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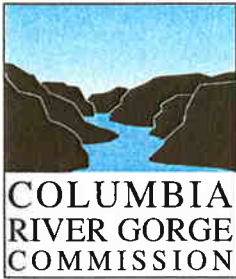
TO: Columbia River Gorge Commission

FROM: Jennifer Ball Kaden, Planner

DATE: August 31, 2011 for the September 13, 2011 meeting

SUBJECT: Hearing on Notice of Violation and Proposed Resolution through Agreement for Merriann Bell and Franklin Petersen

Attached are the materials for the hearing on the Proposed Resolution Through Agreement for Merriann Bell and Franklin Petersen. These materials were prepared for your June 14, 2011 meeting. Prior to that meeting but after the packet materials were prepared, the Commission postponed the hearing to accommodate other business on its agenda. Staff contacted Ms. Bell and Mr. Petersen about postponing the hearing until September 13, 2011 and received their agreement. Staff spoke with Ms. Bell again in July to remind her of the hearing date and in August to inform her of the hearing time and location. On August 22, 2011, Ms. Bell and Mr. Petersen submitted an after-the-fact development application to construct the structures at issue as recommended in the proposed agreement.



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TO: Columbia River Gorge Commission

FROM: Jennifer Ball Kaden, Planner

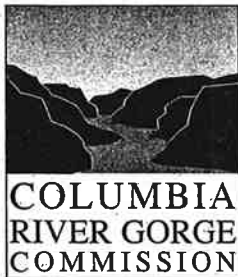
DATE: June 1, 2011 for the June 14, 2011 meeting

SUBJECT: Hearing on Notice of Violation and Proposed Resolution through Agreement for Merriann Bell and Franklin Petersen

On May 17, 2011 the Executive Director issued a Notice of Violation to Merriann Bell and Franklin Petersen for structures constructed without review. At your June 14, 2011 meeting, you will conduct a hearing on the Proposed Resolution Through Agreement. This is not a public hearing; only staff, Ms. Bell, and Mr. Franklin can address the Commission. Ms. Bell and Mr. Petersen have signed the Agreement which requires them to apply for approval of the structures or remove them. Enclosed you will find a copy of the Notice of Violation, the signed Proposed Resolution Through Agreement, the Notice of Hearing, and photographs of the subject structures. The hearing procedures are included in the Notice of Hearing.

Action Requested

Staff recommends that at the June 14, 2011 hearing the Commission accept the Proposed Resolution Through Agreement to resolve the violation.



BEFORE THE COLUMBIA RIVER GORGE COMMISSION

In the Matter of a Notice of Alleged)
Violation Issued to Merriann Bell and) CRGC No. E11-K-G-146
Franklin Petersen for Nursery Structures)
In Klickitat County, Washington) **NOTICE OF HEARING**
_____)

The Columbia River Gorge Commission will hold a hearing on June 14, 2011 at 9:00 a.m.¹ at the Hood River County Administration Building, at 601 State Street in Hood River, Oregon to consider the matters raised in the Notice of Alleged Violation and the Proposed Resolution Through Agreement .

Staff mailed the proposed agreement to Ms. Bell and Mr. Petersen on May 17, 2011. Ms. Bell and Mr. Petersen signed the agreement on May 22 and May 20, 2011, respectively.

The Commission derives its jurisdiction over the matter from the Columbia River Gorge National Scenic Area Act. The Commission will conduct the hearing

¹ At the time of this notice, the agenda for the Commission's June 14, 2011 meeting has not been finalized. Therefore, this hearing is noticed for the beginning time of the Commission's meeting. The Executive Director will notify Ms. Bell and Mr. Petersen of the time that this hearing is scheduled on the final meeting agenda. Ms. Bell and Mr. Petersen may also contact the Commission office approximately 10 days prior to the date of the hearing to inquire about the scheduled time.

as an enforcement action, which is a quasi-judicial hearing. 16 USC § 544m(3); Commission Rule 350-30-005 et seq.; Commission Rule 350-16-001 et seq.

