

BEFORE THE COLUMBIA RIVER GORGE COMMISSION

FRIENDS OF THE COLUMBIA)
GORGE, INC.,)
)
Petitioner,)
)
v.) CRGC No. COA-S-96-03
)
SKAMANIA COUNTY,) Skamania County No. NSA-95-104
)
Respondent,) DECISION
)
and)
)
ALAN CARELL,)
)
Respondent-Intervenor.)

This case is an appeal by Friends of the Columbia Gorge ("Friends") from a decision of Skamania County upholding the planning director's approval of an application for development in the Columbia River Gorge National Scenic Area. We reverse.

The applicant, Alan Carell, applied for a permit for a cluster development. The property, located in Skamania County within a general management area, is designated "Small Woodland". The owner sought to create three lots from a parcel identified as Skamania County Tax Lot 2-6-33-1300.

The planning department treated the proposal as a land division and approved it. The Friends appealed the decision to the Board of Adjustment. The Board conducted a hearing and upheld the department. The Friends then filed this appeal with the Gorge Commission.

In regard to the standard of review, since the issues presented here are primarily legal, our review must determine

whether the county's approval violates a provision of applicable law and is prohibited as a matter of law, or improperly construes the law, based on the record before us. In that circumstance, either reversal or remand of the decision is required under Rule 350-60-220(1).¹

In the first assignment of error, the Friends assert the county erred by approving the cluster development because the applicant did not meet all of the requirements of the ordinance, including the 40-acre minimum parcel size. They contend the property is 38.12 acres and note the application for the development states the property is 40-acres "less BPA and County RD (Rights of Way)." Rec., 327. They also point to testimony in the record indicating the county constructed the road through the

¹Rule 350-60-220 provides:

(1) 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 360-60-090(2)(d).

property in 1961 and acquired 1.88 acres in fee simple. Moreover, the deed for the property specifically excluded the road.

In response, the county concedes that approval of a cluster development requires at least 40 acres and the "record undisputedly establishes that the subject parcel is only 38.12 acres." (Skamania County's Response To Petitioner's Request For Review, 1) For this reason, a contested question of fact is not presented and therefore, the county requests the Commission reverse the Board's decision.

In our review, we examine the text of the ordinance. The section entitled "Cluster Development Standard" has several requirements.² Sec. 22.08.020(D). As we noted in another recent

²The complete text of the ordinance is set forth here:

Cluster Development Standards (GMA only).

1. Where authorized, land divisions in the General Management Areas may create parcels smaller than the designated minimum size and may include a bonus in order to cluster new dwellings. Approval of cluster developments shall be contingent upon submission of plans specifying dwelling sites and areas of permanent, undeveloped open land.
2. To approve a cluster development, the County must find that clustering new dwellings will provide a siting opportunity not available through conventional parcel-by-parcel development. These opportunities include, but are not limited to, siting new dwellings to:
 - a) Be located in areas with screening vegetation or other features that reduce visibility of development from Key Viewing areas.
 - b) Avoid significant landscape features.
 - c) Protect the existing character of the landscape setting.

(continued...)

(...continued)

- d) Reduce interference with movement of deer or elk winter range.
 - e) Avoid areas of known cultural resources.
 - f) Consolidate road access, septic drainfields, or other development features to reduce impacts associated with grading or ground disturbance.
 - g) Reduce adverse effects upon riparian areas, wetlands, natural areas, rare plants, sensitive wildlife sites or other natural resources.
 - h) Increase the likelihood of agricultural or forest management on the undeveloped land left by the cluster development.
3. Following cluster development, no further division of any resulting parcel for residential purposes shall be allowed until the subject parcel is included within the boundary of an Urban Area.
 4. No parcel in a cluster development may be smaller than one acre in a 5-acre Residential or 10-acre Residential designation or two acres in a Small-Scale Agriculture or Small Woodland designation.
 5. Cluster development may create up to 25 percent more parcels than otherwise allowed by the minimum parcel size on lands designated 5-acre or 10-acre Residential and up to 50 percent more on lands designated Small-Scale Agriculture or Small Woodland.
 6. Any division in a cluster development may create at least one additional parcel.
 7. At least 75 percent of land subject to a cluster development shall be permanently protected as undeveloped land. The County shall ensure permanent protection for open areas created by cluster development.
 8. Contiguous parcels in the same ownership or in separate ownerships may be consolidated and redivided to take advantage of cluster development bonuses.

(continued...)

case, these standards

are based on recognition of the special nature of cluster development. It is an incentive for good land use planning that provides resource protection in excess of conventional development. In complying with these additional restrictions, a property owner obtains what is, in effect, a density bonus.

