

BEFORE THE COLUMBIA RIVER GORGE COMMISSION

In the matter of an appeal of Development)
Review Decision No. C19-0004) **FINAL OPINION AND ORDER**
by Charles and Valerie Fowler)
_____)

The Columbia River Gorge Commission met on June 11, 2019 to hear oral argument and hold a public hearing on Charles and Valerie Fowler’s appeal of the Executive Director’s Development Review Decision No. C19-0004. During the hearing, the Commission staff proposed that the Commission remand the matter to allow the staff to consider and address additional information that was presented after the Director’s Decision and at the hearing. The Commission thus remanded the matter back to the Executive Director.

Record Before the Commission

Prior to the hearing, the Commission received the following documents:

1. A staff report;
2. The appellants’ brief and attachments.
3. Notice of Hearing;
4. Record of the Executive Director’s Decision.;
5. Report from Jurgen Hess, Environmental Planning and Scenery Management, *Fowler House Project – Scenic Analysis* (June 3, 2019) (from Friends of the Columbia Gorge);
6. Email from Charles and Valerie Fowler, Re: Expert Visual Analysis (June 4, 2019, 12:17 pm).

At the hearing, the Commission viewed slide presentations from staff and Charles and Valerie Fowler.¹ The slides are part of the record.

At the hearing, the Commission received the following additional documents:

1. Letter from David McCune, Lyle Fire Chief to Fowlers (undated) (from Charles and Valerie Fowler).
2. Living with Fire, A Guide for the Homeowner (undated newsprint) (from Friends of the Columbia Gorge).
3. Untitled Google Earth Image (from Friends of the Columbia Gorge).
4. Friends Written Comments, June 11, 2019 (from Peggy Hennessy, Attorney for Friends of the Columbia Gorge).

Hearing Fairness and Disclosures

At the beginning of the hearing, the Chair of the Commission asked members of the Commission to disclose any potential or actual conflicts of interest, potential bias, appearance of fairness concerns, and *ex parte* communications.

Commissioner Bowen Blair disclosed that he was Executive Director of Friends of the Columbia Gorge from 1982 to 1988 and was a board member of and donor to Friends of the Columbia Gorge from 1988 to March 2011 and was Board Chair for part of that time and was a board member for Friends of the Columbia Gorge Land Trust for part of that time. He was a staff member and officer of Trust for Public Lands from 1989 to 2010. The Trust for Public Lands acquired land near property and across river, most of which predated his involvement with the Trust for Public Lands. All the above activities predated his appointment to the Gorge Commission. Commissioner Blair also stated that knows Jurgen Hess and may have briefly served with him on the Board of Friends of the Columbia Gorge Land Trust. Commissioner Blair stated that he is confident he can be fair and impartial in the proceeding.

¹ Friends of the Columbia Gorge used slides from the Commission and Mr. and Mrs. Fowlers' presentations.

Commissioner Lynn Burditt disclosed that she is the Area Manager for the U.S. Forest Service, National Scenic Area office. She stated that her office provides staffing assistance to the Commission and counties and her staff submitted comments that were used by the Commission staff in analyzing the matter and making a decision. She also knows Jurgen Hess, who worked for the U.S. Forest Service. She stated that she is a non-voting member and that she can be fair and impartial in her participation in the deliberations.

Commissioner Robert Liberty disclosed that he served on the Board of Directors for Friends of the Columbia Gorge in the late 1980s and maybe into the early 1990s. Until recently, he paid dues of \$30 per year to Friends of the Columbia Gorge. He was a land use hearings officer for Multnomah County and believes he can be fair and impartial.

Commissioner Rodger Nichols disclosed that he has met Jurgen Hess a number of times and stated that it will not influence his decision.

Commissioner Bridget Bailey disclosed that her husband is the Wasco County District Attorney, but that he does not handle land use matters. She stated that she may have paid to go on hike with Friends of the Columbia Gorge (she did not remember when) and she paid a membership fee to Friends of the Columbia Gorge.

The Chair of the Commission asked whether any person had questions of Commissioners or concerns about a commissioner's participation in the hearing. No person asked any question or challenged any commissioner's participation.

Background

The subject parcel is off Old Highway 8, between White Salmon and Lyle, east of the Catherine Creek recreation area, more specifically east of and adjacent to Major Creek. The applicants and appellants, Charles and Valerie Fowler purchased the parcel in 2016. At the time

they purchased the parcel, the parcel contained a single-family dwelling in a dense grove of trees in the northwest corner of the parcel, a barn approved by the Gorge Commission in 1999 east and a little north of the dwelling, an access road from the south end of the parcel, driveway and parking area, garage, barn, two sheds, a rock wall, and a water reservoir. That same year, they discussed with Commission staff their plans to replace the existing dwelling and plant a vineyard.

In early 2017, Mr. and Ms. Fowler applied for National Scenic Area approval to construct their vineyard. Over the next several months, Mr. and Mrs. Fowler, together with staff of the Gorge Commission, the Washington Department of Fish and Wildlife and U.S. Forest Service, developed wildlife and plant mitigation plans for the vineyard project. The Executive Director approved the vineyard, and Mr. and Mrs. Fowler followed through with the mitigation plans and reported progress along the way to staff. Currently, there is a 16-acre vineyard on the parcel east and south of the existing dwelling.