The hearing will address the allegations of the Executive Director, which are contained in the Notice of Alleged Violation, and the terms of the Proposed Resolution Through Agreement . This matter concerns two greenhouses, a shade house, and a propagation shed constructed without a land use approval, as required by Commission Rule 350-81. The specific provisions of law are specified in the Notice of Alleged Violation.

A portion of the hearing may be conducted in executive session, in which the hearing room will be cleared of all persons except for the Commission, necessary Commission staff, Ms. Bell and Mr. Petersen, and their representative(s). During executive session, the Commission may take testimony and consider written evidence that qualifies as confidential pursuant to federal and state law and the Commission's rules. During executive session, the Commission may rule on motions that involve confidential information if confidentiality cannot be preserved to rule on the motions in open session.

PARTIES

Merriann Bell and Franklin Petersen, Lyle, Washington²

RECORD

² Ms. Bell and Mr. Petersen have not informed staff that they will be represented by an attorney, but as specified below, they may choose to be represented by an attorney.

A mechanical record shall be made of the proceeding. An executive session portion of the hearing, if any, shall be recorded separately. All recordings shall be part of the record of the appeal and shall be available for duplication and transcription; however, a recording of an executive session shall be confidential and available only to the Commission, Ms. Bell, Mr. Petersen, and the court. All motions, rulings and testimony shall be part of the record of the hearing for purposes of an appeal of a decision by the Commission.

ATTORNEYS

Ms. Bell and Mr. Petersen may be represented by an attorney. Parties to quasi-judicial hearings are often represented by attorneys; however, it is not necessary that parties be represented by an attorney. A Legal Aid organization may be able to assist a party with limited financial resources. Any party may speak on her or his own behalf. The Commission's counsel, Jeffrey Litwak, will be present to provide advice to the agency.

ROLE OF PRESIDING OFFICER, COMMISSION

The Chair of the Commission will act as Presiding Officer at the hearing. In the absence of the Chair, the Vice Chair will act as Presiding Officer. The Presiding Officer will rule on all motions, evidentiary questions, and other similar matters. The full Commission will hear all arguments and will make the final decision. The Chair of the Commission is Joyce Reinig, P.O. Box 730, White Salmon, WA 98672 (509) 493-3323.

The Commission will render a written decision within 90 days after the date the Commission completes its deliberation and issues an oral decision.

EVIDENCE

The Commission will accept as evidence any oral or written testimony or document that is commonly relied upon by a reasonably prudent person in the conduct of serious affairs. See Commission Rule 350-16-014. Testimony shall be taken upon oath or affirmation administered by the Presiding Officer.

The Commission may, on its own, or by motion of a party, exclude irrelevant or repetitious evidence.

HEARING PROCEDURE

Approximately 10 days prior to the hearing, members of the Commission and Ms. Bell and Mr. Petersen will be provided with a copy of the record for this matter. The record shall include this Notice of Hearing, the Notice of Alleged Violation, and all relevant correspondence and other documents in this matter. Documents submitted at the hearing as evidence become part of the record. There is no opportunity for discovery because all of the information relating to this matter is included in the record.

The Commission will also receive a copy of the Proposed Resolution Through Agreement that was signed by Ms. Bell and Mr. Petersen.

At the hearing, the Presiding Officer will commence the hearing by announcing the case.

The Commission will first take up preliminary matters, such as disclosure of conflicts of interest or ex-parte contacts by the Commission or the status of the parties.

Ms. Bell and Mr. Petersen will then be given an opportunity to make a brief opening statement. It is not the purpose of the opening statement to present evidence; the statement should introduce what the party intends to argue and to demonstrate with evidence.

The Presiding Officer will call upon the Executive Director to present the Notice of Alleged Violation and Proposed Resolution Through Agreement.

