BEFORE THE COLUMBIA RIVER GORGE COMMISSION

JOSEPH A. BACUS and SANDRA BACUS, Appellants, vs. SKAMANIA COUNTY, a Washington County, Respondent.	)	CRGC No. COA-S-04-01 **FINAL OPINION AND ORDER**

This case involves an appeal by Joseph and Sandra Bacus of a decision by Skamania County approving a single family dwelling. Appellants, Joseph and Sandra Bacus contested approval of the dwelling. The Columbia River Gorge Commission met on June 8, 2004 to hear oral argument and deliberate to a decision. We remand.

I. PARTIES

The parties to this matter are:[1]

Joseph and Sandra Bacus, appearing pro se
Skamania County, represented by Peter Banks, Prosecuting Attorney

[1] The applicant/landowner was not a party to this matter. He filed a late motion to intervene in the appeal, which the Chair of the Gorge Commission denied. *See* Order Denying Motion to Intervene (March 9, 2004).

II. PRELIMINARY ISSUES

Disclosure of *Ex Parte* Communication

1. The Chair of the Gorge Commission, Anne Squier, noted for the record that some of the issues presented in this appeal were similar to arguments presented in an earlier appeal involving the same parties (*Bacus v. Skamania County and Andersen*, COA-S-01-04 (June 19, 2002), and that Mr. Bacus appeared before the Commission during the public comment segments of the March 2001 and April 2001 Gorge Commission meetings to discuss the fill, which is an issue raised in this appeal. Chair Squier noted that the Commission did not take any action at the March and April 2001 meetings involving the matters that are the subject of this appeal. No person raised any concerns or objections about these contacts.

2. Commissioner Doug Crow noted for the record that he was acquainted with Mr. Bacus and stated that he has not discussed this case with Mr. Bacus. No person raised any concerns or objections about Commissioner Crow's participation in this matter.

3. Commissioner Walt Loehrke also noted for the record that he was personally and professionally acquainted with the Bacuses and stated that he has not discussed this case with them. No person raised any concerns or objections about Commissioner Loehrke's participation in this matter.

Exhibits

Skamania County objected to the five documents that Mr. and Mrs. Bacus attached to their brief. Mr. Banks argued that the first four documents were not

part of the record before the Board of Adjustment and thus were not part of the record on appeal to the Gorge Commission. Mr. Banks argued that the last document, a copy of the Board of Adjustment's decision, which is a part of the record, contains handwritten notes, which are not part of the record.

The first four exhibits are excerpts from public documents. Mr. Bacus identified the documents to the Commission. He stated that the Planning Department referred to the first document at the hearing before the Board of Adjustment, and that he referred to the second, third, and fourth documents in his briefing to the Board of Adjustment. The Chair of the Commission allowed these documents. The Chair ruled that the last document was inadmissible because the handwritten notes are not part of the record and instructed that the Commission should not consider the document. The same document without the handwritten notes is contained in the record at pages GC-11–GC-17.

Mr. Bacus also requested that the Commission receive a written summary of his oral argument. The Chair of the Commission denied this request.

The Commission permitted Mr. Bacus to use an enlargement of Exhibit 8 for illustrative purposes.

Failure to Object to Findings and Conclusions

Skamania County argued that the Bacuses failed to object to the Board of Adjustment's findings and conclusions, and thus under Washington law, they are considered verities on appeal. The Chair ruled that Bacus' assignments of error sufficiently objected to the Boards' findings and conclusions even without specifying the findings and conclusions by number.

Rulings on Other Objections and Motions

All rulings made on objections and motions during the hearing are hereby affirmed. Any objections or motions not ruled upon during the hearing are hereby overruled.

Hearing Procedure

The Chair noted that this was the first appeal hearing under the Commission's new appeal rules (effective August 1, 2003). The new procedure allows Commissioners to ask questions prior to oral argument, gives parties 20 minutes uninterrupted by questions, and then allows the Commission to ask questions of the parties, with each party allowed two minutes to answer each post-argument question. The Commission adhered to this procedure and these time constraints.

