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No. 81486-9-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STEPHEN AND SANDRA KLINEBURGER,

Petitioners,

v.

KING COUNTY DEPARTMENT OF PERMITTING AND ENVIRONMENTAL REVIEW,

Respondent.

PETITION FOR REVIEW

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TABLE OF AUTHORITIES

A. IDENTITY OF PETITIONERS

The Petitioners, Stephen and Sandra Klineburger respectfully request the Supreme Court to review the Court of Appeals' decision designated in Part B of this petition.

B. COURT OF APPEALS DECISION

Pursuant to RAP 13.4, the Petitioners respectfully ask the Court to review the Court of Appeals' decision entered on April 19, 2021. The Court of Appeals' decision is unpublished. A copy of the unpublished opinion is attached as Appendix A.

C. ISSUE PRESENTED FOR REVIEW

Whether the Court of Appeals erred when it affirmed the Superior Court's decision granting Respondent's motion for summary judgment and dismissing the LUPA appeal with prejudice, thereby upholding the unlawful assessment of a civil penalty against the Petitioners, notwithstanding the Court of Appeals reversal and remand of the underlying case that gave rise to the civil penalties at issue in this case.

D. STATEMENT OF THE CASE

The Petitioners, Stephen and Sandra Klineburger ("Klineburgers"), are the owners of Parcel No. 0323089039 in King County, located at 9609 428th Avenue SE, North Bend, Washington. The Klineburgers purchased the property on July 7, 2011 and have lived on and farmed the property since that time.

On October 26, 2017, the Department of Permitting and Environmental Review ("DPER") issued a Notice and Order to the Klineburgers alleging two land use violations, with respect to their property: (1) clearing and/or grading (fill) within four types of critical areas (floodways, aquatic, channel migration, shoreline and/or their buffers) in violation of specified provisions of the Grading, Critical Areas, and Shoreline codes, Chapters 16.82, 21A.24, and 21A.25 of the King County Code ("KCC" or "Code"), respectively; and (2) placement of a cargo container within these four types of critical areas and/or their buffers without the required permits.

The Klineburgers timely appealed the code enforcement action. The hearing for the appeal was held on July 11, 2019. The Klineburgers, as well as qualified experts, provided testimony in the proceedings before the County's Hearing Examiner. The Hearing Examiner denied the

appeal, affirming the imposition of civil penalties for the alleged violations. Appellants sought judicial review of the County Hearing Examiners decision by filing an appeal under the Land Use Petition Act ("LUPA"). RCW 36.70C., et seq. The Superior Court upheld the Hearing Examiner's decision in the underlying cause, Superior Court Case No. 18-2-09782-7 SEA, and dismissed the LUPA appeal with prejudice.

The Klineburgers appealed to Division I, and in an unpublished opinion dated November 12, 2019, the Court of Appeals reversed the dismissal of the LUPA appeal challenging the decision of the Hearing Examiner under RCW 36.70C.130(1)(b), (c) and (d). This opinion is attached as Appendix B.

Following the November 12, 2019 remand decision, Petitioners filed a motion to consolidate the instant case with the remanded case. The Superior Court erred by failing to follow the Court of Appeals' Unpublished Opinion dated November 12, 2019, with regard to Case No. 80928-8-I, wherein the Court of Appeals reversed the Superior Court and remanded. The motion to consolidate was denied and the Superior Court granted Respondents' motion for summary judgment on December 6, 2019 and dismissed the LUPA appeal with prejudice, thereby upholding the unlawful assessment of a civil penalty against the Klineburgers. The dismissal occurred only 24 days after the November 12, 2019 remand

decision. King County violated the CR 56 twenty-eight day time period required for a summary judgment motion hearing.

The Klineburgers appealed to Division I, and in an unpublished opinion dated April 19, 2021, the Court of Appeals affirmed the Superior Court. This Petition asks for reversal.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

This Petition for Review should be accepted under RAP 13.4(b)(3) and RAP 13.4(b)(4) because the decision of the Court of Appeals raises significant questions of law under both the U.S. and Washington constitutions, and involves significant issues of public interest under LUPA that should be determined by this Court.