After the Executive Director finishes presenting the Notice of Alleged Violation, Ms. Bell and Mr. Petersen may address the Commission (however, they are not required to do so). Ms. Bell and Mr. Petersen have the right to respond to all issues properly before the Commission and present evidence and witnesses on those issues as allowed by the Commission rules.

The Commission will then deliberate and decide whether to accept the Proposed Resolution Through Agreement.

If the Commission rejects the Proposed Resolution Through Agreement, then the Commission shall set the matter for a contested case hearing at its next available meeting (the next available meeting will depend on the Commission's workload at its future meetings).

If the Commission wishes to make changes to the Proposed Resolution Through Agreement, then the Commission shall provide Ms. Bell and Mr. Petersen an opportunity to accept the changes before voting. The Commission

will not accept any Proposed Resolution Through Agreement without Ms. Bell's and Mr. Petersen's acceptance of the Agreement.

If the Commission accepts the Proposed Resolution Through Agreement, the Commission will enter an order, with findings of fact and conclusions of law. The Commission's legal counsel will draft the order. There will be no opportunity after the hearing for review or objection to a draft order. That opportunity exists through judicial review.

There is no opportunity for an adjournment at the end of the hearing if a party then determines that additional evidence should be brought to the attention of the Commission and the hearing reopened.

NOTICES

A party who fails to attend or participate in the hearing may be held in default in accordance with Commission Rule 350-16.

In the event a party is not represented by an attorney, that party may, during the course of the proceedings, request a recess if at that point the party determines that representation by an attorney is necessary to the protection of the party's rights.

Any party may appeal the Commission's order within 60 days after the date of service of the order, under Section 15(b) of the Scenic Area Act.

DATED this 24th day of May, 2011.



Nancy Andring
Administrative Secretary

NOTE:

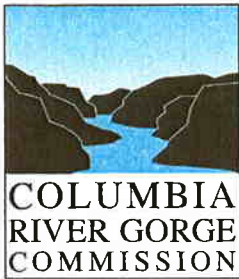
On May 24, 2011 I received a voice message from Merriann Bell granting permission for the attached Notice of Hearing for CRGC No. E11-K-G-146 to be mailed by regular U.S. mail in lieu of registered or certified mail as required in Commission Rule 350-16-009(1).

Signed:


Jennifer Ball Kaden, Planner

5-24-11

Date



RECEIVED

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MAY 24 2011

COLUMBIA RIVER GORGE COMM.

BEFORE THE COLUMBIA RIVER GORGE COMMISSION

In the Matter of a Notice of Alleged)	CRGC No. E10-K-G-146
Violation Issued to Merriann Bell &)	
Franklin Petersen)	PROPOSED RESOLUTION
)	THROUGH AGREEMENT
_____)	

Introduction

This proposed resolution through agreement concerns a Notice of Alleged Violation issued to Merriann Bell and Franklin Petersen on May 17, 2011. The Notice of Alleged Violation alleges that Ms. Bell and Mr. Petersen undertook development activities on their 5-acre parcel in Klickitat County without seeking required approval for consistency with the Columbia River Gorge Commission's Land Use Ordinance for Klickitat County (Commission Rule 350-81) and the Management Plan for the Columbia River Gorge National Scenic Area. Ms. Bell and Mr. Petersen constructed greenhouses, a shade house, and a propagation shed on their property. The Notice of Alleged Violation attached as Exhibit A to this proposed resolution.

Ms. Bell and Mr. Petersen understand that this is a *proposed* resolution, which must be approved by the Columbia River Gorge Commission as described in the Procedures section below.

Parties

The parties to this proposed resolution through agreement are:

Merriann Bell and Franklin Petersen, representing themselves

Authority

The Columbia River Gorge National Scenic Area Act (Scenic Area Act) authorizes the Columbia River Gorge Commission to enforce the Management Plan for the Columbia River Gorge National Scenic Area (Management Plan), land use ordinance, and any implementation measure. 16 U.S.C. § 544m(a)(3).

Commission Rule 350-30 (titled "Enforcement") contains procedures and criteria for enforcing the Scenic Area Act and related implementation measures and orders.

