BEFORE THE COLUMBIA RIVER GORGE COMMISSION

JODY AKERS, PAUL AKERS, DANNY GAUDREN, KATHEE GAUDREN, RACHEL GRICE, ZACHARY GRICE, GREG MISARTI, EDMOND MURRELL, KIMBERLY MURRELL, KIMI RITTER, WAYNE RITTER, RICHARD J. ROSS, KAREN STREETER, SEAN STREETER, and ELEANOR WARREN, Appellants, and FRIENDS OF THE COLUMBIA GORGE, Intervenor-Appellant, v. CLARK COUNTY, Respondent, and JUDITH ZIMMERLY, JERRY NUTTER, and NUTTER CORPORATION, Intervenors-Respondents.	CRGC No. COA-C-18-01 Clark County No. CDE2017-Z-1069(A) **CORRECTIONS TO FINAL OPINION AND ORDER**
FRIENDS OF THE COLUMBIA GORGE, Appellant,	CRGC No. COA-C-18-02 Clark County No. CDE2017-Z-1069(A)

and)
)
JODY AKERS, PAUL AKERS, DANNY)
GAUDREN, KATHEE GAUDREN, RACHEL)
GRICE, ZACHARY GRICE, GREG MISARTI,)
EDMOND MURRELL, KIMBERLY)
MURRELL, KIMI RITTER, WAYNE RITTER,)
RICHARD J. ROSS, KAREN STREETER,)
SEAN STREETER, and ELEANOR WARREN,)
)
Intervenors-Appellants,)
)
v.)
)
CLARK COUNTY,)
)
Respondent,)
)
and)
)
JUDITH ZIMMERLY, JERRY NUTTER, and)
NUTTER CORPORATION,)
)
Intervenors-Respondents.)
)

On October 16, 2019, the Gorge Commission issued its Final Opinion and Order in this matter. Subsequently, Friends of the Columbia Gorge sent an email to the Commission, copied to all parties, noting a possible typo on page 3, footnote 2 in the Final Opinion and Order. In reviewing the decision relating to this possible typo, the Commission agrees there is a typo and has also discovered three additional typo matters to correct. The following corrections are made to the Commission's Final Opinion and Order:

Page 3, footnote 2, second sentence: The reference to "Conclusion G.1" is changed to "Conclusion G.2."

Page 31: The reference to "Commission Rules 350-81-220(1)(c) and (f)" is changed to "Commission Rules 350-81-220(1)(d) and (f)."

Page 35, footnote 21: The word "topsoil" is changed to "fill." *See* Rec. 21, Hearings Examiner Finding D.4.h.ii (using term "fill"; the term "topsoil" does not appear in the Hearing Examiner's decision).

Page 40: The reference to "The May 18, 2019 Notice and Order" is changed to "The May 17, 2019 Notice and Order."

There is no new decision document or replacement pages accompanying this errata sheet.

IT IS SO ORDERED this 22nd day of October 2019.

Loretta S. DeKay

Loretta S. DeKay
Chair
Columbia River Gorge Commission

NOTICE OF MAILING

I certify that on October 22nd, 2019, I mailed the attached CORRECTIONS TO FINAL OPINION AND ORDER by electronic mail to the following persons, all of whom have indicated that they accept email service:

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This case involves two consolidated appeals[1] relating to a Clark County Hearings Examiner decision granting in part Judith Zimmerly, Jerry Nutter, and the Nutter Corporation's appeals of a Notice and Order from the Clark County Code Enforcement Coordinator and Director of Community Development. The Notice and Order alleged that Ms. Zimmerly and the Nutters were using land in the National Scenic Area for gravel mining operations in violation of Clark County's National Scenic Area code and other applicable code. Ms. Akers, et al. (neighbors of the gravel pit) and Friends of the Columbia Gorge appealed the Hearings Examiner's decision to the Columbia River Gorge Commission pursuant to 16 U.S.C. §

[1] In this consolidated proceeding, the parties prepared separate written briefs, but delivered one oral argument covering the assignments of error. The Commission held a single hearing.

544m(a)(2). The Gorge Commission met on August 13, 2019 to hear oral argument and deliberate to a decision. The Commission voted to conclude that Conclusion G.1 of the Clark County Hearings Examiner's decision that "Surface mining operations are allowed as an existing use on the Property pursuant to CCC 40.240.170.D(4). No County permits or approvals are required for this existing use" is arbitrary and capricious and improperly construes applicable law. The Commission thus reverses Decision H.1 of the Hearing Examiner's decision that "grant[ed] the appeal in part and dismiss[ed] that portion of N&O CDE2017-Z-1069(A) alleging violations of 250.022.E, 40.250.022.F(l), and 40.240.010.8 for conducting surface mining operations on the Property."[2]

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[2] Conclusion G.2 and Decisions H.1.b and H.2 were not appealed and thus this decision does not make findings or conclusions or any decision about them. Any reference to the Hearing Examiner's conclusions or decision that might be broad enough to include Conclusion G.1 and Decisions H.1.b. and H.2 are incidental.

