BEFORE THE COLUMBIA RIVER GORGE COMMISSION

FRIENDS OF THE COLUMBIA GORGE, INC. and COLUMBIA GORGE ESTATES, LLC, Appellants, v. KLICKITAT COUNTY, Respondent, and KEITH ARNDT and THE ARNDT LIVING TRUST, Intervenor-Respondents.	CRGC No. COA-K-09-03 Klickitat County No. SPL 2008-24 **AMENDMENT TO FINAL OPINION AND ORDER**

On August 5, 2010, the Columbia River Gorge Commission issued a final opinion and order in this matter. Subsequently, all parties to this matter sought judicial review and other civil actions in the Klickitat County Superior Court. On March 8, 2011, the Columbia River Gorge Commission adopted a new rule into its land use ordinance, Comm'n R. 350-81-017. The content of this rule makes certain sentences in the conclusion of the final opinion and order unimportant.

By settlement agreement, the Commission strikes the following text from the conclusion of the final opinion and order:

> On remand, we suggest that Klickitat County may simply impose a condition of approval that Mr. Arndt's final short plat map be based on a surveyed line (by a licensed surveyor) of the Dallesport Urban Area. Such a condition of approval would end this dispute and avoid any boundary disputes on this parcel in the future. Additionally, the survey could prove Mr. Arndt correct that the actual boundary could put more land in the Dallesport Urban Area than shown on the 1993 site plan.

Additionally, by settlement agreement, the Commission has determined that the Final Opinion and Order in this matter shall not be cited as precedent, policy or practice in any future proceeding without limitation, including but not limited to matters before the Commission or in any state or federal court proceeding.

A copy of this order shall be attached to the final order and opinion in this matter.

IT IS SO ORDERED this 21st day of February 2012.

Carl E. McNew

Carl McNew
Chair

BEFORE THE COLUMBIA RIVER GORGE COMMISSION

FRIENDS OF THE COLUMBIA GORGE, INC. and COLUMBIA GORGE ESTATES, LLC, Appellants, v. KLICKITAT COUNTY, Respondent, and KEITH ARNDT and THE ARNDT LIVING TRUST, Intervenor-Respondents.	CRGC No. COA-K-09-03 Klickitat County No. SPL 2008-24 **FINAL OPINION AND ORDER**

This case involves an appeal by Friends of the Columbia Gorge, Inc. and Columbia Gorge Estates, LLC of the decision of the Klickitat County Hearings Examiner approving a short plat application by Bert Arndt.[1] The Columbia River Gorge Commission met on May 11, 2010 to hear oral argument and deliberate to a decision. We remand the decision of the Klickitat County's hearing examiner back to the county.

[1] Mr. Arndt passed away during the County's consideration of his application. Mr. Arndt's son, Keith Arndt, and the Arndt Living Trust continued the application.

I. PARTIES

The parties in the appeal were:

- Friends of the Columbia Gorge, represented by Nathan Baker, Staff Attorney, Portland, Oregon, and Gary K. Kahn, Reeves, Kahn & Hennessy, Portland, Oregon.
- Columbia Gorge Estates, LLC, represented by Gary K. Kahn, Reeves, Kahn & Hennessy, Portland, Oregon.
- Klickitat County, represented by Timothy O'Neill, Prosecuting Attorney, Goldendale, Washington and Susan Drummond, Law Offices of Susan E. Drummond, Seattle, Washington.
- Keith Arndt and the Arndt Living Trust, represented by John M. Groen, Groen Stephens & Klinge, LLP, Bellevue, Washington.

II. PRELIMINARY ISSUES

Conflicts of Interest

No Commissioners reported any conflicts of interest.

Ex Parte Communications

No Commissioners reported any ex parte communications.

Exhibits

Appellants showed PowerPoint slides during their oral argument. The slides were exact images of documents already in the record. Appellants provided copies of the slides for respondents, the commissioners and for the record of the Commission's hearing. Mr. Arndt showed a large exhibit board, which was an exact image of a document already in the record. Mr. Arndt did not leave the exhibit board with the Commission for its record of the hearing. Mr. Arndt is responsible for producing the exhibit board if necessary at a later date. No party objected to any of the exhibits.

