

BEFORE THE COLUMBIA RIVER GORGE COMMISSION

In the matter of an appeal of Development)
Review Decision No. C19-0004 (Modified)) **FINAL OPINION AND ORDER**
by Friends of the Columbia Gorge)
_____)

The Columbia River Gorge Commission met on February 11, 2020 to hear oral argument and hold a public hearing on Friends of the Columbia Gorge’s appeal of the Executive Director’s Development Review Decision No. C19-0004 (Modified). Having considered the administrative record, the testimony and evidence submitted at the hearing, and the legal arguments by the parties, the Commission made no revisions to the decision of the Executive Director. At the conclusion of the hearing, the Gorge Commission deliberated and voted 8-3¹ to deny all assignments of error and adopt the decision of the Executive Director as its decision in this matter.

Record Before the Commission

Prior to the hearing, the Commission received the following documents:

1. A staff report;
2. The appellant’s brief and attachments.
3. Notice of Hearing;
4. Record of the Executive Director’s Decision;
5. Fowler Brief in Advance of February 11, 2019 Appeal Hearing (dated February 5, 2019).

¹ Commissioner Bridget Bailey did not participate in the hearing or decision. Commissioner Burditt is a non-voting ex-officio member.

At the hearing, the Commission viewed slide presentations from staff, Appellant Friends of the Columbia Gorge, and Charles and Valerie Fowler. The slides are part of the record. In addition to each party's slides, the Commission received the following documents at the hearing:

From Friends of the Columbia Gorge:

- Appellant's Exhibit 1 – list of assignments of error
- Appellant's Exhibit 2 – packet of slides
- Appellant's Exhibit 3 – Hood River News, The Dalles Chronicle, "Cruise ships cut economic wake" (undated)
- Appellant's Exhibit 4 – Ponderosa Pine Characteristics

From Charles and Valerie Fowler:

- three 11x17 photos (enlargements of images on slide 7)

Public Comment:

- Email from Barbara Robinson to Krystyna Wolniakowski (Feb. 11, 2020, 12:39 a.m. PST)

Hearing Fairness and Disclosures

At the beginning of the hearing, the Chair of the Commission asked members of the Commission to disclose any potential or actual conflicts of interest, potential bias, appearance of fairness concerns, and *ex parte* communications.

Commissioner Bowen Blair disclosed that he was Executive Director of Friends of the Columbia Gorge from 1982 to 1988 and was a board member of and donor to Friends of the Columbia Gorge from 1988 to March 2011 and was Board Chair for part of that time and was a board member for Friends of the Columbia Gorge Land Trust for part of that time. He was a staff member and officer of Trust for Public Lands from 1989 to 2010. The Trust for Public Lands acquired land near the property and across river, most of which predated his involvement with the Trust for Public Lands. All the above activities predated his appointment to the Gorge

Commission. Commissioner Blair also stated that knows Jurgen Hess and may have briefly served with him on the Board of Friends of the Columbia Gorge Land Trust. Commissioner Blair stated that he is confident he can be fair and impartial in the proceeding.

Commissioner Lynn Burditt disclosed that she is the Area Manager for the U.S. Forest Service, National Scenic Area office. She stated that her office provides staffing assistance to the Commission and counties and her staff submitted comments that were used by the Commission staff in analyzing the matter and making a decision. She also knows Jurgen Hess, who worked for the U.S. Forest Service. She stated that she is a non-voting member and that she can be fair and impartial in her participation in the deliberations.

Commission Chair Robert Liberty disclosed that he served on the Board of Directors for Friends of the Columbia Gorge in the late 1980s. Until recently, he paid dues of approximately \$35 per year to Friends of the Columbia Gorge. He was a land use hearings officer for Multnomah County and believes he can be fair and impartial.

Commission Vice-Chair Rodger Nichols disclosed that he knows Jurgen Hess and stated that it will not influence his decision.

The Chair of the Commission asked whether any person had questions of commissioners or concerns about a commissioner's participation in the hearing. No person asked any question or challenged any commissioner's participation.

Background

The subject parcel is off Old Highway 8, between White Salmon and Lyle, east of the Catherine Creek recreation area, more specifically east of and adjacent to Major Creek in Klickitat County, Washington. It is 56 acres in size. The applicants, Charles and Valerie Fowler, purchased the parcel in 2016. At the time they purchased the parcel, the parcel

contained a single-family dwelling in a dense grove of trees in the northwest corner of the parcel that predated the National Scenic Area Act, a barn approved by the Gorge Commission in 1999 located east and a little north of the dwelling, an access road from the south end of the parcel, driveway and parking area, two sheds, a rock wall, and a water reservoir. That same year, the Fowlers discussed with Commission staff their plans to replace the existing dwelling and plant a vineyard.

In early 2017, Mr. and Ms. Fowler applied for National Scenic Area approval to construct their vineyard. Over the next several months, Mr. and Mrs. Fowler, together with staff of the Gorge Commission, the Washington Department of Fish and Wildlife and U.S. Forest Service, developed wildlife and plant mitigation plans for the vineyard project. The Executive Director approved the vineyard. Mr. and Mrs. Fowler planted the vineyard and followed through with the mitigation plans and reported progress along the way to staff. The vineyard is 16-acres in size and is located east and south of the existing dwelling.

