

BEFORE THE COLUMBIA RIVER GORGE COMMISSION

GLW VENTURES, LLC,)
)
 Appellant,)
)
 v.)
)
 SKAMANIA COUNTY,)
)
 Respondent,)
)
 and)
)
 FRIENDS OF THE COLUMBIA)
 GORGE, INC.,)
)
 Intervenor-Respondent,)
)
 and)
)
 USDA FOREST SERVICE,)
)
 Intervenor-Respondent.)
 _____)

CRGC No. COA-S-13-02
Skamania County No. 12-32

**CORRECTIONS TO FINAL
OPINION AND ORDER**

USDA FOREST SERVICE,)
)
 Appellant,)
)
 and)
)
 FRIENDS OF THE COLUMBIA)
 GORGE, INC.,)
)
 Intervenor-Appellant,)

CRGC No. COA-S-13-03
Skamania County No. 12-32

v.)
)
 SKAMANIA COUNTY,)
)
 Respondent,)
)
 and)
)
 GLW VENTURES, LLC,)
)
 Respondent (Applicant).)
 _____)

On May 5, 2014, the Gorge Commission issued the Final Opinion and Order in this matter. On May 8, 2014, Friends of the Columbia Gorge requested the Gorge Commission correct typos in its decision. The Commission issues the following changes to its Final Opinion and Order.¹ Deleted words are shown in ~~strikeout~~. New words are shown in underline. Attached to this order is the Final Opinion and Order (as corrected May 13, 2014) incorporating the following changes.

Page 6:

. . . The subject property (the entire ownership) is within a Special Management Area as designated in the Act, and the Forest Service adopted an “Agriculture” land use designation for the property. There was no minimum parcel size for land divisions associated with that land use designation because, as mentioned above, the Act prohibits land divisions in the SMAs except to facilitate acquisition by the Secretary of Agriculture. The Management Plan allowed boundary line adjustments in the SMAs subject to the applicable minimum parcel size requirements.

In 1993 Skamania County adopted a land use ordinance for the National Scenic Area which the Commission approved as consistent with the Management Plan. The U.S. Secretary of Agriculture concurred with the Commission's approval. Skamania County’s land use ordinance did not change the SMA Agriculture land use designation for the subject property and allowed boundary line adjustments as review uses in the SMAs, with a minimum parcel size of 40 acres.

¹ The changes herein do not follow Friends’ suggestions exactly; the parties are cautioned to use this correction document not Friends’ suggestions.

Page 15:

. . . While GLW identifies some elements of the conservation easement that are more restrictive than the Skamania County Code, the material issue is the minimum parcel size restriction for ~~dividing the property~~ boundary line adjustments.

Page 16:

The hearing examiner disagreed with GLW's argument. She relied on the phrase "to be acquired," concluding that the exception cited by GLW applies only to facilitate prospective acquisition of land. In this case, the ~~land~~ conservation easement was already acquired.

Pages 17-18:

. . . In terms of ~~dividing the property~~ boundary line adjustments, the Scenic Area Ordinance is more restrictive than the easement deed because the Ordinance requires an 80-acre minimum parcel size whereas the easement deed allows smaller lots. While GLW identifies some elements of the conservation easement that are more restrictive than the Skamania County Code, the material issue is the parcel size for ~~dividing the property~~ boundary line adjustments.

Page 24:

. . . Finally, we do not foreclose Skamania County's ability to act on prior legal concern.

IT IS SO ORDERED this 13 day of May 2014



Jim Middaugh, Chair
Columbia River Gorge Commission

CERTIFICATE OF MAILING

I certify that on the 15th day of May 2014, I mailed the attached CORRECTIONS TO FINAL OPINION AND ORDER together with the FINAL OPINION AND ORDER (as corrected May 13, 2014) to the following attorneys of record in the matter by electronic mail.

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Nancy A. Andring
Executive Secretary
Columbia River Gorge Commission

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CRGC No. COA-S-13-02
Skamania County No. 12-32

**FINAL OPINION AND
ORDER (as corrected May 13, 2014)**

USDA FOREST SERVICE,)
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 Appellant,)
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 and)
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 FRIENDS OF THE COLUMBIA)
 GORGE, INC.,)
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CRGC No. COA-S-13-03
Skamania County No. 12-32

v.)
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 GLW VENTURES, LLC,)
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This case involves two consolidated appeals.¹ Both appeals relate to Skamania County’s land use decision regarding approximately 108.08 acres owned by GLW Ventures, LLC (GLW).² The two appeals arise out of a decision by the Skamania County Hearing Examiner denying an application for a lot line adjustment. The Columbia River Gorge Commission met on February 11, 2014 to hear oral argument and deliberate to a decision. The Commission largely upheld the Skamania County Hearing Examiner’s decision, but remanded a portion of the decision.

I. PARTIES

The parties to this matter are:

- USDA Forest Service, represented by Jocelyn Somers, General Counsel, Portland, Oregon;
- Friends of the Columbia Gorge, represented by Nathan Baker, Staff Attorney, Portland, Oregon and Gary K. Kahn, Reeves, Kahn, Hennessy & Elkins, Portland, Oregon;
- GLW Ventures, LLC, represented by LeAnne Bremer, Miller Nash LLP, Vancouver, Washington;

¹ In this consolidated proceeding, the parties prepared separate written briefs and delivered separate oral arguments on each appeal. The Commission held a single hearing, but decided each set of assignments of error separately, and prepared only this single order.

