

FILED
SUPREME COURT
STATE OF WASHINGTON
6/22/2021 10:44 AM
BY SUSAN L. CARLSON
CLERK

NO. 99778-1

IN THE SUPREME COURT OF THE STATE OF
WASHINGTON

STEPHEN AND SANDRA KLINEBURGER,

Petitioners,

v.

KING COUNTY DEPARTMENT OF PERMITTING AND
ENVIRONMENTAL REVIEW,

Respondent.

KING COUNTY'S ANSWER TO PETITION FOR REVIEW

DANIEL T. SATTERBERG
King County Prosecuting Attorney

MICHAEL D. HEPBURN, WSBA #14378
JILL HIGGINS HENDRIX, WSBA #16312
Senior Deputy Prosecuting Attorneys
Attorneys for Respondent

King County Prosecuting Attorney
King County Courthouse
516 Third Avenue, Suite W400
Seattle, Washington 98104
(206) 477-1120

TABLE OF CONTENTS

Table of Authorities.....	iii
I. STATEMENT OF THE FACTS.....	1
A. The five Klineburger appeals	1
1. <i>Klineburger v. King Cty. Dep't of Dev. & Env't Servs. Bldg., 189 Wn. App. 153, 356 P.3d 223 (2015) Court of Appeals No. 71325-6-I, (Klineburger I)</i>	2
2. Court of Appeals No. 76458-6-I (<i>Klineburger II</i>).....	2
3. Court of Appeals No. 79028-5-I (<i>Klineburger III</i>).....	3
4. King County Superior Court No. 19-2-22857- 1 SEA; Court of Appeals No. 81486-9-I (<i>Klineburger IV</i>).....	4
5. Court of Appeals No. 80928-8-I (<i>Klineburger V</i>).....	4
B. The petitioner's arguments	5
II. ISSUES PRESENTED	6
III. AUTHORITIES AND ARGUMENT	7
A. This case does not meet the standard for discretionary review	7
B. As the Court of Appeals correctly concluded, the opinion in Court of Appeals No. 79028-5-I,	

issued November 12, 2019, was not determinative of the issue in this case.....	8
C. The 28-day notice requirement of CR 56 was met.....	14
IV. CONCLUSION	16

TABLE OF AUTHORITIES

Cases

<i>Klineburger v. King County. Dep't of Dev. & Env't Servs. Bldg., 189 Wn. App. 153, 356 P.3d 223 (2015) (Klineburger I)</i>	2
<i>Klineburger v. Wa State Dep't of Ecology, Court of Appeals No. 76458-6-I, 2018 WL 3853574 (August 13, 2018), 4 Wn.App.2d 1077 (2018), (Klineburger II)</i>	2, 3
<i>Klineburger v. King County Dep't of Permitting and Env't Review, Court of Appeals No. 79028-5-I, 2019 WL 5951532 11 Wn.App.2d 1019 (2019), (Nov. 12, 2019) (Klineburger III)</i>	<i>passim</i>
<i>Klineburger v. King County Dep't of Permitting and Env't Review, Court of Appeals No. 81486-9-I, 2021 WL 1530066 (April 19, 2019) (Klineburger IV)</i>	4, 13
<i>Klineburger v. King County Dep't of Permitting and Env't Review, Court of Appeals No. 80928-8-I, 2021 WL 1701267 (April 26, 2021) (Klineburger V)</i>	4, 5

Statutes and Court Rules

RCW 36.70C.130(1)(b).....	12, 13
RCW 36.70C.130(1)(c)	12, 13

RCW 36.70C.130(1)(d).....	12, 13
RAP 13.4	8
RAP 13.4(b)	7
RAP 13.4(b)(3).....	7, 8
RAP 13.4(b)(4).....	7, 8
CR 56.....	6, 7, 14, 15, 16

I. STATEMENT OF THE FACTS

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

A. The five Klineburger appeals.

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

Act, and then to Division One of the Court of Appeals. Each case and procedural history are listed here:

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

The Klineburgers filed an appeal of a hearing examiner decision in DPER case number E1100560 in King County Superior Court, *Klineburger I, supra., p. 162*. The superior court reversed the hearing examiner's decision. *Id., 162-163*. DPER appealed and the Klineburgers cross appealed in Court of Appeals No. 71325-6-I. The Court of Appeals reversed the superior court decision and affirmed the decision of the hearing examiner. *Id., p. 174*.

