BEFORE THE COLUMBIA RIVER GORGE COMMISSION

FRIENDS OF THE COLUMBIA, GORGE Petitioner, vs. MULTNOMAH COUNTY, Respondent, and TIM AND CASEY HEUKER Respondent-Intervenors.	CRGC No. COA-M-02-01 **FINAL OPINION AND ORDER**

Friends of the Columbia Gorge appealed a decision of the Multnomah County Hearings Officer approving an in-kind replacement house for Tim and Casey Heuker. Friends of the Columbia Gorge does not contest whether the Heukers are entitled to a replacement dwelling, the location of the replacement dwelling, or the size of the replacement dwelling. It contests only Multnomah County's application of the color, reflectivity and landscaping standards as provided for in the Multnomah County Code. On June 11, 2002, the Columbia River Gorge Commission met to hear oral argument in this matter and deliberate

toward a decision. Because we conclude that Multnomah County improperly construed the applicable law, we remand the matter back to Multnomah County.

I. PARTIES

The parties to this matter are:

Friends of the Columbia Gorge, represented by Gary K. Kahn, Reeves, Kahn and Hennessy, Portland, Oregon
Multnomah County, represented by Sandra N. Duffy, Multnomah County Attorney, Portland, Oregon
Tim and Casey Heuker, represented by Michael G. Neff, Haglund Kirtley Kelley Horngren and Jones, LLP, Portland, Oregon

II. PRELIMINARY MATTERS

Ex-Parte Contacts

Commissioners Anne Squier, Dave Robertson, Kathy Sheehan, Doug Crow, Don Dunn, and Walt Loehrke stated for the record that they were present at an Oregon Legislative Subcommittee hearing on March 15, 2002, at which Casey Heuker related facts of this matter to the Subcommittee. Ms. Heuker did not discuss the case directly with members of the Gorge Commission at the time. Each of these Commissioners stated they believed they could be fair and objective in this matter.

Commissioners Joe Palena and Dave Robertson also stated for the record that they had been on the subject property for a purpose not related to this matter and did not discuss the facts of this matter at the time. They stated they believed they could be fair and objective in this matter.

There were no objections to the participation of any Commissioner resulting from these disclosures.

III. STANDARD OF REVIEW

The issues presented here are legal in nature. Our review thus 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.[1]

IV. FINDINGS OF FACT

The facts of this matter are largely uncontested. The issue on appeal is a legal question involving interpretation of a provision of Multnomah County Code.

The subject property is located in Dodson, Oregon adjacent to the Columbia River. The property is designated Residential in the General Management Area of the National Scenic Area, Rec. 13, and is in a Rural Residential landscape setting. The dwelling would be visible from three key viewing areas: Columbia River, Interstate 84 and Beacon Rock. Rec. 93.

On January 1, 2001, a fire destroyed Tim and Casey Heuker's home. Rec. 89.

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[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 or 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(2)(d) [sic].

On May 4, 2001, the Heukers applied to Multnomah County to replace their home in kind. Rec. 91. Multnomah County approved the application. In its approval, the Multnomah County Planning Department concluded because the dwelling could not be made visually subordinate using only the color, reflectivity and landscape requirements of MCC § 38.0030(B)(1), and because that provision does not expressly require the replacement dwelling to be *visually subordinate* as seen from key viewing areas, that it "worked with the applicant to *minimize visibility* of the dwelling considering the limited aspects of the development that could be considered (i.e., color, reflectivity, and landscaping)." Rec. 94 (emphasis supplied).

The Planning Department found and concluded that the visibility of the dwelling will be minimized as seen from the Columbia River and Beacon Rock, and found and concluded that the dwelling will be visually subordinate when viewed from Interstate 84. *Id.*

The Planning Department required that the exterior of the dwelling be a dark earth tone brown, and that the windows be non- or low-reflective, and that landscaping be planted as shown on the applicant's site plan. Rec. 87–88. The decision does not specify which site plan it is referring to, but it appears to refer to the site plan entitled, "Proposed Site Plan" submitted by the Heukers on July 26, 2001. Rec. 165. This site plan shows vegetation to the east and west of the dwelling, but not to the immediate north of the dwelling, between the dwelling and Beacon Rock and the Columbia River.

Friends of the Columbia Gorge appealed the decision to the Multnomah County Hearings Officer. Rec. 77–85. The Executive Director of the Gorge Commission and the Area Manager participated in that hearing by offering testimony that they believed the color, reflectivity, and landscaping standards must be applied to in-kind replacement dwellings with the goal of achieving visual subordinance. Rec. 37–46, 72–73.