I. PARTIES AND ATTORNEYS

The parties in the appeals are:

- Jody Akers, Paul Akers, Danny Gaudren, Kathee Gaudren, Rachel Grice, Zachary Grice, Greg Misarti, Edmond Murrell, Kimberly Murrell, Richard J. Ross, Karen Streeter, Sean Streeter, and Eleanor Warren, represented by Gary K. Kahn and Peggy Hennessy, Reeves Kahn Hennessy & Elkins, Portland, Oregon.
- Friends of the Columbia Gorge, represented by Nathan J. Baker, Senior Staff Attorney, Friends of the Columbia Gorge, Portland, Oregon.
- Clark County, represented by William Richardson, Deputy Prosecuting Attorney, Clark County Prosecuting Attorney's Office, Civil Division, Vancouver, Washington.
- Judith Zimmerly, represented by James D. Howsley and Armand Resto-Spotts, Jordan Ramis, PC, Vancouver, Washington.
- Jerry Nutter and Nutter Corporation, represented by Stephen W. Horenstein and Maren Calvert, Horenstein Law Group PLLC Vancouver, Washington.

This order refers to the parties as follows: "the neighbors," "Friends," "Clark County," "Ms. Zimmerly," and "the Nutters." This order also uses the term "Commission" to mean the Columbia River Gorge Commission and the term "National Scenic Area Act" to refer to the Columbia River Gorge National Scenic Area Act, 16 U.S.C. §§ 544 to 544p, or to a specific provision within that federal law.

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II. RECORD PRESENT BEFORE THE COMMISSION

The Commission's proceeding was on the record developed by Clark County. Clark County provided the record to the Commission in electronic form only. The parties raised several record objections. The Chair of the Commission resolved all record objections in prior orders and settled the record on December 21, 2018. Members of the Commission received an electronic copy of the settled record approximately two weeks prior to the hearing on motions to dismiss (discussed below), and again approximately two weeks prior to the hearing on the merits of the appeals. A copy of the record was present at both oral argument hearings.

If a party appeals this Final Opinion and Order, the Commission will transmit Clark County's record and the record of the Commission's proceeding (under separate cover) to the court in which the appeal is filed. If the court requires or requests a paper copy of the record, Clark County is responsible for supplying the paper copy of its record and the Commission is responsible for supplying the paper copy of the record of its proceeding. The Commission made an oral recording of each of its two oral arguments. The oral recordings are part of the record of the Commission's proceeding and are available to the parties for duplication and transcription.

At both hearings, all parties provided illustrative exhibits of portions of documents in the record or that summarized (with citations to the record) information in the record. No party objected to any of these illustrative exhibits and the Commission allowed and considered them. If a party appeals this Final Opinion and Order, the Commission will transmit these illustrative exhibits as part of the record of the Commission's proceeding.

III. PROCEDURAL MATTERS AND RULINGS

The Commission held two oral arguments in this matter. On April 9, 2019, the Commission held oral argument and deliberated to an oral decision on two motions to dismiss

the appeals, which Ms. Zimmerly and the Nutters filed. On August 13, 2019, the Commission held oral argument and deliberated to an oral decision on the merits of the appeals.

A. Disclosure of Conflicts of Interest and Ex Parte Communications

1. Disclosures Prior to Hearing on Motions to Dismiss

The Commission's Counsel provided a staff report to the Commission prior to the hearing on the motions to dismiss the appeals. The staff report listed several general disclosures relating to enforcement and the gravel pit at issue. The Commission provided a copy of the staff report to the parties approximately two weeks prior to the hearing on the motions to dismiss. None of the parties raised any concerns with the disclosures in the staff report. The staff report also noted that the parties could raise concerns or objections with the Commission's Counsel advising the Commission; no party raised any such concerns or objections. At oral argument, commissioners Bowen Blair, Robert Liberty, Bridget Bailey, Lynn Burditt, and Damon Webster made disclosures of past connections with the parties. Following the disclosures, the Chair announced that the parties could raise concerns with and challenge commissioners' participation in the hearing. No party raised concerns with or challenged any commissioner's participation.

