BEFORE THE COLUMBIA RIVER GORGE COMMISSION

FRIENDS OF THE COLUMBIA GORGE, Petitioners, vs. SKAMANIA COUNTY, Respondent, and JAMES HUETT AND BONNIE HUETT, Intervenor-Respondents.	)	CRGC No. COA-S-00-02 **FINAL OPINION AND ORDER**

This case involves an appeal by Friends of the Columbia Gorge from a decision of the Skamania County Board of Adjustment approving a boundary line adjustment. We reverse the decision of the Skamania County Board of Adjustment.

The property, located in Underwood, WA, consists of lots 19, 20 and 22, within the Township of Underwood subdivision, platted in 1904. James and Bonnie Huett, Intervenor-Respondents, own the lots. They applied to Skamania County for a boundary line adjustment between lots 19 and 22.

The County Planning and Community Development Director approved the request. Friends of the Columbia Gorge appealed the decision to the Skamania County Board of Adjustment. The Board of Adjustment upheld the Planning Director's decision. Friends of the Columbia Gorge then filed this appeal with the Columbia River Gorge Commission.

The Columbia River Gorge Commission met on October 10, 2000 to hear oral argument and deliberate to a decision.

PARTIES

Petitioner, Friends of the Columbia Gorge was represented by Gary K. Kahn, Reeves Kahn & Eder, Portland, Oregon and Beth Englander, Staff Attorney, Friends of the Columbia Gorge, Portland, Oregon.

Respondent, Skamania County, was represented by Bradley W. Andersen, Skamania County Prosecuting Attorney, Stevenson, Washington.

Intervenor-Respondents, James Huett and Bonnie Huett, Carson, Washington, represented themselves.

PROCEDURAL RULINGS

1. Columbia River Gorge Commissioner Walt Loehrke recused himself from the hearing because he was a member of the Skamania County Board of Adjustment at the time this matter was heard by that Board and had participated in the hearing below.

2. Pursuant to Commission Rule 350-60-120(3), James Huett was not permitted to present oral argument because he did not submit a written brief. At the hearing, Mr. Huett did speak to the facts of the boundary line adjustment and

the size of the lots, and drew one or more lines on an illustrative exhibit at the hearing. There was no objection to Mr. Huett speaking or drawing on the illustrative exhibit.

FACTS

This case involves lots 19, 20 and 22 of the Town of Underwood subdivision, platted in 1904. The original subdivision consisted of 22 lots (Rec. 5).

On September 10, 1999, Skamania County Senior Planner, Mark Mazeski issued an administrative decision (in the form of a letter) recognizing each of the three lots as legally created and buildable. A copy of the letter was sent as notice of the decision (Rec. 168). On September 28, 1999, Friends of the Columbia Gorge appealed the administrative decision to the Skamania County Board of Adjustment (Rec. 164-167). On February 17, 2000, the Skamania County Board of Adjustment upheld the administrative decision (Rec. 5-10). On March 16, 2000, Friends of the Columbia Gorge appealed the decision of the Board of Adjustment to the Columbia River Gorge Commission Rec. 2-4, *See also* Rec. 001).

The only disputed fact in this case is whether lots 19, 20 and 22 are one (1) acre in size, or smaller. The Skamania County Board of Adjustment found and concluded that the parcels are one (1) acre in size (Rec. 5, 7). However, at the hearing before the Board of Adjustment, Skamania County Senior Planner Mark Mazeski testified that the parcels were a little less than one acre (Suppl. Rec. 3).

The remainder of the Board of Adjustment's findings of fact (Rec. 5-7) are undisputed and we do not repeat them here.

STANDARD OF REVIEW

Skamania County argues this case involves a mixed question of law and fact. We believe the issues presented here are primarily legal in nature; however, there is one factual issue—whether the subject lots are one acre in size, or smaller. For the legal issue, 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 issue, we consider whether the decision was clearly erroneous or arbitrary and capricious; the findings are insufficient to support the decision; or the decision is not supported by substantial evidence in the whole record.[1]

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[1] Commission Rule 350-60-220(1) provides:

"(1) The Commission shall reverse or remand a land use decision for further review 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).

CONTENTIONS OF THE PARTIES

Friends of the Columbia Gorge contend lots 19, 20, and 22 are not legal parcels at this time for three reasons: (1) the 1904 subdivision did not vest prior to 1987 when the Washington Legislature adopted RCW 58.17.033; (2) the 1904 subdivision was invalidated by Washington's 1937 subdivision statute as addressed in Attorney General Legal Opinion, 1974, No. 7 and Attorney General Opinion, 1996, No. 005; and, (3) even if the subdivision is a "final plat," it expired in 1986.

Skamania County contends that the lots are each legal parcels, rebutting Friends of the Columbia Gorge's arguments. Skamania County also contends that Washington Attorney General Opinion, 1998, No. 4 gives the counties the option of recognizing ancient subdivisions, and that the subdivision at issue should be recognized considering the factors that the Attorney General suggests are relevant.

ANALYSIS

1. The Board of Adjustment's finding that lots 19, 20 and 22 are one (1) acre in size is not supported by substantial evidence.

