

BEFORE THE COLUMBIA RIVER GORGE COMMISSION

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| FRIENDS OF THE COLUMBIA GORGE, |) | |
| |) | |
| Petitioner, |) | CRGC No. COA-S-99-01 |
| |) | |
| vs. |) | FINAL OPINION AND |
| |) | ORDER |
| SKAMANIA COUNTY, |) | |
| |) | |
| Respondent. |) | |
| _____ |) | |

This case involves an appeal by Friends of the Columbia Gorge of a decision issued by Skamania County approving a new aggregate quarry, with related extraction, crushing, screening, and stockpiling operations. Petitioner Friends of the Columbia Gorge contested the approval of the quarry and related operations. The Columbia River Gorge Commission met on May 8, 2001 to hear oral argument and deliberate to a decision.

I. Parties

The parties to the hearing were:

Friends of the Columbia Gorge, represented by Gary K, Kahn, Reeves Kahn & Eder, Portland, Oregon.

Skamania County. Skamania County did not submit a brief and thus did not participate in oral argument. Commission Rule 350-60-120(3).

II. Preliminary Rulings

Columbia River Gorge Commissioner Walt Loehrke recused himself from the hearing because of his prior involvement with the case with the Skamania County Planning Commission.

III. 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 based on the record before us. For the factual issues, our review focuses on whether the decision is supported by substantial evidence in the whole record, whether the findings are insufficient to support the decision, or whether the decision was clearly erroneous or arbitrary and capricious.¹

IV. Facts

The relevant facts are:

¹ Commission Rule 350-60-220 provides:

“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 360-060-0090(s)(d) [sic].

1. The subject parcel is approximately 160 acres in size and is located northwest of Ash Lake, off Blue Lake Road, in Section 4 of T2N, R7E, Skamania County Tax Lot Nos. 2-7-4-300, 301, 302, 303, 304, 305, and 306. The property is zoned General Management Area Large Woodland (F-2) in the Skamania County Code. Rec. 323-4.

2. On January 13, 1997, Byron Slack, representing Eagle Ridge Development Corp., submitted an application for a new aggregate quarry, with related extraction, crushing, screening, and stockpiling operations. Rec. 323. The application stated, "Reclamation Drawings and Topography Map to Follow." Rec. 331.

3. The proposed quarry would be seen from at least five key viewing areas. Rec. 128.

4. On October 24, 1997, the applicant submitted to Skamania County a Washington Department of Natural Resources Standard Reclamation Plan (Form SM-8A). Rec. 191-202. On March 3, 1998, the applicant submitted four perspective drawings. Rec. 168-171. The perspective drawings were general in nature and were not identified as being the views seen from any particular key viewing areas.

5. On December 9, 1997, Washington Department of Natural Resources rejected the applicant's reclamation plan. Rec. 180.

6. Skamania County's decision imposed a condition of approval requiring the applicant to submit a revised reclamation plan. Rec. 7-11.

7. The applicant undertook a sensitive wildlife assessment study, Rec. 215-244, which was rejected as inadequate by Washington Department of Fish and Wildlife, Rec. 188-190. On July 20, 1998, the applicant prepared a Wildlife Management Plan, which significantly limited the size, scope, and location of the proposed mining. Rec. 54-65. On August 8, 1998, Washington Department of Fish and Wildlife recommended that the plan would protect sensitive wildlife resources. Rec. 31. This letter was faxed to Skamania County on August 4, 1998 prior to a Planning Commission hearing recommending approval of the application. Rec. 48-9.

8. The Skamania County Planning Commission held public hearings on the application on April 7, 1998, May 19, 1998, and August 4, 1998, recommending approval of the application.

V. Contentions of the Parties

Friends of the Columbia Gorge argued two assignments of error: (1) the county misconstrued the applicable law and rendered a decision not supported by adequate findings or substantial evidence when it concluded that the four perspective drawings in the record were adequate to satisfy SCC § 22.10.020.B.22; and (2) the county misconstrued the applicable law and rendered a decision not supported by adequate findings or substantial evidence when it concluded that a reclamation plan had been submitted as required by SCC § 22.10.020.B.5, when the reclamation plan had been rejected by Washington Department of Natural Resources and when a condition of the County's approval required submitting a revised reclamation plan.

VI. Analysis

Both of the assignments of error presented in this appeal relate to the sufficiency of the application materials, to whether Skamania County's decision properly construed the applicable law in making a decision based on the incomplete application, and to whether the decision, based on incomplete application materials, is supported by substantial evidence.

Mining is a very intensive land use, which has a high potential of adversely affecting the Gorge resources. Modifying land forms is irreversible. Scenic vistas are altered, cultural resources and sensitive plant and wildlife habitat species may be removed, and recreation may be affected by the effects to scenic, cultural, and natural resources and other associated impacts such as noise, dust, and blasting.

Recognizing these issues associated with mining, Congress specifically required that the Management Plan include provisions to:

require that the exploration, development, and production of mineral resources, and the reclamation of lands thereafter, take place without adversely affecting the scenic, cultural, recreational, and natural resources of the scenic area.

16 U.S.C. 544d(d)(9). To this end, the Management Plan contains specific and detailed application requirements for mining applications in the Scenic Area.

These application materials are information necessary for a permitting agency (either a County or the Gorge Commission) to evaluate the application and make a decision about whether the proposal would adversely affect the Gorge resources.