2. Disclosures Prior to Hearing on Merits

The Commission's Counsel provided a second staff report to the Commission prior to the hearing on the merits of the appeals. The staff report listed and updated the same disclosures from the staff report for the hearing on the motions to dismiss and listed subsequent matters relating to enforcement and the gravel pit at issue. The Commission provided a copy of the staff report to the parties approximately two weeks prior to the hearing on the merits of the appeals. None of the parties raised any concerns with the disclosures in the staff report. The staff report also noted that the parties could raise concerns or objections with the Commission's Counsel

advising the Commission; no party raised any such concerns or objections. At oral argument, commissioners Bowen Blair, Robert Liberty, Bridget Bailey and Robin Grimwade,[3] made disclosures of past connections with the parties. Following the disclosures, the Chair announced that the parties could raise concerns with and challenge commissioners' participation in the hearing. Ms. Zimmerly's attorney stated that Ms. Zimmerly was preserving her ability under the Washington Land Use Petition Act, RCW 36.70C.120, to supplement the record later to raise issues related to disqualification and conflicts of interest. The Commission did not rule on this request at the hearing but notes here that the Land Use Petition Act (LUPA) does not apply to the Commission's proceeding because the Commission's proceeding is authorized and required by federal law, 16 U.S.C. § 544m(a)(2), and because LUPA specifies that it does not apply to this proceeding, RCW 36.70C.030(1)(a)(ii). The Nutters' attorney questioned Commissioner Bailey. No party challenged any commissioner's participation.

B. Hearing Procedure

1. Procedure for Hearing on Motions to Dismiss

The Commission issued a Notice of Hearing on March 7, 2019 for the April 13, 2019 hearing on the motions to dismiss the appeals. Commission Chair, Loretta DeKay, was the presiding officer at the April 13, 2019 hearing. The Chair reviewed the hearing procedure and announced that the parties could raise objections about the procedure or conduct of the hearing. No party raised any objections or concerns with the hearing process. The Commission adhered to the hearing procedure specified in the Notice of Hearing.

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[3] Commissioner Grimwade replaced Commissioner Webster on the Commission on July 1, 2019, between dates of the hearing on the motions to dismiss and the hearing on the merits of the appeals.

2. Procedure for Hearing on Merits

The Commission issued a Notice of Hearing on July 9, 2019 for the August 13, 2019 hearing on the merits of the appeals. On a stipulated motion from the parties to revise the procedure, the Commission issued a revised Notice of Hearing on July 24, 2019. Commission Chair, Loretta DeKay, was the presiding officer at the August 13, 2019 hearing. The Chair reviewed the hearing procedure and announced that the parties could raise objections about the procedure or conduct of the hearing. No party raised any objections or concerns with the hearing process. The Commission adhered to the hearing procedure specified in the Notice of Hearing.

C. Motions and Orders Prior to this Final Opinion and Order

The Chair issued several orders concerning briefing deadlines and other scheduling and procedural matters *sua sponte* and in response to parties' motions. The Chair issued these orders after allowing all parties an opportunity for oral objection or written briefing, except that the Chair denied Ms. Zimmerly and the Nutters' motion for reconsideration of the Commission's decision denying the motions to dismiss without waiting for responses to the motion because the motion was untimely pursuant to Commission Rule 350-60-230(1)(a).

The Commission heard argument on Ms. Zimmerly and the Nutters' motions to dismiss the appeals on April 9, 2019. On April 22, 2019, the Commission issued a brief order denying the motions and stated that this Final Opinion and Order would contain the Commission's reasoning for its decision. The Commission's reasoning is in section V of this Final Opinion and Order.[4]

[4] In response to the Commission's denial of the motions to dismiss, Ms. Zimmerly and the Nutters sought interlocutory relief by filing a *Petition for Judicial Review (16 U.S.C. § 544, National Scenic Area Act); Declaratory Relief (RCW 7.24); and Writs of Mandamus and Prohibition (RCW 7.16)* and a motion to stay the Commission's proceeding in Clark County

After the Commission's August 13, 2019 oral ruling on the merits, the neighbors and Friends filed a motion for a permanent injunction. Ms. Zimmerly and the Nutters responded. The Chair denied the motion in a separate order.

IV. FACTS

A. Clark County's Enforcement Proceeding

Ms. Zimmerly is the owner of the property at issue and the Nutters operate the gravel pit at issue on the property. On March 29, 2018, the Clark County Code Enforcement Coordinator and Director of Community Development issued a Notice and Order (an enforcement action) to Ms. Zimmerly and the Nutters. Rec. 1386–88. On May 17, 2018, the Coordinator and Director issued an Amended Notice and Order. Rec. 1389–91. References to the Notice and Order in this Final Opinion and Order are to the Amended Notice and Order. The Notice and Order alleged the following violations:

1. Failure to obtain required Clark County site plan and conditional use permits for surface mining operation and rock crushing in a Surface Mining Overlay District. This is a violation of Clark County Codes 40.250.022(E) and 40.250.022(F)(1).

2. Land alterations and surface mining activities within the Columbia River Gorge National Scenic Area without Clark County review and approval. This is a violation of Clark County Code 40.240.010(B).

