

BEFORE THE COLUMBIA RIVER GORGE COMMISSION

WADE JOHNSON,	)	
	)	CRGC No. COA-M-01-02
Petitioner,	)	
	)	
vs.	)	
	)	
MULTNOMAH COUNTY,	)	<b>AMENDED FINAL OPINION</b>
	)	<b>AND ORDER</b>
Respondent,	)	
	)	
and	)	
	)	
FRIENDS OF THE COLUMBIA GORGE,	)	
	)	
Intervenor-Respondent.	)	
_____	)	

This matter came on for hearing before the Columbia River Gorge Commission on October 9, 2001. Petitioner was present and represented by counsel Ellen P. Hawes and Steven W. Abel. Respondent appeared through counsel Sandra N. Duffy. Intervenor-Respondent did not appear. The sole issue for consideration is whether we have jurisdiction to hear this appeal.

FINDINGS OF FACT

On November 5, 1999, Petitioner filed with the Multnomah County Land Use Planning Division an application for construction of a single family dwelling, located within the Columbia River Gorge National Scenic Area (NSA). On

January 11, 2001, Multnomah County's Planning Director denied the application. Petitioner appealed that decision to a Hearings Officer, and a hearing was held on February 21, 2001.

On March 19, 2001, the Columbia River Gorge Commission approved changes to Multnomah County's National Scenic Area ordinance. Those changes are codified at Chapter 38 of the Multnomah County Code (MCC). Of particular importance here, the new county code provisions changed the procedure for appealing land use decisions pertaining to the NSA. Prior to these changes an appeal from the decision of the Planning Director went to the Hearings Officer, whose review was limited to the issues raised in the notice of appeal. An appeal of the Hearings Officer's decision then went to the Multnomah County Board of Commissioners, where there was an opportunity for de novo review. MCC 11.15.8270(A) (superceded). From there, appeals proceeded to the Columbia River Gorge Commission for review on the record. 16 U.S.C. §544m(a)(2); Commission Rule 350-60-000, et seq.. The new MCC Chapter 38 directs that appeals from the Planning Director's decision go to the Hearings Officer for de novo review, and from there to the Columbia River Gorge Commission, MCC 38.0540(B), 38.0640(F), for review on the record.

At the opening of the February 21, 2001, hearing the Hearings Officer informed the parties that she was constrained to apply the procedures "specified in the old ordinance," MCC 11.15.8295, pending approval of the new MCC Chapter 38 by the "appropriate bodies." The Hearings Officer further stated that the hearing would be limited to the specific grounds relied on for reversal or

modification of the decision in the Notice of Appeal, but that there was an “additional possibility of a County Board Review, which would be . . . de novo. . . . So it’s not certain that you will be precluded from raising issues if you don’t raise them today.” Record at 26. The parties were given until March 8, 2001, to submit post-hearing evidence. Record at 58.

On April 20, 2001, the Hearings Officer issued her decision upholding the denial. In that decision she noted that between the time the hearing was held and the decision was issued, Multnomah County had “revised its appeal procedures. As a result, the appeal is not limited to those issues raised in the notice of appeal. The Hearings Officer, therefore, has considered and resolved all issues raised by either party.” Record at 58.

Petitioner then filed concurrent appeals of the Hearings Officer’s decision with the Multnomah County Board of Commissioners and the Columbia River Gorge Commission. Petitioner then moved to stay his appeal before the Gorge Commission “until jurisdiction of this matter is resolved by the Multnomah County Board of Commissioners.” Record at 103-105. By letter of May 31, 2001, from its Land Use Planning Division, Multnomah County refused to send Petitioner’s appeal to the Multnomah County Board of Commissioners, asserting that the Gorge Commission was the proper body to hear the appeal. Record at 48. The County objects to Petitioner’s request for a stay. Record at 92-97.

#### CONCLUSIONS OF LAW

Although Multnomah County adopted its revised appeal procedures on November 30, 2000, through 2000 Ordinance 953 §2, those changes did not

become effective until they were approved by the Gorge Commission. 16 U.S.C. § 544e. The Gorge Commission did not approve the changes until March 19, 2001, nearly a month after Petitioner's hearing, and eleven days after the deadline to submit post-hearing evidence. Therefore, Petitioner's hearing could not have been de novo.

Further, despite the Hearings Officer's assertion in her decision that she had, in effect, conducted a de novo hearing ex post facto, it is difficult to see how this could be the case without the parties being so informed at the time of the hearing. In fact, the Hearings Officer's statements at the time of the hearing were to the contrary.

It is clear from the County's ordinances that both before and after the changes to the appeal procedure an applicant is to be given the right to at least one opportunity for de novo review by a County decision-maker before the County's decision is final. Under the circumstances of this case the Petitioner has not been afforded that right, therefore the County's decision is not final.

The Gorge Commission's jurisdiction to hear appeals from decisions rendered under county NSA ordinances is limited to review, on the record, of a "final action or order." 16 U.S.C. §544m(a)(2); Commission Rule 350-60-000, et seq.. Until there is an opportunity for de novo review by a County decision-maker there can be no "final action or order" of the County for the Gorge Commission to review.

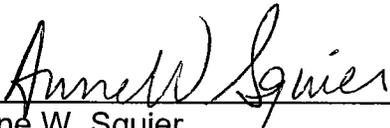
OPINION AND ORDER

Petitioner argues that we are without jurisdiction to hear his appeal. We agree. Petitioner further requests that we dismiss this appeal, and order the County to hold a de novo hearing of his appeal from the Hearings Officer's decision. However, because we agree that we lack jurisdiction, we do not have authority to order the County to hold such a hearing. We realize that this may leave Petitioner in a difficult position in the event that the County continues to deny him the opportunity for a de novo hearing, but the two components of Petitioner's requested relief are mutually exclusive. I.e., in accepting petitioner's argument that we lack jurisdiction we are unable to grant his request for an order to the County.

Because, under the facts and circumstances of this case, there is no final action or order by the County, we find that we are without jurisdiction to hear this matter. Therefore,

IT IS HEREBY ORDERED that this appeal is dismissed.

DATED this 5<sup>th</sup> day of November, 2001

  
\_\_\_\_\_  
Anne W. Squier  
Chair

Date of Service: see attached certificate of service (na), 2001

NOTICE: You are entitled to judicial review of this final order. Judicial review may be obtained by appeal to the Oregon Court of Appeals within 60 days of the date of service of this order. 16 U.S.C. § 544 (b)(4), (6); ORS 196.115(2)(a)