The Klineburgers contend that the Superior Court erred when it dismissed their LUPA appeal with prejudice. The Court of Appeals' November 12, 2019 decision reversed and remanded the underlying case that gave rise to the civil penalties that were imposed in the case at bar. *See Clerk's pages No. 27.*

> "However, we reverse dismissal of the LUPA appeal challenging the decision of the hearing examiner under RCW 36.70C.130(1)(b), (c), and (d). The record establishes the court did not consider or reach the merits of the LUPA appeal challenging the hearing examiner decision under RCW 36.70C.130(1)(b), (c), and (d). The court did not address whether the hearing examiner erroneously interpreted the KCC, that the decision is not supported

> by substantial evidence, and that the decision is a clearly erroneous application of the law to the facts under RCW 36.70C.130(1)(b), (c), and (d)." Klineburger v. King Cnty. Dep't of Permitting & Envtl. Review, 2019 WL 5951532, at *4 (Wash. App. Div. 1, 2019).

The Court of Appeals' November 12, 2019 decision required the Superior Court to review the record and to reach a decision based on the merits. However, the Superior Court failed to follow the Court of Appeals' directive and dismissed this case on summary judgment only 24 days after the November 12, 2019 remand, unlawfully upholding the assessment of a civil penalty against the Klineburgers. King County violated CR 56 which requires 28 days' notice of a hearing on summary judgment. "CR 56(c)'s filing and service dates are calculated as 28 calendar days before the hearing," and "this rule applies to the date on which the hearing actually occurs." Cole v. Red Lion, 92 Wash. App. 743, 749, 969 P.2d 481, 485 (1998).

Such action deprived the Klineburgers of procedural due process, as required under both the U.S. Constitution and the Washington State Constitution. U.S. Const. amend XIV, § 1 ("nor shall any state deprive any person of life, liberty, or property without due process of law"); Wash. Const. Art. I, § 3 ("No person shall be deprived of life, liberty, or property, without due process of law").

Procedurally, following the denial of the motion to consolidate, the

two LUPA appeals should have remained separate, providing the Klineburgers with a full and fair opportunity to have both matters reviewed on the merits independently. The Superior Court had an obligation to follow the Court of Appeals' November 12, 2019 mandate with respect to the underlying case. The Superior Court must address whether "the hearing examiner erroneously interpreted the KCC," whether "the decision is not supported by substantial evidence," and whether "the decision is a clearly erroneous application of the law to the facts under RCW 36.70C.130(1)(b), (c), and (d)." Klineburger v. King Cnty. Dep't of Permitting & Envtl. Review, 2019 WL 5951532, at *4 (Wash. App. Div. 1, 2019). The decision to enter an order of dismissal without following the Court of Appeals' mandate to consider and reach the merits of the LUPA appeal under RCW 36.70C.130(1)(b), (c), and (d) constituted error because the outcome of the case at bar is completely dependent on a review of the underlying remanded case.

"The two touchstones of procedural due process are notice and the opportunity to be heard." Johnson v. City of Seattle, 184 Wash. App. 8, 18, 335 P.3d 1027, 1032 (2014). Parties are afforded "the opportunity to be heard at a meaningful time and in a meaningful manner." Post v. City of Tacoma, 167 Wash. 2d 300, 313, 217 P.3d 1179, 1186 (2009). "The fundamental requirement of due process is an opportunity to be heard

upon such notice and proceedings as are adequate to safeguard the right for which the constitutional protecting is invoked." Miller v. City of Sammamish, 9 Wash. App. 2d 861, 872, 447 P.3d 593, 600 (2019).

The Superior Court dismissed the case without considering and reaching the merits of the LUPA appeal under RCW 36.70C.130(1)(b), (c), and (d) as mandated by the Court of Appeals. Thus, the Klineburgers were not given a full and fair opportunity to be heard at a meaningful time or in a meaningful manner. Dismissing the case without providing them with procedural due process does not adequately guard against the erroneous deprivation of their interests. The timelines required in CR 56 were not complied with.

The Klineburgers deserve to have the Superior Court review the record and reach a decision based on the merits, as mandated by the Court of Appeals' November 12, 2019 opinion. To deny them such an opportunity deprives them of due process and jeopardizes the public's interest in adequately safeguarding against the erroneous deprivation of property.

F. CONCLUSION

The Court should accept review for the reasons indicated in Part E and should reverse the dismissal of this case and remand to the Superior

Court for further proceedings in compliance with the Court of Appeals' November 12, 2019 opinion.

