

BEFORE THE COLUMBIA RIVER GORGE COMMISSION

BARBARA HAIGH,)
)
) Petitioner,) CRGC No. COA-W-00-01
)
) and)
) **FINAL OPINION AND**
) **ORDER**
) FRIENDS OF THE COLUMBIA GORGE)
)
) Petitioner-Intervenor,)
)
) vs.)
)
) WASCO COUNTY,)
)
) Respondent,)
)
) and)
)
) JOHN AND DIANA TRUJILLO)
)
) Respondent-Intervenors.)
 _____)

This case involves an appeal by Barbara Haigh and Friends of the Columbia Gorge of a decision issued by Wasco County approving construction of a single family dwelling, garage, and barn. Petitioner Barbara Haigh and Petitioner-Intervenor Friends of the Columbia Gorge contested the approved site of the development. The property is located at 1007 Lava Place, Mosier Oregon. We affirm Wasco County's decision.

Parties

The parties to the hearing were:

Barbara Haigh, represented by Mark Mazeski, Attorney at Law.

Friends of the Columbia Gorge, represented by Gary K. Kahn, Reeves Kahn & Eder, Portland, Oregon.

Wasco County represented by Eric Nisley, Wasco County District Attorney and Tia Lewis, Merrill O'Sullivan, Bend, Oregon. Wasco County did not appear at oral argument.

John and Diana Trujillo, represented by Daniel Kearns, Reeve Kearns, Portland, Oregon.

Proceedings Below

This case was initially filed in January 2000. On March 15, 2000, Wasco County moved for a voluntary remand in order to consider matters raised in the appeal and issue and new decision. On April 11, 2000, the Chair of the Gorge Commission ordered the appeal be suspended pending Wasco County issuing a revised decision. Wasco County's revised decision became final on August 2, 2000. On September 1, 2000, Petitioner appealed Wasco County's revised decision.

The Columbia River Gorge Commission met on February 13, 2001 to hear oral argument and deliberate to a decision.

Procedural Rulings

At the beginning of the hearing, the Chair of the Gorge Commission requested the parties jointly give an orientation to the subject property, and

asked the Commissioners to state their questions prior to oral argument so the parties could address those questions in their oral argument. There were no objections to this process.

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.

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

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].

Facts

The relevant facts are:

The subject parcel is approximately 10 acres in size and is located at the terminus of Lava Place within the Rocky Prairie subdivision immediately south of Mosier in Wasco County, Oregon. The parcel slopes down primarily to the west and slightly to the north as well. There are only a few scattered trees on the parcel, except in the southwest corner of the parcel, where the parcel slopes steeply down into a heavily vegetated ravine. The parties agree that the southwest corner of the parcel is not a buildable site. A Pacific Power and Light easement crosses the property in an east-west direction. Within the easement is an existing above-ground power line on poles.

John and Diana Trujillo, the applicants, proposed to construct a single family dwelling, garage and barn on the subject parcel. Wasco County approved the development on the line between "squares 1 and 2."² This location is close to the north border of the parcel and slightly to the east of center, and is sited behind a large maple tree as seen from key viewing areas, which are located north of the parcel.

Ms. Haigh argued that the development should have been approved at square 7. Wasco County determined that square 7 was unbuildable because a septic line could not be placed within the power line easement to reach the

² For ease of describing locations on the parcel, the parties divided the parcel into a 3 by 3 grid (9 equal squares). Square 1 is the northeast square. Square 2 is immediately to the west of square 1. Square 5 is the center square, and square 7 is the southeast square.

approved septic field in square 5 and because an engineered septic system at square 7 would increase the cost of the septic system by \$10,000.

Contentions of the Parties

Ms. Haigh argued two assignments of error: (1) the county erroneously determined that square 7 was unbuildable, and (2) the County erroneously applied the minimize visibility standard. Friends of the Columbia Gorge asserted there was insufficient evidence to support the county's finding that less visible sites were unbuildable.

Wasco County and the Trujillos claimed that the buildable site that minimized visibility was on the line between squares 1 and 2, following Wasco County's determination that square 7 had legal and physical limitations that would prevent the proposed development from being sited there.

Analysis

The issues presented by this case are remarkably similar to a case that the Gorge Commission decided last year. In *Friends of the Columbia Gorge v. Skamania County and David and Gretchen L'Hommedieu*, CRGC No. COA-S-00-04 (October 16, 2000), the Gorge Commission stated that only buildable sites need be considered in a "minimize visibility" analysis and that "[s]everal practicable building sites may each reduce visibility to a minimum, as the difference in visibility at two or more sites, as seen from key viewing areas, may be difficult to measure." *Id.* at 11.

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First Assignment of Error

We first address the issue of buildability. Petitioner disputes Wasco County's determination that square 7 was unbuildable for the two reasons stated (legal impossibility of crossing an existing easement and increased cost). The record contains ample evidence that casts doubt as to whether a sewer line could legally cross the electrical line easement. As a practical matter, Petitioner argues that if a road can cross underneath the power line, then a septic line should be able to do so too. On its face, this seems logical; however, whether the easement allows construction of an underground septic line is a question of law—whether this easement would allow for construction of an underground septic line underneath it.

