BEFORE THE COLUMBIA RIVER GORGE COMMISSION

SHERRI IRISH, et al., Petitioners, vs. SKAMANIA COUNTY, Respondent and NORMAN HAIGHT, Intervenor-Respondent.	)	CRGC No. COA-S-01-07 **FINAL OPINION AND ORDER**

Petitioners appeal from the decision of the Skamania County Board of County Commissioners ("Board") approving Intervenor-Respondent's application for a cluster development. Petitioners argue that, among other things, the Board's decision improperly concluded that the proposed dwellings were "clustered," and that the Board's decision is flawed because the County conducted no independent review of the application. We agree and reverse.

FINDINGS OF FACT

On July 18, 1996, Norman and Dan Haight submitted to Skamania County an application for a cluster development on the subject parcel,

designated as tax lot 1-5-7-700. We will assume, without deciding, that the subject parcel is 61.42 acres.[1] The western boundary of the parcel abuts Clark County. The subject parcel is designated Small-Scale Agriculture, with a 20-acre minimum lot size, and therefore under conventional development could be divided into three twenty-plus acre lots. With an approved cluster development a parcel of 61.42 acres could be divided into four lots, and minimum lot size could be reduced to as low as two acres for three of those lots. SCC § 22.08.020D(4), (5).

Mr. Haight's amended application proposes that the parcel be divided into three lots. Proposed Lot 2 would be 2.56 acres, in the northwest corner of the subject parcel, and contain a dwelling and barn. Proposed Lot 3 would be 10.00 acres, located in the northeast corner of the subject parcel. This portion of the property has already been conventionally developed, and contains a dwelling and accessory structure. Proposed Lot 1 would be 48.86 acres, and occupy the remainder of the subject parcel. The amended application proposes a dwelling and garage in the northeast part of proposed Lot 1, where it abuts proposed Lot 3. The distance between this proposed dwelling and garage and the existing buildings on Proposed Lot 3 is approximately 350 feet. The distance between the two dwellings proposed in the application (on Lots 1 and 2) is about a quarter of a mile. Record at A-038.

[1] There is some dispute as to whether the subject parcel is 56.92 acres, as argued by the petitioners, or 61.42 acres, as argued by the County and Mr. Haight. If the parcel is 61.42 acres, then through clustering the parcel could be divided into four lots. If the parcel is 56.92 acres, then through clustering the parcel could be divided into three lots. Because Mr. Haight's amended application proposes only three lots, the dispute is immaterial.

Petitioners San Antonio and Korjenek's residence is approximately 450 feet north of the proposed dwelling on Lot 2. Petitioner Hays' residence is located approximately 1000 feet northeast of the proposed dwelling on Lot 2. Petitioner Irish's residence is within 450 feet west of the proposed dwelling on Lot 2, however Irish's residence is in Clark County. The Board used the proximity of the Irish, Hays, and San Antonio / Korjenek residences as the basis for finding that Mr. Haight's proposed development was a cluster development. That is, the Board found that the proposed dwelling on Lot 2 was clustered with three other existing residences up to 1000 feet away, not on the subject parcel, and not owned by the applicant. Record at A-005, A-018 to A-019.

Regarding the proposed dwelling and garage on Lot 1, toward the northeast section of the subject parcel, the Board found that it was clustered with the existing and conventionally developed buildings on Lot 3, and the existing "nearby" residences of Minturn, Carroll, Micks, and Eric Haight. Record at A-005, A-018 to A-019. The Minturn, Carroll, Micks, and Eric Haight residences range from northeast to southeast of the proposed buildings on Lot 1, and are approximately 900 to 1,200 feet away. Record at A-038. The Board found that the proposed dwelling on Lot 1 was clustered with existing dwellings not owned by the applicant, on parcels of land not owned by the applicant, and nearly a quarter-mile away.

There appears to be no dispute that the Skamania County Planning and Community Development Department's "Staff Report" and "Preliminary Director's Decision," Record at 131 to 153, were not prepared by County staff

but were instead written by the applicant himself. Skamania County's Response to Petitioners' Request for Review at 5; Respondent-Intervenor's Response to Petitioners' Request for Review at 6; Record at 102. As a result, the Planning Department explained to the Planning Commission that it was "rendering no opinion on the content of either document." Id. Even so, the Planning Commission and the Board of County Commissioners largely adopted the findings and conclusions written by the applicant. The Board made only "minor changes." Skamania County's Response to Petitioners' Request for Review at 6. Except for a site visit by the Board and a memo from the Acting Director of the Planning Department evaluating whether the proposed development met the definition of a cluster development there was no independent review and evaluation by the County of Mr. Haight's "Staff Report" and "Preliminary Director's Decision." Skamania County's Response to Petitioners' Request for Review at 3; Respondent-Intervenor's Response to Petitioners' Request for Review at 6.

CONCLUSIONS OF LAW

We review pursuant to Commission Rule 350-60-220.

In their First Assignment of Error, Petitioners assert that the Board's decision should be reversed because, among other things, "the Board erred when it determined that the proposed development clusters new dwellings." Request for Review, at 9-11. Their argument is threefold. First, that the proposed dwelling on Lot 1 cannot be "clustered" with the existing dwelling on Lot 3 because under the SCC only "new dwellings" can be considered when

evaluating an application for a cluster development. Second, Petitioners argue that the proposed dwelling on Lot 2 is not clustered with the proposed dwelling on Lot 1, being 1/4 mile away. Third, petitioners argue that proposed dwellings cannot be considered to be "clustered" with existing dwellings 400 to 1000 feet away on land not owned by the applicant, one of which is in a different county.