RESPECTFULLY SUBMITTED this ~~19th~~ 18th day of May, 2021.

LUKINS & ANNIS, P.S.

By A. T. Miller
ALLEN T. MILLER
WSBA #12936
Attorney for Petitioners

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 18th day of May, 2021, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to all entities as follows:

Jill Higgins Hendrix King County Courthouse 516 3rd Ave. Rm. W400 Seattle, WA 98104-2388	☒ ☐ ☐ ☐ ☒	U.S. Mail Hand Delivered Overnight Mail Telecopy (FAX) Via email: Jill.hendrix@kingcunty.gov
Michael David Hepburn Office of the Prosecuting Attorney 516 3rd Ave. Rm W400 Seattle, WA 98104-2388	☒ ☐ ☐ ☐ ☒	U.S. Mail Hand Delivered Overnight Mail Telecopy (FAX) Via email: michael.hepburn@kingcounty.gov

SHEANA N. LOOMIS

No. 81486-9

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

SANDRA KLINEBURGER and STEPHEN KLINEBURGER, husband and wife,

Petitioners,

v.

KING COUNTY DEPARTMENT OF PERMITTING AND ENVIRONMENTAL REVIEW,

Respondent.

APPENDIX TO PETITION FOR REVIEW

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Appendix

A. *Klineburger v. King County Dept.*,
Court of Appeals Case No. 81486-9-I, Unpublished Opinion

B. *Klineburger v. King County Dept.,*
Court of Appeals Case No. 79025-5-I, Unpublished Opinion

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 18th day of May, 2021, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to all entities as follows:

Jill Higgins Hendrix King County Courthouse 516 3rd Ave. Rm. W400 Seattle, WA 98104-2388	☒ ☐ ☐ ☐ ☒	U.S. Mail Hand Delivered Overnight Mail Telecopy (FAX) Via email: Jill.hendrix@kingcunty.gov
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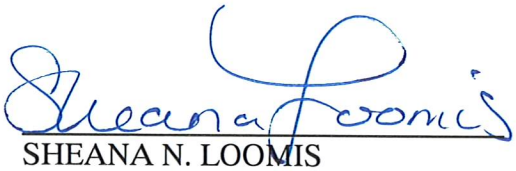

SHEANA N. LOOMIS

Appendix A

FILED
4/19/2021
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

SANDRA KLINEBURGER and STEPHEN KLINEBURGER, individually and the marital community comprised thereof, Appellants, v. KING COUNTY DEPARTMENT OF PERMITTING AND ENVIRONMENTAL REVIEW, Respondent.	No. 81486-9-I DIVISION ONE UNPUBLISHED OPINION

CHUN, J. — Sandra and Stephen Klineburger appeal the trial court's affirmance of a hearing examiner's imposition of civil penalties related to a mobile home on their property (Property). Since the Klineburgers raise no issue warranting reversal, we affirm.

I. BACKGROUND

The Klineburgers own property in King County that is entirely within a FEMA designated floodway and a Moderate Channel Migration Zone. On January 9, 2012, the King County Department of Permitting and Environmental Services issued a notice and order against the Klineburgers, "citing the placement and occupancy of a mobile home without the required permits, inspections, and approvals and encroaching upon an environmentally critical area."

The Klineburgers appealed the notice and order to a hearing examiner under the Land Use Petition Act (LUPA), chapter 36.70C RCW. The hearing examiner concluded that the Department of Ecology's denial of the Klineburgers' request for a floodway exemption bound King County and affirmed the notice and order. They then appealed the hearing examiner's decision to the superior court, which affirmed, and then to this court. In Klineburger v. King County Department of Development and Environmental Services Building, we affirmed the hearing examiner's decision.[1] 189 Wn. App. 153, 356 P.3d 223 (2015).

The Klineburgers also brought an administrative appeal before the Washington Pollution Control Hearings Board against the Department of Ecology related to the notice and order; the Board ruled against the Klineburgers and the trial court affirmed. The Klineburgers appealed and in Klineburger v. Department of Ecology,[2] we affirmed. Our Supreme Court denied review of Klineburger v. Department of Ecology on February 6, 2019.