Procedures

Commission Rule 350-30-050 states, "The Director may seek to resolve or settle an alleged violation. Any proposed resolution must be presented to and approved by the Commission as provided in 350-30-060."

The Columbia River Gorge Commission shall conduct a hearing on this proposed resolution as required in Commission Rule 350-30-060. The Commission will schedule a hearing on this proposed resolution on a mutually agreeable date during 2011. The Commission will send Ms. Bell and Mr. Petersen a formal Notice of Hearing at least 20 days prior to the hearing.

This agreement becomes final when the Commission issues a written order accepting this resolution which will occur shortly after the hearing.

The violations alleged in the Notice of Alleged Violation shall be deemed resolved upon performance of the terms and conditions of this proposed resolution. Substantial compliance shall not be deemed adequate performance.

Terms and Conditions of the Proposed Resolution

1. Inspection of Property

Ms. Bell and Mr. Petersen agree to allow Commission staff to inspect their property as necessary to determine what land uses and structures require review and approval, and to ensure compliance with this agreement. Unless there are exigent circumstances, or consent by Ms. Bell or Mr. Petersen, Commission staff will provide Ms. Bell and Mr. Petersen at least 24 hours oral notice. Ms. Bell and Mr. Petersen acknowledge that their signatures on this agreement is their authorization and that no additional written authorization for Commission staff to enter their property is needed.

2. Application to Commission

Ms. Bell and Mr. Petersen agree to submit a land use application to the Commission to address all uses and development that require review. The application shall be complete upon submittal or Ms. Bell or Mr. Petersen will make it complete within 30 days after the Commission informs them of any deficiencies in the application. Ms. Bell and Mr. Petersen agree to submit this application within 30 days of the date this agreement becomes final. This agreement becomes final when the Commission issues a written order accepting this resolution which will occur shortly after the hearing.

3. Review by the Commission

Ms. Bell and Mr. Petersen acknowledge that the Commission's land use ordinance (350-81) allows them to apply for the greenhouses, shade house, and propagation shed. The burden is on Ms. Bell and Mr. Petersen to demonstrate that the structures are or will be consistent with Commission rules for the protection of scenic, natural, cultural and recreation resources listed in Commission Rules 350-81-520 through 620.

If the Executive Director approves the application, then Ms. Bell and Mr. Petersen agree to comply with all terms of that approval and to use the structures solely as provided for in that approval. Any violation of the terms of that approval or use of the structures shall constitute a repeated violation for the purpose of Commission Rule 350-30.

If the Executive Director does not approve the application, then Ms. Bell and Mr. Petersen reserve all rights to appeal the Executive Director's decision. If Ms. Bell and Mr. Petersen choose not to appeal the decision or if the decision is upheld on appeal, then Ms. Bell and Mr. Petersen shall remove the structures or bring the structures into compliance with the conditions of approval within 30 days after the decision becomes final and not appealable.

As of the date of this agreement, Ms. Bell and Mr. Petersen have indicated that they intend to apply for approval of the greenhouses, shade house, and propagation shed. Commission Rule 350-81-032 specifies the requirements for new land use applications.

4. Compliance with Klickitat County Ordinances

Ms. Bell and Mr. Petersen understand that review and approval pursuant to the Scenic Area land use ordinance does not assure compliance with Klickitat County's ordinances and permit requirements. Klickitat County might require Ms. Bell and Mr. Petersen to discontinue a land use or remove a structure independent of an approval from the Commission.

Failure to Perform

If the terms and conditions of this proposed resolution are not performed in full within the specified time periods, the Gorge Commission may rescind the agreement and proceed with a contested case hearing on the Notice of Alleged Violation. The Executive Director may also issue a revised Notice of Alleged Violation recommending a civil penalty.

The Commission shall be entitled to its costs and attorneys fees for any successful action enforcing this agreement.

