

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

SANDRA KLINEBURGER and  
STEPHEN KLINEBURGER, husband  
and wife,

Appellants,

v.

KING COUNTY DEPARTMENT OF  
PERMITTING AND ENVIRONMENTAL  
REVIEW,

Respondents.

No. 80928-8-I

DIVISION ONE

UNPUBLISHED OPINION

CHUN, J. — After a trial court affirmed a hearing examiner’s ruling regarding use of their property (Property), Stephen and Sandra Klineburger appealed to this court. In an unpublished opinion, Klineburger v. King County Department of Permitting and Environmental Review,<sup>1</sup> a panel affirmed in part and reversed in part, directing the trial court on remand to determine, under RCW 36.70C.130(1)(b), (c), and (d), whether the hearing examiner erroneously interpreted the King County Code (KCC), whether substantial evidence supported the ruling, and whether the ruling was a clearly erroneous application of the law.

The Klineburgers moved to consolidate the remanded case with their Land Use Petition Act (LUPA) appeal from the linked appeal, Klineburger v. King

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<sup>1</sup> No. 79028-5-I (Wash. Ct. App. Nov. 12, 2019) (unpublished)  
<https://www.courts.wa.gov/opinions/pdf/790285.pdf>,

County Department of Permitting and Environmental Review, No. 81486-9-1. The trial court denied their motion to consolidate. In its order denying consolidation, the trial court ruled that the hearing examiner had not erroneously interpreted the KCC, that substantial evidence supported the findings, conclusions, and decision, and that the ruling was not a clearly erroneous application of the law. The order also dismissed the remanded matter with prejudice.

The Klineburgers appeal, saying that the trial court improperly dismissed the remanded case without considering whether the hearing examiner's ruling complied with RCW 36.70C.130(1)(b), (c), and (d). We disagree and affirm.

#### I. BACKGROUND

The Property sits about 800 feet south of the middle fork of the Snoqualmie River within a FEMA-designated floodway and a King County-designated conservancy shoreline and channel migration zone. Klineburger, No. 79028-5, slip op. at 1–2. King County designated a portion of the Property as a buffer aquatic area. Id.

In 2012, the Klineburgers placed a 400-square-foot cargo container in the portion designated as a conservancy shoreline area, channel migration zone, and aquatic buffer. Id. at 2–3. “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.” Id. at 3.

In 2017, the King County Department of Permitting and Environmental Review (DPER) issued a Notice and Order for the Property, alleging two violations:

(1) clearing and/or grading (fill) within four types of critical areas (floodway, 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 [KCC], respectively; and (2) placement a [sic] cargo container within these four types of critical areas and/or their buffers without the required permits.

The Klineburgers appealed to a hearing examiner, who affirmed in part and reversed in part the notice and order.

The Klineburgers petitioned the trial court under LUPA, seeking review of the hearing examiner's decision under RCW 36.70C.130(1)(b), (c), and (d). The trial court dismissed the LUPA appeal, determining that (1) it lacked jurisdiction under LUPA to review the federal special flood hazard management designations and mappings to which the Klineburgers assigned error, (2) the Klineburgers had failed to exhaust their administrative remedies, and (3) res judicata and collateral estoppel barred consideration of the issues.

The Klineburgers appealed to this court. A panel affirmed in part and reversed in part. Klineburger, No. 79028-5, slip op. at 9. The panel affirmed the dismissal of the Klineburgers' challenge to the FEMA and King County designations for lack of standing because of failure to exhaust administrative remedies, but reversed dismissal of the LUPA appeal challenging the decision of the hearing examiner under RCW 36.70C.130(1)(b), (c), and (d). Id. at 7. It concluded that the trial court did not address whether the hearing examiner

erroneously interpreted the KCC, whether substantial evidence supports the decision, 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). Id.

The Klineburgers moved to consolidate the remanded matter with their civil penalties matter in the linked case. King County opposed their motion on the grounds that substantial evidence supported the hearing examiner's decision and that the hearing examiner correctly interpreted and applied the KCC, effectively arguing that the matter should not be consolidated because it should be dismissed. It also argued that a decision denying review by the Washington Supreme Court in a separate matter mooted the remanded proceedings. It said that since the ruling that the Klineburgers' primary use for the Property—a mobile home—was illegal had finalized, through the denial of review, their accessory use for the Property was necessarily illegal as well. The Klineburgers did not file a reply brief.

The trial court denied the motion to consolidate and dismissed the remanded case on the merits. It concluded that Hearing Examiner Moss correctly interpreted the applicable King County land use code provisions at issue, that substantial evidence supported her findings, conclusions, and decision, and that her decision was not a clearly erroneous application of the law to the facts. It also concluded that because the primary use for the property was illegal, this matter regarding accessory use of the Property was moot.

## II. ANALYSIS

The Klineburgers say that the trial court erred by dismissing the remanded matter without adhering to this court's directive to address whether (1) the hearing examiner erroneously interpreted the KCC, (2) substantial evidence supports the decision, and (3) the decision is a clearly erroneous application of the law to the facts under RCW 36.70C.130(1)(b), (c), and (d). We disagree.

RCW 36.70C.130(1) provides, in applicable part, that a superior court may grant relief in a LUPA appeal if:

(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.