On February 7, 2019, the King County Department of Local Services Permitting Division inspected the Property and, finding that the mobile home was still present 60 days past the date specified in its previous letter, imposed $7,200 in civil penalties. The Klineburgers appealed.

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[1] We also reversed a ruling by the trial court that is not at issue here. Klineburger, 189 Wn. App. at 174.

[2] No. 76458-6-I (Wash. Ct. App. Aug. 13, 2018) (unpublished) http://www.courts.wa.gov/opinions/pdf/764586.pdf

On August 9, 2019, a hearing examiner affirmed the civil penalty order. The Klineburgers petitioned for review by the superior court of the hearing examiner's decision. King County moved for summary judgment to dismiss the Klineburgers' LUPA appeal, which motion the trial court granted.

The Klineburgers appeal.

II. ANALYSIS

We review de novo a summary judgment ruling. Berst v. Snohomish County, 114 Wn. App. 245, 251, 57 P.3d 273 (2002). "We may affirm an order granting summary judgment if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law." Id. "A genuine issue of material fact exists where reasonable minds could differ on the facts controlling the outcome of the litigation." Ranger Ins. Co. v. Pierce County, 164 Wn.2d 545, 552, 192 P.3d 886 (2008). "When determining whether an issue of material fact exists, [we] must construe all facts and inferences in favor of the nonmoving party." Id.

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.[3] 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 our prior decision, contrary to the Klineburgers' assertions, held the civil penalties order in legal abeyance.[4]

The Klineburgers offer no other reason why we should reverse the trial court's grant of summary judgment; thus, we conclude the trial court did not err.[5]

The Klineburgers also request an award of attorney fees under RAP 18.1 and RCW 4.84.370. RCW 4.84.370 requires a court to award attorney fees and costs to the prevailing party in a land use decision; but under RCW 4.84.370(2),

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[3] We are to address this remanded matter in the linked appeal, Klineburger v. King County Department of Permitting and Environmental Review, No. 80928-8-I.

[4] The Klineburgers also say that the outcome of the instant appeal depends entirely on our disposition of the issues in the linked appeal. To the contrary, the two matters lack any legal or factual relation. The hearing examiner decision in the linked appeal relates to determinations that the Klineburgers improperly cleared and graded the Property and placed a cargo container without a permit. The hearing examiner decision here relates to civil penalties imposed by King County because of the Klineburgers' failure to remove their mobile home from the Property as ordered.

[5] King County says we should affirm the trial court's grant of summary judgment because the Klineburgers lack standing, the King County Code bars them from relitigating the underlying code violations, and the hearing examiner and superior court lacked jurisdiction to alter the floodway and channel migration zone determinations. Given our conclusion above, we need not reach these issues.

the county "whose decision is on appeal is considered a prevailing party if its decision is upheld at superior court and on appeal." Thus, King County, not the Klineburgers, is the prevailing party here.

We affirm and deny the Klineburgers' request for attorney fees and costs.

Chun, J.

WE CONCUR:

Cohen, J.

Andrus, A.C.J.

Appendix B

FILED
11/12/2019
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

SANDRA KLINEBURGER and STEPHEN KLINEBURGER, husband and wife,	)	No. 79028-5-I
	)	DIVISION ONE
Appellants,	)	
v.	)	
	)	UNPUBLISHED OPINION
KING COUNTY DEPARTMENT OF PERMITTING AND ENVIRONMENTAL REVIEW,	)	
Respondent.	)	FILED: November 12, 2019

SCHINDLER, J. — Stephen and Sandra Klineburger appeal the superior court order dismissing with prejudice the Land Use Petition Act, chapter 36.70C RCW, appeal they filed that challenges the decision of the King County hearing examiner affirming code enforcement violations. We affirm in part, reverse in part, and remand.

FACTS

Stephen and Sandra Klineburger own property located approximately 800 feet south of the middle fork of the Snoqualmie River near North Bend. The Federal Emergency Management Agency (FEMA) designated the entire property as a "floodway." A "floodway" is an area "where the flood hazard is generally highest, i.e., where water depths and velocities are the greatest." 44 C.F.R. § 9.4. King County

designated the property as a "conservancy shoreline" and a "channel migration zone." A "channel migration zone" is "the area along a river channel within which the channel can be reasonably predicted . . . to migrate over time as a result of natural and normally occurring hydrological and related processes when considered with the characteristics of the river and its surroundings." King County Code (KCC) 21A.06.182.