Modification of this Agreement

If the Gorge Commission desires to modify this proposed resolution, Ms. Bell and Mr. Petersen shall be provided an opportunity to agree to the modifications at the hearing. Ms. Bell

and Mr. Petersen may orally agree to the modifications on the record, and the Gorge Commission shall incorporate any modifications into its written order approving the agreement. Ms. Bell and Mr. Petersen may seek advice of counsel concerning any modifications to this agreement. If Ms. Bell and Mr. Petersen do not agree to the modifications, then the Commission may choose not to approve the proposed resolution.

After the Gorge Commission approves the proposed resolution, together with any modifications that Ms. Bell and Mr. Petersen agree to, the agreement shall not be further modified, unless upon motion, the Gorge Commission approves the modification. The Commission, however, authorizes the Executive Director to extend any time periods in this agreement for a total time period not to exceed twice the originally specified time period upon a showing of good cause, good faith effort, or substantial progress. The Executive Director is not obligated to extend a time period and may choose to refer an extension to the Gorge Commission.

Effect of Non-Approval by the Gorge Commission

The parties agree that if the Columbia River Gorge Commission fails to adopt this proposed resolution, then this proposed resolution agreement shall be void and a contested case hearing shall take place in accordance with Commission Rule 350-30-060(1)(f). If this agreement is voided, then it shall not be admissible in a contested case hearing concerning the alleged violation.

Future Compliance with All Scenic Area Laws

Ms. Bell and Mr. Petersen agree to contact the Commission prior to any future change or addition to uses of their land, including construction or placement of any new structures, to determine if Scenic Area review and approval is required. Ms. Bell and Mr. Petersen agree to comply with Scenic Area requirements in the future. In the event Ms. Bell or Mr. Petersen does not comply with Scenic Area requirements in the future, the Commission may take additional enforcement actions; may use this agreement to determine that Ms. Bell or Mr. Petersen willfully violated the Scenic Area Act, Management Plan, and Commission rules; and may issue a civil penalty.

Non-Precedential Effect

Ms. Bell and Mr. Petersen understand that this proposed resolution is offered to the Columbia River Gorge Commission in the spirit of settling the Notice of Alleged Violation in this matter only, and shall not constitute precedent for resolution of any future violation by Ms. Bell or Mr. Petersen or any other party. To this end, they agree that except to prove knowledge or non-performance of the terms and conditions of this proposed resolution, the terms and conditions shall not be admissible in any way in any subsequent proceeding before the Columbia River Gorge Commission or court action, whether related to this matter or any other matter in which either or both parties are involved.

This stipulation of non-admissibility shall not preclude the Gorge Commission from considering Ms. Bell or Mr. Petersen's actions as a prior violation of the National Scenic Area Act, the Management Plan, and the Gorge Commission's Land Use Ordinance for Klickitat County in the future when applicable to resolve or prevent future violations.

Advice of Counsel

The Commission does not require parties in an enforcement matter to be represented by counsel, but encourages parties to seek advice of counsel if they desire. Merriann Bell and Franklin Petersen acknowledge that the Commission has advised her to seek the advice of counsel prior to signing this agreement. Initial: MB

Signature

By our signatures hereon, we acknowledge, understand, agree to, and will carry out all provisions of this proposed resolution through agreement, including, if applicable, modifications by the Gorge Commission that we agree to orally on the record at the hearing.

Merriann Bell
Merriann Bell

22 May -11
Date

Franklin Petersen
Franklin Petersen

5-20-11
Date

the Commission for construction on your property and you recently completed a review process to construct a new dwelling, fence, pump house, driveway extension, and to remove three buildings, in which you did not request approval for the nursery structures.