In February 2018, Mr. and Ms. Fowler applied to replace the existing home. They proposed to locate the dwelling within the vineyard immediately north and east of the existing vineyard rows. Mr. and Mrs. Fowler, together with Commission staff, and Underwood Conservation District staff developed an agricultural rehabilitation plan to ensure that no viable agricultural land would be lost by the proposed development. The Executive Director approved the application; however, shortly after issuing the approval, staff discovered that it made a mistake—that the new house would protrude above the skyline as seen from a section of Old Highway 8, which is a key viewing area, in violation of Commission Rule 350-81-530(2)(h)—and the Executive Director withdrew the decision.

Staff worked with Mr. and Mrs. Fowler to evaluate several other sites on the parcel where the house might be sited so that it would not protrude above the skyline. Mr. and Mrs. Fowler proposed a site just west of the originally proposed site. At the time, Mr. and Mrs. Fowler and staff recognized the house at this site would protrude above the skyline. To address this issue, the Fowlers proposed planting mature evergreen trees behind the proposed dwelling, to create a skyline out of these trees.

Staff considered that proposal but was unable to find precedent where an applicant had been allowed to plant trees in order to comply with the guideline. Staff understands the guideline to require review of the application based on what exists on the parcel. Mr. and Mrs. Fowler withdrew their application and told staff they might submit a new application the following year after the trees were established.

In early 2019, Mr. and Mrs. Fowler submitted a new application for a smaller home 4,242 square feet versus 4,362 square feet applied for in the 2018 application and 15 to 26 feet in height versus 20 to 29 feet in height applied for in the 2018 application. The location of the home proposed in 2019 was slightly east of their first proposed location. Again, staff determined that the proposed dwelling would protrude above the skyline as seen from the Old Highway 8 Key Viewing Area and the Executive Director approved the application with a condition of approval that the new dwelling be constructed at the location of the existing dwelling.

Applicable Standards

Commission Rule 350-81-530(2) includes guidelines for development and uses visible from key viewing areas. Commission Rule 350-81-530(2)(a) states, “The guidelines in this section shall apply to proposed developments on sites topographically visible from key viewing areas.”

Commission Rule 350-81-530(2)(h) states, “Proposed developments shall not protrude above the line of a bluff, cliff, or skyline as seen from key viewing areas.”

Commission Rule 350-81-020(146) defines “Skyline” as

The line that represents the place at which a landform, such as a cliff, bluff or ridge, meets the sky, as viewed from a specified vantage point (generally a key viewing area, for the purpose of the Management Plan). 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.

Material Facts, Summary of Arguments, Commission’s Action

Material facts are contained in the Executive Director’s decision. Additionally, Mr. and Mrs. Fowler do not disagree that the dwelling as proposed would protrude into the skyline, but they argued that finding a location on their property that achieves perfect visual subordination is difficult. They also argued that the protrusion exists only a short distance and for a short duration along Old Highway 8, and the protrusion is only visible where Old Highway 8 enters a sweeping bend in the road. These factors, Mr. and Mrs. Fowler argue, are relevant because a reasonable driver would not have the opportunity to view the protrusion. Staff argued that the Commission rules do not allow consideration of the visible distance or time of a protrusion—that all protrusions are prohibited. Mr. and Mrs. Fowler also argued that the skyline was more vulnerable at the approved site than at the proposed site.

Mr. and Mrs. Fowler also argued that the location where the Executive Director approved the new home would not be consistent with Firewise principles for building in fire-prone areas. Staff argued that different entities that promote Firewise principles use different standards for creating safe space around new buildings—that size of space and what is permitted within that space differs—and that the Management Plan does not allow varying development standards based upon Firewise principles.

The only issue before the Commission is how to apply Commission Rule 350-81-530(2)(h) in this particular situation. But the Commission does not reach this question because the Executive Director requested the Commission remand the decision back to staff to work with Mr. and Mrs. Fowler and other interested persons to work on reaching agreement on a final design and location for the dwelling consistent with the Commission's rules. Mr. and Mrs. Fowler asked the Commission not to remand the decision, but to approve their preferred location.

The Commission remands the decision. The Commission believes a dwelling can be designed and located on the subject property in full compliance with the Commission's Rules. Based on the staff's statement that it wants to work with other parties in addition to Mr. and Mrs. Fowler, the Commission directs staff to work with Mr. and Mrs. Fowler and other interested parties, including Friends of the Columbia Gorge,² to find an approvable design and location and directs the parties to consider all necessary design and location options. The Commission does not decide that Mr. and Mrs. Fowler's preferred location cannot work and does not decide that the Executive Director's approved location is the best or only place to locate a dwelling in compliance with the Commission's rules.

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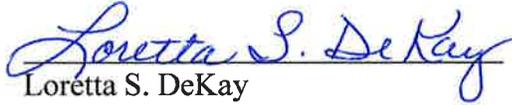
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² Friends of the Columbia Gorge filed a separate appeal of the Director's Decision. The two appeals were not consolidated, but the Commission is hopeful that by including Friends of the Columbia Gorge in the discussions, staff and Mr. and Mrs. Fowler can eliminate the need to proceed with Friends of the Columbia Gorge's appeal.

The decision of the Executive Director is REMANDED.

DATED this 5th day of September 2019



Loretta S. DeKay

Chair

Columbia River Gorge Commission

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, 16 USC § 544m(b)(4).

NOTICE OF MAILING

I certify that on September 5th, 2019, I mailed the attached FINAL OPINION AND ORDER by electronic mail to the following persons, all of whom have indicated that they accept email service:

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/s/ Connie Acker

Connie Acker
Administrative Analyst