Rulings on Objections and Motions

All rulings made on objections and motions during the hearing are affirmed. Any objections or motions not ruled upon during the hearing are overruled or denied.

Hearing Procedure

The Chair reviewed the procedures for the hearing, which are contained in Commission Rule 350-60 and included in the Notice of Hearing. The Commission adhered to the hearing procedures.

III. STANDARD OF REVIEW

The issues presented are both factual and legal in nature. Our review focuses on whether the decision is clearly erroneous, and whether the decision was supported by substantial evidence. Commission Rule 350-60-220(1) (d) and (f).

IV. FACTS

The facts of this appeal are simple, yet at the same time, complex. We give the simple version here, and leave the detailed complex pieces to our discussion of the parties' arguments below. In 1993, Bert Arndt applied to the Gorge Commission to construct a single-family dwelling in the general management area portion of his property that is split by the Dallesport Urban Area and the general management area. The Commission approved that application and a final map in 1993. Mr. Arndt argues that the 1993 and 1995 site maps, which depict a non-surveyed line estimated by a Gorge Commission planner, are boundary determinations.

In 2006, the Gorge Commission approved development on the parcel immediately south of Mr. Arndt's property. In reviewing that application, the Commission requested the landowner survey the Dallesport Urban Area/general management area boundary on that parcel. The landowner did. The survey point on the boundary between Mr. Arndt's parcel and the parcel to the south is in a different location than shown on the 1993 and 1995 site maps. The Gorge Commission relied on the 2006 survey in making its decision.

In 2008, Mr. Arndt proposed a 3-lot short plat for his parcel. One of the land division lines would be along the Dallesport Urban Area/general management area boundary taken from the 1993 and 1995 site maps. *See e.g.,* Rec. 48[2]; Rec. 401[3]; Tr. 10.[4] Klickitat County sent an email to the staff of the Gorge Commission asking whether the short plat was within the general management area.[5] The Commission staff reviewed the prior documents relating to Mr. Arndt's property and wrote in a letter dated May 27, 2008 that the short plat was entirely within the Dallesport Urban Area. Rec. 399. Subsequently, the owner of the property to the south contacted the Commission staff and stated that the 2006 survey of his property showed the Dallesport Urban Area/general management area boundary in a different location. The Commission staff thus sent another letter to Klickitat County informing the county that the Commission staff had received new information relating to the Dallesport Urban Area/general management line and recommended the county request Mr. Arndt survey his property. Rec. 385. Mr. Arndt refused to do so. Klickitat County approved the short plat as proposed, and appellants appealed to Klickitat County. The Klickitat County hearing examiner held a hearing on the appeal and upheld Klickitat County's decision. Appeal to this Commission followed.

V. JURISDICTION

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[2] Klickitat County's Response Brief to the hearing examiner stated, "The Plat approval provides for a single 4.21 acre lot to be located entirely within the Scenic Area's general management area, and two smaller lots (.59 and .43 acres) to be located within the urban area." The brief refers to Exhibit 8, which seems to be at page 247 of the record before the Commission.

[3] Klickitat County's initial correspondence with the Commission described the short plat as, "He wants to create 2 lots within the Urban Area which would leave Lot 3 all in the General Management Area."

[4] Mr. Arndt's attorney stated to the hearing examiner that the proposed lots lie entirely within the urban area.

[5] The email states, "His parcel number is * * *. He wants to create 2 lots within the Urban Area which would leave Lot 3 all in the General Management area. I have included a copy of his proposed layout also. If you have any questions, please give me a call." Rec. 401.

The parties dispute whether the Commission has jurisdiction to hear this appeal. The appellants argue that the Commission has jurisdiction pursuant to 16 U.S.C. § 544m(a)(2), which states, "Any person or entity adversely affected by any final action or order of a county relating to the implementation of [the federal Scenic Area Act] may appeal such action or order to the Commission * * *." Mr. Arndt argues that the Commission does not have jurisdiction in this matter for numerous reasons. First, he argues that Klickitat County's decision did not relate to the implementation of the Scenic Area Act because it was not an application for development within the general management area, rather Mr. Arndt applied for a short plat in the Dallesport Urban Area where the Commission does not have jurisdiction. Second, he argues that Klickitat County applied only its own land use ordinance, not any Scenic Area regulations. Finally, he argues that Washington's Land Use Petition Act (LUPA) gives the Klickitat County Superior Court jurisdiction (citing RCW 36.70C.130(1)(e)) to decide the issue in dispute.