² The total acreage of the property adds up to approximately 109.09 acres when Turk Road is included, and approximately 108.08 acres when it is excluded. Rec. 79, 832–37, 852–54. For clarity, we refer to property as being 108.08 acres.

Skamania County, represented by Adam Kick, Skamania County Prosecuting Attorney, Stevenson, Washington.

II. PROCEDURAL MATTERS AND RULINGS

Disclosure of Conflicts of Interest and Ex Parte Communications

Gorge Commissioner Bowen Blair disclosed that he was Executive Director of Friends of the Columbia Gorge, Inc. from 1982 to 1988 and was a board member of Friends of the Columbia Gorge, Inc. until March 2011. Commissioner Blair also disclosed that he was a staff member at Trust for Public Land for 21 years. As a Trust for Public Land staff member, he negotiated conservation easements in the Columbia River Gorge. However, he did not negotiate the conservation easement at issue in this appeal. Commissioner Blair stated that he believed he could be fair and objective in deciding this matter. No person raised any concerns or objections about Commissioner Blair's participation in this matter.

No other commissioners disclosed any other conflicts of interest or ex parte communications and no party raised concerns with or challenged any other commissioner's participation in this matter.

Hearing Procedure

The Chair reviewed the procedures for the hearing, which are contained in Commission Rule 350-60 and included in the Notice of Hearing. The Commission adhered to the hearing procedures. No party raised any objection about the procedure or conduct of the hearing.

III. STANDARDS 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. Commission Rule 350-60-220(1)(c), (d) and (h).

IV. FACTS

The subject property is located in Skamania County, within the Columbia River Gorge National Scenic Area (Scenic Area) at the top of Mount Pleasant. Rec. 813–17. The property contains several undeveloped lots, which together are approximately 108.08 acres in size. Skamania County’s staff report explained that there are six tax lots, but only four legal parcels. Rec. 284, 519. On December 14, 1988, the U.S. Forest Service acquired a conservation easement on the subject property from the previous landowner, Ms. Sharleen James, under the authority of the Columbia River Gorge National Scenic Area Act (the Scenic Area Act). Rec. 825–831. The Forest Service paid \$203,500 for the conservation easement. Rec. 825. The easement deed acquired by the Forest Service describes the totality of the subject property (the ownership) with reference to three parcels (where Parcel II consists of 3 short plat lots). Rec. 826. The easement deed also states that the “right is reserved to break the ownership into two tracts, Tract 1 being 62 acres in farm and woodlot and 5 acres in homesite, and Tract 2 being 38 acres in farm and woodlot and 5 in homesite.” Rec. 827. The easement deed did not specify the land use process for creating the two tracts.

This case involves an application for a lot line adjustment to create two tracts of land pursuant to the easement deed. At base, there are two legal issues. First, the proposed tracts would be different in size and configuration than shown in the easement deed. Second the parties dispute whether the easement deed allows creation of two tracts, even as exactly proposed, because the zoning regulations applicable to the ownership have changed and would not allow creation of two tracts because the tracts could not meet the minimum parcel size of 80 acres.

To understand the legal issues, we begin with a discussion of the Columbia River Gorge National Scenic Area authorities for context. The Columbia River Gorge National Scenic Area Act, 16 U.S.C. §§ 544 to 544p (Scenic Area Act or Act), created the National Scenic Area, and incorporated maps that showed special management areas, among other specifically designated areas. 16 U.S.C. § 544b. The Scenic Area Act does not use the term, “general management area.” This is a term that early planners from the Gorge Commission and USDA Forest Service coined to refer to all land within the National Scenic Area that the Scenic Area Act does not specifically designate otherwise. Relevant to the instant case, the Scenic Area Act prohibits land divisions in the special management areas, except to facilitate the Secretary of Agriculture acquiring land pursuant to its authority in the Act to acquire land in the Act. 16 U.S.C. § 544d(d)(5).

The Scenic Area Act required the Secretary of Agriculture to adopt interim guidelines for reviewing development proposals for consistency with the Act. 16 U.S.C. § 544(h). The interim guidelines were effective until the counties adopted their own land use ordinances that the Commission and U.S. Secretary of Agriculture concluded were consistent with the Management Plan (discussed below) and the Act. The “Final Interim Guidelines” were the applicable land use standards at the time the USDA Forest Service acquired the conservation easement. Consistent with the Act, the Final Interim Guidelines prohibited land divisions on parcels in the special management area except to facilitate land acquisition. Final Interim Guidelines, land division guidelines no. III.C.5.a(2). The Final Interim Guidelines allowed lot line adjustments in the special management area provided that the resulting parcels would not be reduced below 40 acres in size if the parcel contained a residence. Final Interim Guidelines, land division guidelines no. III.C.5.a(1).

The Scenic Area Act required the Gorge Commission and USDA Forest Service to prepare a regional management plan that included land use designations and guidelines to meet criteria that the Act specifies. 16 U.S.C. §§ 544d(b) and 544d(d). Under the Act, the Gorge Commission must adopt the management plan, which must incorporate without change the land use designations for the special management area that the Act required the USDA Forest Service to adopt. 16 U.S.C. § 544d(c)(5)(A). In 1992, the Gorge Commission published the *Management Plan for the Columbia River Gorge National Scenic Area* (the Management Plan).³ The subject property (the entire ownership) is within a Special Management Area as designated in the Act, and the Forest Service adopted an “Agriculture” land use designation for the property. There was no minimum parcel size for land divisions associated with that land use designation because, as mentioned above, the Act prohibits land divisions in the SMAs except to facilitate acquisition by the Secretary of Agriculture. The Management Plan allowed boundary line adjustments in the SMAs subject to the applicable minimum parcel size requirements.