III. STANDARD OF REVIEW

The issues presented are primarily legal in nature. Our review focuses on whether the decision violates a provision of applicable law and is prohibited as a matter of law (Commission Rule 350-60-220(1)(c)), whether the decision improperly construes the applicable law based on the record before us (350-60-220(1)(h), or whether the decision is flawed by procedural errors that prejudice the substantial rights of the appellants (350-60-220(1)(g)).

IV. FACTS

The material facts of this case are not in dispute. Because the appellant presented 12 assignments of error, we give the material facts concerning each assignment of error with our discussion of the assignments of error.

V. ANALYSIS OF ASSIGNMENTS OF ERROR

We do not repeat the appellants' 12 assignments of error here. The assignments of error can be categorized into five main issues:

1. Was the *de novo* hearing adequate? [Assignment of Error 1]
2. Did Skamania County properly consider whether the subject lot was legally created pursuant to SCC 22.08.090-B.1.a? [Assignments of Error 2, 5, 6, 7, 8, 9, 10]
3. Did the Skamania County commit procedural errors? [Assignments of Error 3, 12]
4. Should Skamania County be defending its decision when the applicant has stated that he does not intend to build the approved dwelling? [Assignment of Error 4]
5. Can the existing highway demolition spoils be used for site development? [Assignment of Error 11]

Was the *de novo* hearing adequate? [Assignment of Error 1]

Facts and Arguments of the Parties: Mr. and Mrs. Bacus claim that they were denied an opportunity for a *de novo* hearing as required by the Skamania County Code. SCC 22.06.060.C.1. They argue that Board of Adjustment did not permit them to make all of their legal arguments. In support of this, they point out three particular issues: (1) the Chair of the Board of Adjustment stated, "it is not the Board's job to decide the legalities" (Rec. GC-26); (2) the Chair of the Board erroneously disallowed rebuttal on an issue that was raised (Rec.GC-25); and, (3) and Board Member Shissler stated that they

had to provide "extremely convincing evidence" to overturn the Director's decision (Rec. GC-26).

Skamania County does not dispute these three statements, but argues that they are not procedural errors. Skamania County argues that the Board of Adjustment limited all persons' testimony to 15 minutes, that Mr. and Mrs. Bacus each spoke for 15 minutes, giving them a total of 30 minutes, and that Board Member Shissler's comments were directed at the argument by Mr. Bacus that the short plat was invalid, not the merits of the subject application. Skamania County did not address the Chair's comments.

Analysis: The standard of review for this assignment of error is whether the decision is flawed by procedural errors that prejudice the substantial rights of the appellants. Commission Rule 350-60-220(1)(g). We are concerned about the issues that the Bacuses raised, but conclude that their substantial rights were not prejudiced.

To hold a *de novo* hearing, the Board of Adjustment is supposed to hear the matter anew as if it had not been heard before. This typically means that the parties may submit new evidence and that the burden remains with the applicant to demonstrate that the application is consistent with the applicable standards. It is the Board of Adjustment's job to decide whether the application meets the standards, which necessarily involves making both factual and legal determinations.

First, the Chair of the Board of Adjustment's broad statement "it is not the Board's job to decide the legalities" is incorrect. However, in this case, the Board

of Adjustment did decide the legal issue presented—whether the subject lot was legally created. The Board Chair's statement, while technically incorrect, is not itself a procedural error that prejudiced the Bacus' substantial rights, when the Board did decide the legal issue in the case.

