

BEFORE THE COLUMBIA RIVER GORGE COMMISSION

JOSEPH A. and SANDRA S. BACUS,)	
)	
Petitioners,)	CRGC No. COA-S-01-04
)	
vs.)	FINAL OPINION AND
)	ORDER
SKAMANIA COUNTY,)	
)	
Respondent,)	
)	
and)	
)	
STANLEY W. ANDERSEN,)	
)	
Respondent-Intervenor.)	
_____)	

This case involves an appeal by Joseph and Sandra Bacus of a decision issued by Skamania County approving a forest practices road. Petitioners, Joseph and Sandra Bacus, contested the approval of the road. The Columbia River Gorge Commission met on April 9, 2002 to hear oral argument and deliberate to a decision. We remand.

I. PARTIES

The parties to this matter are:

Joseph and Sandra Bacus, appearing pro se;
Skamania County, represented by Mark Johnsen, Karr Tuttle Campbell,
Seattle

Stanley W. Andersen, appearing pro se. Mr. Andersen did not submit a brief and thus did not participate in the oral argument. CRGC Rule 350-60-120(3).

II. PROCEDURAL MATTERS AND RULINGS

Disclosure of Ex Parte Contacts

1. The Chair of the Gorge Commission, Anne Squier, noted for the record a potential ex parte contact involving most of the members of the Gorge Commission. Mr. Bacus appeared before the Commission during the public comment segments of the March 2001 and April 2001 Gorge Commission meetings to discuss the fill, which was an issue raised in the briefing for this appeal. Chair Squier noted that the Commission did not take any action at those meetings involving the matters that are the subject of this appeal. No person raised any concerns or objections about these contacts.

2. Commissioner Doug Crow noted for the record that he was acquainted with Mr. Bacus and Michael Neff, who had represented Stanley Andersen before the Skamania County Board of Adjustment. Commissioner Crow stated that he believed he could be fair and objective in deciding this matter. No person raised any concerns or objections about this contact.

3. Commissioner Walt Loehrke noted for the record that he was acquainted with all of the parties in this matter and that he had served on the Skamania County Planning Commission at the time that the Planning Department was handling permitting issues early in the application phase of this matter, but not during the appeal to the Board of Adjustment. No person raised any concerns or objections about this contact.

Record

Skamania County objected to several documents that Mr. and Mr. Bacus had submitted as exhibits to their brief, but which were not contained in the bound record filed by Skamania County. Skamania County argued that it timely filed the record and that Mr. and Mrs. Bacus failed to file a timely record objection; hence the record, as originally filed, was the complete record on appeal.

Mr. and Mrs. Bacus responded by arguing:

(1) Skamania County failed to provide a copy of the tape of the hearing before the Board of Adjustment during the time allowed for record objections and thus they could not have reviewed the testimony against the bound record to determine if they had any objections to the record;

(2) During the hearing before the Board of Adjustment, Mr. and Mrs. Bacus had incorporated by reference all documents in the possession of Skamania County; and

(3) Mr. and Mrs. Bacus presented argument at the Board of Adjustment hearing referring to the documents, which is evidenced in the tape recording and minutes of the hearing in the filed record.

The Gorge Commission considered the arguments of the parties and voted to consider the appeal based solely upon the record filed by Skamania County. The Commission reasoned (1) that the Commission's rules at 350-60-070 establish a procedure for a party to add documents to the record, if that party believes the documents were erroneously omitted; (2) Mr. and Mrs. Bacus could

have filed a precautionary record objection under the Commission's rules while awaiting a duplication of the tape of the hearing; (3) a general incorporation by reference to all documents in the County's possession is not adequate notice of what documents will be relied on; and (4) it is also unfair to parties to have to respond to a constantly changing record. The Chair of the Commission instructed the parties not to reference any documents outside of the record filed by Skamania County. In deciding this matter, the Gorge Commission did not consider any documents outside of the record filed by Skamania County.

Mr. and Mrs. Bacus made an offer of proof to the Gorge Commission that the tape recording was presented to them after the due date for record objections.

Other Objections and Motions

All rulings made on objections and motions during the hearing are hereby affirmed. Any objections or motions not ruled upon during the hearing are hereby overruled.