In 1993 Skamania County adopted a land use ordinance for the National Scenic Area, which the Commission approved as consistent with the Management Plan. The U.S. Secretary of Agriculture concurred with the Commission’s approval. Skamania County’s land use ordinance did not change the SMA Agriculture land use designation for the subject property and allowed boundary line adjustments as review uses in the SMAs, with a minimum parcel size of 40 acres.

On March 2, 2001, more than 12 years after selling a conservation easement to the USDA Forest Service, James offered to sell fee simple title to the subject property to the Forest Service

³ The Commission adopted the Management Plan in October 1991, the Secretary of Agriculture concurred with the Management Plan in February 1992.

pursuant to 16 U.S.C. § 544f(o) (commonly referred to as the section 8(o) process).⁴ Rec. 231. Under section 8(o), if a landowner offered a Special Management Area (SMA) property for sale to the Forest Service and the Forest Service did not purchase it, then beginning three years after the date of the landowner's offer, the SMA standards would no longer apply and the property became subject to General Management Area (GMA) requirements. 16 U.S.C. § 544f(o)(1). As part of the section 8(o) process, the USDA Forest Service assigned the GMA land use designation to the property.

The Forest Service did not purchase the fee simple title to James's property, Rec. 242–45, and assigned the property a GMA-Large-Scale Agriculture land use designation with an 80-acre minimum parcel size. Rec. 244. On March 2, 2004, the property was converted from the SMA-Agriculture land use designation to the GMA-Large-Scale Agriculture land use designation with an 80-acre minimum parcel size, which Skamania County subsequently adopted into its code. Skamania County Ordinance No. 2003-10 (Aug. 4, 2003) (listing the effective date of the zoning change for the James property as March 2, 2004).

On July 12, 2005, James sold the subject property to GLW Ventures, LLC (GLW). In 2012, GLW applied for a boundary line adjustment reducing the 96.06-acre parcel to 51.99 acres. This proposed configuration differed from the configuration in the easement deed. On May 13, 2013, the Skamania County Hearing Examiner denied this application because it would have reduced the historic 96-acre parcel below the 80-acre minimum lot size in violation of SCC § 22.08.040(A)(3), which requires parcels that meet or exceed the minimum parcel size before a

⁴ In 2000, Congress amended the National Scenic Area Act to add a sunset date for the section 8(o) process. Any landowner who wished to participate in section 8(o) needed to make their offers to the Forest Service no later than March 31, 2001. *See* Department of the Interior and Related Agencies Appropriations Act of 2001, Pub. L. No. 106-291, tit. 3, § 346(b)(3), 114 Stat. 922, 1000 (2000) (codified at 16 U.S.C. § 544f(o)(2)).

lot-line adjustment to meet or exceed the minimum parcel size after the lot-line adjustment. The hearing examiner did not address whether the easement deed created two tracts or gave GLW the right to create new tracts, believing this issue was not within her jurisdictional authority. In addition, the hearing examiner found that the exception in SCC § 22.080.040(A)(3) (allowing lots to be adjusted below the minimum lot size if doing so would facilitate acquisition by a public agency) did not apply. The hearing examiner reasoned that this exception relates to facilitating new protection of resources rather than acquisitions that have occurred in the past.

GLW and the Forest Service each filed an appeal of the hearing examiner's decision raising the issues they did not prevail on.

V. ANALYSIS OF ASSIGNMENTS OF ERROR

The parties argued the two appeals separately and consecutively. Our decision thus addresses the assignments of error in the two appeals separately and consecutively.

First Appeal: *GLW Ventures, LLC v. Skamania County and Friends of the Columbia River Gorge and USDA Forest Service*, CRGC No. COA-S-13-02

Assignment of Error No. 1: Did the Hearing Examiner impermissibly allow the Forest Service to include new issues in its appeals after the appeal deadline, in violation of SCC § 22.06.130 and other applicable law?

No party contests that the Forest Service timely filed its original Notice of Appeal. GLW argues, however, that the hearing examiner impermissibly allowed the Forest Service to raise two new issues outside the 20-day appeal deadline window provided in SCC § 22.06.130(A)(1).⁵ Specifically, GLW argued that Rule 9.5 of the Skamania County Hearing Examiner Rules of Procedure (“hearing examiner rules”) states, “[b]riefs or other memoranda of law, *limited to the*

⁵ SCC § 22.06.130(A)(1) provides that “Parties of Record may appeal any decision of the Administrator within twenty (20) days after the date upon which the decision is rendered. Appeal shall be made to the Hearing Examiner and shall be commenced with the filing of a Notice of Appeal at the Department.”

specific issues set forth in the Appellant's statement of appeal, may be submitted by the parties in support of or in response to an appeal” (Emphasis added). According to GLW, this language demonstrates that the Forest Service was limited to arguing the issues it raised in its original Notice of Appeal filed within the 20-day appeal period. In response, the Forest Service and Friends of the Columbia Gorge (Friends) largely argue that the Skamania County Code, not the hearing examiner rules, governs procedure for appeals of National Scenic Area land use decisions.

For the reasons that follow, we conclude that the hearing examiner properly construed the applicable law and did not err when she allowed the Forest Service to raise new issues after the original 20-day deadline to file an appeal. Accordingly, we deny this assignment of error.

First, we note that hearing examiner rule 12 expressly states that “[t]hese rules of procedure are adopted to supplement the requirements set forth in the SCC. Any conflicts between these rules and the provisions of the SCC shall be decided in favor of the SCC.” Thus, even if we were to apply the hearing examiner’s rules, we would not conclude that Rule 9.5 applies where there is a conflict between Rule 9.5 and SCC § 33.06.130.