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

Klineburgers filed an appeal of the decision of the Washington State Department of Ecology with the Pollution Control Hearings Board (PCHB), which

dismissed their appeal on summary judgment.

Klineburger II, supra, at pp. 4-5. The superior court affirmed PCHB's summary judgment dismissal. *Id, at p.*

5. The Klineburgers appealed in Court of Appeals No.

76458-6-I. *Id.* The Court of Appeals affirmed the

superior court dismissal. *Id., at p. 16.*

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

The Klineburgers filed an appeal of a hearing examiner decision in King County Superior Court. *Klineburger*

III, supra, p. 4. The superior court dismissed the appeal with prejudice on summary judgment. *Id., pp. 4-5.* The

Klineburgers appealed in Court of Appeals No. 79028-5-

I. *Id., p. 1.* The Court of Appeals upheld the dismissal

in part, reversed in part, and remanded the case to

superior court. *Id., p. 7 and p. 9.*

4. *Klineburger v. King County Dep't of Permitting and Env't Review*, Court of Appeals No. 81486-9-I, 2021 WL 1530066 (April 19, 2019) (*Klineburger IV*).

On August 30, 2019, the Klineburgers filed an appeal of the hearing examiner decision which assessed civil penalties against the Klineburgers in DPER case number E1100560, in King County Superior Court No. 19-2-22857-1 SEA. CP 4. The superior court dismissed the appeal on summary judgment. CP 279-282. The Klineburgers appealed. CP 283-284. On April 19, 2021 the Court of Appeals affirmed the dismissal. *Klineburger IV, p. 2 and p. 8*. This is the matter for which the Klineburgers are seeking review in this petition.

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

On November 15, 2019, the Klineburgers filed a motion for order consolidating King County Superior Court case number 18-2-09782-7 SEA, after its remand from Court of Appeals in case number 79028-5-I with King County Superior Court No. 19-2-22857-1 SEA. CP 253, *Klineburger V, supra, p. 1-2*. On December 6, 2019, the superior court denied the

motion to consolidate and dismissed the remanded case with prejudice. *Klineburger V*, at p. 2. The Klineburgers appealed in Court of Appeals No. 80928-8-I. The Court of Appeals affirmed the dismissal. *Klineburger V*, p. 2, and p. 8. The Klineburgers filed a separate petition for discretionary review in this Court in that matter.

B. The petitioners' arguments.

The Klineburgers assert in their petition for discretionary review that the trial court erred by dismissing their LUPA appeal without giving due consideration to a Division One unpublished opinion issued on November 19, 2019 (*Klineburger v. King County Department of Permitting and Environmental Review*, No. 79028-5-I, Westlaw Citation *11 Wn.App.2d 1019* (2019), Appendix B to the petition for discretionary review) (referred herein as *Klineburger III*), which affirmed in part and reversed and remanded in part an unrelated LUPA appeal that they filed with superior court in 2018. See *Petition for Discretionary Review*, p. 4.

Beginning at page 7, the Klineburgers' petition asserts a second claim, i.e., that they were not provided 28 days' notice as prescribed by CR 56, and that the alleged lack of 28' days notice violated their due process rights to proper notice and a meaningful opportunity to be heard.

In fact, however, the clerk's papers in the appellate record conclusively demonstrate that the Klineburgers actually received 28 days' notice from the date the County filed its motion and the date of entry of summary judgment. Therefore, the Klineburgers' claim that they were deprived of due process in the proceedings which led to summary judgment dismissal of their LUPA appeal is false, and therefore frivolous.