III. Provisions of the Law Alleged to Have Been Violated

Columbia River Gorge National Scenic Area Act and Management Plan:

The subject parcel is located in the General Management Area of the Columbia River Gorge National Scenic Area and, therefore, is subject to the Scenic Area Act and related rules, orders and implementation measures. The Scenic Area Act called for the creation of the Columbia River Gorge Commission and directed the Commission to develop a management plan that would include, among other measures, provisions to ensure residential and commercial development does not adversely affect scenic, cultural, natural and recreation resources. The Act further directed the Commission to adopt a land use ordinance to carry out the provisions of the *Management Plan for the Columbia River Gorge National Scenic Area*. The resulting land use ordinance is known as Commission Rule 350-81.

Commission Rules 350-81-016 and 350-81-032:

Review and approval of any use of land within the National Scenic Area is required.

Ms. Bell and Mr. Petersen's construction of nursery structures occurred without approval because they did not submit an application to the Commission for review of the structures.

Commission Rule 350-81-190:

Allows agricultural structures, agricultural buildings, and accessory structures on lands designated Small-Scale Agriculture, subject to compliance with scenic, cultural, natural, and recreation guidelines.

This rule lists the allowable uses on land designated General Management Area Small-Scale Agriculture. Pursuant to Commission Rules 350-81-190 (1)(b) and (c), agricultural structures and agricultural buildings are allowed in this designation in conjunction with an agricultural use, subject to guidelines protecting scenic, cultural, natural and recreation resources. Placement of the greenhouses, propagation shed, and shade house on the parcel without an application, review, or approval by the Gorge Commission is in violation of Commission Rules 350-81-016 and 350-81-032.

IV. Background Information

While making a staff visit in conjunction with review of an application for a new dwelling, fence, and pump house, Gorge Commission staff observed the greenhouses, propagation shed, and shade house on the subject property. The subject parcel is located in the GMA in the Small-Scale Agriculture land use designation. Commission staff did not observe these structures

during a site visit about one year earlier, nor were they included in the then-pending development application referenced above. The pending development review included several items for after-the-fact review – modifications to an existing building, removal of a shed, and construction of a pump house and fence. Commission staff had discussed with the applicants the need for Commission review of all development on the subject property during a site visit in 2010 and as part of the completeness review of the application for the new dwelling and associated development.

Copies of all documents relating to this Notice of Alleged Violation are available at the Commission office upon request.

V. Proposed Disposition of the Violation

Commission Rule 350-30 governs enforcement actions under the Scenic Area Act, the Management Plan, and Commission Rule 350-80. Commission Rules 350-30-050 through 350-30-070 provide that violations may be resolved through an agreement (Commission Rules 350-30-050 and 350-30-060) or a contested case hearing (Commission Rule 350-30-070).

Commission Rule 350-30-050 states: “The Director may seek to resolve or settle an alleged violation. Any proposed resolution must be presented to and approved by the Commission as provided in 350-30-060.” Commission Rule 350-30-060 lists six steps the Gorge Commission must follow when considering a proposed agreement.

The Executive Director proposes to resolve the alleged violation through an agreement resulting in compliance with the Scenic Area Act, the Management Plan, and Commission Rule 350-81. Commission staff has drafted a Proposed Resolution Through Agreement, which is enclosed with this notice. To resolve the alleged violation through an agreement, Ms. Bell and Mr. Petersen must: (1) notify the Gorge Commission that the greenhouses, shade house, and propagation shed have been removed (to be verified by a site visit), (2) agree to remove the said structures no later than 30 days from the date of this Notice of Alleged Violation, or (3) submit a land use application no later than 30 days following the Commission’s hearing on a Proposed Resolution Through Agreement for the new land use and development on the subject parcel, and receive approval for continued use of the structures.

According to Commission Rule 350-30-070, the Gorge Commission will consider the alleged violation at a contested case hearing if it is not resolved through an agreement. The contested case hearing may result in the entry of a final order imposing a civil penalty of up to \$10,000 per violation based upon a *prima facie* case made on the record, whether or not Ms. Bell and Mr. Franklin or their representative participates in the hearing. Commission Rule 350-16 includes procedures for contested case hearings. A copy of this rule is enclosed.