We believe the Gorge Commission does have jurisdiction to hear this appeal. The Scenic Area Act authorizes, "Any person or entity adversely affected by any final action or order of a county relating to the implementation of sections 544 to 544p of this title[6] may appeal such action or order to the [Gorge] Commission * * *." 16 U.S.C. § 544m(a)(2). Here, an appeal concerning whether a short plat decision by Klickitat County involves land within the congressionally designated Dallesport Urban Area or in the general management area of the National Scenic Area clearly relates to implementation of the National Scenic Area Act.

Additionally, the Scenic Area Act does not limit the commission's jurisdiction to hear appeals to only matters specifically arising under a land use ordinance authorized by the Act. We note that sections 15(b)(4)(A) and (B) (16 U.S.C. § 544m(b)(4)(A) and (B)) contain separate

[6] "Sections 544 to 544p of this title" refers to the Columbia River Gorge National Scenic Area Act.

authorizations for judicial review of "any final action or order of a county, the Commission, or the Secretary relating to implementation of sections 544 to 544p of this title" and "any land use ordinance or interim guidelines adopted pursuant to sections 544 to 544p of this title." This distinction in the text of a subsection of the same provision of the Act helps us interpret section 544m(a)(2) to mean that "implementation of sections 544 to 544p of this title" is broad and not limited to only matters arising out of Scenic Area land use ordinances. Our research shows us that all appeals brought to the commission during the commission's existence have arisen out of the application of a Scenic Area land use ordinance; however, we do not believe this means that section 544m(a)(2) limits our jurisdiction to hear appeals to only those matters arising out of Scenic Area land use ordinance.

Finally, we do not believe that RCW 36.70C.130(1)(e) divests the Gorge Commission of jurisdiction to hear this appeal. That statute lists standards for superior courts to grant relief under LUPA, including whether "The land use decision is outside the authority or jurisdiction of the body or officer making the decision." We do not understand this statutory authority for superior courts to consider whether a local government exceeded its jurisdiction to mean that the Gorge Commission cannot hear appeals of county decisions relating to the implementation of the Scenic Area Act under the separate authority of the federal Scenic Area Act.

Additionally, the parties informed us that petitioners sought review of the hearing examiner's decision in the Klickitat County Superior Court, and that matter shares a common question with this appeal. Mr. Arndt argued that the action in state court means there could be no jurisdiction before the Gorge Commission. Again, we disagree that an action in state court means the Commission loses jurisdiction under its independent federal authority. Mr. Arndt's interpretation of the Scenic Area Act would mean that a party (or possibly any person) could

defeat Gorge Commission jurisdiction simply by filing an action in Superior Court with a common question. We agree with appellants' argument that the Commission and Superior Court would have concurrent jurisdiction.[7]

In short, we conclude that the Gorge Commission has jurisdiction pursuant to 16 U.S.C. § 544m(a)(2) to consider and decide the appeal as brought by appellants.

VI. ANALYSIS OF ASSIGNMENTS OF ERROR

Assignment of Error No. 1: Whether the Hearing Examiner misinterpreted the actions of Gorge Commission staff and erroneously rely on the misinterpretation?

Standard of Review

This assignment of error invokes two standards of review specified in the Commission's rules: whether the decision is supported by substantial evidence in the whole record (Comm. R. 350-60-220(1)(f)), and whether the decision was clearly erroneous (Comm. R. 350-60-220(1)(d)).

The Washington Supreme Court explains that substantial evidence "is a sufficient quantity of evidence to persuade a fair-minded person of the truth or correctness of the order." *City of Redmond v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 136 Wash.2d 38, 46, 959 P.2d 1091 (1998). RCW 34.05.570(3)(e) requires a reviewing court to consider the whole record. The Oregon APA states, "Substantial evidence exists to support a finding of fact when the record viewed as a whole would permit a reasonable person to make that finding." ORS 183.482(8)(c).

