BEFORE THE COLUMBIA RIVER GORGE COMMISSION

WILLIAM E. and CONNIE K. DARCY, Appellants, v. MULTNOMAH COUNTY, Respondent, and ROBERT LEIPPER, Intervenor-Respondent, and FRIENDS OF THE COLUMBIA GORGE, INC., Intervenor-Respondent.	CRGC No. COA-M-06-04 **FINAL OPINION AND ORDER**

This case involves an appeal by William and Connie Darcy of the decision of the Multnomah County Hearings Officer concluding that the Darcy's dwelling and horse boarding use are not "existing uses." The Columbia River Gorge Commission met on May 8, 2007 to hear oral argument and deliberate to a decision. We affirm Multnomah County's Hearings Officer's decision.

I. PARTIES

The parties in the appeal are:

- William and Connie Darcy, represented by John Groen, Groen Stephens & Klinge, LLP, Bellevue, Washington
- Multnomah County, represented by Sandra N. Duffy, Multnomah County Attorney's Office
- Robert Leipper, *pro se*
- Friends of the Columbia Gorge, Inc., represented by Gary K. Kahn, Reeves, Kahn & Hennessy, Portland, Oregon, and Nathan J. Baker, Friends of the Columbia Gorge.

II. PRELIMINARY ISSUES

Conflicts of Interest

No Commissioners reported any conflicts of interest.

Ex Parte Communications

The Chair of the Commission noted that prior to this appeal being filed, Mr. Leipper mentioned the property that is the subject of the appeal at several Commission meetings, and provided the Commission with numerous letters and photos. The Commission staff responded to him and provided Commissioners with copies of the responses. The Commission offered an opportunity for parties to respond or raise concerns about these prior communications. No party raised any concerns or objections to these communications. No Commissioners reported any other ex parte communications.

Scope of the Appeal

The appellants listed 11 issues in their Notice of Appeal, but assigned error to only two issues. We do not take action on issues to which no error has been assigned. Multnomah County's findings of fact, conclusions of law, and decisions concerning

issues raised in the Notice of Appeal, but for which no error was assigned in the briefing shall be considered affirmed without action by the Commission.

Exhibits

Each of the parties attached appendices to their briefs that were not part of the administrative record transmitted by Multnomah County. No party objected to any of the appendices prior to or at the hearing. The Commission considered these appendices in its deliberation and decision. These appendices shall be part of the record of the Commission's decision.

Multnomah County brought large exhibits boards and distributed handouts to the Commission at the hearing. No party objected to these exhibits. Multnomah County retained these exhibits and is responsible for transmitting them to other tribunals as appropriate.

Rulings on 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.

Hearing Procedure

The Chair reviewed the procedures for the hearing, which are contained in Commission Rule 350-60 and were written into the Notice of Hearing. The Commission adhered to the hearing procedures.

III. STANDARD OF REVIEW

The issues presented are primarily legal in nature. Our review focuses on whether the decision violates a provision of applicable law and is prohibited as a matter of law,

whether the decision is clearly erroneous, and whether the decision improperly construes the applicable law based on the record before us. Commission Rule 350-60-220(1)(c), (d) or (h).

IV. FACTS

Background

The subject property is located within the Columbia River Gorge National Scenic Area. Since 1993, Multnomah County has issued land use decisions based on their Columbia River Gorge National Scenic Area land use ordinance (MC Ch. 38), which the Gorge Commission has found to be consistent with the Columbia River Gorge National Scenic Area Management Plan. From 1986 (the date of the National Scenic Area Act) to 1993, the Gorge Commission and Forest Service issued land use decisions for all new land uses in the Scenic Area portion of Multnomah County. This permitting was concurrent with Multnomah County's traditional land use permitting responsibilities.

In the early 1970s, William and Hope Darcy acquired the subject property.[1] At the time, there was a principal farm dwelling with garage; a stable for the feeding, stabling of horses and storing tack, feed and equipment; and structures accessory to farm use. Rec. 7.

In 2006, the Darcys applied to Multnomah County for an existing use determination. The application requested a determination for whether 16 buildings, structures, and uses are "existing uses." On August 30, 2006, the Multnomah County Planning Director issued a decision concluding that 11 of the buildings, structures and uses are not existing uses. Rec. 132–47. The applicants appealed that decision to the

[1] The Hearings Officer decision explains inconsistencies in the applicants' evidence as to acquisition of the property. Rec. 13–14. The exact date is not material to our decision.

Multnomah County Hearings Officer. The Hearings Officer upheld the the Planning Director's decision.[2] The applicants only appealed the determination that their single-family dwelling and their horse boarding use are not existing uses. We recite the facts principally from the Hearings Officer's decision.