In the event this case is not resolved through an agreement, the Executive Director proposes the following disposition of the matter: (1) the Gorge Commission order Ms. Bell and Mr. Petersen to remove the greenhouses, shade house, and propagation shed, or submit a land use application for use of the structures on the subject parcel, and receive approval for that use,

and (2) the Commission impose a civil penalty against Ms. Bell and Mr. Petersen in an amount to be determined by the Commission.

VI. Answer to the Notice of Alleged Violation

Pursuant to Commission Rule 350-30-040, Ms. Bell or Mr. Petersen must file an answer within 14 days of receiving this notice. The answer must conform to Commission Rule 350-30-040, which is enclosed for convenience. The answer could take the form of Ms. Bell or Mr. Petersen signing the enclosed Proposed Resolution Through Agreement.

VII. Enforcement Authority

The Commission's authority to enforce the Columbia River Gorge National Scenic Area Act, Management Plan, and Commission Land Use Ordinance for Klickitat County (Commission rule 350-81) is provided as follows:

Columbia River Gorge National Scenic Area Act, 16 U.S.C. § 544m(a)(3):

Civil penalties. Any person or entity who willfully violates the management plan or any land use ordinance or any implementation measure or any order issued by the Commission pursuant to sections 544 to 544p of this title may be assessed a civil penalty by the Commission

Columbia River Gorge National Scenic Area Act, 16 U.S.C. § 544m(b)(1)(B):

The Commission . . . may institute a civil action for an injunction or other appropriate order to prevent any person or entity from utilizing lands within the scenic area outside urban areas in violation of the provisions of sections 544 to 544p of this title, the management plan, or any land use ordinance or interim guideline adopted or other action taken by the Commission or any county pursuant to sections 544 to 544p of this title.

Columbia River Gorge Commission Rule 350-30-005:

The purpose of this division is to establish procedures and criteria for enforcement of P.L. 99-663 [the Columbia River Gorge National Scenic Area Act] as set forth in section 15 [544m] of the Scenic Area Act.

VIII. Penalty Criteria

The Gorge Commission uses the procedures and criteria in Commission Rule 350-30 to address alleged violations. Commission Rule 350-30-030(1)(d) states that a Notice of Alleged Violation must include "the recommended penalty to be imposed (if any) and the criteria from 350-30-090 upon which the penalty is based."

Commission Rule 350-30-090 lists four criteria that the Executive Director and the Gorge Commission must consider when determining the amount of a civil penalty. These criteria are addressed below.

Criteria 1.A: "Whether the person or entity has violated the P.L. 99-663 management plan, a land use ordinance, an implementation measure or an order in the past."

In 2010, Ms. Bell and Mr. Petersen submitted an application for a replacement dwelling on the subject property. In the course of conducting a completeness review of the application, Commission staff made a site visit and learned that some development had occurred on the property without review by the Gorge Commission. At that time, Commission staff informed Ms. Bell and Mr. Petersen that development on their property requires review by the Gorge Commission. Commission staff resolved the situation by working with Ms. Bell and Mr. Petersen to file a complete application for review of the items constructed without review: modifications to an existing accessory building, removal of an accessory building, and construction of a pump house and fence. This after-the-fact review was done in conjunction with the review for a new dwelling and the removal of an existing dwelling and garage. Although no formal enforcement file was created, Commission staff treated the violation as de minimis in nature.

Criteria 1.B: "Whether the person or entity has undertaken measures to remedy the violation or mitigate harm resulting from the violation."

Jennifer Ball Kaden, Commission planner, discussed the need for review of the nursery structures with Mr. Petersen during site visits on March 29 and May 11, 2011 and with Ms. Bell on the telephone on or around April 12, 2011. Both Mr. Petersen and Ms. Bell expressed willingness to bring the structures into compliance through review.

Criteria 1.C: "The nature and seriousness of the violation."

The violation is an unpermitted land use. Commission staff does not believe the violation has caused irreparable harm to scenic, natural, cultural, or recreation resources, therefore review and approval of the nursery structures or their removal could resolve the violation.