The majority of the property is designated as a "moderate hazard" area within the channel migration zone. The area designated as a moderate hazard channel migration zone "lies between the severe channel migration hazard area and the outer boundaries of the channel migration zone." KCC 21A.06.181E.

King County designated the southeast portion of the property as a "buffer" "aquatic area." An "aquatic area" is a "nonwetland water feature," including "[a]ll shorelines of the state, rivers, streams, marine waters and bodies of open water, such as lakes, ponds and reservoirs." KCC 21A.06.072C.A.1. A "buffer" is "a designated area contiguous to and intended to protect and be an integral part of an aquatic area or wetland." KCC 21A.06.122.

In Klineburger v. King County Department of Development & Environmental Services, Building & Fire Services Division, Code Enforcement Section, 189 Wn. App. 153, 158-59, 356 P.3d 223 (2015), we affirmed the decision of the King County hearing examiner that the county did not have the authority to address the decision of the Department of Ecology that the Klineburgers were prohibited from engaging in construction in the designated floodway.

In 2012, the Klineburgers placed a 400-square-foot "cargo container" on the southeast portion of the property that FEMA designated as a floodway and King County

designated as a conservancy shoreline area, a channel migration zone, and the aquatic buffer. The Klineburgers planned to use the cargo container as a "storage shed."

Between 2013 and 2017, the Klineburgers spread mulch, stacked "cords" and "rounds" of firewood, and removed blackberries and other vegetation on the southeast portion of the property. In 2017, the Klineburgers constructed a gravel driveway in the designated floodway area, conservancy shoreline area, and aquatic buffer.

On October 16, 2017, the King County Department of Permitting and Environmental Review (DPER) issued a "Notice of King County Code Violation" and an "Abatement Order" (Notice and Order). The Notice and Order cited the Klineburgers for violations of the KCC. The Notice and Order asserts the Klineburgers spread mulch, stacked firewood, removed blackberries and other vegetation, and constructed a gravel driveway without a "[c]learing and/or grading" permit in an area designated as a "Floodway, Aquatic, Channel Migration, [and] Shoreline and/or their buffers" and placed the cargo container "within environmentally critical areas and/or their buffers."

The Klineburgers appealed the Notice and Order to the King County hearing examiner. The Klineburgers argued the KCC did not require permits for agricultural uses such as spreading "mulch over a garden and around newly planted trees" or for removing "invasive species and revegetation." The Klineburgers argued the cargo container "is either not in violation of the Code or was 'approved' during the 2016 site inspection." The Klineburgers also asserted DPER "is selectively enforcing" the KCC.

A number of witnesses testified at the hearing and the hearing examiner admitted into evidence more than 30 exhibits. The Klineburgers submitted the declaration of expert witness Douglas Weber to support their argument that FEMA and King County

improperly designated and mapped the property as a floodway, conservancy shoreline area, and hazardous channel migration zone.

The hearing examiner entered a decision and extensive findings of fact and conclusions of law. The hearing examiner denied the appeal of the code enforcement citations for "[c]learing and/or grading (fill)" without a permit and "[p]lacement of a cargo container" without a permit. The hearing examiner granted the appeal as to the citation for removing grasses without a permit.

The Klineburgers timely filed a Land Use Petition Act (LUPA), chapter 36.70C RCW, appeal of the hearing examiner decision. The Klineburgers alleged the hearing examiner erred in interpreting the KCC, substantial evidence did not support the decision, and the decision was a clearly erroneous application of the law to the facts.

King County filed a motion to dismiss the LUPA appeal. King County argued the court lacked jurisdiction to review the FEMA floodway hazard designation, the Klineburgers failed to exhaust administrative remedies, and the LUPA appeal was barred by the doctrines of res judicata and collateral estoppel.

The superior court entered an order dismissing the LUPA appeal with prejudice. The court concluded it lacked jurisdiction "to review the federal flood hazard management designations and mapping"; the Klineburgers did not "exhaust available administrative remedies, specifically to change the federal special flood hazard management designations and mapping and county critical areas designations and mapping"; and the Klineburgers were precluded by the doctrines of res judicata and collateral estoppel from "re-litigation of the issues of the federal special flood hazard

management designations and mapping and county critical areas designations and mapping."

