



MEMORANDUM

January 28, 2020

TO: Gorge Commissioners

FROM: Krystyna Wolniakowski, Executive Director
Joanna Kaiserman, Sr. Land Use Planner

SUBJECT: Staff Report for Appeal
In re Appeal of Development Review Decision No. C19-0004 (Modified) by Friends of the Columbia Gorge
Public Hearing Scheduled for February 11, 2020

Action Requested

On February 11, 2020, you will conduct a public hearing and deliberate to an oral decision on Friends of the Columbia River Gorge's appeal of Director's Decision No. C19-0004 (Modified). This is an appeal of decision of the Commission's Executive Director. It is unlike appeal hearings you have held involving appeals of county decisions. Please review this staff report and the Notice of Hearing carefully to understanding how you will conduct the hearing.

You are not reviewing the Director's Decision for error. For appeals of Executive Director decisions, the Commission is deciding whether to approve the application as proposed, with conditions of approval (which may differ from the conditions in the Director's Decision) or deny the application. If you vote to approve the application, you may use the Director's Decision as your base and explain any differences you vote to approve.

Your decision requires a simple majority of a quorum of commissioners. If all commissioners participate in the hearing, a decision to grant the appeal or modify any of the conditions in the Director's Decision requires at least seven votes.

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Order of the Hearing

1. Chair calls to the hearing to order and summarizes the order of the hearing;
2. Chair asks members of the Commission for disclosures of conflicts of interest, potential bias, appearance of fairness concerns, and ex parte communications; parties may ask questions or challenge commissioners' participation; resolution of concerns and challenges;
3. The Executive Director will briefly summarize the decision on appeal and any recommendation if different from the decision on appeal;
4. The appellant presents its evidence and legal argument;
5. The applicants present their evidence and legal argument;
6. Public comment, including evidence and legal argument;
7. The Executive Director may respond to the appellants' and public's evidence and legal argument;
8. The appellant may respond to all the evidence and legal argument;
9. The applicants present rebuttal evidence and legal argument;
10. Commissioners and the appellants may ask questions while the Executive Director, the appellants and the public are speaking; any other person may submit questions in writing to the Chair of the Commission to ask on behalf of that person;
11. The Commission will deliberate to an oral decision.

Hearing Package

Your hearing package includes the following documents.

1. This staff report;
2. The appellant's brief and attachments.¹
3. Notice of Hearing;
4. Volumes 1-4 of Record of the Executive Director's Decision (several separate documents).

You have a copy of the Commission's Land Use Ordinance for Klickitat County (Commission Rule 350-81) in your Commissioner Handbook. Please contact me if you can't find your copy, or you may read and download it from the Commission's web site.

Applicable Rules, Hearing Procedure, and Admissible Evidence

The appellants brought the appeal under Commission Rule 350-70. I recommend you review Commission Rule 350-70-140 concerning oral argument and evidence that is admissible in the hearing. The Notice of Hearing contains the hearing procedure and information about admissible evidence in more detail.

The Commission's Counsel has assisted the Executive Director with the Director's Decision and is unable to be the Commission's legal advisor in this matter. The Chair of the Commission has elected to conduct the hearing without a legal advisor to the Commission. If the Chair has legal advice questions, he may ask the parties to give their opinion. In this situation, the Commission's counsel may offer an opinion.

¹ The applicants did not submit a brief in advance of the hearing. They may present their evidence and argument at the hearing.

Hearing Fairness and Disclosures

Conflicts of Interest/Bias/Appearance of Fairness

Commission rules require this hearing to be objectively fair and to appear fair to a reasonable person. At the beginning of the Commission's hearing, the Chair will request commissioners disclose any conflicts of interest, bias, prejudgment and appearance of fairness concerns toward or against the project or any party. A conflict of interest involves any financial interest with one or more of the parties, with the property in question, or in the outcome of the appeals. You must disclose any conflict involving you or your immediate family. Bias, prejudgment and appearance of fairness concerns arise when there are facts that would lead a reasonable person to believe that you cannot be a fair decision-maker in this appeal. You must disclose written or oral communications, statements, current or prior memberships, friendships, employment or other professional relationships, and other factors that might lead to such a concern. You should make disclosures about any communications you have had or statements you have made; however, you must make disclosures about communications and statements since November 5, 2019 (when Friends of the Columbia Gorge filed their appeal).

Commissioners Blair, Burditt, Liberty, Nichols, and Bailey made disclosures at the prior hearing in June 2019. Staff recommends you make the same disclosures with any updates as necessary. The audio of the Commission's prior hearing is available on the Commission website. Your disclosures are within the first 10-15 minutes of the meeting audio.

***Ex Parte* Communication**

If you have had conversations or received communications other than those described above that directly or indirectly relate to these appeals, you must disclose those conversations. A complete disclosure includes when, who and what.

