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FILED: August 9, 2010

COLUMBIA RIVER GORGE COMM.

IN THE COURT OF APPEALS OF THE STATE OF OREGON

FRIENDS OF THE COLUMBIA GORGE, INC.; COLUMBIA RIVERKEEPER;
FRIENDS OF MOUNT HOOD; FUTUREWISE; ADVENTURE CRUISES; MT.
HOOD HAMLET BED & BREAKFAST; LAURIE BALMUTH; DAVID BERGER;
LYDIE BOYER; RON CARROLL; JOAN CHASE; SUSAN GARRETT CROWLEY;
KATHLEEN FITZPATRICK; JURGEN HESS; SHERRI IRISH; LARRY KEISTER;
CHRIS LLOYD; KEN MADDOX; PAT MEEKS; SHERRY MEIER; BLAYNEY
MYERS; MARY REPAR; TOM ROUSSEAU; PAUL SMITH; DAWN STOVER;
CAROL TAYLOR; JIM WEAVER; JUDITH WERNER; MARY WILEY; POLLY
WOOD; and TOM WOOD,
Petitioners,

v.

COLUMBIA RIVER GORGE COMMISSION,
Respondent.

Columbia River Gorge Commission
PA0601

A139921

Argued and submitted on May 10, 2010.

Gary K. Kahn argued the cause for petitioners. With him on the briefs was Reeves, Kahn & Hennessy.

Jeffrey B. Litwak argued the cause and filed the brief for respondent.

Before Haselton, Presiding Judge, and Armstrong, Judge, and Duncan, Judge.

DUNCAN, J.

Affirmed.

DESIGNATION OF PREVAILING PARTY AND AWARD OF COSTS

Prevailing party: Respondent

- No costs allowed.
 Costs allowed, payable by
 Costs allowed, to abide the outcome on remand, payable by
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1 DUNCAN, J.

2 This is a land use case involving the site of a former lumber mill in
3 Skamania County, Washington, across the Columbia River from Oregon. The site is
4 located within the Columbia River Gorge National Scenic Area (the scenic area) and is
5 subject to the scenic area's land use management plan. Petitioners seek judicial review of
6 a final order of the Columbia River Gorge Commission (the commission) amending the
7 management plan to make it possible to convert the mill site to a recreation resort.

8 On judicial review, petitioners make three assignments of error. In one,
9 they assert that the commission lacked the authority to amend the management plan
10 because conditions in the scenic area had not significantly changed. In a second, they
11 assert that the amendment is inconsistent with the purposes and standards of the
12 Columbia River Gorge National Scenic Area Act (the Act). 16 USC §§ 544 - 544p. In a
13 third, they assert that the commission inappropriately determined that the mill site
14 contains an existing industrial use, a determination that, according to petitioners, can only
15 be made by Skamania County. For the reasons explained below, we affirm.

16 I. BACKGROUND

17 Recent opinions by this court and the Supreme Court have discussed in
18 some detail the statutory and regulatory framework governing actions by the
19 commission.¹ Before addressing petitioners' assignments of error, we briefly recount that

¹ See *Friends of Columbia Gorge v. Columbia River Gorge*, 215 Or App 557, 171 P3d 942 (2007) (*Friends A125031*), *aff'd in part, rev'd in part*, *Friends of Columbia Gorge v. Columbia River* (S055722), 346 Or 366, 213 P3d 1164 (2009) (*Friends S055722*); *Friends of Columbia Gorge v. Columbia River* (A131299), 218 Or App 232,

1 background as it is pertinent to the issues presented in this case. We then describe the
2 facts that gave rise to this dispute. We supplement that information as necessary in our
3 discussion and resolution of each of petitioners' individual assignments of error.

4 A. *Statutory and Regulatory Framework*

5 The scenic area encompasses roughly 292,000 acres and includes portions
6 of six counties, Multnomah, Hood River, and Wasco counties in Oregon and Clark,
7 Skamania, and Klickitat counties in Washington. It was created in 1986 by the Act. The
8 Act has two purposes:

9 "(1) to establish a national scenic area to protect and provide for the
10 enhancement of the scenic, cultural, recreational, and natural resources of
11 the Columbia River Gorge; and

12 "(2) to protect and support the economy of the Columbia River
13 Gorge area by encouraging growth to occur in existing urban areas and by
14 allowing future economic development in a manner that is consistent with
15 paragraph (1)."