Second, Board Member Shissler's statement that the Bacuses had to provide "extremely convincing evidence" to overturn the Director's decision is also technically incorrect. While an appellant may introduce evidence tending to disprove that the application meets the applicable standards, it is the applicant who must continue to prove that the application meets all applicable standards to prevail. For example, the Oregon Land Use Board of Appeals recently addressed the burden of proof issue:

> It is one thing to weigh conflicting evidence, and choose which evidence to believe. It is another to explicitly reject proffered evidence, apparently *without* weighing that evidence against the record, because the local government deems the proponent of that evidence to have failed a nonexistent burden of proof to produce a particular kind of evidence. * * * Here, while the county's findings *can* be read as intervenors suggest, to weigh and choose among conflicting evidence, the findings explicitly impose a burden on the opponents to produce a particular kind of evidence

Stahl v. Tillamook County, 43 Or LUBA 518, 528 (2003). LUBA remanded that case back to the County to apply the correct standard. In this case, however, Board Member Shissler's statement could be interpreted as attempting to weigh the conflicting evidence presented at the hearing. As well, the County's findings did not impose a burden on the Bacuses to produce "extremely convincing evidence." For these reasons, we do not believe that the Bacus' substantial rights were prejudiced by this statement.

Third, the record does demonstrate that the Board of Adjustment improperly ruled that the Bacuses were not permitted to offer rebuttal testimony on the slope of the driveway (Rec. GC-25), which the applicant discussed in his testimony (Rec. GC-24). However, because the Bacuses did not raise the slope of the driveway as an assignment of error here, we find they were not prejudiced by this procedural error.

Finally, we agree with Skamania County that it may limit the time permitted to give oral testimony. This is especially so because parties were permitted to submit written testimony as well. One member of the Gorge Commission asked Mr. Bacus what other information he would have put in the record if he had been allowed more time. Mr. Bacus did not respond with specific information that he could not introduce due to the time constraint. In this case, 15 minutes was a sufficient amount of time; however, we caution that counties must not set time limits that prevent a party from presenting all relevant facts and arguments in a *de novo* hearing; in many cases, 15 minutes may not be enough time.

We recognize that Skamania County's hearing did contain procedural errors, some of which may be avoided in the future by notifying the parties of the hearing procedure and burdens, and strictly adhering to them. However, for the reasons described, we do not find that those errors prejudiced the Bacuses, and thus we deny assignment of error no. 1.

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Did Skamania County properly consider whether the subject lot was legally created pursuant to SCC 22.08.090-B.1.a? [Assignments of Error 2, 5, 6, 7, 8, 9, 10]

Facts and Arguments of the Parties: In Assignment of Error No. 2, the Bacuses argue that Skamania County failed to analyze whether lot 2 was "legally created" before approving the dwelling pursuant to SCC 22.08.090-B.1.a, which allows "one dwelling per legally created parcel". They offered several arguments why lot 2 was not legally created (contained in assignments of error 5–10) that they claim Skamania County ignored. The Bacuses raised these issues several times throughout the permitting and appeal processes (Rec. 153–57, 73-80, GC-36–GC-52). Skamania County determined that lot 2 was legally created because it was created by short plat that was not appealed and thus became final (Rec. GC-14).

Analysis: Our analysis starts with the text of the provision before us. SCC § 22.08.090-B.1 states,

> The following uses may be allowed in all residential zones, subject to review by the Director for compliance with all other applicable provisions of this Title.
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> a) One single-family dwelling per legally created parcel. * * *"

This provision is clear and unambiguous. The legality of the lot is an approval criterion for allowing a single-family dwelling. This criterion ensures that illegal lots are not granted the benefit of a dwelling. Hence, the legality of the subject lot must be evaluated as part of approving a residence.

Here, the subject lot was created through a formal governmental process. This is important because we draw a distinction between lots that were created

through a prior governmental approval and lots that were created without governmental approval but required approval at the time of creation. While the latter situation clearly results in a lot that was not legally created, that is not the situation here. Where, as here, a lot was created through a governmental approval, we presume that the lot was legally created. We do not believe Skamania County was required to explore the substantive correctness of the approval creating the subject lot.

