima County*, 166 Wn. App. 435, 447, 450–51, 271 P.3d 289 (2012) (ban on residential development in the floodway regulates problem activities or conditions, is not unduly oppressive, and does not violate substantive due process); for equal protection claims: *Maple Leaf Investors*, 88 Wn.2d at 733

(restricting development in the floodway is a valid exercise of the state's police power that does not violate the constitutional right to equal protection); and *Meridian Minerals Co. v. King County*, 61 Wn. App. 195, 214, 810 P.2d 31 (1991) (equal protection is not denied when the same legal standard is applied to all similarly situated land owners).

Because the Klineburgers have not met the criteria for review under RAP 13.4(b), Ecology asks the Court to deny the Klineburgers' Petition for Review, if it reaches the merits of the Petition.

IV. CONCLUSION

The Court should deny the Klineburgers' Motion to Extend Time and preclude their untimely Petition for Review. Even if the Court proceeds to the merits, there is no reason for the Court's review. The Court of Appeals decision in this case is consistent with previous case law

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and does not involve any significant questions of law under the
Constitution.

RESPECTFULLY SUBMITTED this 5th day of December 2018.

ROBERT W. FERGUSON
Attorney General



KATHARINE G. SHIREY
Assistant Attorney General

WSBA No. 35736

Attorneys for Respondent

State of Washington, Department of Ecology

P.O. Box 40117

Olympia, WA 98504-0117

360-586-6769

kay.shirey@atg.wa.gov

CERTIFICATE OF SERVICE

I certify, under penalty of perjury under the laws of the state of Washington, that on this date I caused to be served a true and correct copy of the foregoing document upon the parties using the Appellate Court Portal filing system, which will send electronic notification of such filing to the following:

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Ste 205	allen@atmlawoffice.com
Olympia, WA 98502	andrea@atmlawoffice.com]

Attorney for Appellants

DATED at Olympia, Washington, this 5th day of December 2018.


MEAGHAN KOHLER
Legal Assistant

APPENDIX

Cross-walk Table of References

Table 1: Cross-walk between the clerks papers (CP) referenced in the Klineburgers’ Petition for Review (which are from the first Klineburger case) and where those documents can be found in the administrative record for this case. At the court of appeals in his case, both parties referenced the administrative record (AR) rather than the clerks papers because the Index to the Clerk’s Papers in this case identifies the administrative record as one document with no separate page numbers.

CP from first Klineburger case referenced in Klineburgers’ Petition for Review in this case	Document	AR at the court of appeals in this case
CP 157	Superior court ruling in the first Klineburger case	AR 227-231
CP 158	Superior court ruling in the first Klineburger case	AR 227-231
CP 278	Transcript of hearing before the King County Hearing Examiner (Transcript) p. 21	AR 385
CP 280	Transcript p. 23	AR 387
CP 283	Transcript p. 26	AR 390
CP 284	Transcript p. 27	AR 391
CP 285	Transcript p. 28	AR 392
CP 286	Transcript p. 29	AR 393
CP 292	Transcript p. 36	AR 400
CP 293	Transcript p. 37	AR 401
CP 295	Transcript p. 38	AR 402
CP 296	Transcript p. 40	AR 403
CP 309	Transcript p. 52	AR 529
CP 381-382	Ecology Oct 22, 2012 letter	AR 184-185

CP 384	Ecology Dec 18, 2012 letter	AR 201-203
CP 409-410	Taylor report July 27, 2012	AR 165-182 Also AR 357-366
CP 416	Taylor report July 27, 2012	
CP 423-435	Taylor report October 29, 2012	AR 187-188+ Also AR 368-380
CP 436-438	Ecology letter December 18, 2012 (same as CP 384)	AR 201-203
CP 487	Taylor Feb 15, 2013 report	AR 339

ATTORNEY GENERAL'S OFFICE - ECOLOGY DIVISION

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