Rec. 1389. Chapter 40.240 is Clark County's National Scenic Area Ordinance adopted pursuant to the National Scenic Area Act, 16 U.S.C. § 544e. On May 25, 2018, Ms. Zimmerly and the Nutters filed appeals of the Notice and Order pursuant to Clark County Code (CCC) § 32.08.040(1) and requested a hearing before the Hearings Examiner. Rec. 2321–25.

Superior Court. On July 19, 2019, the Clark County Superior Court orally denied the motion to stay the Commission's proceeding and issued its written order on August 19, 2019.

The neighbors and Friends filed notices of appearance in the Hearings Examiner's proceeding. Rec. 708, 709. Ms. Zimmerly responded to the notices of appearance by filing a Motion to Strike the Notices of Appearance, alleging that the neighbors and Friends did not have the right to participate in the enforcement hearing. Rec. 702–07. Relying on CCC § 32.08.040, Ms. Zimmerly contended that only those who appealed the Notice and Order and the Director had the right to participate. At the hearing, the Hearings Examiner heard argument on the motion to strike, and in a written order granted the motion to strike. Rec. 199-204.

The neighbors and Friends sought to submit their hearing brief as an amicus curiae brief, which the Hearings Examiner denied. Rec. 17–19. The Hearings Examiner allowed Clark County to enter into evidence as exhibits most of the evidence that the neighbors and Friends sought to introduce at the hearing. Rec. 19. In this appeal the neighbors and Friends assign error to the Hearings Examiner's decision granting Ms. Zimmerly and the Nutters' motion to strike.

Following the hearing, the Hearings Examiner concluded that Ms. Zimmerly and the Nutters had the necessary approvals to continue their gravel pit operations, except that they could not operate a rock crusher on site because that use had been lost through discontinuance and would require a new permit. Rec. 16–32. Ms. Zimmerly and the Nutters sought reconsideration of the Hearings Examiner's decision that rock crushing was discontinued and required a new permit. Rec. 7–15. The Hearings Examiner denied the motion for reconsideration. Rec. 2068–71. Ms. Zimmerly and the Nutters did not appeal the Hearings Examiner's decision.

B. Gorge Commission's Proceeding on Appeal

The neighbors and Friends filed separate timely appeals of the Hearings Examiner's decision to the Gorge Commission and the Gorge Commission consolidated them into a single appeal. Clark County filed timely notices of appearance; the neighbors and Friends filed timely

notices to intervene in each other's appeals; and Ms. Zimmerly and the Nutters filed timely motions to intervene in both appeals. The Chair of the Commission granted all interventions.

Ms. Zimmerly and the Nutters informed the Commission and other parties that they intended to file motions to dismiss the appeals. The Chair of the Commission set a briefing schedule and date for a hearing on the motions to dismiss. Following the parties' briefing and the hearing, the Commission denied the motions to dismiss the appeals as discussed in section V of this Final Opinion and Order. The Commission thus set a briefing schedule and oral argument to decide the merits of the appeal. Following the parties' briefing and oral argument to the Commission, the Commission granted the consolidated appeal in part and denied the consolidated appeal in part, as discussed in section VI of this Final Opinion and Order.

C. Material Substantive Facts

Washington Department of Natural Resources issued an operating permit for Ms. Zimmerly's gravel pit operation on February 1, 1972. Rec. 1050–55. Subsequently, in 1993, the Executive Director of the Gorge Commission issued a Development Review decision (the equivalent of a permit) for the then-current gravel pit operation and an expansion of the gravel pit to a total of 67 acres on the subject property. We note the Hearings Examiner erroneously stated that the mining activity was occurring on 123 acres. Rec. 22 (Finding of Fact D.9). The parties agree and the evidence in the record shows that mining was permitted for 67 acres.

The material substantive facts in this matter relate to whether that 1993 Development Review decision expired under its own terms through discontinuance of the gravel pit operations, or by the provisions of the Clark County National Scenic Area code. We especially note the following uncontested findings of fact in the Hearings Examiner's decision.

> h. No mining or other activities occurred on the Property between 2005 and 2015. Aggregate stockpiles remained on the Property. However the stockpiles and

> disturbed areas had revegetated with voluntary trees and grasses. (Exhibits 77, 78, 80, and 81–89).
> . . . .
> j. No mining occurred between August 2015 and January 2017. (Exhibits 90 and 91).

Findings D.4.h and j (Rec. 21) (internal footnote omitted). None of the parties assign error to these two findings. We are thus bound by these findings. These two uncontested findings form the basis of our legal conclusions and decision to reverse the Hearings Examiner's decision.