II. ISSUES PRESENTED

1. Should this Court deny the petition for discretionary review herein, where the Klineburgers falsely allege that the Division One opinion in *Klineburger III* overturned the underlying Superior Court Land Use Petition Act decision herein?
2. Should this Court deny the petition for discretionary review herein, where the

Klineburgers falsely allege that they received less than the 28 day notice required under CR 56, and Respondent has demonstrated that the required notice was provided?

III. AUTHORITIES AND ARGUMENT

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

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

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

RAP 13.4 (b). The Klineburgers summarily assert that the decision by Division One satisfies RAP 13.4 (b) (3) and (b) (4).

The Klineburgers' "Issue Presented for Review" is whether Division One erred by affirming the trial court's

dismissal of their LUPA appeal in light of a decision by Division One which was rendered on November 12, 2019 in *Klineburger III*, an unrelated unpublished opinion. See Petition for Review, p. 4. This issue statement, by itself, does not satisfy the criteria specified in either RAP 13.4 (b) (3) or (b) (4). Further, the Klineburgers' petition fails to explain how the issue they present relates to this Court's review criteria under RAP 13.4. For these reasons, this Court should deny this petition for discretionary review.

B. As the Court of Appeals correctly concluded, the opinion in Court of Appeals No. 79028-5-I, issued November 12, 2019, was not determinative of the issue in this case.

The Klineburgers' petition misrepresents the relationship between the two Division One opinions in their Appendices in order to create the appearance of a genuine issue that would merit the exercise of this Court's discretionary review. For example, the Klineburgers misrepresent that in *Klineburger III*, Division One reversed and remanded, "the underlying case that gave rise to the civil penalties at issue in this case."

Petition, at 1. Nothing could be further from the truth. Rather, the *Klineburger III* decision remanded superior case number 18-2-09782-7 SEA for determination of whether three assignments of error under LUPA were committed by the trial court in that case, and only that case. See *Klineburger III*, at pp. 4 and 7. The *Klineburger III* opinion has no legal effect upon the superior court cause number 19-2-22857-1 SEA, the LUPA petition at issue in this case.

This case arose out of an administrative proceeding in which the County issued a Notice and Order against the Klineburgers on January 9, 2012, for their illegal placement of a mobile home. Proof of this fact is shown by the Klineburgers' LUPA petition filed in this case. CP 5. The LUPA petition states the following allegations:

IV. IDENTIFICATION OF THE DECISION MAKING BODY OR OFFICER

The decision-making body is the Office of the Hearing Examiner for King County, Washington ("Hearing Examiner"). *On*

August 9, 2019 the Hearing Examiner dismissed Petitioners' appeal of the Code Enforcement action against Petitioners by the King County Department of Development and Environmental Review, File Number ENFR 1100560. . .

CP 5: 18-20. A copy of the Hearing Examiner's August 9, 2019 decision was attached to the LUPA petition. Finding 3 of the Examiner's decision documents that the Examiner found:

On January 9, 2012, the King County Department of Development and Permitting and Environmental Services, (now Department of Local Services Permitting Division (Permitting) issued a Notice and Order to the Klineburgers, citing the placement and occupancy of a mobile home without the required permits, inspections, and approvals and encroaching upon an environmental critical area (the floodway) Exhibit 2; Exhibit 4, Finding 1.

(Emphasis in italics added.) *CP 12, ¶ 3, Finding 3.*

That the January 9, 2012 Notice and Order was issued in the same case in which the Klineburgers' civil penalties at issue in this case were assessed is also documented in Division One's careful recitation of the factual and lengthy procedural history

of that case. The Court of Appeals decision in this case accurately recites the complete history of the County's code enforcement in the 2012 case, and makes *no* reference to the County's Notice and Order that it issued against the Klineburgers on October 26, 2017 in the *Klineburger III* case.