The Washington Supreme Court explains the clearly erroneous standard as, "a court may reverse an administrative decision if review of the whole record leaves a court with the definite

[7] We do not opine on whether there could be conflicting decisions and how a conflict might be resolved. To our knowledge, this final order and opinion does not conflict with any final decision of the Klickitat County Superior Court.

and firm conviction that a mistake has been made." *Cougar Mountain Assoc. v. King County*, 111 Wn.2d 742, 749–750, 765 P.2d 264 (1988). Oregon administrative law does not use the "clearly erroneous" standard.

Analysis – Was there substantial evidence to support the hearing examiner's finding that the May 27, 2008 letter was a boundary determination?

The appellants argue the hearing examiner's decision that the May 27, 2008 letter was a boundary line determination was clearly erroneous because the record contains facts showing that it was a comment letter and that it was superseded by a July 11, 2008 letter. Klickitat County and Mr. Arndt argue that the hearing examiner correctly interpreted the letter as a determination of the boundary pursuant to a settlement agreement specifying that the Commission would determine the boundary upon a request from Klickitat County.

Because the hearing examiner found as a fact that the May 27, 2008 letter was a boundary determination, we believe the correct standard of review is whether the hearing examiner's finding is supported by substantial evidence.

We conclude that there was not substantial evidence to support a finding that the May 27, 2008 letter was a boundary determination. On July 11, 2008, the Commission staff sent Klickitat County a second letter. The hearing examiner noted that the July letter did not expressly retract the May 27 letter, nor instruct the county to stop processing the application. Rec. 7 (paragraph 19). What is missing from the hearing examiner's discussion of the letter is the testimony of Brian Litt, the Commission's Principal Planner, who stated that the July 11, 2008 letter was a "revised position" of the Executive Director. Tr. 45, and that the May 11, 2008 letter was a "comment letter." Tr. 51. Mr. Litt explained that in the early days of the Gorge Commission, Commission staff would sometimes estimate or project where an urban area line was located, but that none of the staff have been licensed surveyors, and the Commission stopped that practice

after 2000 because the Oregon Board of Examiners for Engineering and Land Surveying believed that practice constituted surveying without a license. Tr. 45–46; 49–50; 51. There is no evidence in the hearing examiner's decision that the hearing examiner considered the May 27, 2008 letter in the context of this testimony and thus we cannot conclude the hearing examiner's finding that the May 27, 2008 letter was a boundary determination is supported by substantial evidence in the whole record.

Analysis – Was it clearly erroneous for the hearing examiner to interpret the decision of the Executive Director of the Gorge Commission not to appeal the Klickitat County Planning Director's decision to mean that the short plat is entirely within the Dallesport Urban Area?

The appellants also argue that the hearing examiner should not have given any legal weight to the decision of the Executive Director of the Gorge Commission not to appeal the short plat approval. Mr. Arndt argues that because the Scenic Area Act requires the Commission to take action to ensure compliance with the Act (16 U.S.C. § 544m(a)(1)), the hearing examiner reasonably interpreted the Executive Director's inaction to mean that the project was in the Dallesport Urban Area.

The Scenic Area Act does not require the Commission to appeal a land use decision that it may question whether it is correct. Certainly, appeal is one of the Commission's options, but the Act only requires that the Commission "shall take such actions as it determinates are necessary to ensure compliance." 16 U.S.C. § 544m(a)(1). This provision gives the Commission discretion to decide *inter alia* whether to take an action and what action to take.

Courts in Washington and Oregon statutes have held that state agencies have discretion whether to take actions relating to compliance in similarly worded statutes. For example, the Washington Supreme Court stated that the Department of Ecology has discretion under RCW

90.58.210[8] whether to enforce compliance with shoreline permit requirements. *Twin Bridge Marine Park v. Department of Ecology*, 162 Wn.2d 825, 861, 175 P.3d 1050 (2008). Similarly, the Oregon Court of Appeals noted that Oregon's Land Conservation and Development Commission has discretion to take enforcement action under ORS 197.320.[9] *1000 Friends of Oregon v. Curry County*, 63 Or. App. 296, 300, 663 P.2d 818 (1983).

