

August 9, 2019

**OFFICE OF THE HEARING EXAMINER  
KING COUNTY, WASHINGTON**

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**REPORT AND DECISION**

SUBJECT: Department of Local Services file no. **E1100560**

**STEPHEN KLINEBURGER**

Code Enforcement Appeal

Location: [REDACTED] North Bend

Appellants: Stephen and Sandra Klineburger  
*represented by* **Allen Miller**  
The Law Offices of Allen T. Miller, PLLC  
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Olympia, WA 98502  
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King County: Department of Local Services  
*represented by* **Jeri Breazeal**  
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RECOMMENDATIONS/DECISION:

Department's Recommendation:  
Examiner's Decision:

Deny appeal  
Deny appeal

## FINDINGS

1. Stephen and Sandra Klineburger are property owners of parcel 0323089039 located in the RA-10 zone in unincorporated King County, at 4609 428th Avenue SE.
2. The entirety of the property is mapped within a FEMA designated floodway and in a Moderate Channel Migration Zone (CMZ). Exhibit 4, April 3, 2013 *Report and Decision in DPER file number E1100560*, Finding 4; Exhibit 18, *Permitting Division's Brief in Response to Appellants' Offer of Proof*.
3. On January 9, 2012, the Department of 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 environmentally critical area (the floodway). Exhibit 2; Exhibit 4, Finding 1.
4. The Klineburger's timely appealed the Notice and Order. Exhibit 4, Finding 2. As Examiner Smith found:

Considerable effort has gone into the review by various agencies of the floodway issues affecting this property. A July 27, 2012, report by Taylor Engineering Consultants analyzed base flood depth and velocity issues in the context of requirements stated at KCC 21A.24.260G. The Taylor report was submitted to the State Department of Ecology, which reviewed it pursuant to the standard stated at WAC 173-158-076. As summarized within a letter dated October 22, 2012 from David Radabaugh of the Department of Ecology, WAC 173-158-076(1) authorizes a substantially damaged residential structure in the regulatory floodway to be replaced based upon a showing that certain criteria have been met. First, the base flood event at the site should not exceed three feet in depth or generate velocities greater than three feet per second. Second, there should be no evidence at the site of flood-related erosion. Finally, existing flood warning times must exceed 12 hours, or in the alternative, a local government must have an emergency warning plan in place. The DOE letter concluded that of these requirements only the flood velocities standard would be met at the Klineburger property. The Department of Ecology thus did not recommend approval of the Klineburger residence replacement proposal as requested.

Exhibit 4, Finding 6.

5. Appellants pursued their critique of the Department of Ecology's floodway analysis and its ultimate regulatory conclusions in Code Enforcement proceeding E1100560. Exhibit 4, Finding 8. Examiner Smith concluded that:

What is abundantly clear from a perusal of the foregoing regulatory scheme is that the County's floodway management system is merely an extension and implementation of the State program. All the essential

regulatory determinations are made by the State Department of Ecology. The role of the County is limited to concurring with an affirmative recommendation from Ecology, with the further option of imposing additional minor requirements if the County deems such to be desirable. But if the Department of Ecology has concluded that the proposed floodway development should be denied, the County lacks any authority to overturn such determination. Its authority is limited to concurring after Ecology has made an affirmative finding of floodway compliance. This means, among other things, that the County DNR letter of concurrence dated January 8, 2013, was completely superfluous from a regulatory standpoint. Once Ecology had denied the Klineburger request for a floodway exemption, that determination was conclusive and binding on the County.

Exhibit 4, Conclusion 2.

6. Consequently, Examiner Smith denied the appeal. Examiner Smith held that no penalties would be assessed against the Klineburgers if within 60 days of the date of the decision they had taken one of the following actions: (a) filed a complete building permit to site the mobile home on the property; (b) filed a timely appeal for judicial review in Superior Court; or (c) removed the mobile home from the property. Exhibit 4.
7. The Klineburgers appealed Examiner Smith’s decision to Superior Court, which affirmed Examiner’s Smith’s conclusion regarding the County’s authority, but decided that it could review the determination by the Department of Ecology. On appeal, Division One of the Washington State Court of Appeals affirmed Examiner Smith’s decision but reversed that portion of the Superior Court’s order setting aside Ecology’s determination. *Klineburger or v. King County Department of Development and Environmental Services Building*, 189 Wn. App. 153, 356 P. 3d 223 (2015) (*Klineburger I*).
8. The Klineburgers also brought an administrative appeal before the Washington Pollution Control Hearings Board (PCHB) against Ecology, contending that they had satisfied the criteria set forth in WAC 173-158-076(1) and KCC 21A.24.260.G.1. The PCHB dismissed the appeal on summary judgment. King County Superior Court upheld the PCHB’s dismissal. Division One of the Court of Appeals issued an unpublished opinion on August 13, 2018. *Klineburger v. Washington State Department of Ecology*, 2018 WL 385-3574 (Westlaw citation) (*Klineburger II*). In its statement of Facts, the Court of Appeals explained that the PCHB had found that the Klineburgers did not dispute that their property is in the FEMA floodway or CMZ. *Klineburger II*, p. 2.
9. Following the *Klineburger II* decision, on November 16, 2018, Permitting sent the Klineburgers a certified letter stating:

You appealed the Hearing Examiner’s decision and the determination by the Department of Ecology to King County Superior Court and the Washington State Court of Appeals. These appeals have now reached their final determination upholding DPER’s determination that your

mobile home is unpermitted and cannot be permitted under the King County Code. For these reasons, you are now required to remove the mobile home from the property within 60 days of the date of this letter. Exhibit 7.

10. On February 6, 2019, the Washington State Supreme Court denied review of *Klineburger II*. Exhibit 6; Exhibit 18, Attachment 5.
11. On February 7, 2019, Permitting inspected the property, finding that the mobile home remained. Exhibit 1; Exhibit 8.
12. Permitting imposed civil penalties for 60 days totaling \$7,200 for failure to correct the violation by the date stated in the November 16, 2018, letter. The penalties were calculated as follows: \$80 per day for the first 30 days (comprised of \$25 basic + \$15 public health risk + \$15 environmental damage risk + \$25 economic benefit) and \$160 per day for the subsequent 30 days. Exhibits 9, 10, 12.
13. The Code Enforcement Billing Statement, Exhibit 10, advised the Klineburgers that, if they believed that the civil penalties were assessed in error, were assessed for a time period after the property was in compliance, or should be waived or reduced for other reasons, they may request a waiver. The waiver request must include a description of the actions taken to achieve compliance and an explanation of why the civil penalties assessed should be reduced or waived.
14. The issues related to the floodway and CMZ mapping of the property have taken their toll. The Klineburgers are no longer married. Testimony of Stephen Klineburger.
15. Mr. Klineburger timely requested a waiver of the penalties. Exhibit 11. He did not argue that he had achieved compliance, but rather that the property should be removed from the CMZ<sup>1</sup> and floodplain.
16. Permitting denied the requested waiver on April 19, 2019, as the property was not in compliance. Exhibit 12.
17. Mr. Klineburger appealed the waiver denial arguing that he is actively pursuing a letter of map amendment to remove the property from the mapped floodway. Exhibit 13. He seeks to relitigate the Notice and Order which was upheld by Examiner Smith, whose decision was, in turn, upheld by the Court of Appeals. Examiner Smith's April 3, 2013, decision is final. As she repeatedly advised Mr. Klineburger, his counsel and his experts, this Examiner has no jurisdiction to reopen that matter in an appeal of the denial of a civil penalty waiver.

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<sup>1</sup> The CMZ mapping is critical to the Klineburgers because under both 173-158-076(1) and KCC 21A.24.260.G.1, evidence of flood-related erosion is determined by location of the project site in relationship to mapped channel migration zones.

18. The Examiner permitted Mr. Klineburger to make an offer of proof, cautioning that she had no jurisdiction to resolve the question of whether the property was originally or is currently properly mapped as within a CMZ or floodway. The Examiner further cautioned that, because these issues are outside of the scope of a penalty appeal, Permitting was not prepared to cross-examine Mr. Klineburger’s witnesses or to present any rebuttal of their arguments and that the record on factual issues raised by his offer of proof would demand that the record be supplemented by witness testimony and documentary evidence in the appropriate forum. The offer of proof is contained in Exhibit 16 and the testimony of Alan Wald, Logan McClish, and Stephen Klineburger. As the question of whether the property is properly mapped as within the CMZ or floodway was not within the scope of the appeal hearing, Permitting understandably did not present evidence or testimony on these issues.
19. During his offer of proof, Mr. Klineburger and his experts testified that they felt they were getting a “run around” from Ecology and King County. Testimony of Stephen Klineburger and Alan Wald. The Examiner held the record open for a two-week period to allow Permitting to report back on whether it asked the Department of Ecology to review an additional report from Mr. Klineburger’s consultants challenging the CMZ designation and mapping and compliance with the criteria in KCC 21A.24.260.G.1. In its *Brief in Response to Appellants’ Offer of Proof* Permitting advised:

Permitting and Ecology have discussed the most recent report from the Watershed Group, and jointly concluded that at this time, further review of their challenge to the CMZ designation and mapping is unwarranted. Exhibit 18, p. 8, lines 21-23.
20. Any Finding of Fact, which should more properly be considered a Conclusion of Law is hereby adopted as a Conclusion of Law.

