

BEFORE THE COLUMBIA RIVER GORGE COMMISSION

FRED HEANY,)	
)	
Petitioner,)	CRGC No. C99-0002-K-S-11
)	
vs.)	
)	
EXECUTIVE DIRECTOR,)	FINAL OPINION AND
)	ORDER
)	
Respondent,)	
)	
and)	
)	
FRIENDS OF THE COLUMBIA GORGE)	
)	
Respondent-Intervenor)	
_____)	

INTRODUCTION

This case involves an appeal by Fred Heany from a decision of the Executive Director of the Columbia River Gorge Commission denying his application to construct a 40-foot by 60 foot accessory building. Mr. Heany contends that storage of farm machinery along with equipment and building materials for his contractor/construction business are incidental and subordinate, and therefore accessory, to his use of his parcel. The Executive Director concluded the main use of the property is residential and the shop building would not be accessory to the residence. The Executive Director denied the application. Mr. Heany appealed that denial. The Columbia River Gorge Commission met on February 8, 2000 to conduct a "de novo" hearing, which in

accord with Commission Rule 350-70-140 included the record of the Executive Director's underlying decision. The Commission received evidence, heard oral argument, and deliberated to a decision. We affirm.

PROCEDURAL MATTERS

On November 28, 1999, the Chair of the Columbia River Gorge Commission granted Friends of the Columbia Gorge's motion to intervene and granted in part Mr. Heany's Motion for Extension of Time for Filing Request for Review, allowing a filing date of December 1, 1999.

On February 3, 2000, the Chair of the Columbia River Gorge Commission held a pre-hearing conference by telephone to discuss evidentiary issues and the expected length of each party's case. All of the parties consented to the conference and participated in the conference.

EVIDENTIARY RULINGS

Exhibits Admitted

The following exhibits were admitted:

Exhibit 101 – Record before the Executive Director

Petitioner's Exhibit 1 – bound maps, written testimony, flyer, and photographs

Petitioner's Exhibit 2 - photograph

Petitioner's Exhibit 3 - photograph

Petitioner's Exhibit 4 - photograph

Petitioner's Exhibit 5 - photograph

Petitioner's Exhibit 6 - photograph

Petitioner's Exhibit 7 - hand drawn diagram

Petitioner's Exhibit 8 – hand drawn diagram

Petitioner's Exhibit 9 – hand drawn diagram

Respondent's Exhibit 1 – printouts from Klickitat County Assessor's Office

Respondent's Exhibit 2 – memorandum from Allen Bell, October 19, 1994

Witnesses

At the hearing, Mr. Heany testified on his own behalf and Allen Bell, Senior Planner, testified on behalf of Mr. Heany and on behalf of the Executive Director.

Objections

At the hearing, Mr. Heany moved to admit photographs and evidence of buildings located on properties that are not the subject of this matter. Friends of the Columbia Gorge objected, arguing the existence of buildings on other properties is not relevant to determining whether the proposed building in the matter before us complies with the land use ordinance (Commission Rule 350-80). This objection is **sustained**.

At the hearing, the Executive Director objected to Mr. Heany offering any evidence or argument relating to whether the building complies with the resource protection guidelines because the Executive Director did not base her denial on these guidelines. The Commission noted that if it found in favor of Mr. Heany on the issue of whether the building is a permitted land use, then it would remand the matter back to the Executive Director to make findings on compliance with the resource protection guidelines. The Executive Director's objection is **sustained**.

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. For the factual issues, our review focuses on whether the decision is supported by substantial evidence in the whole record and thus is not clearly erroneous or arbitrary and capricious.¹

FACTS AND CONTENTIONS OF THE PARTIES

The property is located in the Special Management Area and is 20 acres in size. The property is designated Agriculture. Mr. Heany has the following land uses on the property:

- a two-story, ten bedroom house with an attached two car garage in which Mr. Heany and his two children live;

¹ Commission Rule 350-70-230 provides:

- “(1) The Commission shall reverse a land use decision when:
 - (a) The Executive Director exceeded his/her 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.
- (2) The Commission shall remand a land use decision for further proceedings when:
 - (a) The findings are insufficient to support the decision;
 - (b) The decision is not supported by substantial evidence in the whole record;
 - (c) The decision is flawed by procedural errors that prejudice the substantial rights of the petitioner(s); or
 - (d) The decision improperly construes the applicable law.

- a bed and breakfast inn, which, as required by a condition of its 1992 approval, must be incidental, accessory, and subordinate to the residential use of the house;
- a mobile home permitted to be used as “agriculture housing;”
- a contractor/construction business with an office in the house and construction materials and equipment placed on the property;
- an approximately 14 acre open area with hay, alfalfa, and other grasses that Mr. Heany last cut at least two years ago. At one time, 5-10 years ago, Mr. Heany grazed up to 16 cattle to graze on that area; and
- approximately 5 acres of wooded area from which Mr. Heany occasionally cuts personal use firewood.

The evidence presented demonstrates that residential use of the parcel predated the National Scenic Area Act and permits were issued for the bed and breakfast and agriculture housing. We do not decide whether the remaining uses are legally established. We also do not decide whether any of the uses are in full compliance with their corresponding permits.