While we are not bound by the states laws, we note this decision is consistent with at least one Oregon Court of Appeals decision, *McKay Creek Valley Ass'n v. Washington County*, 118 Or. App. 543, 549, 848 P.2d 624 (1993). In upholding a decision by the Land Use Board of Appeals, the Oregon Court of Appeals stated:

> LUBA drew a distinction here between prior governmental approvals and the substantive correctness of those approvals, and indicated that the existence of the former could be re-explored in connection with subsequent applications, while the latter question could not be.

We are not aware of any Washington court case that also answers this question so directly. At the hearing before the Board of Adjustment, the applicant cited to *Chelan County v. Nykreim*, 146 Wash.2d, 904, 52 P.3d 1 (2002) for the proposition that lot 2 has become "final." Skamania County cited this case to us too in this matter. Our decision here is consistent with the *Nykreim* court's general discussion of the need for finality; however, we note that the primary issue in *Nykreim* involves the applicability of the Washington Land Use Petition Act, which is not applicable in the National Scenic Area.

Having decided that Skamania County is not required to explore the substantive correctness of the governmental approval creating the subject lot, we turn to the Bacus' fifth through tenth assignments of error. These assignments of error are (in summary form):

5. Skamania County did not properly repeal its pre-Scenic Area zoning, and thus that zoning still exists. The subject lot cannot be developed under Skamania County's pre-Scenic Area zoning because it is too narrow in size.

6. Skamania County erred in how it approved the creation of the subject lot. They argue that Skamania County approved the lot through a "short plat" process, when it should have been approved through a "subdivision" process.

7. The initial short plat violated health requirements relating to sewage disposal and potable water when it was created.

8. Lot 1 of the short plat (lot 1 is not the subject lot) violated minimum parcel size and access requirements contained in the prior county code.

9. The apparent easement creating Patricia Road (which provides access to the subject lot) was not validly created and thus there is no access to and from the subject lot.

10. The Short Plat was not supported by a SEPA determination.

Each of these assignments of error relates to the substantive correctness of Skamania County's approval of the short plat that created the subject lot. Because the County need not re-open these issues, the County did not err when it did not consider these points in determining whether the subject lot was legally created.

Our decision here does not mean that once a lot is created through a governmental approval, it is to be considered legal in perpetuity. For example other applicable law or a violation of a condition of the lot's approval may lead to

the conclusion that the lot is no longer legal, or that a defect must be corrected before the lot is considered legal. The Bacuses argued only issues relating to the initial approval of the short plat creating lot 2, not to, for example, other applicable law that makes the lot illegal at this time or that the subject lot violates any condition of approval applicable after recording of the subdivision.

For these reasons, we deny Assignment of Error No. 2, and accordingly, we also deny Assignments of Error 5 through 10.

Did the Skamania County commit procedural errors? [Assignments of Error 3, 12]

Facts and Arguments of the Parties: Mr. and Mrs. Bacus argue that Skamania County erred by sending the Notice of Development Review prior to having a complete application. They argue that the application did not have a final grading plan or a selection of exterior colors when public notice was sent. They also argue that Skamania County failed to consult with WDFW as required because the development will be within 1000 feet of the Columbia River, which contains sensitive wildlife resources.

Skamania County argues that the application was materially complete when the notice of development review was sent and that all of the materials were complete before the county issued its decision. The County also argues that it was not required to consult because the resource inventory maps did not show a wildlife site within 1000 feet, and that even though not required, it did consult with WDFW prior to the hearing before the Board of Adjustment.

Facts Relating to Grading Plan: Skamania County initially sent a notice of the application without having the required grading plan (Rec. 185–90).

However, after public comment revealed this error (Rec. 151–84), the county required the applicant to submit a grading plan (Rec. 142–48). The county rejected the first draft of a grading plan (Rec. 133–44) and the applicant submitted a revised grading plan (Rec. 126-32). The County then sent another notice of the application (Rec. 112–16). Public comment noted that the grading plan was still incomplete because it was missing the 5-foot contour lines (Rec. 70–71). The applicant submitted at least two more revisions to the grading plan before Skamania County accepted it. Only then did Skamania County issue its decision on the application.