We dispose of the sole factual issue first. The only fact in dispute in this case is whether lots 19, 20, and 22 are one (1) acre in size, or smaller (Pet. Br. 2; Resp. Br. 2). The Skamania County Board of Adjustment's Findings of Fact, Conclusions of Law, and Order Upholding the Director's Decision, at paragraph 2, stated that these lots are each one (1) acre in size (Rec. 5, 7). Friends of the Columbia Gorge contends the lots are a little less than one acre in size. Friends of the Columbia Gorge points to the testimony of Skamania County Senior

Planner, Mark Mazeski, who testified that the parcels are a little less than an acre (Suppl. Rec. 3). In its brief, Skamania County argues that the lots were intended to be one acre in size when originally platted, but conceded that there is no evidence to support the County's finding that the parcels are currently one acre in size.[2] A mere statement of past intent without supporting documentation or expert testimony does not constitute substantial evidence. Based on the supplemental record and Skamania County's concession, we find there is not substantial evidence to support the Board of Adjustment's finding that the lots are each one acre in size.

2. Lots 19, 20 and 22 are not legally separate and buildable.

a. The Attorney General Opinions regarding "ancient subdivisions" do not mandate recognition of lots 19, 20 and 22 as legally separate and buildable.

In a prior case, *Reynier v. Skamania County*, CRGC Nos. COA-S-98-01 and 98-02 (December 10, 1999), we upheld the reasoning in Attorney General Legal Opinion, 1974, No. 7 and Attorney General Opinion, 1996, No. 005, and found that a developer of a pre-1937 subdivision must comply with the current subdivision standards and regulations. We continue to rely on those opinions for this case.

In addition, we considered Attorney General Opinion, 1998, No. 4. The Attorney General opined that the Washington Growth Management Act allows, but does not mandate, that a county recognize a pre-1937 subdivision. The Attorney General listed several factors that counties might consider in

[2] At the hearing, we heard argument that the parcels are currently approximately .98 acres.

determining whether, on a case-by-case basis, they would recognize the individual lots in a pre-1937 subdivision. Skamania County argued these factors to us, but we conclude the Scenic Area Act and Management Plan do not allow recognition of a pre-1937 subdivision in the Scenic Area. The Attorney General's opinion is inapplicable in the National Scenic Area because it is based on the requirements of the Growth Management Act issues. For example, the Attorney General stated:

> First, the language of the Growth Management Act gives each county considerable leeway in deciding how to apply the Act's requirements to local conditions. (citation omitted)

By contrast, the Scenic Area Act required the Gorge Commission to develop a single Management Plan for the entire six county, two-state region. The Management Plan includes a definition of parcel, which the counties adopt into their own land use ordinances. There is not the leeway under the Act, Management Plan, and implementing land use ordinances that the Attorney General finds in Washington's Growth Management Act.

The Attorney General also stated:

> The Act leaves room for counties to consider a variety of elements in planning in rural areas and the extent and location of previously platted tracts of land is one logical element to consider.

Again, in contrast, the type of planning for density and intensity of use in the Scenic Area occurred during development of the Management Plan, and will continue through mandatory periodic review of the Management Plan. There is

not the same "room" for counties to plan for their rural areas located within the Scenic Area as for their lands subject to the Growth Management Act.

b. Prior Gorge Commission approvals of dwellings on other lots in the subdivision does not require recognition that lots 19, 20 and 22 are legally separate and buildable.

Finally, Skamania County asserts that a conclusion that the lots are not legally separate and individually buildable would result in unequal application of the law to the Huetts. Several of the lots within the original subdivision have been developed with single family dwellings (Rec. 6). Between 1989 and 1991, the Gorge Commission Executive Director approved several of the single-family dwellings and did not raise the issue of whether the Town of Underwood subdivision was still a valid subdivision in any of these decisions (Rec. 6, 9, 59-126). Essentially, Skamania County is arguing that because the Gorge Commission approved dwellings on other lots in the same subdivision, then it cannot now decide that lots 19, 20 and 22 are not legally separate and buildable.

We have already addressed in this issue in the *Reynier* case. In that case we concluded that an expired 1991 Gorge Commission approval for residential development on one of the subject lots in that case, did not give the landowners a vested right to build on that lot.[3]

Likewise, in this case, we hold that that prior Gorge Commission approvals for development on lots in the 1904 Town of Underwood subdivision do not require that we continue to recognize other lots in that subdivision today.

[3] The 1991 Gorge Commission approval was issued under the Final Interim Guidelines prior to adoption of and concurrence with the Management Plan.

Those prior approvals were made under the Final Interim Guidelines and did not contain any analysis concerning the later-identified issue of the of legal status of a pre-1937 subdivision. Our analysis in this case is not bound by those prior decisions.

Finally, we note that this decision does no more than determine that lots 19, 20 and 22 are not each separate legal parcels. Petitioner stated at oral argument and we agree that this decision does not predetermine the outcome of a future land use application. The Huetts may apply for a land division or any land use allowed by the Skamania County land use ordinance for the National Scenic Area.

Because the lots are not separate legal parcels, the boundaries between the lots may not be adjusted. Skamania County's decision to allow the boundary line adjustment violates applicable law and is prohibited as a matter of law, and improperly construes applicable law based on the record before us.

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The decision of the Skamania County Board of Adjustment is

REVERSED.

DATED this 20th day of December, 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.