The County and Respondent-Intervenor respond that the ordinance does not prohibit cluster development on parcels that contain an existing dwelling. Skamania County's Response to Petitioners' Request for Review at 11; Respondent-Intervenor's Response to Petitioners' Request for Review at 11. The County also argues that there is "no mathematical formula to determine how close homes must be located to each other to be considered 'clustered.'" Rather, the County urges us to look to the intent of the cluster development ordinance, which the County argues is "to provide greater protection to the various resources than would be provided by a convention [sic] parcel-by-parcel development. " Skamania County's Response to Petitioners' Request for Review at 14.

Taking the second point first, we largely agree with the County's stated purpose of the ordinance, but the ordinance also prescribes the means to be employed to achieve that purpose. Here the means is a "clustered" development. A "cluster" is "2: a number of similar things grouped together in association or in physical proximity <a [cluster] of houses>." Webster's Third New International Dictionary of the English Language, Unabridged (1993). Or, to use the definition employed by the County: "a group of buildings and esp.

houses built *close together* on *a* sizable tract in order to preserve open spaces larger than the individual yard for common recreation." Record at A-018 (emphasis added). The application in this case does not meet either definition of a cluster, and does not comport with the method of clustering to be used to gain increased resource protection.

Under the Skamania County Code, a cluster development allows the owner of property designated Small-Scale Agriculture to reduce the minimum size of new lots from 20 acres to as little as two acres, and allows for 50 percent more lots than would otherwise be allowed on the land being divided. At least seventy-five percent of the land must be left permanently undeveloped. In considering whether a cluster development is appropriate, the County is to examine whether so concentrating the development would:

a) . . . reduce visibility of development from Key Viewing Areas.
b) Avoid significant landscape features.
c) Protect the existing character of the landscape setting.
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.

SCC § 22.08.020.D2.

The purpose behind this is to allow new dwellings to be concentrated, when such a concentration would provide greater resource protection than could otherwise be afforded under conventional parcel-by-parcel development. In exchange for increased resource protection the applicant may be provided

with a certain number of lots beyond that which would be permitted under conventional development. Cluster development provides a property owner "what is, in effect, a density bonus" in exchange for a development plan that provides resource protection beyond that which could be obtained by conventional development. Friends of the Columbia Gorge v. Skamania County (Spiegl Property), CRGC No. COA-S-96-02, at 5 (July 24, 1997). Central to this idea is that new dwellings may be grouped together in a smaller footprint when doing so would diminish the aggregate impact on resources.

Here the two proposed new dwellings are not grouped together, but are 1/4 mile apart on nearly opposite sides of the subject parcel. The County would have us define this as a cluster development. However, if we were to accept this design as a cluster development, we would be left with no reasoned basis to deny, for example, a cluster development on a 120-acre parcel with eight new dwellings scattered about the entire acreage on two-acre lots. In this example, the ninth new dwelling could be located on the remaining 104-acre lot, but because at least 75% of the parcel would remain undeveloped, such a development could still be deemed "clustered" were we to approve the application in the case before us. Such a result simply runs counter to the very idea of a cluster development, and any definition of the word "cluster."

Nor may the County use existing dwellings on land not owned by the applicant to effectuate a cluster. The cluster development ordinance by its

terms applies only to "new dwellings." SCC § 22.08.020.D(1) & (2).[2] While the ordinance does not specify with what the new dwellings are to be clustered, it is clear that new dwellings are to be clustered with each other, not with neighboring dwellings on other tracts of land that are not subject to the restrictions imposed on the cluster development.

This is not to say that a cluster development could never be permitted when a dwelling already exists on the land owned by the applicant, nor is it to say that a cluster development could never be permitted in proximity to neighboring dwellings. Under certain circumstances it may be that such siting would be appropriate, however it may not be used to determine that the new dwellings are themselves clustered. This is also not to say that a cluster development is inappropriate for the subject parcel, however the application approved by the Board is not cluster development.

In their Third Assignment of Error, Petitioners assert that the Board's decision is further flawed by the lack of any significant independent review by the County of Mr. Haight's "Staff Report" and "Preliminary Director's Decision." The County concedes this issue. Skamania County's Response to Petitioners'

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[2] SCC § 22.08.020.D reads, in pertinent part:

1. Where authorized, land divisions in the General Management Area may create parcels smaller than the designated minimum size and may create 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: * * *.

(Emphasis added).

Request for Review at 3-4, 6-7. Except for adopting the Planning Department's rationale as to why the application should be considered a cluster development, the County simply relied on and adopted the applicant's evaluation of his project's compliance with the Skamania County Code. In doing so the County abdicated its responsibility to independently examine whether the project in fact complied.

OPINION AND ORDER

For the reasons outlined above we find that application does not meet the requirements for a cluster development. In approving the application as a cluster development the County's decision violated a provision of applicable law and is prohibited as a matter of law. Further, in rendering its decision the County failed to conduct any meaningful review of the application.

Therefore,

IT IS HEREBY ORDERED that the decision of the Skamania County Board of Commissioners is reversed.

DATED this 8th day of May, 2002

Anne W. Squier
Chair

Date of Service: 8 May, 2002

NOTICE: You are entitled to judicial review of this final order. Judicial review may be obtained by appeal to the Washington State Superior Court within 60 days after the date of service of this order. 16 U.S.C. § 544m(b)(4), (6).

CERTIFICATE OF SERVICE

I hereby certify that on the 8th day of May, 2002, I served a true and correct copy of the foregoing **FINAL OPINION AND ORDER** by first class mail on the following persons:

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