V. MOTIONS TO DISMISS

Ms. Zimmerly and the Nutters filed two motions to dismiss the appeals prior to briefing on the merits of the appeals. Ms. Zimmerly's motion argues that the Commission lacks jurisdiction to hear the appeals and that appellants lack standing to bring the appeals. The Nutters' motion argues that the appellants failed to comply with the Commission Rules in filing the notices of appeal. Ms. Zimmerly joined in the Nutters' motion and the Nutters joined in Ms. Zimmerly's motion. The neighbors responded to the Nutters' motion and Friends responded to Ms. Zimmerly's motion. Friends joined in the neighbors' response and the neighbors joined in Friends' response. Thus, all parties were a movant or respondent to both motions. The Commission issued a brief written order on April 22, 2019 denying the motions to dismiss and stating that the Final Opinion and Order would contain the Commission's reasoning. This section of the Final Opinion and Order is that reasoning.

A. Lack of Jurisdiction Argument

Ms. Zimmerly argues that the Commission does not have jurisdiction to hear appeals of Clark County code enforcement actions generally, including actions relating to the implementation of the Columbia River Gorge National Scenic Area Act, and that all appeals of

code enforcement actions must be appealed to Clark County Superior Court through Washington State's Land Use Petition Act (LUPA).

We start our analysis of this argument with a recitation of the various authorities related to the Commission's authority to hear appeals of county decisions in the National Scenic Area.

The National Scenic Area Act, 16 U.S.C. § 544m(a)(2), states:

> **(2) Appeal to the Commission**
> Any person or entity adversely affected by any final action or order of a county relating to the implementation of [the National Scenic Area Act] may appeal such action or order to the Commission . . . .

The Commission has previously interpreted this section of the National Scenic Area Act to authorize appeals of enforcement actions to the Commission in the *Management Plan for the Columbia River Gorge National Scenic Area*. Appeals to the Gorge Commission, Policy 2 (Mgmt. Plan IV-1-5) states:

> The Gorge Commission shall hear appeals of final enforcement actions relating to implementation of the Management Plan.

The National Scenic Area Act requires the Management Plan, 16 U.S.C. § 544d, and Clark County adopted its National Scenic Area Unified Development Code (chapter 40.240) pursuant to the National Scenic Area Act, 16 U.S.C. §§ 544e, 544f, which the Gorge Commission found to be consistent with the Management Plan. Thus, Clark County enforcement actions relating to violation of CCC chapter 40.240 are actions relating to the implementation of the Management Plan pursuant to Management Plan Policy 2 above and relating to the implementation of the National Scenic Area Act pursuant to 16 U.S.C. § 544m(a)(2).

Finally, Commission Rule 350-60-010 entitled "Authority" cites back to the Act; it does not further refine or interpret the Act. That rule states:

> The National Scenic Act authorizes appeals to the Gorge Commission by a person or entity adversely affected by a final action or order of a county.

Ms. Zimmerly makes two main arguments: (1) the meanings of the word "any" and the phrase "related to the implementation of [this Act]" in section 544m(a)(2) of the National Scenic Area Act are limited by other sections of the National Scenic Area Act, Washington State law, court decisions, and by the Commission's rules, and (2) the Clark County Code specifies appeals to state court not the Gorge Commission. These authorities, Ms. Zimmerly argues, require appeal of the Hearings Examiner decision to Clark County Superior Court through Washington State's Land Use Petition Act (LUPA).

Ms. Zimmerly's first argument in support of her lack of jurisdiction claim is that once the Gorge Commission approved Clark County's ordinance, it wholly delegated enforcement responsibilities to Clark County and retained no appellate jurisdiction over those actions. Ms. Zimmerly argues that 16 U.S.C. § 544e (the section of the National Scenic Area Act requiring the counties to adopt National Scenic Area ordinances and for the Commission to approve the ordinances) is best interpreted to mean that once the Commission approves a county's ordinance, the Commission has delegated enforcement responsibility to the county and retains no role in the county's enforcement process. Ms. Zimmerly also argues that the Act expressly gives the Commission authority for enforcement actions against counties in section 544m(a)(1), but in contrast, section 544m(a)(2) is silent about and thus does not give authority to hear appeals of county enforcement actions. This silence, Ms. Zimmerly argues, means that the Commission does not have jurisdiction to hear appeals of county enforcement actions.

We disagree with Ms. Zimmerly's characterizations of the National Scenic Area Act. Nothing in sections 544e or 544m(a)(1) limits the authority provided to the Commission in section 544m(a)(2). Sections 544e and 544m(a)(1) are in addition to the requirement in the National Scenic Area Act for the Commission to hear appeals of county actions relating to the

implementation of the National Scenic Area Act. Section 544e requires the Commission approve a county ordinance as consistent with the National Scenic Area Act before a county can make National Scenic Area land use decisions. Section 544m(a)(1) authorizes the Commission to take actions *sua sponte* for any reason to ensure a county complies with the National Scenic Area Act. Section 544m(a)(2) authorizes individuals to bring claims to the Commission alleging a county has improperly applied a National Scenic Area standard in a county land use action. These sections are fundamentally different authorities. Individuals do not have a role in sections 544e and 544m(a)(1); and an appeal in section 544m(a)(2) is not a direct enforcement action against a county. Together, sections 544e, 544m(a)(1), and 544m(a)(2) (and others) provide a comprehensive administrative structure for management of the National Scenic Area and administrative resolution of different types of disputes involving county actions implementing the National Scenic Area authorities. Furthermore, the Commission has consistently, without exception, applied the National Scenic Area Act to mean that once a county adopts a National Scenic Area ordinance, that county makes decisions related to the implementation of the National Scenic Area Act with opportunity to appeal to the Gorge Commission. The National Scenic Area Act does not treat county enforcement actions differently from county permit decisions.