Mr. Heany applied to the Executive Director to construct a 40' x' 60' building, which would be 32-34 feet in height and would have four of doors each 12 feet wide and 14 feet high. Mr. Heany stated in his application that he intended to use the building for storage and maintenance of equipment used for his farm, bed and breakfast, and other activities. After a site visit by Allen Bell, Senior Planner, Mr. Heany stated in a letter that he intended to use the building for his construction business, the water system he operates, and property

management activities, as well as for his farm and forest management on his own land.

At hearing, Mr. Heany argued that the main use of his property was “mixed use,” including all of the land uses mentioned above. Mr. Heany further argued that the proposed building would be incidental and subordinate to this “mixed use” of the property, and thus would be an allowed accessory building.

The Executive Director determined that the main use of the property is residential because it is the largest structure and the most dominant and continuous use on the property. At hearing, the Executive Director further argued that there must be one “main use,” and that none of the uses except for the residence can be the main use of the property. The Executive Director argued the proposed use and the size and design of the building were not incidental and subordinate to the residential use.

ANALYSIS

Our analysis begins with the pertinent provision of the ordinance. Commission Rule 350-80-040(2) defines accessory building as, “A building or structure whose use is incidental and subordinate to that of the main use of the property and that is located on the same parcel as the main building or use.”

In examining this definition, we find that we must determine the “main use” of the property, and then determine whether the proposed building would be incidental and subordinate to that main use.

In our review, we apply the basic rules of statutory construction to the provisions of the ordinance. The words are used in accord with their plain

meaning. Cowiche Canyon Conservancy v. Bosley, 118 Wn. 2d 801, 828 P.2d 549 (1992). They are construed in a manner that best advances their purposes. Allison v. Housing Authority, 118 Wn. 2d 79, 821 P.2d 34 (1991). They are applied so that meaning is given to each term. Clark v. PacifiCorp, 118 Wn. 2d 167, 822 P.2d 162 (1991).

We find the Executive Director properly applied the definition of “Accessory Building” in determining that there can only be one main use of the property. The land use ordinance (Commission Rule 350-80) does not include “mixed use” as a category of allowed uses, and we cannot permit a building to be accessory to a use that is not allowed. This is consistent with our prior decision in Friends of the Columbia Gorge and Marilyn Kelly v. Skamania County and Nature Friends Northwest, COA-S-95-01, 8-9 (November 16, 1995), in which we concluded that a governing body is not free to permit a use that is not allowed. Additionally, while many land uses may occur on a single parcel, the land use ordinance does not recognize that all the uses that occur on Mr. Heany’s parcel do so on equal footing. Hence, Mr. Heany’s argument that the main use of his property is “mixed use” is not supported by the land use ordinance.

In determining that there can only be one “main use” of the property, we rely on the precise language of the ordinance and management plan. We have stated in several of our prior decisions that we must adhere to this strict standard, and by doing so, we are advancing the purposes of the National Scenic Area Act. See e.g. Friends of the Columbia Gorge v. Skamania County and Mills, COA-S-95-02, 5-6 (June 27, 1996); Friends of the Columbia Gorge v. Skamania County,

COA-S-96-02, 7-9 (July 24, 1997); Friends of the Columbia Gorge and Kelly v. Skamania County and Nature Friends Northwest, supra.

In both the record and at the hearing, Mr. Heany admitted the dwelling is his residence. Mr. Heany further admitted that he does not use the property for the other uses on a day-to-day basis. Additionally, Mr. Heany stated in his brief that the main use of the property was residential. None of Mr. Heany's arguments at the hearing persuade us that the main use of the property is anything but residential. We find the Executive Director properly concluded that the main use of the property is residential.

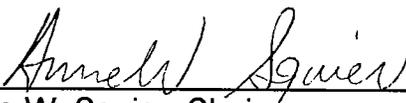
We further find the Executive Director properly concluded that the building would not be incidental and subordinate to the main use of the property. Mr. Heany admitted in his initial application, in a supplemental letter, and at hearing that he intended to use the building to store and work on his various equipment and materials that are primarily related to his agriculture, forestry, property management (including operation of a water system) and construction business. The Executive Director informed Mr. Heany that she could approve a building that was smaller in size and appropriately designed as accessory to the residence. Mr. Heany told her that he did not want approval of a smaller building because it would not meet his needs. We hold the Executive Director properly concluded Mr. Heany did not intend to use the building as accessory to the residence.

Based upon all of the exhibits, testimony of Mr. Heany and Allen Bell, Senior Planner, and argument of the parties, we hold the Executive Director's

decision did not violate applicable law and is not prohibited as a matter of law; further we hold the Executive Director's decision properly construed the applicable law based on the record before us. We also hold the Executive Director's decision was supported by substantial evidence, including the record before the Executive Director and exhibits and testimony provided at the hearing, and thus is not clearly erroneous or arbitrary and capricious.

The decision of the Executive Director of the Columbia River Gorge Commission is **AFFIRMED**.

DATED this 22nd day of February, 2000



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.