Federal law also supports interpreting section 544m(a)(1) to allow the Commission discretion to take an action. *See Heckler v. Chaney*, 470 U.S. 821, 832 (1985) (presumption exists in federal law that a decision whether to take an enforcement action is committed to agency discretion pursuant to 5 U.S.C. § 701(a)(2)). While *Heckler* involved a question of the reviewability of the federal FDA's choice not to act pursuant to the federal administrative procedure act, the High Court's reasoning is compelling. Specifically, the Supreme Court reasoned, in part:

> an agency decision not to enforce often involves a complicated balancing of a number of factors which are peculiarly within its expertise. Thus, the agency must not only assess whether a violation has occurred, but whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action requested best fits the agency's overall policies, and, indeed, whether the agency has enough resources to undertake the action at all. An agency generally cannot act against each technical violation of the statute it is charged with enforcing.

Id. at 831. Like Ecology and LCDC, the Gorge Commission has broad discretion to determine what actions it determines are necessary, and like federal law, must balance many factors in

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[8] RCW 90.58.201(1) states, "* * * the attorney general or the attorney for the local government shall bring such injunctive, declaratory, or other actions as are necessary to insure that no uses are made of the shorelines of the state in conflict with the provisions and programs of this chapter, and to otherwise enforce the provisions of this chapter."

[9] ORS 197.320 states, "The Land Conservation and Development Commission shall issue an order requiring a local government, state agency or special district to take action necessary to bring its comprehensive plan, land use regulation, limited land use decisions or other land use decisions into compliance with the goals, acknowledged comprehensive plan provisions or land use regulations if the commission has good cause to believe: * * *"

determining what action or actions, if any, to take. Here, there is no evidence in the record why the Executive Director did not appeal the decision. The only evidence in the record is that the Executive Director decided not to appeal the decision, Tr. 54, and that she only appeals county decisions rarely. Tr. 56–57. These facts are insufficient to support a conclusion that a decision not to appeal could be interpreted to mean that the short plan is inside the Dallesport Urban Area. The hearing examiner's conclusion was clearly erroneous to the extent that it gave any weight to the Executive Director's choice not to appeal Klickitat County's decision without any factual basis supporting such a conclusion.

Mr. Arndt also argues that the Commission must give substantial weight to the Executive Director's decision to not appeal a county decision. This variation on the argument above incorrectly links the Commission's authority to monitor the activities of the counties and take actions to ensure compliance (16 U.S.C. § 544m(a)(1)) to the Commission's responsibility to hear appeals from persons adversely affected by county decisions (16 U.S.C. § 544m(a)(2)). By the design of the Act, these two authorities cannot be linked. If Mr. Arndt were correct, then the Commission would be unable to reverse decisions that the Executive Director did not herself appeal. That result would be contrary to the Act's authority for any person adversely affected by a county decision to appeal that decision to the Commission, and receive a fair appeal process based on the county's record.

Second Assignment of Error – Was the Hearing Examiner's decision that the short plat is entirely within the Dallesport Urban Area based on substantial evidence?

Standard of Review

In this assignment of error, the appellants argue that "substantial evidence" does not support the hearing examiner's finding that the short plat is entirely within the urban area. The definitions of substantial evidence in Washington and Oregon law are given above.

Analysis

In their briefs, both parties cite to evidence in the record that they claim supports their arguments. Principally, appellants argue that because there are multiple lines in the record purporting to be the Dallesport Urban Area boundary, a survey of the boundary line would be necessary to resolve the discrepancies and determine for certain whether the short plat would actually be solely within the urban area. Mr. Arndt cites to the several determinations, prior decisions that relied on those determinations, and testimony before the hearing examiner and argues that all of this evidence considered together supports a conclusion that the short plat is entirely within the urban area.

As stated in the facts above, Mr. Arndt intended to divide his property along the boundary of the Dallesport Urban Area/general management area. This is a critical fact because in order to ensure that the land division actually occurs along the Dallesport Urban Area/general management area boundary, Klickitat County must know the boundary with precision. We conclude that the evidence in the record, buttressed by the reasoning of the hearing examiner, did not constitute substantial evidence of the precise boundary.

We consider the evidence presented to the Klickitat County planning staff and the hearing examiner. We start with the Commission staff's May 27, 2008 letter. If this letter were the entire quantum of evidence, we would certainly uphold Klickitat County's decision. However, it is not. As noted above, the hearing examiner did not consider all of the evidence in the record relating to the May 27, 2008 letter and a subsequent July 11, 2008 letter.