Second, the hearing examiner’s decision was consistent with SCC § 22.06.130(A)(4). Under SCC § 22.06.130(A)(4), a Notice of Appeal must include the name of the person filing the notice, the date of the decision being appealed, a concise description of the decision, the name and address of the applicant and all parties of record, and proof of service. A Notice of Appeal must also state that “[f]ailure to raise an issue *before the close of the public record* in sufficient detail to afford the County and all parties an opportunity to respond may preclude appeal on that issue to the Hearing Examiner.” SCC § 22.06.130(A)(4)(f)(i) (emphasis added). This statement is prospective. It contemplates that parties may raise new issues between the time the Notice of

Appeal is filed and the close of the public record. More importantly, it indicates that parties are allowed to raise new issues before the close of the public record, so long as the party provides “sufficient detail to afford the County and all parties an opportunity to respond” to the issue. *Id.*

Based on Hearing Examiner Rule 12 and SCC § 22.06.130(A)(4)(f)(i), we conclude that the Skamania County Code does not prohibit those issues provided a party raises them before the close of the public record. The hearing examiner correctly applied the Skamania County Code. This assignment of error is denied.

Assignment of Error No. 2: Whether the Hearing Examiner correctly concluded that the 80-acre minimum parcel size applies to the proposed boundary line adjustment.

In this assignment of error, GLW raises three loosely related arguments. In its first argument, GLW contends that the hearing examiner’s decision constitutes a taking of property without due process in violation of Article I, § 16 of the Washington Constitution as well as the Fifth Amendment of the U.S. Constitution as applied to the states through the Fourteenth Amendment. Next, GLW argues that the conservation easement preempts the Skamania County Code cited by the hearing examiner and thus, the terms of the conservation easement should control. Finally, GLW argues that it is impossible to reconcile the easement deed with the Skamania County Code and the terms of the easement deed specify that it prevails over the code.

We reject GLW’s state and federal takings claims. The Takings Clause of the U.S. Constitution states, “private property shall not be taken for public use without just compensation.” U.S. Const. amend. V. Central to this requirement is the proposition that private parties cannot be forced to bear costs that should in fairness and justice be borne by the public. *Nollan v. California Coastal Commission*, 483 U.S. 825, 837 (1987). In *Lucas v. South Carolina Coastal Council*, the Supreme Court noted that the controlling issue in a Fifth Amendment

takings analysis is the expectation of a compensable property right. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1004 (1992).

We find no taking under the U.S. Constitution because the James's own actions led to the change in zoning. The Forest Service paid James for the conservation easement. Indeed, the Forest Service paid James more than 60 percent of the property's 1988 value in order to acquire the conservation easement.⁶ However, James did not break up the tract as authorized in the easement. Instead she offered to sell the remainder of her property to the U.S. Forest Service pursuant to section 8(o). After she offered her property to the Forest Service (Rec. 231), the Forest Service conducted an acquisition evaluation and issued a draft GMA designation determination (Rec. 232–241) in which it informed James of the proposed 80-acre minimum parcel size. James could have rescinded her offer—the offer form that she submitted expressly stated so (Rec. 231)—however, she allowed the 8(o) process to proceed to a final determination. Rec. 242–45.

Further, after submitting her offer, but before the change in zoning took place, James was apparently marketing her property for sale. A real estate agent consulted with the U.S. Forest Service, and the Forest Service informed the agent,

Whatever reserved rights Sharlene James retained are governed by applicable law, whether that law is referenced in the easement, or not. For example, if local zoning ordinances prohibited subdividing the property, a reservation of that right in the easement would not allow subdivision.

Rec. 229. The Record is not clear whether the agent was the listing agent or another agent who had a client interested in purchasing the property; however, this detail is not material because the

⁶ The subject property was appraised at \$333,500 before the conservation easement and \$130,000 after it, as valued in 1988 dollars. Rec. 224. The Forest Service purchased the easement in 1988 for \$203,500. Rec. 825.

Forest Service provided a copy of its letter directly to James. Rec. 230. In short, James knew that the 8(o) process would change the zoning; she knew that the new zoning would require an 80-acre minimum parcel size for dividing land; she knew that the Forest Service interpreted the easement to require compliance specifically with land division rules in a local zoning ordinance even if the easement specified a reserved right; and she knew that she could withdraw the offer and retain her existing zoning. Despite this knowledge, she continued with the 8(o) process.

On March 2, 2004, the zoning of the subject property changed via the section 8(o) process. By the time GLW purchased the property on July 12, 2005, the property was subject to the 80-acre minimum parcel size. GLW had constructive knowledge of this zoning designation and the Forest Service's interpretation of the easement deed when it purchased the property.⁷ Thus, GLW never acquired an expectation to create new parcels less than 80 acres in size even though one term in the easement mentioned such parcels. Under these facts, we do not conclude that the hearing examiner's decision resulted in a taking in violation of the U.S. Constitution.

As for GLW's taking claim under the Washington State Constitution, we note that GLW failed to develop this argument in either its brief or at oral argument. Washington courts do not consider undeveloped arguments. *See Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992). GLW also did not provide the required analysis under *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986), to demonstrate whether the Washington Constitution would provide greater protection in this case or that the facts in this record require a different outcome under the Washington State Constitution.

⁷ The record does not indicate what due diligence GLW used prior to purchasing property, such as whether it consulted with the Forest Service and was informed of the Forest Service's existing interpretation of the easement.

