BEFORE THE COLUMBIA RIVER GORGE COMMISSION

FRIENDS OF THE COLUMBIA GORGE, Petitioner, vs. SKAMANIA COUNTY, Respondent, and DAVID AND GRETCHEN L'HOMMEDIEU, Respondent-Intervenors.	)	CRGC No. COA-S-00-04 **FINAL OPINION AND ORDER**

This case involves an appeal by Friends of the Columbia Gorge of a decision by Skamania County approving an application to construct a dwelling and garage. The Friends of the Columbia Gorge assign error to Skamania County's decision allowing the development at a specific portion of "site 2" instead of at "site 3." We affirm Skamania County's decision.

Parties

The parties to the hearing were:

Friends of the Columbia Gorge, represented by Gary K, Kahn, Reeves Kahn & Eder, and Beth Englander, Friends of the Columbia Gorge;

Skamania County, represented by Bradley W. Andersen, Skamania County Prosecuting Attorney;

David and Gretchen L'Hommedieu, represented by John M. Groen, Groen, Stephens, & Klinge, LLP.

Proceedings Below

This case is unusual in that the Skamania County Planning Director did not make the initial decision, but rather chose to elevate the matter to the Skamania County Planning Commission for a recommendation and to the Skamania County Board of Commissioners for decision. The Skamania County Planning Department issued a staff report to the Planning Commission recommending approval of the proposed development at "site 3." The Planning Commission commenced a public hearing on the application, heard evidence, conducted a site visit, and then recommended approval of the proposed development at a specific portion of "site 2." The Board of County Commissioners adopted the recommendation of the Planning Commission. Petitioners do not assign error to this decision-making process. Petitioners appealed the decision of the Skamania County Board of Commissioners to this body.

The Columbia River Gorge Commission met on September 12, 2000 to hear oral argument and deliberate to a decision.

Procedural Rulings

1. Columbia River Gorge Commissioner Walt Loehrke recused himself because he participated as Chairman in the hearing before the Skamania County Planning Commission.

2. The video tape made during the site visit of the Skamania County Planning Commission was played without sound prior to oral argument. Commissioner Loehrke, with consent of all parties, did point out sites 1, 2, and 3 on the video tape.

3. On September 11, 2000, Chair Anne Squier denied Petitioner Friends of the Columbia Gorge's motion to supplement the record with the Columbia River Gorge Commission's July 2000 Draft Scenic Monitoring Report. During oral argument, Intervenor referred to that document. No objection was made at the moment of Intervenor's statement. Subsequently, Petitioner wished to refer to that document in his rebuttal. The Chair ruled that Intervenor's statement would be stricken and Petitioner could not refer to the document. Petitioner noted an objection to this ruling.

Standard of Review

The issues presented here are both legal and factual in nature. For the legal issues, our review focuses on whether the decision violates a provision of applicable law and is prohibited as a matter of law, or whether the decision improperly construes the applicable law based on the record before us. For the factual issues, our review focuses on whether the decision is supported by substantial evidence in the whole record, whether the findings are insufficient to

support the decision, or whether the decision was clearly erroneous or arbitrary and capricious.[1]

Findings of Fact

We incorporate the findings of fact recommended by the Skamania County Planning Commission and adopted by the Skamania County Board of Commissioners. We summarize and clarify the relevant facts below.

The subject property is 10 acres in size and is located in the general management area. There is no dispute that the proposed development is an allowed land use on the parcel. The County identified three possible general areas for the proposed development—referred to as sites 1, 2, and 3. Site 1 is the southernmost of the three sites and is located on edge of the bluff. The parties agree that site 1 does not meet the guidelines in the Skamania County Land Use Ordinance for protection of scenic resources. Site 2 is located north of site 1. The specific portion of site 2 that the Planning Commission approved for the development is "east of the existing driveway and north of the four existing fir

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[1] Commission Rule 350-60-220 provides:

"The Commission shall reverse or remand a land use decision for further proceedings when:

(a) The governing body exceeded its jurisdiction;
(b) The decision is unconstitutional
(c) The decision violates a provision of applicable law and is prohibited as a matter or law; or;
(d) The decision was clearly erroneous or arbitrary and capricious.
(e) The findings are insufficient to support the decision;
(f) The decision is not supported by substantial evidence in the whole record;
(g) The decision is flawed by procedural errors that prejudice the substantial rights of the petitioner(s);
(h) The decision improperly construes the applicable law; or
(i) A remand is required pursuant to 360-060-0090(s)(d) [sic].

trees." (Rec. at 009, 017). Additionally, if a garage would be constructed, the County's decision provides it must be constructed to the north of the dwelling (Rec. 017), toward site 3. The portion of site 2 specified in the County's decision uses existing topography and existing vegetation to a high degree to screen the development as seen from key viewing areas, which are all located to the south of the subject parcel. In addition, Skamania County has required the applicant to plant an additional 12 trees, six feet in height, as screening. (Rec. 14, 18).[2] Site 3 is located north of site 2 and north of additional topographic features and vegetation. The parties agree that development at site 3 would not be visible from key viewing areas.