Criteria 1.D: "Whether the violation is repeated or continuous, or the person or entity has had prior violations."

Although the Commission has no formal enforcement files for Ms. Bell and Mr. Petersen, they previously have conducted development on their property without review and Commission staff informed them that any development requires review. The violation is continuous because the structures exist and are being used for an agricultural use on the property. Their choice to not seek approval from the Commission for these represents a continuous disregard for Scenic Area laws.

IX. Recommended Civil Penalty

Section 15(a)(3) of the Scenic Area Act and Commission Rule 350-30-090(2) authorize the Gorge Commission to assess a civil penalty not to exceed \$10,000 for each violation. Based on the


criteria in Commission Rule 350-30-090, the Executive Director recommends that the Gorge Commission not impose a civil penalty on Ms. Bell and Mr. Petersen at this time. The violation was serious because it includes development constructed without review; Ms. Bell and Mr. Petersen previously have conducted development without review on their property; and Commission staff has previously informed Ms. Bell and Mr. Petersen that they needed to apply before constructing new development on their property. However, the violation can be remedied through submission of a land use application and compliance with all conditions of approval of that application.

As well, Ms. Bell and Mr. Petersen are being cooperative at this time, and the Executive Director recommends that imposing a penalty might discourage their cooperation and the cooperation of others similarly situated. Note that the Commission has imposed penalties where a violation has resulted in immediate and permanent damage to irreplaceable resources. That does not appear to be the situation here. A decision not to impose a civil penalty is not precedent for future violations because the facts of each violation are different. As well, should Ms. Bell and Mr. Petersen stop cooperating to resolve this violation, the Commission could consider imposing a civil penalty at that time.

X. Advice of Counsel

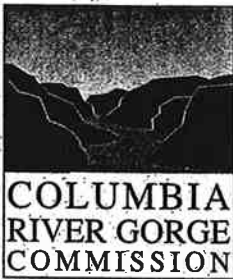
The Commission does not require parties in an enforcement matter to be represented by an attorney, but encourages parties to seek legal advice if they desire. If you choose to seek the advice of an attorney, your attorney may contact the Commission's attorney, Jeffrey B. Litwak (509) 493-3323 x222 to discuss this matter.

DATED this 17th day of May 2011



Jill Arens
Executive Director

Enclosure



PO Box 730 • #1 Town & Country Square • White Salmon, Washington 98672 • 509-493-3323 • fax 509-493-2229
www.gorgecommission.org

May 17, 2011

Merriann Bell & Franklin Petersen
58 Canyon Road
Lyle, WA 98635

Dear Ms. Bell and Mr. Franklin:

Enclosed is a Notice of Alleged Violation regarding the construction of nursery structures on your property on Canyon Road. As required by Commission Rule 350-30-030, I am sending this Notice to you by registered mail, with a copy also sent to you by regular U.S. mail. As explained in this Notice and the enclosed copy of Gorge Commission Rule 350-30, you need to submit an answer to our office within 14 days.

I understand you have been working cooperatively with Jennifer Ball Kaden on my staff to resolve this issue. Thank you. Unfortunately, because development was initiated on your property prior to review by our office in the past, our rules state we must initiate formal violation proceedings.

In addition to the Notice, I have enclosed a Proposed Resolution through Agreement which I believe was shared with you in draft form last week by Jennifer. If you agree with the proposed agreement, I will present it to the Gorge Commission (as required by our rules) at its next meeting on Tuesday morning, June 14, 2011 in Hood River. Jennifer will let you know the hearing time about two weeks prior to the meeting.

I hope you will agree to resolve this matter through the enclosed agreement. Please call me or Jennifer Ball Kaden if you have any questions or concerns.

Sincerely,

Jill Arens
Executive Director

Enclosures: Notice of Alleged Violation with Commission Rules 350-16 and 350-30
Proposed Resolution Through Agreement

E11-K-G-146
3-29-2011 site visit