The hearing examiner also determined that the 1993 and 1995 site plan map approving a single-family dwelling was a final decision by the Gorge Commission that must be followed here. We disagree with the hearing examiner and note that the precise boundary was not

material to approval of the dwelling in 1993. The 1993 map included a depiction of the Dallesport Urban Area boundary; however, it did not purport to determine the boundary with any precision; rather it only showed that the dwelling would obviously be within the general management area, as Mr. Arndt proposed at that time. Here, had Mr. Arndt proposed to divide his land obviously within the Scenic Area and sought Scenic Area approval, then perhaps reliance on the 1993 boundary would have been sufficient as it was in 1993. Instead, because Mr. Arndt proposes to divide the property along the Dallesport Urban Area boundary, such an estimate is not sufficient to ensure that there is no land division within the Scenic Area without Scenic Area review.

The hearing examiner's decision, at paragraph 14 also explained, "Three different maps in the record show three different 'entry points' for the location where the old road or trail entered the Arndt property from the south. These three maps are the 1993 site map for a dwelling (prepared by Mr. Arndt and approved by the Gorge Commission), the 2007 Columbia Vineyard estates subdivision map (also accepted by the Gorge Commission and approved by the County), and the 2009 map prepared by [Austin] Bell for this proceeding. Rec. Ex. 10.I, 34, and 21." The hearing examiner explained why he did not believe Mr. Bell's map was persuasive, Rec. 5, paragraph 10, and then reasoned: "Whether the boundary line from [the Columbia Vineyards Estates] survey is used or the line from the 1993 decision, which the Gorge Commission also approved, the plat is consistent with the Scenic Area Act." Rec. 8, paragraph 22. We disagree. Because Mr. Arndt proposed to divide his property along the Dallesport Urban Area boundary, it was not sufficient for the hearing examiner to conclude that the short plat would be entirely within the Dallesport Urban Area based upon conflicting boundary lines, even without considering Mr. Bell's map. This is especially so here because the southern point of the

Dallesport Urban Area boundary shown on the tentative short plat map for the subject parcel differs from the northern point of the Dallesport Urban Area shown on a surveyed line prepared by a licensed surveyor for the parcel adjacent to the south.

Additionally, we note that the hearing examiner also concluded that Klickitat County used the most conservative line of all the options—i.e., the boundary that would place the greatest area of Mr. Arndt's parcel in the general management area. Rec. 8, paragraph 21. The parties also argued this point to us. Audio Recording of Oral Argument at 10:29:04–40. We conclude, however, that whether there would be more or less of Mr. Arndt's parcel in the Dallesport Urban Area is not a relevant factor to ensuring the short plat would only be within the Dallesport Urban Area. The Commission has no position on whether there should be more or less land area in the Dallesport Urban Area, and the hearing examiner's reliance on this factor as evidence that the short plat was entirely within the Dallesport Urban Area is misplaced.

Finally, we note that the Klickitat County planning staff did not ignore the Commission staff's July 11, 2008 letter.[10] Klickitat County planning staff asked Mr. Arndt for a survey, Rec. 7, paragraph 19. Mr. Arndt refused to provide a survey, *Id.*; Rec. 65; Audio Recording of Oral Argument 10:46:28.

In summary, because Mr. Arndt proposed to divide his property along the Dallesport Urban Area/general management area boundary, we conclude that the evidence in Klickitat County's record was not sufficient to persuade a fair-minded or reasonable person to find that

[10] Klickitat County argued to the hearing examiner and to the Commission that the July 11, 2008 letter ordered the Klickitat County Planning Department to require an applicant to prepare a survey for the planning department to determine the Scenic Area boundary. This is a misunderstanding of the July 11, 2008, letter. The July 11, 2008 letter did not order the county to require Mr. Arndt prepare a survey.

Mr. Arndt's short plat followed the actual boundary line and did not intrude into the general management area where Klickitat County could not approve the short plat.

Third Assignment of Error – Did the Hearing Examiner erroneously give substantial weight to previous decisions involving the subject property?