Ms. Zimmerly next argues that *Skamania County v. Columbia River Gorge Commission*, 144 Wn.2d 30, 26 P.3d 241 (2001) supports her interpretation of section 544e, specifically that the Commission would only have appellate jurisdiction if the Commission's Executive Director had commenced her own independent enforcement action. We disagree. In that case, the Washington Supreme Court interpreted section 544m(a)(1) of the Act (requiring the Commission to monitor the activities of counties) and concluded that the Gorge Commission could take an

enforcement action against Skamania County for issuing a land use decision that violated Skamania County's National Scenic Area code, but in remedying the violation, the Commission could not order Skamania County to rescind that permit because that remedy was only available if the Commission or another party had first appealed Skamania County's original decision to the Commission pursuant to section 544m(a)(2). This matter does not involve application of section 544m(a)(1) and does not involve a Commission order for Clark County to rescind a permit outside of the appellate process in section 544m(a)(2). Furthermore, contrary to Ms. Zimmerly's argument, the Washington Supreme Court specifically described the Commission's authorities after a county adopted a National Scenic Area ordinance, including "final appellate authority over all final county decisions":

> When the Gorge Commission approved the [Skamania County National Scenic Area] Ordinance as consistent with the Management Plan, the authority that the Gorge Commission had under the interim guidelines was transferred to the County, with the Gorge Commission retaining only the right to comment on land use applications, the right to appeal the director's decisions to the County's Board of Adjustment, *and final appellate authority over all final county decisions.*

Skamania County v. Columbia River Gorge Comm'n, 144 Wn.2d at 50 (emphasis added).

Ms. Zimmerly next argues that the Commission lacks jurisdiction because Washington State law does not divest Washington State courts from jurisdiction to hear appeals of county National Scenic Area decisions. Ms. Zimmerly compares this to Oregon law, ORS 196.115,[5] which specifies that the Oregon Land Use Board of Appeals does not have authority to hear appeals of county decisions that interpret or apply the National Scenic Area standards. Ms. Zimmerly argues the lack of a similar Washington statute suggests that Washington state courts have jurisdiction. We disagree. The Washington Land Use Petition Act does contain a provision

[5] ORS 197.825(2)(f) also precludes Oregon LUBA jurisdiction to hear appeals of National Scenic Area decisions.

that divests jurisdiction. RCW 36.70C.030(1)(a)(ii) states that LUPA does not apply to judicial review of "Land use decisions of a local jurisdiction that are subject to review by a quasi-judicial body created by state law, such as the shorelines hearings board or the growth management hearings board." The Gorge Commission is a quasi-judicial body created by federal law (Congress's consent to the compact) and state law (Washington and Oregon's enactment of the compact).[6] Because LUPA doesn't apply to decisions that are subject to review by a quasi-judicial body created by state law, it similarly cannot apply to decisions that are subject to review by a quasi-judicial body created by federal and state law.

Furthermore, the statutes in the ORS and RCW are not necessary to preclude review of National Scenic Area decisions under state law. The National Scenic Area Act, as federal law, is applicable independent of the presence or absence of state law that clarifies state responsibilities and limitations under the National Scenic Area Act. The states' legislative decisions to preclude appeals involving the implementation of the National Scenic Area Act from state law processes is helpful in ensuring jurisdictional conflicts do not arise, but they are not a predicate to the Gorge Commission's jurisdiction. Finally, LUPA and LUBA review do not apply to decisions made pursuant to the National Scenic Area Act and Columbia River Gorge Compact because those state laws are not reserved in the Act or Compact. *See, e.g., Klickitat County v. Columbia*

[6] This reference to state law only points out that the states enacted the Columbia River Gorge Compact through state statutes. The Compact is federal law pursuant to *Cuyler v. Adams*, 449 U.S. 433 (1981), in which the Supreme Court concluded that an interstate compact is federal law if it has received the consent of Congress and its subject matter is appropriate for federal legislation. The Compact satisfies both criteria. The Columbia River Gorge National Scenic Area Act contains Congress's consent for Oregon and Washington to enter into the Columbia River Gorge Compact, 16 U.S.C. § 544c(a), and the Ninth Circuit has determined that the subject matter is appropriate for federal legislation under the Commerce Clause. *Columbia River Gorge United v. Yeutter*, 960 F.2d 110 (9th Cir. 1992).