We also note that the Gorge Commission’s rules for appeal provide a specific manner to raise takings claims, which allow the Gorge Commission to evaluate those claims, and if necessary to avoid a taking, remand a decision with an order to allow a land use that might not otherwise be a permitted use of the property. Commission Rule 350-60-090. GLW did not make its taking claim in compliance with the Commission’s rule for doing so. Finally, we note that there is some authority holding that state constitutional restrictions do not apply to issues involving the application of interstate compact authorities. *See, e.g., Stephans v. Tahoe Reg’l Planning Agency*, 697 F. Supp. 1149 (D. Nev. 1988) (dismissing a takings claim based on the state constitution because the compact authorities preempted state law and state constitutional provisions). For these reasons, we conclude that the hearing examiner’s decision did not result in a taking in violation of the Washington State Constitution.

GLW next argues that the conservation easement preempts the County’s Scenic Area Ordinance because there is an “actual conflict” between the two. We do not understand GLW to argue “preemption” in the traditional sense where federal law preempts a state law that conflicts with the federal law. This is not the situation before us. Skamania County’s Scenic Area Ordinance was enacted in order to implement the Scenic Area Act and the Management Plan, as required by the Scenic Area Act (a federal law). *Columbia River Gorge Comm’n v. Hood River County*, 210 Or. App. 689, 702–03, (2007) (Scenic Area land use ordinances are required to comply with federal law); *Klickitat County v. State*, 71 Wn. App. 760, 767 (1993) (Scenic Area management plan and provisions in the Act relating to the plan are “federally mandated and do not constitute a state program). The Forest Service purchased the conservation easement at issue here pursuant to authority provided in the Scenic Area Act. Thus, the County’s Scenic Area Ordinance and the easement deed both implement a federal law.

As we understand it, this argument reflects two conflicting sentences in Section III.G of the easement deed. Section III.G provides, in full:

All uses of the property, including those rights reserved in Part II by the Grantor, shall conform with all provisions which are or may be in effect of the Interim Guidelines promulgated by the Forest Service pursuant to section 10 of the [Scenic] Act, Guidelines for Land Use Ordinances issued pursuant to section 8 of the Act, and any zoning ordinances which may apply to this property. In the event that a specific provision of this easement is more restrictive on the use and development of the property than the above referenced Guidelines or ordinances, the provisions of this easement shall prevail.

Rec. 829. GLW relies on the second sentence in its argument: “In the event that a specific provision of this easement is more restrictive on the use and development of the property than the above referenced Guidelines or ordinances, the provisions of this easement shall prevail.”

The Forest Service and Friends rely on the first sentence: “[a]ll uses of the property . . . shall conform with all provisions which are or may be in effect of . . . any zoning ordinances which may apply to this property.”).

For the reasons that follow, we conclude that the hearing examiner did not err in denying GLW’s application. First, the record indicates that in the past the Forest Service had interpreted Section III.G to mean that where there is a conflict between the zoning and the easement deed, the zoning controls:

The easement does not, and cannot, relax or override local county statutory or regulatory restrictions on the land. If the county determines an activity cannot take place on the property, then such activity is prohibited, regardless of the easement provisions.

Rec. 229 (Letter from Forest Service to real estate agent). James knew of this interpretation because she received a copy of the letter. Rec. 230. The record does not indicate what information GLW sought prior to purchasing the property and thus whether it knew of this prior interpretation of Section III.G. However, given the inconsistency between the two sentences

within Section III.G, and the recent zoning change to GMA Large Scale Agriculture with an 80-acre minimum parcel size, we think a prudent potential purchaser would not assume that the second sentence would control without seeking clarification from the Forest Service, just as the record shows a real estate agent did prior to GLW purchasing the property).

We also do not agree that the easement deed is more restrictive than the County's Scenic Area Ordinance. GLW points out that the conservation easement contains more restrictions than the County Code. However, the matter before us concerns lot size restrictions. While GLW identifies some elements of the conservation easement that are more restrictive than the Skamania County Code, the material issue is the minimum parcel size restriction for boundary line adjustments. In this regard, the 80-acre minimum parcel size in the Skamania County Code is more restrictive than the smaller lot sizes that the easement deed allowed.

This assignment of error is denied.

Assignment of Error No. 3: Whether the Hearing Examiner correctly concluded that the Scenic Area Ordinance applied and prohibits the 96.06-acre parcel from being reduced below the 80-acre minimum lot size.

In this assignment of error, GLW argues that SCC §§ 22.08.040(A)(3) and (4) apply. Together, these county code provisions provide an exception to the 80-acre minimum requirement where doing so would “allow a public or nonprofit entity to acquire the land for the purposes of protecting and enhancing scenic, cultural, recreational or natural resources, provided the land *to be acquired* would be protected by an easement deed or other similar property restriction that precludes future land divisions and developments.” (Emphasis added). GLW argues that its proposal fits within this exception because the Forest Service actually did acquire an interest in the land for the purpose of protecting Scenic Area resources. Thus, GLW urges us

to conclude that the County’s Scenic Area Ordinance does not prohibit the 96.06-acre parcel from being reduced below the 80-acre minimum.

GLW also argues that if it could not divide the subject property as authorized by the easement deed, then the deed would be invalid and it could develop each legal parcel. GLW Appellant Brief at 19. We cannot declare an easement to be invalid and thus we take no position on this argument; however, we point out that the National Scenic Area standards do not equate legal parcels with development rights—the National Scenic Area standards address what constitutes a legal parcel and what development is allowed on a parcel.