The *Klineburger III* opinion, attached as Appendix B to the petition, further supports the County's position that review is unwarranted. The *Klineburger III* opinion documents the completely different facts that gave rise to the County's issuance of its October 26, 2017 Notice and Order against the Klineburgers, as well as a completely different appellate history of the *Klineburger III* case. Significantly, in *Klineburger III* the Court of Appeals made no reference to the County's January 9, 2012 Notice and Order, confirming that the 2012 Notice and Order is separate from the Notice and Order at issue in the *Klineburger III* case.

The above thus demonstrates conclusively that the County's 2012 code enforcement action, i.e., the underlying

case which is the basis for the County's civil penalty assessment at issue in this case, is separate from the enforcement action at issue in *Klineburger III*. The inescapable conclusion is that the disputes presented in the cases in the Klineburgers' appendices are wholly separate. For this reason, the *Klineburger III* remand did not reverse the civil penalty assessment at issue in this case.

In this case, the Court of Appeals, convinced by the County's showing, unequivocally rejected the Klineburgers' attempt to conflate the cases, holding:

The Klineburgers say that a genuine issue of material fact exists because the trial court should have, but did not conduct a hearing under RCW 36.70C.130(1)(b), (c), and (d), as ordered on remand by our opinion in *Klineburger v. King County Department of Permitting and Environmental Review*, No. 79028-5-I (Wash. Ct. App. Nov. 12, 2019) (unpublished) <http://www.courts.wa.gov/opinions/pdf/790285.pdf>. [*Klineburger III*]. But as King County notes, our ruling in that case concerns an entirely different

matter—an appeal of a hearing examiner’s decision from March 2018, which considered a notice and order issued by King County on October 26, 2017. Our remand for the trial court to consider the hearing examiner’s decision under RCW 36.70C.130(1)(b), (c), and (d) on remand relates to the March 2018 hearing examiner decision at issue in the linked appeal, not the August 2019 hearing examiner decision at issue here. And nothing in [*Klineburger III*], contrary to the Klineburgers’ assertions, held the civil penalties order in legal abeyance.

[bracketed references to *Klineburger III* added.] *Klineburger v. King County Dept., 81486-9-I, p. 4* (April 19, 2021).

The Klineburgers’ petition does not *directly* challenge Division One’s lengthy recitation of the 2012 code enforcement case, or the court’s point that *Klineburger III* is unrelated to the 2012 case. Rather, the Klineburgers shamelessly substituted the facts recited in the *Klineburger III* opinion in their petition to this Court in place of the true facts, i.e., the 2012 case facts, in an attempt to create the false impression that the remand in *Klineburger III* applies to the underlying LUPA appeal that is

at issue in this case. This ‘sleight of hand’ approach warrants denial of the petition.

C. The 28-day notice requirement of CR 56 was met.

The 28-day notice requirement for King County’s summary judgment motion was satisfied. CP 187, ¶ 5, 188, 258, and 279-282. Thus, any due process claim is without merit.

On November 1, 2019, King County Superior Court Judge Melinda Young entered an order following the Initial Hearing. CP 186-187. The trial court’s order set a December 6, 2019 hearing date for King County’s summary judgment motion, at the County’s request, and explicitly ordered the parties to comply with CR 56, stating:

5. The Court has set a hearing date of December 6, 2019 to hear King County’s Motion for Summary Judgment of Dismissal. Respondent (King County) shall file a Note for the Motion for Summary Judgment in accordance with the King County Local Rules and the parties shall

comply with CR 56 timelines for
submission of briefs and evidence.

CP 187, ¶ 5.

King County's motion bears a filing stamp from the Court Clerk, which clearly evidences that the County filed its motion on November 8, 2019, at 9:34 a.m., in strict compliance with the 28-day notice requirement of CR 56 for the December 6, 2019 hearing date ordered by the trial court. CP 188.