River Gorge Comm'n, 770 F. Supp. 1419, 1426 (E.D. Wash. 1991) (state law is not applicable to the Commission unless the compact specifically reserves that law).

Ms. Zimmerly next argues that the Commission's appeal rules (Commission Rule 350-60) do not apply to enforcement actions because the terms "applicant," "application," "parties," "land use decision," and "governing body" in the Commission's rules do not refer to characteristics of a county enforcement action—that there is no applicant or application in a county enforcement action, the Hearings Examiner is not a governing body, and the Hearings Examiner's decision is not a land use decision according the definition in the Commission's rules. We disagree. Differences in nomenclature are not a significant departure for us to conclude that the Commission's appeal rules are inapplicable in their entirety. Nor can the Commission, through rulemaking, establish an appellate role that is inconsistent with its required appellate role in the National Scenic Area Act, to hear appeals of "*any* final action or order." 16 U.S.C. § 544m(a)(2) (emphasis added).

Ms. Zimmerly next argues that Washington's Land Use Petition Act applies to this appeal because the appeal is not "related to the implementation of the National Scenic Area Act" as required by 16 U.S.C. § 544m(a)(2). Ms. Zimmerly argues in her brief to the Commission, "The issue that Appellants raise—namely, whether the mining activity on the Property is a legal nonconforming use—is not pertinent to the implementation of the Act, but rather, an interpretation of County Code provisions in a county code enforcement case."

Again, we disagree. Clark County's Notice to Ms. Zimmerly and the Nutters alleged a violation of CCC § 40.240.010(B). Rec. 1389. Additionally, the Hearings Examiner specifically stated that the issues before him involved section 40.240.010(B). Rec. 16. As discussed above, chapter 40.240 is Clark County's National Scenic Area Land Development Code. Furthermore,

as discussed in section VI (addressing the merits of the appeals), the Hearings Examiner interpreted and applied a prior Gorge Commission approval and interpreted and applied two other provision of the Clark County Code that came directly from the Management Plan, CCC §§ 40.240.170(D) and (E). Thus, the administrative proceeding at issue here specifically involves the implementation of the National Scenic Area Act.

B. Lack of Standing Argument

Ms. Zimmerly argues the appellants do not have standing to bring the appeals because they are not "adversely affected" by Clark County's Notice and Order initiating the enforcement action and therefore are not parties to the Clark County proceeding, and because the Hearings Examiner denied their right to intervene and to participate in the appeal proceeding. In response, Friends argues, "the Hearings Examiner's very decision to deny Appellants party status, in and of itself, adversely affects Appellants, and thus gives them standing to appeal the decision."

The applicable standing provisions are in the National Scenic Area Act and Commission rules (the same provisions as in the lack of jurisdiction argument):

The National Scenic Area Act, 16 U.S.C. § 544m(a)(2), states:

> **(2) Appeal to the Commission**
> Any person or entity adversely affected by any final action or order of a county relating to the implementation of [the Act] may appeal such action or order to the Commission . . . .

Commission Rule 350-60-010 states:

> The National Scenic Act authorizes appeals to the Gorge Commission by a person or entity adversely affected by a final action or order of a county.

Ms. Zimmerly's several arguments about whether the neighbors and Friends have standing involve two basic points—(1) the neighbors and Friends cannot have standing to appeal the Hearings Examiner's decision because they were not "parties" in the Hearings Examiner's

proceeding, and (2) the Hearings Examiner was not required to consider the environmental interests of the neighbors and Friends when determining whether the gravel pit was operating with all necessary permits. We do not need to address these arguments because we conclude that the neighbors and Friends are "adversely affected" as that term is used in section 544m(a)(2).

Neither the National Scenic Area Act nor the Commission's rules define "adversely affected" in the context of standing to appeal. The National Scenic Area Act, 16 U.S.C. § 544(a), defines "adversely affect" in the context of protection of scenic, cultural, natural, and recreation resources, but the definition doesn't seem to fit a determination of who is adversely affected for the purpose of appeal to the Commission. We need not delve deeply into Oregon, Washington, and federal law for guidance on whether the neighbors and Friends are adversely affected. The record of Clark County's proceeding establishes that the neighbors and Friends are adversely affected as required by the National Scenic Area Act for the purpose of having standing to appeal to the Gorge Commission. The record contains declarations from the neighbors and Friends that describe physical impacts from noise, dust, traffic and other factors, which they claim that a National Scenic Area permit from Clark County would ameliorate. Rec. 545–75, 637–50, 659–76.[7] The record contains extensive communication between the neighbors and Friends' and Clark County Planning and code enforcement staff, including consultation to calendar the Hearings Examiner's proceeding. Rec. 2113. And the neighbors and Friends' made significant effort to intervene as a party, file an amicus curiae brief, provide evidence, and otherwise