The hearing examiner disagreed with GLW’s argument. She relied on the phrase “to be acquired,” concluding that the exception cited by GLW applies only to facilitate prospective acquisition. In this case, the conservation easement was already acquired. Thus, the Examiner reasoned, the exception does not apply. The Forest Service argues that this interpretation of the County’s Scenic Area Ordinance was correct.

We concur with the hearing examiner’s reasoning. We also note that SCC §§ 22.08.040(A)(3) and (4) do not apply here because the USDA Forest Service acquired the conservation easement prior to the adoption of SCC §§ 22.08.040(A)(3) and (4) and prior even to the Gorge Commission’s enactment of the Management Plan from which SCC §§ 22.08.040(A)(3) and (4) came. In other words, the exception did not even exist at the time the Forest Service acquired the conservation easement. Thus, there was no nexus between the U.S. Forest Service’s acquisition of the conservation easement and allowing creation of parcels less than the minimum parcel size. Accordingly, we conclude that the hearing examiner correctly construed and applied the Skamania County Scenic Area Ordinance.

This assignment of error is denied.

Assignment of Error No. 4: Whether the Hearing Examiner's decision repeals, abrogates, or violates the conservation easement.

In this assignment of error, GLW argues that the hearing examiner's decision improperly repeals, abrogates, or impairs existing easements or covenants in violation of the County's Scenic Area Ordinance. Specifically, SCC § 22.02.080(B) provides "[i]t is not the intent of this title to repeal, abrogate or impair any existing regulations, easement, covenants or deed restrictions. However, where this title imposes greater restrictions, the provisions of this title shall prevail."

GLW argues that SCC § 22.02.080(B) is consistent with Section III.G of the easement deed because both the deed and the County's Scenic Area Ordinance state the more restrictive provision shall prevail. GLW argues that the easement deed is more restrictive because the current configuration for the land is four buildable lots and the easement deed allows only two buildable lots. GLW asks us to conclude that the hearing examiner's decision violated SCC § 22.02.080(B) because it ignores GLW's right under the easement deed to create two tracts.

We disagree. First, we note that the easement deed and the County's Scenic Area Ordinance work in concert. Whichever contains the more restrictive standard, the more restrictive standard controls, provided, as we concluded above, the more restrictive standard does not violate the County Code. GLW cites the final sentence in Section III.G, which states, "In the event that a specific provision of this easement is more restrictive on the use and development of the property than the above referenced Guidelines or ordinances, the provisions of this easement shall prevail." As discussed above in response to the second assignment of error, the matter before us concerns lot size restrictions. In terms of boundary line adjustments, the Scenic Area Ordinance is more restrictive than the easement deed because the Ordinance requires an 80-acre minimum parcel size whereas the easement deed allows smaller lots. While GLW identifies

some elements of the conservation easement that are more restrictive than the Skamania County Code, the material issue is the parcel size for boundary line adjustments. Furthermore, we again note that Section III.G of the easement deed contemplates that zoning laws may change and that actions on the subject property must comply with the currently applicable code.⁸ And, again, we also note that the Forest Service previously interpreted the easement deed to require compliance with currently applicable zoning requirements, and specifically minimum parcel sizes and specifically informed James of this interpretation. Rec. 230. Accordingly, we affirm the hearing examiner’s decision under this assignment of error.

Second Appeal: *USDA Forest Service and Friends of the Columbia River Gorge v. Skamania County and GLW Ventures, LLC*, CRGC No. COA-S-13-03

Assignment of Error No. 1: Whether the Hearing Examiner erred in concluding that the term “property owner” is unambiguous.

Under SCC § 22.06.060(A)(1)(a)(ix), a Scenic Area land use application submitted to Skamania County must contain the “[s]ignature of the applicant and property owner.” The Forest Service and Friends argue that the term “property owner” is ambiguous. GLW disagrees, and argues that the term unambiguously refers to the titleholder of property. We must determine whether the hearing examiner properly construed the applicable law. Commission Rule 350-60-220(1)(h).

To start, we note that SCC § 22.06.060(A)(1)(a)(ix) did not come directly from the Management Plan for the Columbia River Gorge National Scenic Area, which the Gorge Commission adopted in 1991 and which the Secretary of Agriculture concurred with in 1992. This provision is part of Skamania County’s ordinance standards for receiving and reviewing

⁸ Specifically, the first sentence of Section III.G states in part, that “[a]ll uses of the property . . . shall conform with . . . any zoning ordinances which may apply to this property.” Rec. 829.

land use applications that implement the Management Plan's requirement for a complete land use application (Standards for Applications Guideline, Mgmt. Plan at II-7-3 and Review Uses Policies and Guidelines, Mgmt. Plan at II-7-57 through II-7-60). While the Gorge Commission did determine this provision is consistent with the Management Plan this specific provision is not a requirement of the Management Plan. We thus note that our interpretation of this provision follows Washington law method for interpretation.⁹

Interpretation of local government ordinances in Washington uses the same principles applicable to interpretation of statutes. *Sleasman v. City of Lacey*, 159 Wn.2d 639, 643, 151 P.3d 990 (2007). The primary goal of statutory interpretation is to ascertain and give effect to the legislature's intent and purpose. *Am. Cont'l Ins. Co. v. Steen*, 151 Wn.2d 512, 518, 91 P.3d 864 (2004). Where the language of a statute is unambiguous, we must give effect to the statute's plain meaning. *W. Petroleum Importers, Inc. v. Friedt*, 127 Wn.2d 420, 423–24, 899 P.2d 792 (1995). A court will derive plain meaning not only from the statute at hand, but also from related statutes disclosing legislative intent about the provision in question. *Dep't of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 11, 43 P.3d 4 (2002).