Subsection (b) presents a question of law that we review de novo; subsection (c) concerns a factual determination that we review for substantial evidence; and subsection (d) requires us to apply the clearly erroneous standard of review. Abbey Rd. Grp., LLC v. City of Bonney Lake, 167 Wn.2d 242, 250, 218 P.3d 180 (2009) (abrogated on other grounds by Yim v. City of Seattle, 194 Wn.2d 682, 451 P.3d 694 (2019)).

To determine whether substantial evidence supports a decision, the court must decide, while considering the evidence in the light most favorable to the party who prevailed in the forum exercising fact-finding authority, whether a fair-minded person would be persuaded by the evidence of the truth of the findings. Id. To determine whether a decision is a clearly erroneous application of the law

to the facts, 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., Inc. v. City of Woodinville, 171 Wn.2d 820, 829, 256 P.3d 1150 (2011).

The Klineburgers do not say which of the hearing examiner’s findings or conclusions are erroneous or how the trial court’s order falls short; instead, they assert that the trial court did not review the hearing examiner’s decision at all. But the trial court’s order denying consolidation clearly addresses the adequacy of the hearing examiner’s ruling under RCW 36.70C.130(1)(b), (c), and (d); it concluded that

[a]fter review of the findings and conclusions . . . of [the hearing examiner], this Court concludes that the Examiner correctly interpreted the applicable King County land use code provisions at issue, that the Examiner’s findings, conclusions, and decision were supported by substantial evidence, and that her decision was not a clearly erroneous application of the law to the facts.

It also decided that:

Examiner Moss properly interpreted and applied the provision of the [KCC] provisions cited in the Notice and Order issued by DPER. Additionally, Examiner Moss properly found that DPER provided sufficient competent evidence to satisfy its burden to prove by a preponderance that the appellants violated the [KCC] by:

1. Illegal clearing and grading without permits, inspections and approvals within the FEMA (Federal Emergency Management Agency) designated floodway (i.e., a code designated critical area); Aquatic, Channel Migration Zone (CMZ), Shoreline critical areas/buffers; and,
2. Illegal placement of a 400 square foot cargo container without permits, inspections, and approvals in violation of the [KCC], International Building Code, and within the FEMA designated floodway, County designated Channel Migration Zone (CMZ), Shoreline, and Aquatic critical areas/buffers.

The Klineburgers do not cite the record in support of their argument or provide more than scant citation to legal authority. An appellant must provide “argument in support of the issues presented for review, together with citations to legal authority and references to relevant parts of the record.” RAP 10.3(a)(6). We need not consider arguments unsupported by references to the record, meaningful analysis, or citation to pertinent authority. Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 809, 828 P.2d 549 (1992).

We reject the Klineburgers’ claim that the trial court did not consider the issues raised in this court’s directive.

*Opportunity to Litigate Merits*

For the first time on appeal and in their reply brief, the Klineburgers say that the trial court denied them a full and fair opportunity to litigate the merits of the RCW 36.70C.130(1) issues. Under RAP 2.5(a), the Klineburgers may not raise an issue for the first time on appeal, and do not explain how any exception to this rule applies. Nor can they raise this issue for the first time in their reply brief. Cowiche Canyon Conservancy, 118 Wn.2d at 809 (holding an issue raised for the first time in a reply brief is too late to warrant consideration).

But even if we addressed this claim, we would reject it. The Klineburgers presented argument on RCW 36.70C.130(1) in their briefing to the original trial court. They had a chance to raise the issues at oral argument before that trial court. And on remand, they chose not to respond to King County’s arguments on RCW 36.70C.130(1) presented in the opposition to the motion to consolidate or the request for dismissal. The trial court had access to this prior argument and to

the verbatim report of proceedings of the administrative hearing when deciding the RCW 36.70C.130(1) issue. And while the Klineburgers now say the trial court denied them a full and fair opportunity to litigate the merits of this issue, they did not present it with that argument when given the opportunity below. Nor do they say which arguments they would raise now if given another opportunity.<sup>2</sup>

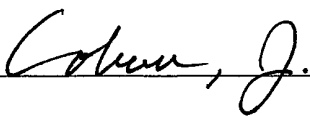
*Attorney Fees and Costs*

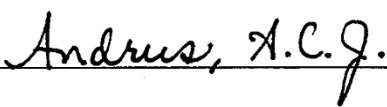
The Klineburgers request an award of attorney fees and costs on appeal under RCW 4.84.370. The statute requires a court to award attorney fees and costs to the prevailing party in a land use decision; but under RCW 4.84.370(2), the county “whose decision is on appeal is considered a prevailing party if its decision is upheld at superior court and on appeal.” Thus, King County, not the Klineburgers, is the prevailing side here. We deny the Klineburgers’ request.

We affirm.<sup>3</sup>

  
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WE CONCUR:

  
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<sup>2</sup> See Hyde v. Fisher, 146 Idaho 782, 786–87, 203 P.3d 712 (2009) (holding a trial court did not deprive an appellant of due process where it relied, on remand, on briefs submitted to the trial court before the previous appeal).

<sup>3</sup> Because we resolve this matter on the grounds discussed above, we do not reach King County’s arguments that we should affirm the trial court on the grounds that it properly concluded the Klineburgers’ appeal is moot and that they lacked standing.