16 16 USC § 544a. Thus, the first and primary purpose of the Act is to protect and enhance
17 the resources of the gorge, and the secondary purpose is to support the economy of the
18 gorge area by encouraging growth in existing urban areas and by otherwise allowing
19 economic development, but only in a manner that is consistent with the first purpose.

20 As authorized by the Act, Oregon and Washington entered into an interstate

179 P3d 706 (2008) (*Friends A131299*), *aff'd*, *Friends of Columbia Gorge v. Columbia River* (S055916), 346 Or 433, 213 P3d 1191 (2009) (*Friends S055916*); *Friends of Columbia Gorge v. Columbia River* (A133281), 218 Or App 261, 179 P3d 700 (2008) (*Friends A133281*), *aff'd*, *Friends of Columbia Gorge v. Columbia River* (S055915), 346 Or 415, 212 P3d 1243 (2009) (*Friends S055915*). We refer to those cases using the short references noted above throughout this opinion.

1 compact and created the commission, a regional agency with regulatory authority over
2 the scenic area. *See* ORS 196.150; RCW 43.97.015 (reflecting ratification of the
3 compact in Oregon and Washington, respectively). The Act charges the commission with
4 developing, implementing, and administering a management plan for the scenic area,
5 with the concurrence of the Secretary of Agriculture (the Secretary). The Act divides the
6 scenic area into three types of subareas: urban areas, which are not subject to the scenic
7 area regulations in the management plan; "special management areas" (SMAs), over
8 which the Secretary has primary responsibility; and the remaining area, which is referred
9 to as the "general management area" (GMA).²

10 The Act provides that, "[n]o sooner than five years after adoption of the
11 management plan, but at least every ten years, the Commission shall review the
12 management plan to determine whether it should be revised." 16 USC § 544d(g). It also
13 provides that the commission may amend the management plan outside of the "usual"
14 revision cycle:

15 *"If the Commission determines at any time that conditions within the scenic*
16 *area have significantly changed, it may amend the management plan. The*
17 *Commission shall submit amendments to the management plan to the*
18 *Secretary for review, in accordance with the provisions of this section for*
19 *adoption of the management plan."*

20 16 USC § 544d(h) (emphasis added). The commission adopted an administrative rule

² The term "general management area" is not defined in the Act, but the commission uses that term throughout the management plan to refer to the remaining land in the scenic area. In addition, the statutes that the Oregon legislature enacted to implement the Act, ORS 196.105 to 196.165, define the term to mean "the area within the scenic area that is not an urban area or special management area." ORS 196.105(2).

1 setting forth additional requirements for amending the plan, which provides, in part:

2 *"The Commission must find the following criteria are satisfied before it*
3 *approves an amendment to the Management Plan:*

4 *"(1) Conditions in the Scenic Area have significantly changed. This*
5 *means:*

6 *"(a) Physical changes that have widespread or major impacts to the*
7 *landforms, resources, or land use patterns in the Scenic Area;*

8 *"(b) New information or inventory data regarding land uses or*
9 *resources that could result in a change of a plan designation, classification,*
10 *or other plan provision;*

11 *"(c) Changes in legal, social, or economic conditions, including*
12 *those that affect public health, safety, or welfare, not anticipated in the*
13 *Management Plan; or*

14 *"(d) A demonstrable mistake in the Management Plan that has*
15 *resulted in significant impacts or that involves significant issues, such as,*
16 *but not limited to, a land use guideline that is less protective of Gorge*
17 *resources than the policies the guideline was intended to implement; a land*
18 *use designation that does not conform to the corresponding designation*
19 *policies; or two or more guidelines that cannot be reasonably reconciled.*

20 *"(2) The proposed amendment is consistent with the purposes and*
21 *standards of the Scenic Area Act; and*

22 *"(3) No practicable alternative to the proposed amendment more*
23 *consistent with the purposes and standards of the Scenic Area Act exists."*

24 OAR 350-050-0030 (emphasis added).

25 B. *Factual Background*

26 Broughton Lumber Company owns more than 260 acres of property in the
27 scenic area, including an approximately 50-acre site that contains a former lumber mill.