Analysis: This assignment of error does not allege that Skamania County did not have a complete application at the time it approved the application. To the contrary, Skamania County worked hard with the applicant to ensure a complete grading plan. This assignment of error alleges that Skamania County needed to have a complete application prior to sending notice of the application and seeking public comment. In this case, however, the only missing information in the grading plan was the 5-foot contour intervals. While these intervals are important to show, the record demonstrates to us that Skamania County reasonably believed that the grading plan was complete when it sent the second notice seeking public comment; hence, we do not find that Skamania County committed a procedural error with respect to the grading plan.

Facts Relating to the Color Sample: The record is clear that the Director did not have any color sample at the time she sent notice of the application and sought pubic comment. At no time during the Director's review, did the

application contain any color sample or information. The record gives some indication of how this may have occurred. The original application was for an access road. *See* Rec. 220, which states, "This application is primarily to put in easement and prepare lot for future homesite." At some point (the record is not clear), the application came to include the single family dwelling.[2]

Analysis: Technically, the Director should not have sent notice of the application until the applicant submitted a color sample. Here, the applicant provided a color sample at the Board of Adjustment hearing.

Additionally, the record does not indicate and the parties do not argue that the Bacuses attempted to view the grading plan or color samples prior to submitting comment, and no assignment of error was raised that the color approved was inappropriate. The material that Skamania County had at the time it sent notice and sought public comment was thus complete enough for the Bacuses to sufficiently understand what was being proposed to enable them to provide detailed substantive comments about the issues that concerned them. In this sense, the Bacuses were not prejudiced.

Facts Relating to Consultation with WDFW: SCC 22.16.010-B requires that proposed development within 1000 feet of a sensitive wildlife site must be reviewed by the Washington Department of Fish and Wildlife. Wildlife Habitat GMA Goal 1 in the Management Plan specifically defines "Sensitive wildlife site":

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[2] *See* Rec. 216, a letter from Mark Mazeski to Stan Andersen, which indicates that the subject application, "includes a request for approval for a 30' x 40' single family home with attached garage and clearing and grading for the homesite and access driveway."

> 'Sensitive wildlife sites' is used here in a generic sense to refer to sites that are used by species that are (1) listed as endangered or threatened pursuant to federal or state endangered species acts, * * *

Management Plan at I-103.

Skamania County admitted that it did not formally consult with WDFW because no specific site is shown within 1000 feet of the development (Rec. GC-70). The record indicates that Skamania County discussed the application with WDFW, outside of the formal consultation requirement. *Id.* WDFW did not express concern about the application during that discussion.

Analysis: As defined, "sensitive wildlife site" is not limited to only those sites that are shown on the inventory maps that the Commission originally transmitted to the counties in 1994. The definition of "sensitive wildlife sites" recognizes that existing sites may expand, contract or become totally inactive, and that new sites may become active. Skamania County's argument, therefore, that it did not need to consult with WDFW because no site was shown on the Commission's inventory map is incorrect. Here, the proposed development would be located within 1000 feet of the Columbia River, which is used by several species that are listed as threatened or endangered pursuant to the federal and states endangered species acts. As such, the County should have consulted with WDFW.[3]

In this case, Skamania County's informal discussion with WDFW, combined with WDFW not expressing any concern about the application, was

[3] We do not address the question of how Skamania County is to know this in other cases. In this case, the salmonid listings are common knowledge.

sufficient despite the lack of specific findings and conclusions concerning compliance with the consultation requirement.

We thus deny Assignments of Error 3 and 12.

Should Skamania County be defending its decision when the applicant has stated that he does not intend to build the approved dwelling? [Assignment of Error 4]

In this argument, Mr. and Mrs. Bacus claim the County exceeded its jurisdiction by defending the appeal after the applicant stated that he did not intend to construct the approved dwelling.[4] They argue that the applicant's statement removes any case or controversy at this time because their appeal is aimed at achieving the same result.