The record contains two references to site 3 being "wet" (Rec. 40), or having "ground water" (Rec. 66). The video tape was inconclusive as to whether site 3 was "wet," but did show thick green grass at the site. The audio tape of the hearing also contains a statement by a Skamania County Planner that if a hydrologist were to tell him that there was water in site 3, then he would believe it. The record contains no contradictory statements to these assertions.

Although the County's decision provides that the dwelling would be one story with a daylight basement and may be 28 feet in height as measured from the top of the footer (Rec. 17), the Intervenors (applicants) clarified in their brief (Intervenor's brief at 17) and at oral argument that they intend to construct a dwelling that is one story plus a basement (not a daylight basement), and that the dwelling would be 18 feet in height from existing grade. Our decision hence

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[2] We note that six foot trees probably will not provide much height or bulk for screening purposes for several years.

considers that the dwelling would be as clarified at oral argument. Additionally, if a garage is to be constructed, it would be limited in size and 18 feet in height as provided in the County's decision (Rec. 17).

Contentions of the Parties

Petitioner argues that site 2 does not comply because it is not the least visible building site. Petitioner claims site 3 (and not site 2) must be chosen because site 3 reduces visibility to its smallest extent. In this case, at site 3, the development would not be seen from key viewing areas. Specifically, Petitioner cites Skamania County Code §§ 22.10.020.B5 and B6[3] to support its contention.

Respondent and Intervenor argue that site 3 is a "wet" area and thus the County properly did not require the development to be located there. They also argue visibility of development is minimized when the development is sited to be visually subordinate, not necessarily when it is in the least visible location on the parcel. They further argue that siting is only one of many tools that may be used

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[3] Skamania County Code § 22.10.020.B5 provides:

> New development and roads shall be sited on portions of the subject property which minimize visibility from Key Viewing Areas, unless siting would place such development in a buffer specified for the protection of wetlands, riparian corridors, * * *. In such situations, development shall comply with this standard to the maximum extent practicable.

Skamania County Code § 22.10.020.B6 provides:

> Use of existing topography and vegetation shall be prioritized over other means of achieving visual subordinance, such as planting of new vegetation or use of artificial berms to screen the development from Key Viewing Areas.

to achieve visual subordinance, and should not be given preference over the other tools. Site 2, according to Respondent and Intervenor, complies with the guidelines because on balance, considering size, height, shape, color, reflectivity, siting, and additional screening, the development would be visually subordinate.

Analysis and Conclusions of Law

This case requires us to evaluate whether petitioner has met its burden of proof that Skamania County erred in allowing the proposed development at a specific portion of site 2 rather than at site 3. We incorporate the conclusions of law recommended by the Skamania County Planning Commission and adopted by the Skamania County Board of Commissioners based upon the following analysis of the arguments presented.

First, we address whether site 3 is a buildable site. We are cautious in ruling that Skamania County properly found that site 3 has the hydrologic limitations based upon the few references in the record to the site being "wet" and the video. However, those references are the only evidence in the record concerning the issue. Petitioners failed to contradict this evidence at either of the Planning Commission hearings or at the hearing before the Board of Commissioners. "Evidence is substantial if it is sufficient to persuade a fair-minded person of the truth of the proposition." *Heinmiller v. Department of Health*, 127 Wn. 2d 595, 607, 903 P.2d 433, 909 P.2d 1294 (1995). While we

hesitate to rule that these references that site 3 is "wet" constitute substantial evidence, it is the only evidence.[4]

Based upon our review of the evidence, we do not believe petitioners have met their burden of proving that site 3 was a practicable building site. The County did not make a specific finding that site 3 was unbuildable; however, we believe the record demonstrates that the County approved site 2 in part because site 3 was "wet." Because we do not believe the County was arbitrary and capricious in its findings concerning site 3, we find the County did not err in allowing the development at site 2.

Second, we evaluate whether site 2 complies with SCC §§ 22.10.020.B5 and B6 to site the development to minimize visibility as seen from key viewing areas and to give priority to using existing topography and vegetation over other means of achieving visual subordinance. Petitioners urge us to compare the visibility of the development at site 2 and at site 3. However, we do not believe that SCC §§ 22.10.020.B5 and B6 require development to be located at a site that is not practicable. For this reason, we hold that Skamania County did not err in its decision allowing the development at the specified portion of site 2.