In February 2018, Mr. and Ms. Fowler applied to replace the existing dwelling with a new dwelling. They proposed to locate the dwelling immediately north and east of the newly established vineyard rows in the western of the two vineyard blocks. Mr. and Mrs. Fowler, together with Commission staff, and Underwood Conservation District staff developed an agricultural rehabilitation plan to ensure that no viable agricultural land would be lost by the proposed dwelling. The plan included rehabilitating the site of the existing dwelling for use as grazing land and Mr. and Mrs. Fowler's application stated they intend to raise sheep there. The Executive Director approved the application; however, shortly after issuing the approval, staff discovered that it made a mistake—that the new dwelling would protrude above the skyline as

seen from a section of Old Highway 8, which is a key viewing area, in violation of Commission Rule 350-81-530(2)(h)—and the Executive Director withdrew the decision.

Staff worked with Mr. and Mrs. Fowler to evaluate several other sites on the parcel where the house might be sited so that it would not protrude above the skyline. Mr. and Mrs. Fowler proposed a site just west of the originally proposed site. At the time, Mr. and Mrs. Fowler and staff recognized the proposed house design at this site would protrude above the skyline. To address this issue, the Fowlers proposed planting mature evergreen trees behind the proposed dwelling, to create a skyline out of these trees.

Staff considered that proposal but was unable to find precedent where an applicant had been allowed to plant trees in order to comply with the guideline. Staff understands the guideline to require review of the application based on what exists on the parcel. Mr. and Mrs. Fowler withdrew their application and told staff they might submit a new application the following year after the trees were established.

In early 2019, Mr. and Mrs. Fowler submitted a new application for a smaller home 4,242 square feet versus 4,362 square feet applied for in the 2018 application and 15 to 26 feet in height versus 20 to 29 feet in height applied for in the 2018 application. The location of the home proposed in 2019 was slightly east of their first proposed location. Again, staff determined that the proposed dwelling would protrude above the skyline as seen from the Old Highway 8 Key Viewing Area. In February 2019, the Executive Director approved the application with a condition of approval requiring the Fowlers to construct the new dwelling at the location of the existing dwelling.

Mr. and Mrs. Fowler and Friends of the Columbia Gorge filed separate appeals of the Executive Director's decision. In June 2019, the Gorge Commission held a hearing on Mr. and

Mrs. Fowler's appeal. The evidence and testimony at the hearing revealed new information about the land and during the hearing, the Executive Director requested the Commission remand the decision back to the staff. The Commission did so, stating,

the Commission directs staff to work with Mr. and Mrs. Fowler and other interested parties, including Friends of the Columbia Gorge, to find an approvable design and location and directs the parties to consider all necessary design and location options. The Commission does not decide that Mr. and Mrs. Fowler's preferred location cannot work and does not decide that the Executive Director's approved location is the best or only place to locate a dwelling in compliance with the Commission's rules.

In re Appeal of C19-0004 by Charles and Valerie Fowler 7 (Sept. 5, 2019). Subsequently, Friends of the Columbia Gorge withdrew their appeal. On October 7, 2019, the Executive Director issued a new decision entitled, Modified Director's Decision Following Remand, which approved a home for Mr. and Mrs. Fowler.

The home approved in the Executive Director's October 2019 decision was in a similar location as the home Mr. and Mrs. Fowler proposed in their original application (the site the Executive Director approved in her withdrawn 2018 decision and rejected in her February 2019 decision). The October 2019 approved home is located approximately 40 feet east of the original location, has a flat roof design and uses a daylight basement that has been sunk into the ground five feet at the north wall of the home. The height of the home will be between 15 and 19 feet (approximately seven feet shorter at its highest point than the original application). The Executive Director concluded that these revisions to the home would ensure the home does not protrude above the skyline as seen from the Old Highway 8 Key Viewing Area. The Executive Director also concluded that the home would be sufficiently screened so that it would be visually subordinate as seen from key viewing areas.

Friends of the Columbia Gorge appealed the decision, principally arguing that the proposed dwelling would protrude above the skyline, the dwelling is not located in a site that minimizes modifications to landforms or loss of agricultural land, the dwelling improperly relies on planting new screening trees rather than using existing trees on the parcel, and the dwelling would not be visually subordinate. In response, Mr. and Mrs. Fowler argued that the proposed siting and flat roof design of the dwelling meet all of the guidelines in the Commission's Land Use Ordinance for Klickitat County, fulfill the intent of the National Scenic Area Act, and comply with and maximize the use of existing vegetation and topography on the parcel.

Decision of the Gorge Commission

After deliberation, the Commission voted to deny the appeal and approve Mr. and Mrs. Fowler's application as approved by the Executive Director.

The Appeal is DENIED. The decision of the Executive Director constitutes the findings of fact, conclusions of law, and the decision of the Columbia River Gorge Commission.

DATED this 9th day of March 2020.

s/ Robert Liberty _____
Robert Liberty
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, 16 USC § 544m(b)(4).

NOTICE OF MAILING

I certify that on March 9, 2020, I mailed the attached FINAL OPINION AND ORDER by electronic mail to the following persons, all of whom have indicated that they accept email service:

Charles and Valerie Fowler
Applicants and Appellants
cwfsleddog@aol.com
valerie.c.fowler@gmail.com

Gary K. Kahn
Steven D. McCoy
Attorneys for Friends of the Columbia Gorge
gkahn@rke-law.com
steve@gorgefriends.org

/s/ Connie Acker

Connie Acker
Administrative Analyst