Facts relating to the single-family dwelling

In 1990, a fire occurred in the Darcy's dwelling on the subject property. The dwelling was a manufactured home. The County's Building Department (contracted to the City of Gresham) issued a building permit to repair the fire damage [Rec. 377]." Rec. 16.

The Hearings Officer inferred from the evidence that the original fire-damaged structure was lawfully established and entitled to be rebuilt. The Darcys did not repair the fire damage, rather they replaced the dwelling with a site-built home.

At the time the Darcys replaced the fire-damaged home, a National Scenic Area permit from the Columbia River Gorge Commission was necessary. The Darcys did not obtain the Scenic Area permit from the Gorge Commission. The Hearings Officer concluded that because the Darcys did not receive the Scenic Area permit, the dwelling was not legally established in accordance with the regulations at that time.

Facts relating to the horse boarding use

In the early 1970s, William and Hope Darcy obtained a land use permit for "Hay and Machinery Storage, Cattle and Horse Shelter." Rec. 183. The application for the use described the use as "For storing hay from my own and leased land. For storing farm

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[2] The Hearings Officer concluded that one of the accessory buildings, which the Planning Director concluded was legally established, was not legally established. This accessory building was not the subject of the appeal to the Gorge Commission and thus is not relevant here.

machinery and shelter for cattle and horses." *Id.* Hope Darcy testified to the Hearings Officer that she boarded horses at the subject property that were brought to the farm for breeding and that horses were trained and shown until 1986. Rec. 14. The Hearings Officer also states, "Evidence was also provided on behalf of the applicant that some boarding unrelated to breeding also occurred," *Id.*, but there is no explanation what this evidence was or documentation supporting it.

"In 1986, Hope Darcy moved from the subject property. The property was leased for a period of two years from 1987 to 1988. The horse breeding operation, apparently, was discontinued when Hope Darcy moved from the property." *Id.* The Darcys claimed to the Hearings Officer "that the subject property continued to be used for a farm use after 1986, but did not provide much detail about the nature of the farm use that existed on the subject property on February 6, 1993."[3] The Darcys claim that horse boarding has been a continuous use since 1973.

V. ANALYSIS OF ASSIGNMENTS OF ERROR

There are two provisions of Multnomah County's land use ordinance that are relevant to both assignments of error. The first authorizes existing uses and structures to continue and the second is the definition of existing uses and structures:

> Right to Continue Exiting Uses and Structures: Any existing use or structure may continue so long as it is used in the same manner and for the same purpose, except as otherwise provided.

MCC 38.0030(A).

> Existing Use or structure: Any use or structure that was legally established. "Legally established" means:

[3] In February 1993, Multnomah County took over Scenic Area permitting after adopting a land use ordinance consistent with the Management Plan for the Columbia River Gorge National Scenic Area.

(a) The land owner or developer obtained applicable land use and building permits and complied with land use regulations and other laws that were in effect at the time the use or structure was established, or that were in effect at the time the landowner or developer corrected an improperly established use or structure;

(b) the use or structure was initially operated or constructed according to those applicable permits, land use regulations and other laws, or has been operated or constructed according to permits obtained to correct an improperly established use or structure; and

(c) any changes to the original use or structure must comply with all applicable permit requirements, land use regulations and other laws that were in effect at the time the change was established.

MCC 38.0015 (Definition of "Existing use or structure")

Assignment of Error No. 1: Was the Darcy's horse boarding use legally established?

To begin, the Commission observes that the salient events occurred long before the National Scenic Area was established. As such, we do not interpret the Scenic Area legislation or regulations here. We review for whether the Hearings Officer's decision is clearly erroneous, and whether the decision improperly construes the applicable law based on the record before us. Commission Rule 350-60-220(1)(d) and (h).

Analysis

The parties' arguments focus on two points: first, whether the Multnomah County Zoning Ordinance required a community service permit for horse boarding, and second, whether sheltering horses owned by others for a fee (i.e., commercial boarding) is the same or different use than sheltering one's own or others' horses that are on site for the purpose breeding or showing.

The first argument requires a historical review of the relevant Multnomah County zoning ordinance. In 1964, Multnomah County's zoning ordinance contained a list of community service uses. Section 7.10 (1964) stated in relevant part:

> USES. The following uses, and those of a similar nature, may be permitted in any district provided such is consistent with the purposes of this ordinance and when approved at a public hearing by the Planning Commission: * * * (g) Livery stable or riding academy.