The court did not address the merits of the LUPA appeal challenging the decision of the hearing examiner to affirm the code enforcement violations. In the order dismissing the LUPA appeal with prejudice, the court struck the proposed findings that address whether the hearing examiner erroneously interpreted and applied the law and whether the findings of fact and conclusions of law are supported by substantial evidence.

ANALYSIS

The Klineburgers contend the superior court erred in dismissing the LUPA appeal with prejudice.

Judicial review of land use decisions is governed by LUPA. Abbey Rd. Grp., LLC v. City of Bonney Lake, 167 Wn.2d 242, 249, 218 P.3d 180 (2009). The party seeking reversal of a land use decision must meet the burden of establishing one of six enumerated standards set forth in RCW 36.70C.130(1). In this case, the Klineburgers challenged the hearing examiner decision in the LUPA appeal under RCW 36.70C.130(1)(b), (c), and (d):

> (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 before the court;
> (d) The land use decision is a clearly erroneous application of the law to the facts.

"In reviewing a land use decision, we stand in the same position as the superior court." Phoenix Dev., Inc. v. City of Woodinville, 171 Wn.2d 820, 828, 256 P.3d 1150

(2011). Under LUPA, the court reviews the administrative record of the "local jurisdiction's body or officer with the highest level of authority to make the determination." RCW 36.70C.020(2).

The superior court dismissed the LUPA appeal for failure to exhaust administrative remedies to challenge the FEMA floodway designation.[1] "To have standing to bring a land use petition, a party must have exhausted administrative remedies 'to the extent required by law.' " Cmty. Treasures v. San Juan County, 192 Wn.2d 47, 51, 427 P.3d 647 (2018) (quoting RCW 36.70C.060(2)(d)). The FEMA floodway designation is based on its "Flood Insurance Rate Map" and "Flood Hazard Boundary Map." 44 C.F.R. § 65.7(a); see KCC 21A.06.480, .476. To request a FEMA change to the floodway designation and mapping, the Klineburgers must submit documentation under 44 C.F.R. § 65.7 demonstrating the property meets certain requirements. The King County designation and mapping is based on FEMA's Flood Insurance Rate Map and Flood Hazard Boundary Map. KCC 21A.06.485. To change the King County designation and mapping, the Klineburgers must submit an application to amend or revise under KCC 21A.06.683 or .684.

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[1] We disagree that either res judicata or collateral estoppel supported dismissal of the LUPA appeal. In Klineburger, 189 Wn. App. at 158, we addressed the scope of the superior court's appellate review under LUPA. In Klineburger v. Washington State Department of Ecology, No. 76458-6-I (Wash. Ct. App. Aug. 13, 2018) (unpublished), http://www.courts.wa.gov/opinions /pdf/764586.pdf, we addressed the Department of Ecology's decision under WAC 173-158-076(1)(b) recommending denial of a permit to repair the Klineburgers' mobile home. See Williams v. Leone & Keeble, Inc., 171 Wn.2d 726, 730, 254 P.3d 818 (2011) (res judicata applies where subsequent action involves "the same subject matter," "same cause of action, "same person or parties," and "same quality of persons for or against whom the decision is made as did a prior adjudication"); Christensen v. Grant County Hosp. Dist. No. 1, 152 Wn.2d 299, 307, 96 P.3d 957 (2004) (collateral estoppel applies where "(1) the issue decided in the earlier proceeding was identical to the issue presented in the later proceeding; (2) the earlier proceeding ended in a judgment on the merits; (3) the party against whom collateral estoppel is asserted was a party to, or in privity with a party to, the earlier proceeding; and (4) application of collateral estoppel does not work an injustice on the party against whom it is applied").