28 Milling began at the site in 1923. Major mill operations ceased in 1986, but the mill

29 continued to operate at a reduced scale until 2001. Since then, the site has been used for

1 light industrial activities, equipment maintenance, and storage. The site contains a
2 complex of large industrial buildings. It is adjacent to a state highway and a state park.

3 1. *The 1989 Resort Proposal and 1990 Resort Approval*

4 In 1989, approximately three years after major mill operations at the site
5 had ceased, Broughton filed a land use application with the commission seeking approval
6 for development of a resort on the mill site. The director of the commission evaluated the
7 application and determined that "the resort as proposed would not encourage hotels,
8 motels, restaurants or retail shops to locate within urban areas" and was, therefore,
9 inconsistent with the second purpose of the Act, as pertinent here: "to protect and
10 support the economy" of the gorge area by "encouraging growth" in existing urban areas.
11 The director also determined that the proposed resort was inconsistent with the standards
12 for commercial development in section 6 of the Act. *See* 16 USC § 544d(d)(7)
13 (providing that the management plan shall include provisions to "require that commercial
14 development outside urban areas take place without adversely affecting the scenic,
15 cultural, recreation, or natural resources of the scenic area").

16 Broughton appealed the director's determination to the commission. In
17 1990, the commission affirmed the director's determination that the resort, as originally
18 proposed, violated the second purpose of the Act, as well as the standards for commercial
19 development. Instead of the original proposal, the commission approved a modified
20 version. The original proposal included "approximately 62 units of overnight
21 accommodations * * *, a headquarters building, a restaurant, retail shops and daytime and
22 overnight parking." The modified proposal called for reduction of the overnight

1 accommodation units from 62 to 45 and elimination of the retail shops. It also called for
2 removal of five former mill buildings and reduction of the scale of a proposed restaurant.
3 Broughton never developed the resort, and the commission's 1990 decision approving the
4 resort use expired in 1992.

5 2. *The 1991 Management Plan*

6 In 1991, the commission adopted the Management Plan for the Columbia
7 River Gorge National Scenic Area (the management plan).³ Most of the Broughton site
8 is within the GMA and has been designated "commercial recreation." The goal of the
9 commercial recreation designation is to "[p]rotect and enhance opportunities for
10 commercially owned, resource-based recreation and supporting commercial uses on lands
11 containing such existing uses or lands on which such proposed uses have been deemed
12 consistent with the Scenic Area Act." Lands that qualified for designation as commercial
13 recreation included privately owned lands in the GMA already devoted to resource-based
14 recreation or that offered "outstanding" or "unique" opportunities for commercially
15 owned resource-based recreation.

16 Management plan policies and guidelines for the commercial recreation
17 designation allow, among other uses, commercially owned resource-based recreation
18 uses; overnight accommodations that are rural in scale and part of or adjacent to,

³ Throughout this opinion, we quote the 2004 version of the management plan, as amended through June 2007. However, the provisions affected by the plan amendment at issue in this case have remained unchanged since adoption of the plan in 1991. The current version of the management plan can be found on the commission's website at: <http://www.gorgecommission.org>.

1 resource-based recreation use; and limited supporting commercial uses, such as
2 restaurants, to accommodate overnight visitors and their guests. For the Broughton site,
3 a recreation use could include an RV campground with up to 175 spaces and 35 overnight
4 accommodation units. The recreational and commercial uses can take place alongside
5 existing industrial uses.

6 The management plan guidelines also provide that "[e]xisting industrial
7 uses in the GMA may convert to less intensive uses." A "less intensive use" is defined as
8 "a commercial, recreation, or residential use with fewer adverse effects upon scenic,
9 cultural, natural, and recreation resources."