The Hearings Officer stated that application of the "minimize visibility" standard would be in error. Rec. 17. But the Hearings Officer also stated:

> [A]s indicated by the testimony of planning staff at the hearing, the County did not apply that standard. The use of the phrase 'minimize visibility' in the decision was not intended to refer to a specific standard. Rather it was an unintentional use of the phrase that had specific connotations with the context of the Multnomah County Code related to the Columbia River Gorge National Scenic Area.

Id. The Hearings Officer then interpreted the Multnomah County Code so as to directly apply MCC § 38.7090, which contains the emergency/disaster response provisions of the County Code. Rec. 19–22. Specifically, the Hearings Officer held that the color, reflectivity and landscaping standards contained in MCC § 38.7090 applied, but that the color, reflectivity, and landscaping standards of MCC § 38.7035 did not apply, and that neither MCC § 38.0030(B)(1) nor MCC §38.7090(E) contains a visual subordinance requirement for in-kind replacement of existing uses. Rec. 22.

The Hearings Officer stated that the landscaping requirement of MCC § 38.7090(E) focuses solely on the replacement of vegetation removed or destroyed as part of an emergency event. *Id.* The Hearings Officer concluded

that the color of the building, reflectivity of the building materials, and landscaping were appropriate, but rejected Friends of the Columbia Gorge's contention that the dwelling must be visually subordinate. Rec. 22–23. In other words, the Hearings Officer upheld the Planning Department's decision, but for different reasons.

Friends of the Columbia Gorge appealed the decision of the Hearings Officer to the Gorge Commission.

V. ANALYSIS AND CONCLUSIONS OF LAW

This case involves interpreting the replacement structures standard for the National Scenic Area. Multnomah County has codified that standard in MCC § 38.0030(B)(1), which reads:

> (B) Any use of structure damaged or destroyed by disaster or emergency event shall be treated as an existing use or structure if an application for replacement in kind and in the same location is filed within two years of the date of the disaster/emergency event pursuant to the provisions of MCC 38.7090.[2]
>
> (1) Replacement of an existing use or structure in the same location shall be subject only to compliance with the standards for protection of scenic resources involving color, reflectivity, and landscaping.

[2] The citation to MCC § 38.7090 refers to Multnomah County's codification of the standards for emergency/disaster response, which authorize emergency response actions necessary to protect life, property and vital public services. The Commission adopted these standards in a Management Plan amendment (PA-98-01) in 1998. The Management Plan replacement structures standard does not cite to these provisions. We do not need to address this cross-reference problem because Multnomah County concedes that the emergency/disaster response provisions do not apply.

Friends of the Columbia Gorge present three assignments of error. We begin with the second and third assignments of error.

Second and Third Assignments of Error

In its second assignment of error, Friends of the Columbia Gorge argues that the Hearings Officer improperly applied the emergency/disaster response provisions to the proposed replacement dwelling. Friends of the Columbia Gorge argues that these provisions do not apply to the proposed replacement dwelling under the definition of emergency/disaster response. FOCG Br. at 11–16.

Multnomah County concedes that the disaster/emergency response provisions of MCC § 38.7090 do not apply to this proposed dwelling (Mult. Cy. Br. at 2), but argues that through MCC § 38.7090, it still required the use of color, reflectivity and landscaping in the same manner that it would have through MCC § 38.7035.[3] Essentially, Multnomah County is arguing that its application of the emergency/disaster response provisions was "harmless error." The Heukers do not directly address this assignment of error, but argue that the emergency/disaster response provisions were correctly applied. Heuker Br. at 9.

We do not find there was harmless error in this case. We start our analysis by noting that Multnomah County did not require landscaping immediately north of the dwelling, between the dwelling and Beacon Rock and the Columbia River. Rec. 26, 165. We next note that the Hearings Officer expressly applied the scenic resource protection guidelines in MCC §

[3] MCC 38.7035 contains the General Management Area standards for protection of scenic resources.

38.7090(E)(1),[4] but rejected the scenic resource protection standards of MCC § 38.7035. Rec. 22. Since Multnomah County concedes that MCC § 38.7090 does not apply, and the Hearings Officer rejected application of MCC § 38.7035, then we are unable to determine that the Hearings Officer applied the equivalent of MCC § 38.7035. If applying MCC § 38.7090 was indeed harmless error, then we would have expected that the County would have required landscaping immediately north of the dwelling, which we believe the scenic resource protection standards of MCC § 38.7035 would require in this case.