The appellants argue that the hearing examiner erroneously gave "substantial weight" to prior approved development decisions in determining that the short plat is entirely within the Dallesport Urban Area. The standard of review for this argument is whether the hearing examiner's decision was "clearly erroneous." Commission Rule 350-60-220(1)(d).

The hearing examiner's decision concluded, "Prior approved development decisions concerning the Arndt property must be given substantial weight and provide a basis for such arguments as detrimental reliance and estoppel." Rec. 10 (paragraph 25). The appellants argue that the hearing examiner did not state which decision he was giving weight to, that the prior land use decisions on the property did not determine the Dallesport Urban Area, that the Commission has not always relied on its early boundary determinations, and that there has been no survey of the urban area boundary. Mr. Arndt principally responded that the finality doctrine governs the location of the Dallesport Urban Area/general management area boundary.

Analysis

To start, we note that the parties referred to the Commission's 1993 decision approving Mr. Arndt's home, and the 1995 approval of the final site plan for the home (which Mr. Arndt stated shows the exact same line as the 1993 decision) in their briefing to the hearing examiner. We agree with Mr. Arndt's explanation in his brief to this Commission that paragraph 25 of the hearing examiner's decision was referring to these two matters.

We concluded above that there are multiple lines purporting to depict the Dallesport Urban Area/general management area boundary on Mr. Arndt's parcel, and there is not

substantial evidence that the 1993 line is the actual boundary line. We therefore also conclude that it was clear error for the hearing examiner to give the 1993 decision substantial weight. As explained above, although the Commission relied on a staff projection of the Dallesport Urban Area/general management area line on Mr. Arndt's property, that reliance was for development that was proposed for the general management area, whereas here, the short plat here is to occur on the boundary line. The 1993 line was not surveyed, and it is insufficient to rely on an unsurveyed line where it is necessary to know the precise boundary. We also note (as did the appellants) that the Commission has not consistently relied on the line as shown in the 1993 decision. Specifically, in 2006, the Commission relied on a surveyed Dallesport Urban Area/general management area line for the Columbia Gorge Estates parcel immediately south of Mr. Arndt's property, and that surveyed line touches Mr. Arndt's parcel at a different point than the 1993 non-surveyed line.

We also disagree with Mr. Arndt's argument that the 1993 decision approving the dwelling and the 1995 final site map is a final decision of the boundary line that cannot be disturbed. Mr. Arndt argues that *Skamania County v. Columbia River Gorge Commission*, 144 Wn. 2d 30, 26 P.3d 241 (2001) does not allow the Commission to determine that the boundary line is anything other than as shown in the 1993 site plan. This case, however, is not similar to the *Skamania County* case. In that case, the Commission ordered Skamania County to rescind a land use permit after the deadline for appealing that permit. Here, the Commission is addressing the appellants' arguments relating to the boundary line in an appeal that was timely filed. As well, a decision by the Commission remanding the matter back to Klickitat County for a determination of the boundary line (which may differ than the 1993 decision) does not revoke or undo any prior land uses approved for the property. The dwelling, driveway, shop building, and

other development on the property are completed unaffected by a remand. The only effect of a remand is prospective—to ensure that Mr. Arndt's currently proposed short plat actually occurs on the Dallesport Urban Area/general management area boundary, as Mr. Arndt proposed.

VII. Conclusion

We remand the decision of the hearing examiner back to Klickitat County. On remand, we suggest that Klickitat County may simply impose a condition of approval that Mr. Arndt's final short plat map be based on a surveyed line (by a licensed surveyor) of the Dallesport Urban Area. Such a condition of approval would end this dispute and avoid any boundary disputes on this parcel in the future. Additionally, the survey could prove Mr. Arndt correct that the actual boundary could put more land in the Dallesport Urban Area than shown on the 1993 site plan.

IT IS SO ORDERED this 5 day of August 2010.

Joyce Reinig
Chair

NOTICE: You are entitled to seek judicial review of this Final Order within 60 days from the date of service of this order, pursuant to section 15(b)(4) of the Scenic Area Act, P.L. 99-663.

CERTIFICATE OF MAILING

I hereby certify that on the 5th day of August 2010, I mailed a true and correct copy of the foregoing FINAL OPINION AND ORDER by first class mail, postage prepaid to the following persons:

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