We focus our analysis on two problems with the County's review and decision in this case. First, the County made its decision without a complete land use application and without the mandatory information necessary to make the requisite findings and conclusions that the application complied with the land use ordinance and did not adversely affect the Gorge resources. Second, in approving the application, the County imposed a condition of approval requiring the applicant to submit several maps (constituting the reclamation plan) that comply with the guidelines. Deferring this requirement is insufficient to establish that the application complies with the guidelines because the County must evaluate the maps to determine if the application complies with the guidelines.

A. The County cannot make a decision supported by substantial evidence without a complete application and information.

The record in this case shows that the applicant failed to submit an application that met those minimum requirements by failing to submit perspective drawings of the proposed mining as seen from key viewing areas and an approved reclamation plan. The relevant sections of the Skamania County Code are:

For proposed mining and associated activities on lands visible from key viewing areas, project applicants shall submit perspective drawings of the proposed mining areas as seen from applicable key viewing areas.

SCC § 22.10.020.B.22, and

For all new production and/or development of mineral resources and expansion of existing quarries, a reclamation plan is required to restore the site to a natural appearance that blends with and emulates

surrounding landforms to the maximum extent practicable.

Such a plan shall be approved by the Department of Natural Resources for uses under its jurisdiction * * *

SCC § 22.10.020.A.5.²

In this case, the project applicant submitted perspective drawings more than one year after submitting the original land use application, and submitted a reclamation plan approximately nine months after submitting the original land use application. The perspective drawings did not purport to show the site from the various key viewing areas, and the reclamation plan was rejected by the Washington Department of Natural Resources. Nevertheless, Skamania County continued to process the application. Subsequently, the applicant prepared a wildlife management plan, which significantly limited the size, scope, and location of the proposed mining in order to protect sensitive wildlife species. Yet, despite this change, Skamania County did not require new perspective drawings or a new reclamation plan.

During the time between submission of the original application and submission of the perspective drawings and reclamation plan, Skamania County issued a Preliminary Director's Decision, Rec. 259-98, and a Determination of Non-Significance (DNS) under Washington's SEPA (not in the record, but see Rec. 300-301). The record thus reveals that Skamania County was making decisions concerning resource protection without even first having a complete

² SCC § 22.10.020.B.23.c contains a similar requirement for quarries more than 3 miles from the nearest key viewing areas. The quarry in this case is seen from key viewing areas that are both within and beyond 3 miles.

application. This indicates that Skamania County staff conducted analyses of the proposed quarry without the benefit of complete information. These analyses were then given to the applicant and the public for review and an opportunity to comment, and to the Planning Commission for consideration during hearings. As a result, public comment and Planning Commission discussions also occurred without the benefit of complete information.³

The Scenic Area standards require submission of certain application materials up front. In this case, the county failed to obtain perspective drawings as required by SCC § 22.10.020.B.22 and failed to require the applicant to submit a reclamation plan that was approved by Washington Department of Natural Resources as required by SCC § 22.10.020.A.5 and B.23.c. Accepting and initiating review of the incomplete application misconstrued and violated these standards.

Without complete application materials, tribal governments, state and local agencies, and the public cannot review the application and provide meaningful comments that are responsive to the criteria in the land use ordinance. It is also impossible for the County to make a decision that the application complies with the approval criteria. In this case, the County could not have known what would be the appearance of the ultimate reclamation of the site without an approved

³ We also note that the record indicates the applicant did not submit an approved wildlife management plan until after the preliminary decision and DNS, and after the second of three Planning Commission hearings. Due to the presence of sensitive wildlife species, the Wildlife Management Plan was a primary factor requiring limiting the size, scope and location of the proposed mining. Again, the timing of this indicates that much of the analysis work was done without complete information.

reclamation plan and without perspective drawings showing the view from the various key viewing areas. Hence, the County's decision is not supported by substantial evidence.

B. The County erroneously applied conditions of approval to the decision.

In addition to reviewing and approving an application based on incomplete information, Skamania County took the approach of approving the development conditioned upon the applicant subsequently submitting several maps that complied with the guidelines. The relevant condition of approval stated:

The mining site plan maps submitted by Bell Design Company shall be modified to include the information represented on the maps attached at the end of the [Wildlife] Management Plan, specifically, the Pre-Mining Topographic Map, the Cross Section Map, the Reclamation Map, the Final Reclamation Map, and the two Reclamation Perspective Model Maps shall be modified so as to be consistent with the map attached to the July 20, 198 Emcon Wildlife Management Plan.

Condition of Approval No. 23. Rec. 10.

As stated above, these are application materials. Hence, imposition of this condition misconstrues and violates SCC § 22.10.020.A.5 and B.23.c. The County cannot defer submission of application materials to after the application is approved. Application materials, by definition, must be submitted with the application.

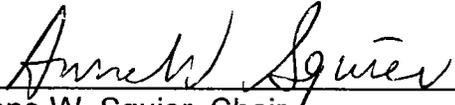
Also, as a result of deferring these application requirements to a condition of approval, the County's decision is not based on substantial evidence in the record. A condition of approval requiring submission of a reclamation plan that

complies with the guidelines cannot establish that the application complies with the land use ordinance because the County must evaluate the reclamation plan to determine if the application complies with the guidelines. The County's findings and conclusions could not be based on substantial evidence because the evidence does not yet exist, but was required after-the-fact as a condition of approval. Imposing conditions of approval is not a substitute for obtaining and reviewing complete land use applications and making adequate findings of fact and conclusions of law.

While we are not bound by state law in our interpretations, we nonetheless point out that our analysis is consistent with case law from Oregon, see e.g. *Miller v. City of Joseph*, 31 Or LUBA 478 (1996). We are unaware of any Washington case law relating to this issue.

The decision of the Skamania County Board of Commissioners is
REVERSED.

DATED this 22nd day of June, 2001



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.