On November 26, 2019, the Klineburgers filed their "Petitioners' Brief In Opposition to Respondent's Motion for Summary Judgment and In Support of Motion to Consolidate Cases." CP 258. The Court Clerk's stamp on the face of the Klineburgers' opposition to the County's summary judgment motion documents that their briefing was filed on November 26, 2019, at 9:00 a.m. *Id.*

Clearly, the Klineburgers' opposition was filed in conformance with CR 56 requirements, as their filing occurred eleven days before the December 6, 2019 hearing. It should be

equally clear from this evidence that the Klineburgers were granted a full and fair opportunity to be heard.

The Superior Court order granting the County's motion and dismissing the Klineburgers' LUPA appeal shows it was signed by the judge on December 6, 2019. CP 279, 281. The Court Clerk's stamp on the face page of order also reflects that her order was filed on the same date. CP 279.

Thus, the Order on Initial Hearing and the date and time stamps on the relevant pleadings by the Court Clerk irrefutably show strict compliance with the 28-day notice requirement of CR 56. There is no merit to Klineburgers' due process claims.

IV. CONCLUSION

While the numerous LUPA and Division One appeals filed by the Klineburgers are admittedly confusing, that does not provide them a basis upon which to deliberately use their confusing multiple appeals to mislead this Court in the hopes of improving the likelihood of success with their petition.

For the reasons stated herein, King County asks this Court to deny their petition for discretionary review.

Certificate of Compliance

This document contains 2625 words, excluding the parts of the document exempted from the word count by RAP 18.17.

DATED this 17th day of June, 2021.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: s/Michael Hepburn
MICHAEL D. HEPBURN, WSBA #14378

By: s/Jill Higgins Hendrix
JILL HIGGINS HENDRIX, WSBA #16312
Senior Deputy Prosecuting Attorneys
King County Prosecuting Attorney Office
WSBA Membership ID #91002
516 Third Avenue, W400
Seattle, Washington 98104
(206) 477-1120
Michael.hepburn@kingcounty.gov
Jill.hendrix@kingcounty.gov

Certificate of Service

I, Monica Erickson, certify under penalty of perjury of the laws of the state of Washington that on June 17, 2021, I caused the foregoing document to be delivered via the Washington State Appellate Courts' Electronic Filing Portal, as well as via Electronic Mail to the following parties:

Allen T. Miller, WSBA #12936
atmiller@lukins.com

Monica Erickson
Monica Erickson

6/17/2021
Date

KING COUNTY PROSECUTING ATTORNEYS OFFICE CIVIL DIVISION

June 22, 2021 - 10:44 AM

Transmittal Information

Filed with Court: Supreme Court
Appellate Court Case Number: 99778-1
Appellate Court Case Title: Sandra & Stephen Klineburger v. King County Dept. of Permitting

The following documents have been uploaded:

- 997781_Answer_Reply_20210622103731SC306352_5315.pdf
This File Contains:
Answer/Reply - Answer to Petition for Review
The Original File Name was Klineburger Answer 6.17.2021 corrected case number - signed cos.pdf

A copy of the uploaded files will be sent to:

- andrea@atmlawoffice.com
- atmiller@lukins.com
- jill.hendrix@kingcounty.gov
- liah.travis@kingcounty.gov
- mmoc@atmlawoffice.com
- sloomis@lukins.com

Comments:

Per the WA Supreme court clerk's office, KC submits this filing. This Answer was timely but inadvertently filed in another case number last week. This filing has a corrected case number on the cover page. Thank you.

Sender Name: Liah Travis - Email: liah.travis@kingcounty.gov

Filing on Behalf of: Michael David Hepburn - Email: michael.hepburn@kingcounty.gov (Alternate Email:)

Address:
516 3rd avenue Room W-400
Seattle, WA, 98104
Phone: (206) 477-1120

Note: The Filing Id is 20210622103731SC306352