A statute is not ambiguous merely because two or more interpretations are conceivable. *Estate of Bunch v. McGraw Residential Ctr.*, 174 Wn.2d 425, 432, 275 P.3d 1119 (2012). However, where the plain language of the statute is subject to more than one reasonable interpretation based on its text, context, and legislative history, it is ambiguous. *Cockle v. Dep't of Labor & Indus.*, 142 Wn.2d 801, 808, 16 P.3d 583 (2001).

⁹ If this provision had come from Management Plan, then we would be concerned with ensuring that we are interpreting the provision uniformly throughout the National Scenic Area, which is a different analysis than simply using Washington's method for interpretation of ordinances.

We begin our analysis by considering whether the term “property owner” has a plain meaning. Plain meaning is discerned by considering the term’s ordinary meaning, the context of the code section in which SCC § 22.06.060(A)(1)(a)(ix) is found, related provisions, and the statutory scheme as a whole. *Washington Pub. Ports Ass'n v. State, Dep't of Revenue*, 148 Wn.2d 637, 645–46, 62 P.3d 462 (2003); *State, Dep't of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 10, 43 P.3d 4 (2002).

We start with the text of SCC § 22.06.060(A)(1)(a)(ix), which provides:

Development review applications shall include the following information:

- a. An Application Form as Provided by the Administrator. The applicant shall provide the following information on the application form:

- ix. Signature of the applicant and property owner

As noted above, SCC § 22.06.060(A)(1)(a)(ix) implements the Management Plan. Neither the Management Plan nor the Skamania County Code define “property owner,” so we turn to the dictionary definition.

Webster’s Third New Int’l Dictionary (unabridged) does not define “property owner.” but it does define “property” and “owner” individually. *Webster’s* defines “property,” in relevant part, as “something to which a person has a legal title: an estate in tangible assets (as lands, goods, or money)” and as “intangible rights (such as copyright, patents) in which or to which a person has a right protected by law.” *Webster’s* at 1818. An “owner” is “one that has the legal or rightful title whether the possessor or not.” *Id.* at 1612. Both definitions refer to the holder of legal title.

Considering only the dictionary definitions of “property” and “owner” suggests that the term “property owner” is unambiguous, and that “property owner” includes the owner of a conservation easement. However, we believe the term “property owner” is ambiguous with

respect to easements generally because of two contextual points that Skamania County raised.¹⁰ First, a broad interpretation of SCC § 22.06.060(A)(1)(a)(ix) could require utility districts and companies, local and state road and highways departments, and others to sign land use applications, which no party suggested is either a common or a best practice for land use applications in Skamania County or elsewhere in the National Scenic Area. Second, treating easement owners as “property owners” would provide such owners with a preemptive veto power over land use applications pursuant to the signature requirement. We do not think the County intended either result.

On balance, we conclude that the term “property owner” in SCC § 22.06.060(A)(1)(a)(ix) is ambiguous.

Assignment of Error No. 2: Whether the Hearing Examiner erred in concluding that the Forest Service is not a “property owner.”

Having concluded that the term “property owner” is ambiguous, we address the parties’ arguments concerning the meaning of the term. The Forest Service argues that “property owner” includes the owner of a conservation easement. GLW responds that a conservation easement is merely a property interest and that, accordingly, the owner of such an easement is not a property owner for purposes of SCC § 22.06.060(A)(1)(a)(ix).

Without deciding whether the owners of all conservation easements are “property owners” for purposes of SCC § 22.06.060(A)(1)(a)(ix), we conclude that, based on the particular facts of this case, the Forest Service did need to sign the land use application.

First, we note that the conservation easement in this case gave all interest in the property to the USDA Forest Service, except the rights specifically reserved to James in the easement

¹⁰ We recognize that Skamania County made these points in support of its argument that the term, “property owner” is not ambiguous.”

deed. Rec. 827. This differs from the description of conservation easements generally that GLW argued. We also note that the magnitude of the Forest Service's interest in this property suggests that it a property owner. When it acquired the conservation easement, the Forest Service paid more than 60 percent of the fair market value of the property when purchased.

Finally, we believe the record reflects facts that differ from Skamania County's argument. Skamania County argued that when development is proposed in the National Scenic Area, it provides notice of the application to the Forest Service and an opportunity to comment. The County stated that its practice is to ask the parties to work out any disagreement regarding proposed development on encumbered property prior to processing the application. In the past, the County argued, this meant that the County would delay an application if there was a conflict between the Forest Service and the developer. But, the County argued, its practice has never been to treat the Forest Service as a "property owner" that must sign the application in order for the application to be complete. The Record in this case does not reflect Skamania County's argument. The staff report for this application stated:

Generally speaking Skamania County has attempted to work out the inconsistency of proposed projects and conservation easements with the Forest Service. Skamania County has attempted to do this through a number of ways such as having the Forest Service sign the application or by placing the pending NSA application on hold while the applicant works out the Conservation Easement issues with the Forest Service. However, the Skamania County Community Development Department has received instruction from our County Attorney(s) in 2009 that Skamania County does not have jurisdiction over the Conservation Easement and therefore cannot deny due process to a property owner by not reviewing an application submitted by a property owner/applicant.

Rec. 288. In another document in the record, a letter to the USDA Forest Service, Skamania County stated, "The [Hoyte] application did not include a signature or a letter from the Forest Service concerning the [Conservation] Easement that [the Forest Service] hold[s] on the property, however, *all other* components required for a complete application appear to be

included in the application materials submitted.” Skamania County then stated that it would begin processing the application. Rec. 326 (emphasis added).