III. 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

IV. FACTS

The relevant facts are:

1. The subject parcel is located near the Carson Junction on Sprague Landing Road in Section 29 of T3N, R8E, Skamania County Tax Lot No. 3-8-29-2000, or Lot 3 of the Patricia Andersen Short Plat recorded in book 3 of short plats on page 143, Skamania County Records. The property is zoned General Management Area Residential (R-10) in the Skamania County Code. Rec. 86.
2. On May 25, 1999, Stanley Andersen filed a land use application with Skamania County to construct two private driveways. One of the driveways included construction of a road on an easement within the subject parcel. Rec. 1-4. The subject application stated that the proposal would require moving more than 100 cubic yards of soil. Rec. 4. The site plan states the land is "very steep." Rec. 14. The elevation drawings also show that the slope of the road

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 of 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].

might be greater than 10%. Rec. 15. The subject application did not include a grading plan as required by the Skamania County Code.

3. For reasons unclear, and not relevant to resolution of this appeal, the character of the application changed to a proposal to construct only one of the roads, and the nature of that road would be as a forest practices road rather than a private driveway. Rec. 47–48, 52–54.

4. On November 22, 2000, the Director of the Skamania County Planning and Community Development Department approved Mr. Andersen's application to construct a forest practices road to be located along the eastern boundary of Lot 3, and within an existing easement.² Rec. 86–101. The decision stated that a portion of the road would be visible from SR-14, a key viewing area. Rec. 92–95. The decision required the applicant to submit a grading plan as a condition of approval. Rec. 87.

5. The easement is shown on the filed plat map.

6. The source of fill material to be used in constructing the approved road was raised in this appeal. There is approximately 2000 cubic yards of road construction debris on land owned by Mr. Andersen. Originally, 5000 cubic yards had been deposited, however, an order from the Southwest Washington Health District required removal of all but 2000 yards of the fill.³ That removal was completed; approximately 2000 cubic yards remains. Rec. 57–63.

² The Gorge Commission makes no judgment as to the validity of the easement. The Gorge Commission uses this term solely to reflect the County's description of the site for the road.

³ The issue of the legality of the fill material was not before the Commission in this matter; hence the Commission declines to opine on that issue in this opinion.

7. Mr. and Mrs. Bacus argued to the Skamania County Planning and Community Development Department that the easement is void. Rec. 32–34.

8. Mr. Andersen stated that he intended to develop the road within an old roadbed. Rec. 15. Skamania County approved the road to be located within the old roadbed. Rec. 92.

9. In approving Mr. Andersen’s application, the Skamania County Planning and Community Development Department imposed conditions of approval. Condition of approval no. 1, required the applicant to determine the property location. Rec. 87.

10. On December 13, 2000, Mr. and Mrs. Bacus filed an appeal of the Director’s decision approving the forest practices road to the Skamania County Board of Adjustment. In the appeal, Mr. and Mrs. Bacus argued, *inter alia*, the forest practices road would actually be used for future development; grading would exceed 100 cubic yards and slopes would exceed 10%, therefore a grading plan should have been submitted as part of the application; the road is visible from SR-14, a key viewing area; and that the road would be on Mr. and Mrs. Bacus’ property because the easement was invalid. Rec. 102–113.

11. At the hearing before the Skamania County Board of Adjustment, Mr. and Mrs. Bacus argued the points specified in their notice of appeal. Rec. 164–169. Mr. and Mrs. Bacus specifically argued that Mr. Andersen did not clearly identify where the road would be located, the validity of the easement, and whether the road would be located within the easement. Rec. 168.

12. One member of the Board of Adjustment stated that so long as the decision required Mr. and Mrs. Bacus and Mr. Andersen to work out the property boundary by themselves, that there was no problem with the decision. Rec. 168. Mr. and Mrs. Bacus further argued that they objected to the condition requiring them to work out the property boundary themselves, because the County would be approving the road without knowing its final location. Rec. 168.

13. One member of the Board of Adjustment stated, "It would be easier if we (the board) knew where the location of the road was supposed to be." Rec. 168. In response, the Planning Department agreed stating, "It would, if Stan were to clearly state, my intention is to build this road on the existing road bed." Rec. 168. The Planning Department further stated,

"However, if the road bed is not within Stan's ability to reconstruct then he might have to relocate it. Then there is the question of where? I'm going to assume it will be 80 feet further east, because that is where Joe says where the property line is. It is as visible or less visible but it will call for extensive grading.