In the third assignment of error, Friends of the Columbia Gorge contends that if the emergency/disaster response provisions do apply, then the application was not filed, nor processed in accordance with those provisions. Multnomah County's concession that the emergency/disaster response provisions do not apply disposes of this assignment of error without action by the Commission.

First Assignment of Error

In its first assignment of error, Friends of the Columbia Gorge argues that Multnomah County misapplied MCC § 38.0030(B)(1) by not requiring that the replacement dwelling be "visually subordinate." In support of its position, Friends of the Columbia Gorge argues that although MCC § 38.0030(B)(1) does not specifically state that replacement structures must be visually subordinate, the individual color, reflectivity and landscaping provisions referenced therein (in MCC § 38.7035) require all development seen from key viewing areas, as is the dwelling in this case, to be visually subordinate. FOCG Br. at 6–11.

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[4] Specifically, the Hearings Officer found that the proposed color, reflectivity and landscaping choices met the requirements of MCC § 38.7090(E)(1)(b). Rec. 23.

Multnomah County argues that because MCC § 38.0030(B)(1) does not specifically state that replacement structures must be visually subordinate, the County could interpret that provision to require a different degree of scenic protection. In this case, the County argues that it required "a degree of scenic protection greater than that which existed prior to the fire," Mult. Cy. Br. at 9, but did not cite any provision of its code to this effect.

The Heukers argue that visual subordinance is neither explicitly nor implicitly required in the replacement structures standard. They argue that Multnomah County may interpret its own ordinance, and that the Gorge Commission should defer to the County's interpretation so long as its interpretation is not inconsistent with the express words, purposes or policy of the Management Plan and the Act. Heuker Br. at 11–12. The Heukers further argue that because the structure was an existing use, its replacement should not create any scenic impacts greater than the destroyed structure, and that the replacement dwelling meets this standard. Heuker Br. at 12–13.

To begin our analysis, we note that color, reflectivity, and landscaping provisions appear only in MCC §§ 38.7035 (GMA scenic resource guidelines), 38.7040 (SMA scenic resource guidelines) and 38.7090 (emergency/disaster response guidelines). Multnomah County concedes that its emergency/disaster response provisions do not apply to this replacement dwelling. As well, the Management Plan provision that MCC § 38.0030(B)(1) is based on does not include reference to the disaster/emergency response provisions (Management Plan Existing Uses Guideline 2 at II-87–88 *as amended*). Therefore, we

conclude that the color, reflectivity, and landscaping provisions stated in MCC § 38.0030(B)(1) refer to those in MCC § 38.7035.[5]

The remaining question presented to us in this assignment of error is to what degree must the color, reflectivity, and landscaping requirements of MCC § 38.7035 be applied to in-kind replacements destroyed by a disaster. Our role in this case is to interpret the language used in that provision, not to legislate a new standard. We first consider the precise wording of MCC § 38.0030(B)(1) to determine if it answers the question posed. If we do not find an answer in the precise wording, then we consider the relationship of MCC § 38.0030 to the other Scenic Area provisions. *Portland Gen. Elec. Co. v. Bureau of Labor and Industries*, 317 Or. 610-612, 859 P.2d 1143 (1993). The parties' briefs recommended the various interpretations summarized above.

We address the precise wording of MCC 38.0030(B)(1) first. Very simply, that provision does not expressly state that an in-kind replacement dwelling must be visually subordinate. We therefore must consider the relationship of this provision to other provisions in the Multnomah County Code. Of the provisions in MCC § 38.7035 requiring the use of color, reflectivity, and landscaping (among other factors) to protect scenic resources, several require that those factors be applied to achieve visual subordinance. The following are excerpts from the Multnomah County Code (and were also specifically recited in the Planning Department's decision, Rec. 93–96):

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[5] In the Special Management Area, the applicable color, reflectivity, and landscaping standards are contained MCC § 38.7040.