The record in this case that shows Skamania County has treated the signature of the Forest Service as a requirement for a complete application in the past, but changed its practice in 2009 in response to a legal (due process) concern. Importantly, neither GLW nor Skamania County explained this legal concern in its briefing. Above, we noted that Washington courts do not consider arguments that the parties do not develop. *See Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992). We do not suggest that Skamania County could not change its practice, but it must explain why it has made that change, and a mere reference to an instruction from its County Attorney is not enough for us to determine whether that change in practice was applicable to the situation before us.

In summary, based on the particular facts of this case, we determine that the Forest Service’s signature was required on this application. We emphasize that this holding is limited to the facts of this particular easement and that we make no judgment about whether any other easement holder must sign other land use applications. We are specifically cautious in our holding because we believe Skamania County raised important concerns (mentioned above) that we do not believe are best addressed in this quasi-judicial appeal proceeding. First, the Skamania County Code does not draw distinctions between conservation easement and other easements; thus a broad interpretation of SCC § 22.06.060(A)(1)(a)(ix) could require utility districts and companies, local and state road and highways departments, and others to sign land use applications, which no party suggested was either a common or best practice for land use applications. Second, treating easement owners as “property owners” could provide such owners with a preemptive veto power over land use applications pursuant to the signature requirement.

This could force an applicant to sue an easement holder that refuses to sign a land use application just to get the application in front of county planning staff. We do not believe that Skamania County intended this consequence when it designed its land use application requirements and review process. Finally, we do not foreclose Skamania County's ability to act on prior legal concern. Skamania County could amend its code or, if this issue arise again before a code change, Skamania County could explain its legal concern and argue how it applies in that situation.

The hearing examiner's decision is remanded. Prior to reprocessing this application or another application from GLW, or its successors or assigns, the Forest Service must sign the land use application.

Assignments of Error No. 3 and No. 4: Whether the Hearing Examiner improperly considered equitable factors.

In their third assignment of error, the Forest Service and Friends argue that the hearing examiner exceeded her jurisdiction by considering equitable factors and awarding equitable remedies. Specifically, the Forest Service and Friends take issue with the hearing examiner's statement that requiring the signature of the Forest Service would "place an untenable burden on the [Planning] Department and would create a de facto veto power for all easement holders." Rec.

86. The hearing examiner continued:

[T]he record contains no evidence that the USFS has ever previously claimed land owner status when notified of development proposals on parcels encumbered with conservation easements and thus the federal agency has acquiesced in not being considered a land owner for application completeness for years. The appellant is not a land owner whose signature is required for application completeness.

Rec. 86. The Forest Service and Friends cite this statement by the hearing examiner as evidence that the hearing examiner based her decision on whether the Forest Service *should* be a property

owner, an authority that the hearing examiner does not have, rather than applying and enforcing the law as written.

In their fourth assignment of error, the Forest Service and Friends argue that even if the hearing examiner had authority to consider equitable matters, her findings and conclusions still violated equitable principles.

GLW responds to both assignments of error by arguing that the hearing examiner's decision was based on her conclusion that "property owner" was an unambiguous term and that she did not consider equitable factors. GLW argues that the language identified by the Forest Service is dicta, and so had no bearing on the decision. Similarly, Skamania County argues that the statement above was only additional reasoning, not part of Examiner's principal holding that the term "property owner" was unambiguous.

As to the third assignment of error, we hold that the hearing examiner properly considered the factors mentioned above. We agree with Skamania County and GLW that those factors are relevant in determining whether the term "property owner is ambiguous."¹¹ Above we noted that we did not believe Skamania County intended to create a de facto veto for easement holders. The third assignment of error is denied.

As to the fourth assignment of error, however, we conclude that the hearing examiner's findings and conclusions as to the "equitable" matters were in error. Specifically, the hearing examiner concluded that the Planning Department had never before asked the Forest Service to sign land use applications for properties where the Forest Service holds easements, that the Forest Service had not previously asserted its property rights with prior applications, and that applying

¹¹ We recognize that Skamania County argued these factors suggest the term is unambiguous.

the ordinance as written would create an “untenable burden” on the Planning Department. Rec. 86. However, the record shows differently.

Above, we discussed two documents that show Skamania County did consider the Forest Service’s signature or consent as a required application component. Rec. 288, 326. Therefore, we conclude that the hearing examiner’s decision was not supported by substantial evidence. We affirm the fourth assignment of error.

VI. CONCLUSIONS OF LAW AND ORDER

For the reasons explained above, we largely conclude that the Skamania County Hearing Examiner’s decision does not improperly construe applicable law; does not violate provisions of law; and is not clearly erroneous. We deny all of the assignments of error that GLW made, and we affirm the first, second, and fourth assignments of error that Friends and the USDA Forest Service made. We remand the hearing examiner’s decision to require the county to obtain the signature of the USDA Forest Service on the application. With this instruction, we do not believe that Skamania County must take any other specific action in response to our decision affirming Friends and the USDA Forest Service’s first and fourth assignments of error. We understand that the USDA Forest Service may choose not to sign the application. We do not address that circumstance in this decision; if that issue comes before the Commission in the future, the Commission will address it at that time with the benefit of the parties’ argument about the specific dispute.

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The decision of the Skamania County Hearing Examiner is AFFIRMED in part and
REMANDED in part.

IT IS SO ORDERED this _____ day of May 2014

Jim Middaugh, 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 U.S.C. § 544m(b)(4).