In 1968, Multnomah County's zoning ordinance contained a similar list of community service uses, except that "livery stable" was deleted. Section 7.30 (1968) stated in relevant part:

> USES. The following uses, and those of a similar nature, may be permitted in any district provided such is consistent with the purposes of this Ordinance and when approved at a public hearing by the Planning Commission: * * * (p) riding academy.

Multnomah County's 1974 zoning ordinance was identical to the 1968 ordinance in this relevant part. However, in 1977, "boarding of horses for profit" was added to the list of community services uses. Section 7.030 (1977) stated in relevant part

> USES. Except as otherwise provided in Section 3.10, the following uses, and those of a similar nature, may be permitted in any district provided such is consistent with the purposes of this Ordinance and when approved at a public hearing by the Hearings Council: * * * (p) riding academy or the boarding of horses for profit.

The Darcys argue that deletion of the "livery stable"[4] use from the list of community service uses in 1968, and its reintroduction in 1977 (as "boarding of horses for profit") meant that livery stables, if they were to be approved, must have been approved with a land use permit, not a community service permit between 1968 and 1977. They claim they received a land use permit in 1975 (Rec. 183). The respondents

[4] For the purpose of this appeal, we are assuming that a "livery stable" and a commercial "horse boarding" use are the same use.

argue that despite the change in the zoning ordinance, the county continued to approve horse boarding through a community service permit. The Hearings Officer concluded that at the time the Darcys established their horse boarding use, it required a community service permit, and because the Darcys did not receive a community service permit, the use was not legally established.

We cannot conclude that Multnomah County improperly construed its own code here. We agree with the Darcy's argument that under rules of statutory construction, deletion of "livery stable" from the list of community service uses could indicate a community service permit would not be required for a livery stable. However, we are equally persuaded by Multnomah County's practice that it had continued to issue community service permits for livery stables for many years after the 1968 change. Their authority to do so could have come from the text of Section 7.30 (1968), which allowed "uses of a similar nature" to the uses listed as community service uses. The list of community service uses was illustrative or open-ended, as opposed to exclusive. Multnomah County may have deleted "livery stable" because it believed a livery stable was already "of a similar nature" to other uses on the list. Similarly, Multnomah County could have added "the boarding of horses for profit" in 1977 after experiencing confusion with administering that section of its ordinance. We cannot know for sure because there is no legislative history that we can turn to, and those events were 30 and 40 years ago.

Given competing compelling arguments, we do not find that Multnomah County erred in construing its own law to mean that at the time the Darcys initiated their use, a "livery stable" required a community service permit.

The second argument in this assignment of error was not briefed as specifically as above, but we address it because no matter how we resolve the above argument, this point could also prove dispositive. The Darcys argue that in 1975, the applicable law did not distinguish between sheltering horses for pay and sheltering horses for personal use. If the Darcys are correct, then the 1975 land use permit could be interpreted as allowing the current use. The respondents argue that the 1975 permit authorized farm use of the building, and that commercial horse boarding was not a farm use under Oregon law in 1975.

We agree with the respondents. Prior to 1993, commercial horse boarding was not considered a farm use: it was only added as a permitted farm use to the Oregon statutes in 1993. ORS 215.203(2)(a). Commercial horse boarding would not have been allowed as a farm use in 1975. The application, which stated, "For storing hay from my own and leased land. For storing farm machinery and shelter for cattle and horses" could not have reasonably been understood to allow a non-farm use. Here, Multnomah County properly construed its own law to distinguish between commercial horse boarding (which was not a farm use at the time it was established) and sheltering personal use horses, which was the use listed on the application. Hence, we conclude that Multnomah County's decision was not clearly erroneous.

Because Multnomah County did not err in interpreting its own code to require a community service permit, and properly concluded that commercial horse boarding was not a farm use, Multnomah County's decision that the commercial horse boarding use was not an existing use that may continue pursuant to MCC 38.0030(A) was not clearly erroneous.

Assignment of Error No. 2: Was the Darcy's rebuilt home legally established?

The facts relating to this assignment of error are largely undisputed. Commission Rule 350-20-003[5] and Final Interim Guideline III.A.5[6] required land use approval for replacement of structures that were damaged or destroyed. These guidelines, which were applicable at the time that the Darcys rebuilt their fire-damaged home, required a Scenic Area approval. The Darcys did not obtain a Scenic Area approval.