We are concerned that Wasco County based its decision in part on the “substantial effort [of the applicants] to obtain permission from PP&L to cross its power line easement, with no result or definitive response.” Rec. Vol. 2 at 43. This merely documents the applicants' apparent efforts, but does not support a legal conclusion that no septic line could be placed in the easement.

However, we believe Wasco County properly construed the scenic area regulations. As we have stated before, our rules do not require development in unbuildable areas. In this case, if a septic field could only be located on the north side of the power line and a septic line cannot be placed in the power line easement, then sites which are on the south side of the power line are not buildable.

In this case, Wasco County cited to OAR § 340-071-0160,³ for the proposition that square 7 is unbuildable. That rule provides in relevant part:

(5) Upon receipt of a completed application the Agent shall deny the permit if: * * * (e) The proposed system location is encumbered as described in OAR 340-071-0130(8);

OAR § 340-071-0160(5)(e), and

A permit to install a new system can be issued only if each site has received an approved site evaluation (OAR 340-071-0150) and is free of encumbrances (i.e., easements, deed restrictions, etc.) which could prevent the installation or operation of the system from being in conformance with the rules of this division.

OAR § 340-071-0130(8).

Generally State law applies in the Scenic Area only if it is specifically reserved in the Compact. *Seattle Master Builders v. Pacific N.W. Elec. Power and Conservation Council*, 786 F.2d 1359, 1371 (9th Cir. 1986). *Klickitat Cy. v. Columbia River Gorge Comm'n.*, 770 F.Supp, 1419, 1429 (E.D. Wash, 1991). Regulation concerning construction of septic systems was not specifically reserved in the Columbia Gorge Compact, or the Act. Hence, while these regulations do not mandate any particular outcome of this case, they do assist us on our analysis under the facts of this case.

In support of its reliance on these regulations, Wasco County considered the evidence of an expert witness who testified that "PP&L would likely not allow any blasting or hydraulic drilling because of the potential for damaging the

³ Wasco County referred only to " * * * the Oregon Administrative Rules cited by the applicants * * * ", but the applicants clarified in their brief to us which rule they cited. Respondent-Intervenor's. Br. at 29.

transmission towers and the powerline.” Rec. Vol. 2 at 43. We cautiously agree. Although the record does not show how much blasting and drilling would be necessary, the county had the knowledge and experience to evaluate this at the time it made the decision, and it seems reasonable to us that the presence of the easement could prevent the installation of the septic line. In the future, we urge counties to rely on a definitive answer from the easement holder addressing specific site standards why a particular proposed septic system could not be installed or operated in the area in question.

Given the evidence in the record, we do not believe Wasco County’s decision violated a provision of applicable law and is prohibited as a matter of law, or that the decision improperly construes the applicable law based on the record before us.

Wasco County’s reasoning that the increased cost of the development makes square 7 unbuildable, however, is not persuasive. We do not base this decision on this cost analysis, but offer some thoughts to assist the counties in determining when a site is buildable. Friends of the Columbia Gorge argued that the Management Plan must first define an unbuildable site to include cost before we can base any decision on cost factors. If the Management Plan defined unbuildable, we would certainly be bound by its terms, however, the Management Plan’s silence does not mean we must necessarily ignore cost. We do not believe that in all cases a \$10,000 increased cost of development (as was the evidence in this case) necessarily renders a site is unbuildable. There may be a significant amount of increased cost or percentage of total construction cost

that may render a site not practicable to build on, but we have not been asked to decide that issue in a serious fashion. Should a case arise where cost is the sole factor determining whether a site is buildable, we expect the evidence will be well-documented by describing why no alternatives to ensure compliance (including different size, shape, height, and other factors that are specified in the Scenic Area regulations) are reasonable, along with the testimony of competent professionals with specific expertise in construction costs, engineering, or other relevant disciplines.

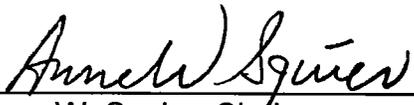
Second Assignment of Error

Next, we turn to the issue of whether the development complies with the minimize visibility standard at the approved location. Based on the record before us, we do not find a measurable difference in the visibility of the proposed development at the approved site versus the site suggested by the petitioner. The key viewing areas from which the development would be seen are located a great distance from the parcel and the development would be seen no matter where it is sited. The record before us showed that the approved site contains a large maple tree that would partially screen the development, whereas the site suggested by the petitioner would screen perhaps only the lower three to four feet of the structures with topography. We do note that Petitioner had introduced evidence into the record before the County that much more of the development would be screened by topography, but our role is not to choose between two different assertions. Rather we uphold Wasco County's decision because we are persuaded that the decision is supported by substantial evidence.

Substantial evidence is evidence sufficient to persuade a fair-minded person of the proposition even if a different conclusion could have been reached. See e.g. . *Adler v. City of Portland*, 25 Or LUBA 546 (1993); *City of University Place v. McGuire*, 9 P.3d 918, --- Wash. App. --- (2000). Wasco County's findings that analyze the visibility of the development at each of the nine squares (Rec. Vol. 2 at 24-25) demonstrate the sufficiency of the evidence. We also conclude that these findings are sufficient to support the decision. Finally, because we believe there is substantial evidence to support the County's decision and that findings are sufficient, we conclude that the decision is neither clearly erroneous nor arbitrary and capricious.

The decision of the Wasco County Court decision is **AFFIRMED**.

DATED this 16th day of April, 2001



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.