Objection to a Commissioner's Participation in the Appeals

A person may object to an individual commissioner's participation based on a disclosure or other information not disclosed. If that occurs, the full Commission may discuss that individual commissioner's participation, but the ultimate decision about whether to participate remains with the individual commissioner at issue. If that commissioner chooses not to participate in the appeal, that commissioner should leave the hearing room so there is no risk that commissioner will interact with the remaining decision-making commissioners. If a commissioner participates, but a court later determines that commissioner should have recused himself or herself, the court can remand the matter back to the Gorge Commission for a new hearing without the participation of that commissioner.

Substance of the Appeal

The modified Director's Decision following the remand of Case File C19-0004 approved an application to remove an existing single-family dwelling, construct a replacement dwelling, and expand an existing driveway. This is the second time the Gorge Commission will hear an appeal on this application. On June 11, 2019, the Commission heard oral argument and held a public hearing on Charles and Valerie Fowler's appeal of the Executive Director's Development Review Decision C19-0004.

Executive Director's Decision C19-0004 did not approve the site that the Fowlers proposed, but rather approved the Fowler's proposed home at the site of the current home, which is in a location

where the home would not protrude above the line of a bluff, cliff, or skyline as seen from key viewing areas. The arguments raised in the Fowlers' appeal were that locating the home at the site approved in the Director's Decision would place the house and residents in a high fire risk location, and that the proposed location for the replacement dwelling would be the most visually subordinate location that meets Firewise guidelines. During the hearing, the Commission staff proposed that the Commission remand the matter to allow the staff to consider and address additional information that was presented after the Director's Decision and at the hearing. The Commission thus remanded the matter back to the Executive Director. The Commission directed staff "to work with Mr. and Mrs. Fowler and other interested parties, including Friends of the Columbia Gorge, to find an approvable design and location and directs the parties to consider all necessary design and location options."

Following the remand of the decision, the applicants worked with their architect and staff to modify the design for the dwelling at the proposed location so that the proposed dwelling would not protrude above the skyline as viewed from all Key Viewing Areas. Other locations on the property were considered but either posed issues of inadequate drainage or would still protrude above the skyline. The applicants entirely changed the design of the roof of the dwelling to significantly lower the overall height of the proposed dwelling by seven feet. In addition to using existing vegetation to screen the proposed dwelling from Key Viewing Areas to the south, the applicants worked with staff to create a planting plan to further screen the south-facing windows to ensure that the proposed dwelling meets the visual subordination standard. Finally, the site of the existing home would be removed, and the area rehabilitated for additional agricultural use. The Executive Director subsequently issued a decision approving the Fowlers' modified proposal for a replacement dwelling.

Please read the complete Director's Decision and Staff Report for the Modified Director's Decision Following Remand, which is at pages 4013-4036 of the Administrative Record. The issue in this appeal is whether the proposed dwelling on the proposed site meets the required legal criteria and meets the visual subordination standard of the Management Plan. The appeal does not present a choice between two or more designs or sites on the parcel.

Commission staff consulted with Friends of the Columbia Gorge and the Forest Service about the new proposal. These parties gave staff their technical input and comments on the proposed new design stating that the new design did not comply with the guidelines to protect scenic resources.

The issues that Friends of the Columbia Gorge raised in its notice of appeal are summarized as:

- whether the siting and the design of the proposed dwelling meet the required Special Management Area ("SMA") criteria.
- whether the proposed siting and design of the dwelling would protrude above the line of a bluff or skyline as viewed from Key Viewing Areas.
- whether the proposed dwelling would rely on new screening rather than taking advantage of existing screening.
- whether the siting and design of the proposed dwelling requires new screening rather than relying on design changes to the proposed dwelling.
- whether it minimizes modifications to landforms and other natural characteristics.
- whether the proposed dwelling demonstrates that it would minimize the loss of land suitable for the production of agricultural crops.
- whether the proposed dwelling meets the visual subordination standard.

The Executive Director has reviewed Friends of the Columbia Gorge's brief and evidentiary exhibits and still believe that the Fowlers' modified proposal is consistent with the Land Use Ordinance. As discussed in the staff report, the applicants worked with staff to reduce the overall height of the proposed dwelling by approximately 7 feet from the original proposal in C19-0004. Staff conducted a visibility analysis of the new proposed dwelling at the proposed location, and also analyzed the site of the existing dwelling to determine which location would best meet the visual subordination standard. Staff concluded the proposed development at the proposed site is visually subordinate and will not protrude above the skyline. This is required by Commission Rule 350-81-530(2) in the Land Use Ordinance. The text of this provision and the Executive Director's findings and conclusion relating to this standard are at pages 4021-4023 of the Administrative Record (pages 4-6 of the staff report supporting the Director's Decision).

At the hearing, the Executive Director will present an overview of the Director's Decision, will be prepared to answer the Commission's questions, and will ask the Commission to deny the appeal.