#### CONCLUSIONS:

1. Any Conclusion of Law which should more properly be considered a Finding of Fact is hereby adopted as a Finding of Fact.
2. The burden in this appeal is on Mr. Klineburger to demonstrate by a preponderance of the evidence that the civil penalties were assessed after he achieved compliance or that the penalties are otherwise erroneous or excessive under the circumstances. KCC 23.32.110; Hearing Examiner Rules of Procedure and Mediation, Rules XV.E and 15.F.
3. Mr. Klineburger had not achieved compliance at the time the Permitting Division assessed the civil penalties, nor has he achieved compliance (removal of the mobile home) as of the date of hearing in this matter. Testimony of Officer Breazeal and Stephen Klineburger.
4. The Klineburgers as a marital community and now Mr. Klineburger individually have resided in the residence located in a mapped floodway and CMZ for more than 8 years. Appellant has not shown that the penalties are erroneous or excessive under the circumstances.

DECISION:

1. The appeal is DENIED.

ORDERED August 9, 2019.



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Alison Moss  
Hearing Examiner pro tem

**NOTICE OF RIGHT TO APPEAL**

King County Code 20.22.040 directs the Examiner to make the County's final decision for this type of case. This decision shall be final and conclusive unless proceedings for review of the decision are timely and properly commenced in superior court. Appeals are governed by the Land Use Petition Act, Chapter 36.70C RCW.

**MINUTES OF THE JULY 11, 2019, HEARING IN THE APPEAL OF STEPHEN  
KLINEBURGER (PENALTY), DEPARTMENT OF LOCAL SERVICES FILE NO.  
E1100560**

Alison Moss was the Hearing Examiner in this matter. Participating in the hearing were Jeri Breazeal, Stephen Klineburger, Logan McClish, and Alan Wald. A verbatim recording of the hearing is available in the Hearing Examiner's Office.

The following exhibits were offered and entered into the record:

- |                |  |
|----------------|--|
| Exhibit no. 1  | Department of Local Services staff report to the Hearing Examiner                            |
| Exhibit no. 2  | Notice and order, issued January 9, 2012   |
| Exhibit no. 3  | Civil Penalty Worksheet, dated January 9, 2012   |
| Exhibit no. 4  | Hearing Examiner's Decision, dated April 3, 2013   |
| Exhibit no. 5  | Court of Appeals Opinion, filed August 13, 2018  |
| Exhibit no. 6  | Supreme Court Dismissal, dated February 6, 2019  |
| Exhibit no. 7  | Letter from Local Services, revised deadline, sent November 16, 2018                         |
| Exhibit no. 8  | Photographs, dated February 7, 2019  |
| Exhibit no. 9  | Billing request form, dated February 7, 2019   |
| Exhibit no. 10 | Bill, sent February 14, 2019   |
| Exhibit no. 11 | Waiver request, dated March 6, 2019  |
| Exhibit no. 12 | Waiver denial letter, dated April 19, 2019   |
| Exhibit no. 13 | Appeal, received May 6, 2019   |
| Exhibit no. 14 | Appellant's Brief, dated March 27, 2018  |
| Exhibit no. 15 | Explanation of information submitted by Accella  |
| Exhibit no. 16 | Appellant binder of exhibits (1-9, 11) admitted for offer of proof for open record of appeal |
| Exhibit no. 17 | Letter, Critical Areas Designation, dated January 25, 2019                                   |

AM/jo

August 9, 2019

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**CERTIFICATE OF SERVICE**

SUBJECT: Department of Local Services file no. **E1100560**

**STEPHEN KLINEBURGER**  
Code Enforcement Appeal

I, Jessica Oscoy, certify under penalty of perjury under the laws of the State of Washington that I transmitted the **REPORT AND DECISION** to those listed on the attached page as follows:

- EMAILED to all County staff listed as parties/interested persons and parties with e-mail addresses on record.
- placed with the United States Postal Service, with sufficient postage, as FIRST CLASS MAIL in an envelope addressed to the non-County employee parties/interested persons to addresses on record.

DATED August 9, 2019.



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Jessica Oscoy  
Legislative Secretary



**Breazeal, Jeri**

Department of Local Services

**Deraitus, Elizabeth**

Department of Local Services

**Garnett, Erroll**

Department of Local Services

**Kemp, Jim**

Hardcopy

**Klineburger, Stephen/Sandra**

Hardcopy

**Lux, Sheryl**

Department of Local Services

**McClish, Logan**

**Miller, Allen**

The Law Offices of Allen T. Miller, PLLC

Hardcopy

**Radley, Ross**

Hardcopy

**Stoddard, Judith**

Hardcopy

**Taylor, William**

Taylor Engineering

Hardcopy

**Wald, Alan**

**Williams, Toya**

Department of Local Services