> Size, height, shape, *color, reflectivity, landscaping*, . . . of proposed development shall be evaluated to ensure that such development is *visually subordinate* to its setting as seen from Key Viewing Areas. [MCC 38.7035(B)(1)]
>
> The extent and type of conditions applied to a proposed development to achieve *visual subordinance* should be proportionate to its potential visual impacts as seen from Key Viewing Areas. [MCC 38.7035(B)(2)]
>
> Compliance with specific conditions to achieve *visual subordinance* (such as *landscaped screening*), . . . shall occur within a period not to exceed 2 years after the date of development approval. [MCC 38.7035(B)(26)]
>
> In portions of this setting [Rural Residential] visible from Key Viewing Areas, the following standards shall be employed to achieve *visual subordinance* . . .
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> (i) Except as is necessary for site development or safety purposes, the existing *tree cover screening* the development from Key Viewing Areas shall be retained.
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> (ii) At least half of any *trees planted* for screening purposes shall be species native to the setting or commonly found in the area.
>
> (iii) At least half of the *trees planted* form screening purposes shall be coniferous to provide winter screening.
>
> (iv) Structures' exteriors shall be dark and either natural or earth-tone *colors* . . . [MCC 38.7035(C)(3)(c)]

These color, reflectivity and landscaping provisions seek to make development visually subordinate. Hence, we believe that the color, reflectivity and landscaping provisions of MCC § 38.7035, referenced in MCC § 38.0030(B)(1), should be applied to achieve visual subordinance. We note that

the Multnomah County Planning Department found that in this case, applying the color, reflectivity, and landscaping provisions alone would not achieve visual subordinance. Rec. 94. We do not decide whether Multnomah County is correct in this finding, but this finding raises the point to us that we cannot interpret MCC § 38.0030(B)(1) so absolutely as to require the impossible. In some cases, an in-kind replacement, which by definition is the same size and height, and built at the same location, cannot be made visually subordinate using the color, reflectivity, and landscaping tools alone. Thus we must qualify our interpretation of MCC § 38.0030(B)(1) to mean that the color, reflectivity and landscaping provisions must be applied to achieve visual subordinance to the maximum extent practicable.

This interpretation respects the general directive of the color, reflectivity, and landscaping provisions, while recognizing that visual subordinance may not be possible with all in-kind replacements without the use of the other tools (siting, size, shape, height, and other factors) that must be considered for new development. This interpretation is also consistent with how the several other counties in the Scenic Area have already been applying their equivalents of MCC § 38.0030(B)(1). FOCG Br. at 11.

We do not believe that the landscaping shown on the proposed site plan (Rec. 165) demonstrates compliance with the landscaping requirements of MCC § 38.0030(B)(1) and MCC § 38.7035.[6]

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[6] While our deliberations focused on the landscape aspect of this decision, we did not decide that the color and reflectivity of the structure was correct. Friends of the Columbia Gorge stated that the proposed replacement dwelling, while in-kind, would have greater impacts to scenic resources that the original dwelling, noting *inter alia* that the amount of glass on the north side of the original dwelling

Other Argument Presented

At the hearing, Multnomah County argued that Friends of the Columbia Gorge assigned as error only that Multnomah County did not use the correct standard, but did not assign as error the standard that Multnomah County actually used. We first must restate that the issue before us was not what standard applies—Friends of the Columbia Gorge and Multnomah County agree that MCC § 38.0030(B)(1) applies. Rather, the issue is the interpretation of MCC § 38.0030(B)(1)—i.e., the extent to which it requires the color, reflectivity, and landscaping provisions of MCC § 38.7035 to be applied. Multnomah County's fine distinction in its argument is not compelling in this situation. Because we have interpreted MCC § 38.0030(B)(1) to mean that the color, reflectivity, and landscaping provisions of MCC § 38.7035 must be applied to achieve visual subordinance to the maximum extent practicable in this case, and because we have found that Multnomah County did not apply MCC § 38.0030(B)(1) in that manner, we necessarily must conclude that Multnomah County's interpretation of MCC § 38.0030(B)(1) and MCC § 38.7035 was erroneous.

For the reasons stated in this Final Opinion and Order, we conclude that Multnomah County did not properly construe MCC § 38.0030(B)(1). We thus REMAND the decision back to Multnomah County to apply MCC § 38.0030(B)(1)

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was approximately 15%, whereas the amount of glass on the north side of the replacement dwelling is proposed to be approximately 40%. FOCG Br. at 3.

in a manner that uses the color, reflectivity, and landscaping provisions of MCC § 38.7035 to achieve visual subordinance to the maximum extent practicable.

IT IS SO ORDERED.

DATED this 9th day of July 2002.

Anne W. Squier
Chair

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.