



MEMORANDUM

May 30, 2019

TO: Gorge Commissioners

FROM: Krystyna Wolniakowski and
Joanna Kaiserman

SUBJECT: Staff Report for Appeal
In re Appeal of Development Review Decision No. C19-0004 by Charles and Valerie Fowler
Public Hearing Scheduled for June 11, 2019

Action Requested

On June 11, 2019, you will conduct a public hearing and deliberate to an oral decision on Charles and Valerie Fowler's appeal of Director's Decision No. C19-0004. This is an appeal of decision of the Commission's Executive Director. It is unlike appeal hearings you have held involving appeals of county decisions. Please review this staff report and the Notice of Hearing carefully to understanding how you will conduct the hearing.

You are not reviewing the Director's Decision for error. For appeals of Executive Director decisions, the Commission is deciding whether to approve the application as proposed, with conditions of approval (which may differ from the conditions in the Director's Decision) or deny the application. If you vote to approve the application, you may use the Director's Decision as your base and explain any differences you vote to approve.

Your decision requires a simple majority of a quorum of commissioners. If all commissioners participate in the hearing, a decision to grant the appeal requires at least seven votes in favor of the Fowlers appeal.

Order of the Hearing

1. Chair calls to the hearing to order and summarizes the order of the hearing;

2. Chair asks members of the Commission for disclosures of conflicts of interest, potential bias, appearance of fairness concerns, and ex parte communications; parties may ask questions or challenge commissioners' participation; resolution of concerns and challenges;
3. The Executive Director will briefly summarize the decision on appeal and any recommendation if different from the decision on appeal;
4. Appellants present their evidence and legal argument;
5. Public comment, including evidence and legal argument;
6. The Executive Director may respond to the appellants' and public's evidence and legal argument;
7. The appellants may respond to all the evidence and legal argument;
8. Commissioners and the appellants may ask questions while the Executive Director, the appellants and the public are speaking; any other person may submit questions in writing to the Chair of the Commission to ask on behalf of that person;
9. The Commission will deliberate to an oral decision.

Hearing Package

Your hearing package includes the following documents.

1. This staff report;
2. The appellants' brief and attachments.
3. Notice of Hearing;
4. Record of the Executive Director's Decision (several separate documents).

You have a copy of the Commission's Land Use Ordinance for Klickitat County (Commission Rule 350-81) in your Commissioner Handbook. Please contact me if you can't find your copy, or you may read and download it from the Commission's web site.

Applicable Rules, Hearing Procedure, and Admissible Evidence

The appellants brought the appeal under Commission Rule 350-70. I recommend you review Commission Rule 350-70-140 concerning oral argument and evidence that is admissible in the hearing. The Notice of Hearing contains the hearing procedure and information about admissible evidence in more detail.

The Commission's Counsel has assisted the Executive Director with the Director's Decision and is unable to be the Commission's legal advisor in this matter. The Chair of the Commission has elected to conduct the hearing without a legal advisor to the Commission. If the Chair has legal advice questions, she may ask the parties to give their opinion. In this situation, the Commission's counsel may offer an opinion.

Hearing Fairness and Disclosures

Conflicts of Interest/Bias/Appearance of Fairness

Commission rules require this hearing to be objectively fair and to appear fair to a reasonable person. At the beginning of the Commission's hearing, the Chair will request commissioners disclose any conflicts of interest, bias, prejudice and appearance of fairness concerns toward or against the project or any party. A conflict of interest involves any financial interest with one or more of the parties, with the property in question, or in the outcome of the appeals. You must

disclose any conflict involving you or your immediate family. Bias, prejudice and appearance of fairness concerns arise when there are facts that would lead a reasonable person to believe that you cannot be a fair decision-maker in this appeal. You must disclose written or oral communications, statements, current or prior memberships, friendships, employment or other professional relationships, and other factors that might lead to such a concern. You should make disclosures about any communications you have had or statements you have made; however, you must make disclosures about communications and statements since April 4, 2019 (when the Fowlers filed their appeal).

***Ex Parte* Communication**

If you have had conversations or received communications other than those described above that directly or indirectly relate to these appeals, you must disclose those conversations. A complete disclosure includes when, who and what.

Objection to a Commissioner's Participation in the Appeals

A person may object to an individual commissioner's participation based on a disclosure or other information not disclosed. If that occurs, the full Commission may discuss that individual commissioner's participation, but the ultimate decision about whether to participate remains with the individual commissioner at issue. If that commissioner chooses not to participate in the appeal, that commissioner should leave the hearing room so there is no risk that commissioner will interact with the remaining decision-making commissioners. If a commissioner participates, but a court later determines that commissioner should have recused himself or herself, the court can remand the matter back to the Gorge Commission for a new hearing without the participation of that commissioner.

Substance of the Appeal

Please read the complete Director's Decision and Staff Report, which is at pages 2–25 of the Administrative Record. The issue in this appeal is the location for the Fowler's proposed home, which would replace an existing home. The Executive Director did not approve the site that the Fowlers proposed, but rather approved the Fowler's proposed home at the site of the current home, which is in a location where the home would not protrude above the line of a bluff, cliff, or skyline as seen from key viewing areas. This is required by Commission Rule 350-81-530(2)(h) in the Land Use Ordinance. The text of this provision and the Executive Director's findings and conclusion relating to this standard are at pages 16–17 of the Administrative Record (pages 11–12 of the staff report supporting the Director's Decision).

The Executive Director has reviewed the Fowlers' brief and evidentiary exhibits and still believe that the Fowlers' proposed location is not consistent with the Land Use Ordinance, and the approved location is consistent with the Land Use Ordinance. As discussed in the staff report, the approved site has a thick canopy of evergreen trees to ensure the home does not protrude above the skyline, whereas the Fowlers' proposed site has more scattered trees. This is important because the definition of "skyline" in the Land Use Ordinance is usually the place at which a landform meeting the sky as viewed from a key viewing area, but, importantly, the definition also states, "In areas with thick, unbroken tree cover, the skyline is generally formed by the top of the vegetative canopy. In treeless areas or areas with more open tree cover, the skyline is generally formed by the surface of the ground." The full text of this provision is in the staff report. The Executive Director concluded that the proposed site is an area with open tree area and the approved site is an area of unbroken tree cover.

Additionally, at pages 10–12 of the administrative record (pages 5–7 of the staff report), the Executive Director explained that the approved site uses more of the topography of the land and existing vegetation to screen the home than the Fowlers’ proposed site.

At the hearing, the Executive Director will present an overview of the site and the Director’s Decision, will be prepared to answer the Commission’s questions, and will ask the Commission to deny the appeal.

After the Fowlers filed their appeal and brief, Friends of the Columbia Gorge also filed an appeal of the same Director’s Decision. Friends of the Columbia Gorge moved to consolidate its appeal with the Fowlers’ appeal; the Fowlers’ objected because it would delay their hearing and because they would have to revise their brief. The Chair denied the motion to consolidate the appeals. The issues that Friends of the Columbia Gorge raised in its notice of appeal are summarized as:

- whether the decision should have required a revised site, building, and landscape plans before issuing a decision, not as a condition of approval.
- whether the dwelling would be visually subordinate even though it has a lot of windows facing key viewing areas
- Scenic finding no. 13 says that staff always included a condition that if the applicants propose outdoor light, they must submit a revised site plan for review and approval, but there is no such condition in the decision document.

Because this hearing is a public hearing, these issues could arise and the Commission could explore, during its deliberation, if it can resolve any of those issues and resolve Friends’ concerns or narrow the issues in Friends’ appeal.