Rec. 168. The Board then voted to uphold the Planning Director's decision.
Rec. 168-169.

V. ASSIGNMENTS OF ERROR

Mr. and Mrs. Bacus offered six assignments of error:

1. Mr. and Mrs. Bacus argued that the County has no jurisdiction to issue a land use approval for the road because the road was approved on their land, not on land in which Mr. Andersen has any interest, and they did not consent to the application. Mr. and Mrs. Bacus made two main claims to support

their argument (Pet. Br. 3-4): First, they argue that the approved road is not located on the easement that crosses Mr. and Mrs. Bacus' land along its eastern boundary. Mr. and Mrs. Bacus argued that the County did not know the precise location of the boundary, and thus did not know the precise location of the road. Further, Mr. Andersen stated that he intended to rebuild an old roadbed, which Mr. and Mrs. Bacus claim is not within the easement. Second, Mr. and Mrs. Bacus have disputed the legal status of the easement.

2. Mr. and Mrs. Bacus argue that the approved road will not be used for forest practices, but rather will be used for residential development. In support of this, Mr. and Mrs. Bacus make three arguments: First, the original application stated that the road would be used as a driveway, but later was changed to a "forest practices road" to be used for fire protection. Second, Mr. and Mrs. Bacus note that the land to be served by the road is only 6.7 acres and review the residential development potential of the land. Third, Mr. and Mrs. Bacus assert that the topography and lot configurations would require that the road be created on slopes steeper than the 12% allowed by the Scenic Area standards. Pet. Br. 7. Mr. and Mrs. Bacus also argue that the road is not necessary for fire protection because the land is otherwise accessible (Pet. Br. 7) and because the land contains no marketable forest products (Pet. Br. 8).

3. Mr. and Mrs. Bacus argue that the road will be used as a means of disposing of illegal fill that was placed on the property without a permit. Mr. and Mrs. Bacus refer to highway demolition waste that Mr. Andersen allowed to be disposed on his property. Mr. and Mrs. Bacus cite to the definition of "Fill" in the

Skamania County Code (SCC 22.04.010(59)), which allows that only “sand sediment or other earth materials.” may be deposited on land in the Scenic Area. Pet. Br. 5–6.

4. Mr. and Mrs. Bacus argue that the County did not consult with other agencies concerning construction on potentially unstable slopes (Pet. Br. 8).

5. Mr. and Mrs. Bacus argue that the County did not properly address natural resource issues in its decision (Pet. Br. 8–9).

6. Mr. and Mrs. Bacus argue that they were denied due process because the County refused to disclose pertinent records (Pet. Br. 9-10), the County’s Notice of Hearing on Appeal did not contain a statement informing persons that an interpreter will be provided if needed (Pet. Br. 10), and because there was no evidentiary standard (Pet. Br. 10-11). Mr. and Mrs. Bacus argue these issues prejudiced them and denied them a fair and impartial hearing.

VI. ANALYSIS AND CONCLUSIONS

The first assignment of error is the primary issue in this case. We conclude that Skamania County did not properly approve the proposed road. The applicant presented Skamania County with conflicting information concerning the location of the proposed road, including a site plan that did not identify the precise location of the road.⁴ In addition, the applicant did not submit a required grading plan. Petitioners raised questions about the location of the proposed road, which Skamania County did not address. As a result, Skamania County approved the proposed road without knowing its precise location. We

⁴ The site plan did not show dimensions or major topographic indicators, either of which would have assisted in locating the road with more precision.

thus conclude the findings are insufficient to support the decision and the decision is not supported by substantial evidence in the whole record.

The facts of this case indisputably lead us to conclude that Skamania County did not know the location of the proposed road it approved and thus could not have accurately determined that the proposal complied with the land use ordinance. This case demonstrates two specific problems with approving development without knowing the precise location of the development.