We also deliberated on whether the term "minimize" gives any flexibility to the counties in siting development. Our deliberations originated with Respondents' argument that the provision requiring development to be sited in a manner that minimizes visibility of the development as seen from key viewing

[4] Expert testimony regarding the hydrologic limitations, or lack thereof, would have bolstered the record, and we hope that parties to a future appeal will provide such evidence for the record to assist in our review.

areas is inconsistent with the Act's definition of "adversely affect" and the Management Plan's policy of "visual subordinance" for developments visible from key viewing areas. Respondents claim this conflict requires us to apply the Act's definition of "adversely affect" and the Management Plan's policy of "visual subordinance" rather than the Management Plan's guideline that requires minimizing visibility. We do not need to address this argument to resolve this case; however, we offer the following thoughts as guidance to the counties applying the "minimize visibility" standard.

We are aware that application of the plain meaning of the term "minimize"[5] may result in development that more than meets the Management Plan's policy requiring new development to be visually subordinate. However, this does not necessarily mean that the guideline is inconsistent with the policy; it may simply be more protective of the resource. Respondent's argument would require us to

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[5] In a prior case we found Skamania County erred when it sited development in a manner that did not minimize visibility as seen from key viewing areas and failed to use existing topography and vegetation to screen the development from key viewing areas, resulting in highly visible development. *In the Matter of Skamania County, Director's Decision NSA 96-81, Findings of Fact, Conclusions of Law and Final Order (January 25, 1999) (Bea)*. Specifically, among other things, we found erroneous, Skamania County's interpretation that to "minimize visibility" means to site anywhere but on the site with maximum visibility. In reaching that conclusion, we relied on the plain meaning of the term "minimize." We stated:

> For example, the county planners, including both Mr. Mazeski and Ms. Fagerness, testified that to "minimize" visibility, the County only sought to find a site that was not the worst. This approach contradicts both the professional and lay understanding of the word "minimize", which is "to reduce to the smallest possible number, degree, or extent." Webster's Third New International Dictionary (1993).

Id. at 30.

either ignore the term "minimize" in the Management Plan or amend the Management Plan. We do neither at this time. We can only amend the Management Plan through the process specified in Commission Rule 350-50 or as part of plan revision, as required by the Act (16 U.S.C. § 544d(g). We cannot and do not amend the Management Plan by our decision in this or any appeal decision.

We must, if possible, interpret the terms in the Management Plan in a manner so that they do not conflict with each other. Our decision that counties need only consider practicable building sites when applying the "minimize visibility" standard does harmonize all relevant provisions of the Management Plan.

Our decision in this case gives counties flexibility at this time in applying the "minimize visibility" standard. That flexibility does not arise from directly applying the Act's definition of "adversely affect" or the Management Plan's policy of "visual subordinance", [6] but is dependant on the specific facts of each case. While we believe the term "minimize" includes siting development such that it is not visible from key viewing areas, that outcome is not mandated in all situations. There may be cases in which an invisible site is not buildable or where any buildable site on a parcel is visible to some degree. The instant case addresses this aspect of "minimize." We believe that Skamania County did use existing

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[6] We note that we do not need to directly apply the Management Plan's goals, objectives, and policies in resolving this case. If ever we must decide whether to directly apply the Management Plan's goals, objectives and policies, we must do so cautiously. *Pardee v. City of Astoria*, 17 Or. LUBA 226 (1988); *Murphey v. City of Ashland*, 19 Or. LUBA 182, *Aff'd.* 103 Or. App. 238 (1990); *Thormahlen v. City of Ashland*, 20 Or. LUBA 218 (1990).

topography and vegetation to screen the development to a high degree, and that given the choice of practicable building sites presented in the record, we believe the County did minimize visibility of the development by allowing the development at the specified portion of site 2.

In short, the "minimize visibility" standard does not necessarily force development to only one site on every parcel. Several practicable building sites may each reduce visibility to a minimum, as the difference in visibility at two or more sites, as seen from key viewing areas, may be difficult to measure.[7] Nothing in the "minimize visibility" standard requires counties to site development at locations that are impracticable, such as site 3 in this case.

Finally, we note that Skamania County and the L'Hommedieus—represented by the same attorney who represents the landowners in *Bea*—both stated in their briefs and at oral argument that allowing the development at site 2 was not inconsistent with the Commission's deliberations in crafting the final order in *Bea* and referred to our final order in their briefs and argument. We rely on these statements made by Skamania County and the L'Hommedieus, and do not believe this case overrules or affects our decision in *Bea* in any way.

We hold the County's decision did not violate applicable law and is not prohibited as a matter of law; further we hold the County's decision properly construed the applicable law based on the record before us. We also hold Skamania County's decision was supported by substantial evidence in the whole

[7] We expect that if a case comes before us in the future that requires us to judge whether this standard has been satisfied, the parties will provide a photographic or other sufficient record to enable us to make such a determination.

record, its findings are sufficient to support its decision, and thus the decision is not clearly erroneous or arbitrary and capricious.

The decision of the Skamania County Board of Commissioners is **AFFIRMED**.

DATED this 16th day of October, 2000

Anne W. Squier

Anne W. Squier, Chair
Columbia River Gorge Commission

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