Skamania County responded that the case or controversy issue is a requirement for court cases filed in federal court, not in this administrative action.

Land use approvals for a dwelling typically run with the land and are transferable. While this applicant may not have any intention of constructing the approved dwelling, another person may be able to use the approval to construct the dwelling. This allows one person to receive an approval and then market the property as approved for construction. Skamania County did not err in defending this appeal; thus we deny this assignment of error.[5]

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[4] *See* App. Br. 27. Appellants point out that this statement is contained on the audio recording of the hearing, but is not in the written minutes. Skamania County does not dispute this, so we accept this fact as true.

[5] During the Commission's deliberations, Mr. Bacus stated that he wished to withdraw this assignment of error. Because we did not receive this withdrawal until after all written and oral argument had been submitted, we believe we must address should the issue.

Can the existing highway demolition spoils be used for site development? [Assignment of Error 11]

Facts and Arguments of the Parties: Mr. and Mrs. Bacus argue that the existing highway demolition spoils that were placed on the property in the mid 1990s may not be used to develop the subject parcel in the Scenic Area because it contains asphalt pieces up to 1 square foot. They point to the definition of fill, which states that fill is sand, sediment, or other earth materials (SCC 22.04.010-59).

Skamania County responded that neither the applicant nor the county staff stated that the highway demolition spoils will be used. The applicant stated that the application was silent as to where the fill would come from, and the Planning Director stated that there was some general discussion about it. Skamania County argued that there is no finding of fact allowing asphalt to be used, and that if the wrong fill is used, it becomes an enforcement action.

The record shows that the Washington Department of Transportation placed these highway demolition spoils on Mr. Andersen's property in 1994 without a permit. A subsequent Southwest Washington Health District enforcement action resulted in the material being screened to remove all pieces greater than 1 square foot. *See* Rec. 193–212.

Upon review of the record, the Commission disagrees with Skamania County that the application is silent about whether the spoils may be used. Two documents in the record establish that the applicant intends to use the spoils for road and site construction. The first document is a letter from the landowner stating that he intends to use the fill (Rec. 198). The second document is the

narrative for the grading plan, which states that the fill for the driveway will come from the highway demolition spoils) (Rec. 17).

Analysis: Based upon the record, we find that the applicant has included the use of the spoils as part of his application. Next, we must evaluate whether the spoils may properly be used. The definition of "fill" states:

> "FILL" means the placement deposition or stockpiling of sand, sediment or other earth materials to create new uplands or creat an elevation above the existing surface.

SCC § 22.04.010.59.

Because the spoils contain pieces of asphalt, up to 1 foot in diameter, the spoils are not "sand, sediment, or other earth materials" and thus do not meet the definition of "fill." As such, the applicant may not use the spoils for site development. Skamania County erred in approving the proposed development, which would use the highway demolition spoils. We therefore remand the matter back to Skamania County to re-evaluate the development specifically disallowing the use of the spoils. We do not address whether our decision requires the landowner to remove the spoils from his property at this time because we may need to address removal specifically in a future proceeding. We grant this Assignment of Error.

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The decision of the Skamania County Board of Adjustment is

REMANDED.

DATED this 10th day of ~~July~~ August, 2004

Anne W. Squier
Chair
Columbia River Gorge Commission

NOTICE: You are entitled to seek judicial review of this Final Order within 60 days from the date of service of this order, pursuant to section 15(b)(4) of the Scenic Area Act, P.L. 99-663.

CERTIFICATE OF SERVICE

I hereby certify that on the 11th day of August 2004, I served a true and correct copy of the foregoing FINAL OPINION AND ORDER by first class mail, postage prepaid to the following persons:

Joseph A. and Sandra Bacus
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Nancy A. Andring
Administrative Secretary