The undisputed record shows the Klineburgers did not submit a request to amend or revise either the FEMA floodway designation or the King County designations. Stephen[2] testified he planned to challenge the King County channel migration zone designation of his property and was in the process of "contacting people and we're going to pursue this more legally in the future." Because the Klineburgers did not exhaust administrative remedies, we affirm the superior court decision to dismiss the Klineburgers' challenge to the FEMA and King County designations for failure to exhaust administrative remedies.[3]

However, we reverse dismissal of the LUPA appeal challenging the decision of the hearing examiner under RCW 36.70C.130(1)(b), (c), and (d). The record establishes the court did not consider or reach the merits of the LUPA appeal challenging the hearing examiner decision under RCW 36.70C.130(1)(b), (c), and (d). The court did not address whether the hearing examiner erroneously interpreted the KCC, that the decision is not supported by substantial evidence, and that the decision is a clearly erroneous application of the law to the facts under RCW 36.70C.130(1)(b), (c), and (d).

Whether the decision is an erroneous interpretation of the law under RCW 36.70C.130(1)(b) is a question of law. Abbey Rd. Grp., 167 Wn.2d at 250. To determine whether the decision is supported by substantial evidence under RCW 36.70C.130(1)(c), the court must decide whether a fair-minded person would be persuaded by the evidence of the truth of the challenged findings. Abbey Rd. Grp., 167 Wn.2d at 250. Under this standard, the court "consider[s] all of the evidence and

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[2] We refer to Stephen Klineburger by his first name for purposes of clarity.

[3] Accordingly, we also conclude the court did not err in striking the declaration of the Klineburgers' expert witness Weber.

reasonable inferences in the light most favorable to the party who prevailed in the highest forum that exercised fact-finding authority." Abbey Rd. Grp., 167 Wn.2d at 250. And to determine whether the decision is a clearly erroneous application of the law to the facts under RCW 36.70C.130(1)(d), the court must decide whether on the record, the court "is left with the definite and firm conviction that a mistake has been committed." Phoenix Dev., 171 Wn.2d at 829.

For the first time on appeal, the Klineburgers also claim the hearing examiner decision is an unconstitutional taking without just compensation and violates substantive due process. The taking and substantive due process claims are not ripe. See Guimont v. City of Seattle, 77 Wn. App. 74, 85, 896 P.2d 70 (1995) (an as-applied "takings claim is not ripe until 'the initial government decision maker has arrived at a definite position, conclusively determining whether the property owner was denied all reasonable beneficial use of its property' ")[4] (quoting Orion Corp. v. State of Wash., 109 Wn.2d 621, 632, 747 P.2d 1062 (1987)); Presbytery of Seattle v. King County, 114 Wn.2d 320, 337, 787 P.2d 907 (1990) (court concluded exhaustion of administrative remedies was necessary to evaluate the challenge and the record must include all the facts needed to apply the three-prong test before a substantive due process claim is ripe).[5]

The Klineburgers request attorney fees and costs on appeal under RCW 4.84.370. "Whether a party is entitled to an award of attorney fees is a question of law and is reviewed on appeal de novo." Durland v. San Juan County, 182 Wn.2d 55, 76,

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[4] Internal quotation marks omitted.

[5] We decline to address the Klineburgers' equal protection argument. The Klineburgers do not support the arguments with citation to the record. See RAP 10.3(a)(6); Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 809, 828 P.2d 549 (1992).

340 P.3d 191 (2014). RCW 4.84.370 governs fees and costs on appeal of land use decisions. RCW 4.84.370(1) states, in pertinent part:

> Notwithstanding any other provisions of this chapter, reasonable attorneys' fees and costs shall be awarded to the prevailing party or substantially prevailing party on appeal before the court of appeals or the supreme court of a decision by a county, city, or town to issue, condition, or deny a development permit involving a site-specific rezone, zoning, plat, conditional use, variance, shoreline permit, building permit, site plan, or similar land use approval or decision.

The Klineburgers are not entitled to an award of attorney fees under RCW 4.84.370(1). A prevailing party is entitled to attorney fees under this statute only if the county decision is "rendered in their favor and at least two courts affirm the decision." Habitat Watch v. Skagit County, 155 Wn.2d 397, 413, 120 P.3d 56 (2005).

We affirm the superior court decision to dismiss the challenge to the FEMA and King County mapping and designations for failure to exhaust administrative remedies. We reverse dismissal of the LUPA appeal challenging the decision of the hearing examiner under RCW 36.70C.130(1)(b), (c), and (d), and remand.

Schindler, J.

WE CONCUR:

Andrus, J.

Applewick, C.J.

LUKINS & ANNIS

May 18, 2021 - 11:09 AM

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