10 3. *The 2006 Proposal for a Plan Amendment*

11 In the spring of 2006, Broughton presented a new proposal to the
12 commission to develop the mill site into a resort. The proposal envisioned the
13 construction of 250 new lodging units, recreational facilities, and commercial and utility
14 facilities for resort guests and recreation-site users, developed over an approximately 10-
15 to 20-year period. On May 3, 2006, the director of the commission held a "pre-
16 application conference," in accordance with OAR 350-050-0045, to discuss potential
17 amendments to the management plan implicated by the proposal. Following the
18 conference, the director determined that development of a resort on the mill site would
19 require new policies within the management plan and thus would be in the nature of a
20 "legislative" amendment initiated by the commission, rather than a "quasi-judicial"
21 amendment requiring an application. *See* OAR 350-050-0040(3) (describing both).

22 Accordingly, commission staff thereafter prepared a draft plan amendment

1 based on policy direction received from the commission and input from the public. In
2 August 2007, the staff released a proposed plan amendment that would "create new
3 policies and guidelines [in the management plan] to allow conversion of an existing
4 industrial complex to a recreation resort as a new review use in the Commercial
5 Recreation land use designation."⁴ The commission held several days of public hearings
6 on the amendment; in all, the commission received over 2,000 written comments and
7 heard oral testimony from over 100 individuals, organizations and entities.⁵

8 In April 2008, the commission approved a plan amendment allowing a new
9 "recreation resort" review use on commercial recreation-designated property that contains
10 "an existing industrial complex."⁶ The approved plan amendment adds new policies,
11 guidelines, and definitions to the management plan.⁷ In particular, it amends the GMA

⁴ The amendment as originally drafted and as ultimately adopted differed in several significant respects. For example, as originally drafted, the amendment included a maximum of 210 accommodation units, with an average size of 1,000 square feet, in the recreation resort use. In addition, restrictions on long-term use applied to only 80 percent of the units. The cap on the total number of units was eventually eliminated in favor of use restrictions to prevent *any* long-term occupancy and "the use of the required impact evaluations, mitigation and enhancement requirements, and various design restrictions to determine the appropriate scale of a recreation resort." Moreover, square footage limitations for individual units were increased "to provide more flexibility and marketability of resort units, thus increasing its practicability."

⁵ The complete record contains more than 5,000 pages.

⁶ As a practical matter, although the amendment does not reference the Broughton site specifically, the commission expressly found that it is the only site in the scenic area that could meet all of the criteria for a recreation resort under the plan amendment.

⁷ As the commission notes in its brief, the plan amendment does not itself "approve" a recreation resort on the Broughton site; rather, it provides the framework for Skamania County to enact a land use ordinance implementing the plan guidelines. *See* 16 USC §

1 policies governing the commercial recreation designation to include the following:

2 "6. Redevelopment of an existing industrial complex as a recreation
3 resort may be allowed if the result is protection of and enhancement
4 to scenic, cultural, natural and recreation resources, and protection of
5 tribal treaty rights. All uses must be part of an approved master plan
6 and consistent with the policies and guidelines for recreation resorts
7 contained in this chapter.

8 "A. The overall scale of a resort shall be limited to ensure the
9 resort protects and supports the economies of urban areas and
10 protects scenic area resources. The total number of resort
11 users shall be roughly equivalent to what is otherwise allowed
12 in the designation.

13 "B. All existing industrial uses shall be extinguished. All
14 structures with the existing industrial complex that are not
15 reused or restored for adaption to resort use shall be removed.
16 Existing residential uses may remain.

17 "C. Recreation uses (including campgrounds) consistent with the
18 recreation intensity class guidelines associated with the
19 recreation resort may extend to contiguous and adjacent lands
20 under other land use designations if consistent with the
21 adjacent land use designation and the recreation intensity
22 class policies and guidelines. All recreation development
23 shall be included in the resort master plan.

24 "D. All accommodation units shall be designed for, and uses
25 limited to, short-term occupancy to ensure the resort protects
26 and supports the economies of urban areas.

27 "E. Commercial uses shall be limited to ensure the resort protects
28 and supports the economies of urban areas. Commercial uses
29 shall be oriented toward serving resort guests and recreation
30 site users rather than the traveling public.

31 "F. The general scale (height, dimensions and overall mass) of
32 buildings in the resort core may be compatible with the scale

544e(b) (providing incentives for counties to adopt land use ordinances consistent with the management plan).