Friends of the Columbia Gorge v. Skamania County (Spiegl Property), CRGC No. COA-S-96-02, 3-4 (July 24, 1997). (emphasis supplied)

In the Friends (Spiegl Property) case, we reversed the decision of the county approving a cluster development after holding the land division there did not comply with the requirements of the ordinance. Friends, 5. We emphasized that the standards for cluster development

clearly contemplate a greater degree of planning and foresight in accommodating increased density. To require less scrutiny and simply treat the matter as a land division is contrary to the larger public interest in comprehensive planning in the National Scenic Area.

Id., 6-7.

In this case, the Friends and the county agree the property does not meet the threshold requirement regarding minimum size for cluster development. The Commission holds the county's decision violates the applicable law and is reversed.

In the second assignment of error, the Friends contend the county erred in accepting an incomplete application and processing it as a land division rather than for cluster development. In order to approve cluster development, the ordinance requires that the County must

(...continued)
Sec. 28.08.020(D).

find that clustering new dwellings will provide a siting opportunity not available through conventional parcel-by-parcel development.

Section 22.08.020 D. 2.

The county's duty under this section is clear. It is required to evaluate and prepare a comparison between the impacts of cluster development with those from conventional parcel-by-parcel development. The analysis must include the siting opportunity available with respect to all of the factors in the ordinance (visibility, landscape features, landscape setting, cultural resources, consolidation of development, natural resources and resource management). The county thus erred in accepting the application³ without this information, in processing it as a land

³The minimum requirements for a development review application include a map which must provide the following information:

- iii) Boundaries, dimension and size of the subject parcel;
- iv) Significant terrain features or landforms.
- v) Groupings and species of trees or other vegetation on the parcel.
- vi) Location and species of vegetation that would be removed or plants.
- vii) Bodies of water and watercourses.
- viii) Location and width of existing and proposed roads, driveways and trails.
- ix) Location and size of existing and proposed structures
- x) Location of existing and proposed services, including wells or other water supplies, sewage disposal systems, power and telephone poles and lines, and outdoor lighting.
- xi) Location and depth of all proposed grading and ditching.

Section 22.06.020 B. 1. i).

division and in approving cluster development without the analysis provided for in the ordinance.

In the third assignment of error, the Friends submit the county erred by not complying with the cluster development standards in the ordinance including

at least 75% of lands subject to a cluster development shall be permanently protected as undeveloped land. The County shall ensure permanent protection for open areas created by cluster development.

Section 22.08.020 D. 7.

In this provision, there is no doubt regarding the legal obligation created. *Permanent protection* for at least 75% of the property is mandatory. However, the county's condition of approval limiting residential development to 25% of the parcel does not comply with this requirement because it does not ensure permanent protection for the remainder of the property.

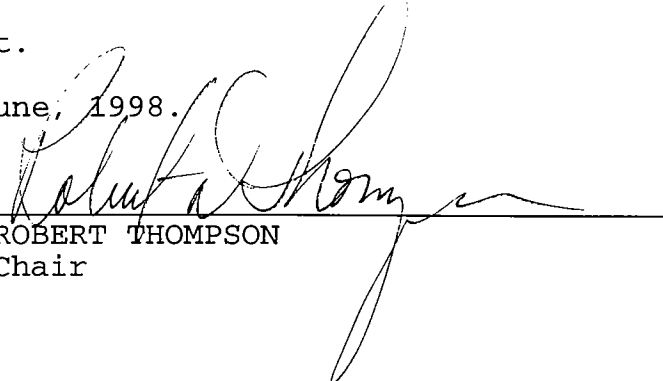
In the fourth assignment of error, the Friends assert the county erred in failing to analyze the impact of the cluster development as seen from Key Viewing Areas. While the county's staff report indicates the property is visible from Key Viewing Areas, the report does not contain any evaluation of the impact of the cluster development on Key Viewing Areas. Without complying with this standard for new development, scenic resources are not protected in violation of the ordinance and the Act itself.

In the fifth and final assignment of error, the Friends argue the county erred in approving the application without a cultural resource reconnaissance survey. The ordinance requires a survey for all large scale uses. Section 22.18.020. This includes "residential

development involving two or more dwellings." Section 22.18.020 C. 1. a). In this case, cluster development will allow three new residential dwellings and therefore, a cultural resource reconnaissance survey is mandatory. The county's proposal to require the survey at a later point in time is in direct conflict with the requirements of the ordinance and the precautionary approach to protecting cultural resources contained in the Act and the management plan.⁴

We reverse the decision below and conclude as a matter of law the action does not meet the requirements in the ordinance for approval of cluster development.

Dated this 2 day of June, 1998.



ROBERT THOMPSON
Chair

c:\legal\carell\decision/jb

⁴The management plan emphasized that the legal framework preceding the Act created "costly delays to developers and irreparable damage to cultural resources" because surveys were not required prior to the approval of development.

Management Plan, I-49. (emphasis supplied)