Analysis:

The Darcys claim that because Multnomah County's Building Department issued a building permit for their replacement dwelling in 1990, Multnomah County could not now determine that the dwelling required additional land use approval. They cite *Skamania County v. Columbia River Gorge Comm'n,* 144 Wn 2d 30, 26 P2d 241 (2001) for authority that Multnomah County cannot now challenge the validity of the building permit. We do not find the Darcys argument to be compelling. The *Skamania County* case is not controlling. That case involved a situation where the landowner had received a Scenic Area land use permit and then a building permit; the Court concluded that the validity of the Scenic Area land use permit could not be challenged after the time for

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[5] Commission Rule 350-20-003 states, "Prior to the effective date of a county's land use ordinance adopted and approved pursuant to sections 7 and 8 of P.L. 99-663, the Commission shall review all proposals for major development actions and new residential development * * *. No major development action or new residential development shall be undertaken or initiated without prior Commission approval." Commission Rule 350-20-004(1) adopts the Final Interim Guidelines as the applicable land use standards.

[6] Final Interim Guideline III.A.5 states, "When a structure is destroyed or partially destroyed, it will be considered an existing use when replaced in kind and in the same location within one year. The exterior color and reflectivity of replacement structures must be consistent with the scenic guidelines in Chapter III. Replacement of a structure or use that differs in size or location from the original shall be subject to a consistency determination."

appeal had expired. In this case, the Darcys did not apply for, nor receive a Scenic Area land use permit, so there is no similar permit being challenged.

We also note that the Darcys filed the land use application in order to determine what uses legally existed on the subject property. The nature of this type of application requires an inquiry into the permit history or lack thereof. Because the Darcys voluntarily submitted their existing use determination application to Multnomah County, they cannot now claim Multnomah County may not consider whether they received all necessary permits.

The Darcys next argue that the Commission and Multnomah County did not establish effective procedures to ensure that building permits could not be issued without a prior Scenic Area permit. The Commission need not make any judgment about the permit process from 1990 to resolve this argument, nor can we because there is no evidence in the record that the Multnomah County Building Official[7] informed, or failed to inform, Mr. Darcy that he needed Scenic Area approval. Ultimately, this does not matter: the burden is always on the landowner to obtain all relevant land use approvals. The Commission has consistently held that buildings constructed without a necessary land use approval were not legally established. For example, the Commission determined that although the landowners had obtained a building permit from Klickitat County to place a mobile home, they had failed to obtain the necessary land use approval, and thus their mobile home was not legally placed. *In the Matter of Johnston,* CRGC No. C93-

[7] Friends of the Columbia Gorge argued at the hearing that the Darcys sought a building permit from the City of Gresham because they knew they would not be able to obtain a permit from Multnomah County. We do not assign such motive or intent to the Darcys: at the time of the relevant events, Multnomah County was contracting with the City of Gresham to issue its east county building permits. Our experience also tells us that landowners cannot choose the jurisdiction where they apply for building permits.

0074-K-S-11 (1993).[8] Here, where the Darcys did not obtain the required Scenic Area approval, Multnomah County's decision that the dwelling was not an existing use that may continue pursuant to MCC 38.0030(A) was not clearly erroneous.

Although not part of our analysis necessary to resolve either assignment of error, we do not believe that Multnomah County's decision is excessive as applied to the Darcys for two reasons. First, Multnomah County's land use ordinance authorizes both commercial horse boarding and construction of a dwelling on this parcel; the Darcys may apply for these at any time. Second, we believe the Darcys knew or reasonably should have known to contact the Scenic Area authorities regarding land use approval for the replacement dwelling. The record shows that the landowners had several contacts with the U.S. Forest Service, Scenic Area Office (which had joint land use approval in the late 1980 and early 1990s) concerning land leases. As well, both Respondent-Intervenors attached as an appendix to their briefs, a November 1988 letter from the Gorge Commission to Mr. Darcy concerning an inquiry he had made to replace his dwelling. This letter long-predated the Darcys seeking their building permit to rebuild their fire-damaged dwelling.

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[8] This decision is cited for precedential authority, not as evidence. A copy of this decision is available at the Commission Office.

VI. CONCLUSIONS OF LAW AND ORDER

For the reasons explained above, Multnomah County's decision does not improperly construe applicable law; does not violate provisions of law; and is not clearly erroneous.

The decision of the Multnomah County Hearings Officer is **AFFIRMED.**

IT IS SO ORDERED THIS 29th day of June 2007.

Judy S. Davis
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, P.L. 99-663.

CERTIFICATE OF SERVICE

I hereby certify that on June 29th, 2007, I served a true and correct copy of this FINAL OPINION AND ORDER by United States Postal Service, first class mail, postage prepaid on the following persons:

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DATED this 29th day of June, 2007.

Nancy A. Andring,
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