

BEFORE THE COLUMBIA RIVER GORGE COMMISSION

RICHARD and GEORGIA MURRAY,)
)
 Petitioners,) CRGC No. COA-W-98-03
)
 v.) Wasco Co. No.
) APL-98-102-WAA11-GC
 WASCO COUNTY,)
)
 Respondent,) DECISION
)
 and)
)
 FALCON CABLE TV)
)
 Intervenor-Respondent.)

This case is an appeal by Richard and Georgia Murray from a decision of Wasco County upholding the county's approval of an application for development in the Columbia River Gorge National Scenic Area. We affirm.

The applicant, Falcon Cable TV (Falcon), intervenor in the appeal, applied for a permit to lay a fiber optic cable in the county's existing right of way. The property, located in the vicinity of Seven Mile Hill Road within a general management area, is designated "A-1, Large Scale Agriculture".

The county planning commission approved the permit. The Murrays appealed the decision to the Wasco County Court. The Court conducted a hearing and upheld the planning commission's decision. The Murrays then filed this appeal with the Gorge Commission.

As a threshold matter, we turn to the question of jurisdiction. Falcon contends the appeal was not timely under Rule 350-60-050 and the Gorge Commission lacks jurisdiction to consider

the case. In response, the Murrays argue their appeal was filed within the time required. After extended discussion and detailed consideration of the issue at the hearing not repeated here, we hold the Commission has jurisdiction to hear the appeal.

In regard to the standard of review, the issues presented here are primarily factual. Our review must therefore determine whether the county's decision is supported by substantial evidence in the record and thus, not clearly erroneous or arbitrary and capricious under Rule 350-60-220.¹

In the first assignment of error, the Murrays assert that Falcon's application and site plan did not comply with the county's ordinance. Falcon responds that the missing elements were not identified by the Murrays. In the alternative, Falcon suggests any error was only procedural and the Murrays failed to show substantial rights were prejudiced because the required information is generally available in the record.

¹Rule 350-60-220 provides:

(1) 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 360-60-090(2)(d).

We hold the county did not err in accepting Falcon's application and site plan. The county's decision is supported by substantial evidence and it is not clearly erroneous or arbitrary and capricious. We note that the county even required Falcon to submit an amended site plan prior to resuming work on the project.

In the second assignment of error, the Murrays question the adequacy of the county's consideration of alleged major ground disturbance and the movement of materials at the site in the process of laying the fiber optic cable. Falcon points out that even if the Murrays were right, there is no basis to reverse the county's decision and that, in any event, the county's staff report properly considered the impacts of the development.

We conclude the county did not err and the decision is supported by substantial evidence. To the extent the claim relied on matters outside the record, we must reject the invitation to stray beyond the standard of review for appeals under the terms of the National Scenic Area Act and basic principles of administrative law. 16 USC 544m(a)(2); See Bernard Schwartz, ADMINISTRATIVE LAW (1991); 637. We do not have the authority to consider matters outside the record.

In the third assignment of error, the Murrays argue the county did not make a finding the project was "necessary for public service." They also contend the description of the project is inadequate and there is uncertainty as to whether the excavation occurred within the county's right of way. They also claim there was a practicable alternative with less adverse impact on resources the county failed to consider. The county and Falcon submit the

decision was proper, the project was necessary for public service and there were no practicable alternatives.

We hold the county did not err because the project met the requisite public service standard. Moreover, while the existence of alternatives was asserted in argument before us, we cannot find the county was clearly erroneous or arbitrary and capricious. The county's determination as to whether an alternative was practicable under the facts and circumstances present simply was not willful, unreasoning action under the standard of review.

In the fourth assignment of error, the Murrays contend the county erred in its determination that the project would not impact cultural resources. In opposition, the county and Falcon emphasize that a cultural resource reconnaissance survey was conducted as required. The survey found the excavation will have "no effect on cultural resources."

We conclude the county did not err because the record before us, which is limited to the evidence presented by the parties in the proceedings below, does not support the petitioner's position.

In the fifth assignment of error, the Murrays claim the county erred in not stopping the development prior to issuance of the permit. However, the evidence in the record, which was not rebutted, reveals Falcon's operations ceased once the company became aware a permit was required. There is thus no basis to conclude county action was necessary at that point in time. In addition, in light of Falcon's compliance with the permit process, the county was not required to take a step that was clearly superfluous.

In upholding the decision of the county in this case, we conclude the Murrays did not meet the burden of proof necessary to prevail in accord with Rule 350-60-220. They did not demonstrate the county's findings were lacking in substantial evidence and we are not free to substitute our judgment for that of the county in these circumstances. Further, the Murrays did not point to specific instances in the record that supported their position. For this reason, faced with only generalized claims regarding the county and Falcon, we do not find any basis to disturb the decision below.

We affirm the decision of the county. We hold it is supported by substantial evidence in the record and was not clearly erroneous or arbitrary and capricious. In light of this disposition, it is unnecessary to address the Murrays' motion for a stay of the development that was made prior to oral argument but well after the submission of briefs.²

Finally, for other matters related to cultural resources in the vicinity of the project that are outside the record, we are constrained in these proceedings, as addressed above, from reaching any conclusions and we do not do so. Other avenues remain to consider issues brought to us outside the scope of this appeal.

²The Murrays filed a motion for stay on July 20, 1999. Falcon submitted a response on July 29, 1999. In order for the Commission to grant a stay, it must meet the requirements of Rule 350-60-200. This includes the burden on the moving party to specify how he or she "will suffer irreparable harm if a stay is not granted." Rule 350-60-200(1)(c) In addition, the rule provides the Commission "shall base its decision on the stay, including the right to a stay, or conditions of any stay order, upon evidence presented." Rule 350-60-200(4). Petitioners did not demonstrate the prospect of irreparable harm and the general allegations of counsel in support of the motion do not satisfy the evidentiary standard.

Dated this 5th day of October, 1999.



ANNE W. SQUIER
Chair

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