First, Skamania County's decision does not demonstrate that it is approving the development on land in which Mr. Andersen has a legal interest. Mr. Andersen claims to be locating the road within an access easement he reserved, as shown on the plat map. The easement is located within lot 3, which is owned by Mr. and Mrs. Bacus. Mr. Andersen also claims that the road will be a reconstruction of an old roadbed. However, the record does not indicate that the old roadbed is located within the easement. In fact, Mr. and Mrs. Bacus argued to Skamania County that the roadbed is not located within the easement, but Skamania County did not address that point. To the contrary, Skamania County required as a condition of approval, that in the event there is a dispute concerning the property boundary, that the applicant must survey the property. It applied this condition knowing that Mr. and Mrs. Bacus posed such questions.⁵

The record does not reasonably indicate that the development was approved on land that the applicant had any legal right to develop. If the road

⁵ The Skamania County Planning staff treated Mr. and Mrs. Bacus' claims as legitimate when they reported to the Board of Adjustment that the roadbed might be 80 feet east of the easement. Rec. 168.

would be located outside of the easement, then Skamania County would have approved development on Mr. and Mrs. Bacus' property without their consent.⁶

Second, approving the road without knowing its precise location could result in impacts to Gorge resources. We note that the record seems to indicate a grading plan should have been submitted with his application. The petitioners argued to us that the road would be visible from SR-14, a key viewing area, would be located on lands with slopes greater than 10%, and would require more than 100 cubic yards of grading. Our review of the record indicates that the petitioners' argument is compelling. The application states that there would be more than 100 cubic yards of grading; the Planning Director's decision states that the road would be visible from SR-14, and the site plans and elevations seem to indicate slopes greater than 10%. Skamania County could not possibly have accurately determined that, despite this information, no grading plan was required unless it knew the precise location of the road, and that the precise location did not require a grading plan. The grading plan is necessary to determine how the proposed road would be constructed, including the extent of the cut banks and fill slopes, all of which is necessary to review the application for compliance with the guidelines to protect scenic resources.⁷

⁶ Petitioners argued to us that the easement was invalid and in their brief and in prehearing motions, asked the Gorge Commission to quiet title in favor of appellants. We do not have authority to do so and we decline to opine in any way as to the validity of the easement. This is a matter for the trial courts of the State of Washington. For the purpose of this decision, we assume, without deciding, that the easement is valid.

⁷ For example, one standard requires development seen from key viewing areas to be located such that grading is minimized. Skamania County must have the information contained in a grading plan to evaluate the proposal to determine if

We also note that in the record, Mr. and Mrs. Bacus argued there is a stream and wet area in the close vicinity of the proposed road, which Skamania County did not address.⁸ We do not decide this argument; however, we mention it here to further illustrate the importance of precisely identifying the location of proposed development in order to conduct a complete review.

The instant case presents substantially similar problems as those we identified in a prior appeal of a Skamania County decision, *Friends of the Columbia Gorge v. Skamania County*, COA-S-99-01 (June 22, 2001). In that case, we reversed a decision of the County approving mining activity because the County conducted its analyses without the complete application materials required for mining proposals. We also noted that the condition of approval in that case requiring the applicants to submit those materials only prior to beginning mining activities was legally insufficient because those materials were necessary to determining whether the proposal complied with the applicable standards. As a result, we concluded that the County's decision was not based on substantial evidence.

In the instant case, Skamania County approved the development, but required submission of a grading plan only prior to commencing work and *if the grading would exceed 100 cubic yards*. This is an insufficient review of the application. There is no way Skamania County could possibly have determined

grading would indeed be minimized. Likewise the grading plan is necessary for evaluating the proposal against the other applicable standards.

⁸ Mr. and Mrs. Bacus mentioned this in their brief the Gorge Commission. Pet. Br. at 8–9, but did not raise it in oral argument.

this road to be fully compliant with all of the review criteria if it did not review the proposed impacts prior to approving the road.

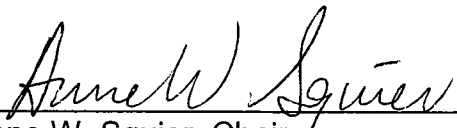
Because we cannot determine that Skamania County knew the precise location of the road when it approved the road, we must remand the decision back to Skamania County to identify the precise location and obtain and review, as necessary, complete application materials to determine if the proposal complies with all applicable standards. As the record stands at this time, we conclude the findings are insufficient to support the decision and the decision is not supported by substantial evidence in the whole record.

The Commission did not make specific findings and conclusions regarding the other assignments of error.

The decision of the Skamania County Board of Commissioners is

REMANDED.

DATED this 19th day of June, 2002



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.