[7] We note the Hearings Examiner stated that he excluded the testimony of impacts of the gravel pit use, Rec. 19 (Finding of Fact C.8), but the use of the term "adversely affected" in section 544m(a)(2) of the National Scenic Area Act makes that testimony relevant.

participate in the Hearings Examiner's proceeding, Rec. 708, 709, 17–19. These facts demonstrate sufficient adverse effect to give the neighbors and Friends standing.[8]

C. Failure to Follow Commission Rules Argument

In this argument, the Nutters argue that the neighbors and Friends did not adequately identify and describe the decisions on appeal in their Notices of Appeal as required by Commission Rules 350-60-050(3)(c) and -050(3)(e), which state:

> (3) Contents of Notice of Appeal: The Notice of Appeal shall be substantially in the form set forth in Exhibit 1 and shall contain:
>
> . . . .
>
> (c) The full title of the decision to be reviewed as it appears on the final decision;
>
> . . . .
>
> (e) A concise description of the decision to be reviewed

The notices of appeal contain the full title of four decision documents, which together, the neighbors and Friends state constitute the Hearing Examiner's decision on appeal; a statement of what each decision document is; and a copy of each decision document. The Nutters stated that the four Hearings Examiner decision documents cumulatively contain "84+ decisions," Nutters' Motion to Dismiss, at 11, which we understand to mean separate findings of fact and conclusions of law. Thus, the Nutters argue, that if the neighbors and Friends did not need to identify which findings and which conclusions of law they intend to appeal, Ms. Zimmerly and the Nutters and other interested persons cannot understand what the appeal will be about, and thus cannot make an informed decision about whether and how to participate in the appeal proceeding. The Nutters further argue that they would have to "set up and knock down

[8] We also note that if the neighbors and Friends did not have standing to seek review of that decision, there would be no opportunity for judicial review of a Hearings Examiner decision granting an appeal because Clark County cannot appeal its own decision and an appellant would not challenge a decision granting its appeal.

hypothetical scenarios to effectively analyze the Commission's jurisdiction and the appealability of the issues presented." *Id.* The neighbors and Friends argue in response that the notices of appeal contained the required information and that neither Oregon's LUBA nor Washington's SHB require more detail in their initiating appeal documents.

The Commission has not interpreted Commission Rules 350-60-050(3)(c) and 050(3)(e) in any past appeals. The Gorge Commission first adopted division 60 of its administrative rules in 1994. At the time of adoption, the Commission's counsel stated that the rules were based on rules of the Oregon Land Use Board of Appeals (LUBA) and the Washington Shorelines Hearings Board (SHB).[9] The Commission's rulemaking file contains copies of these agencies' rules and Multnomah County's rules for appeal hearings. The rulemaking file does not contain other examples of appeal rules.

Neither the LUPA rules nor the SHB rules require the level of detail that the Nutters seek in the notices of appeal. The SHB rules that the Commission considered when drafting its own appeal rules required, "A short and plain statement showing the grounds upon which the appealing party considers such decision or permit to be unjust or unlawful . . . ." Former WAC 461-08-055(5) (Feb. 24, 1983). Current WAC 461-08-350(4) contains the same text as the former provision and current WAC 461-08-350(3) requires the petitioner to attach a copy of the decision appealed from. The LUBA rules that the Commission considered required, "The full title of the decision to be reviewed as it appears on the final decision," and "A concise description of the decision to be reviewed." OAR 661-10-015(3)(c) and (e) (undated but date-stamped as received by the Commission on Nov. 5, 1992).

[9] Statement of Lawrence Watters, Counsel, Columbia River Gorge Commission, Audio Recording of Gorge Commission Hearing on Adoption of Commission Rule 350-60, Part 1 at 53:35 (Apr. 26, 1994).

LUBA has not applied its rules to require the precision that the Nutters argue should be required for the Commission's rules. For example, in one case, LUBA concluded that a notice of intent to appeal was sufficient when that notice only attached a copy of the challenged decision issued by the county. *Tice v. Josephine County*, 21 Or. LUBA 550 (1991). LUBA's current rules implement that *Tice* decision, by now requiring, "The full title of the decision to be reviewed as it appears on the final decision," and "A concise description of the decision to be reviewed, or a copy of either the notice of decision or the decision to be reviewed." OAR 661-10-015(3)(c) and (e). SHB decisions are not indexed; decisions prior to 1994 are not searchable; and no reported judicial decisions interpret the prior or current WAC provisions about the content of a notice of appeal. SHB and LUBA rules seem to support the approach that the neighbors and Friends took in their notices of appeal.

Other provisions within the Commission's procedural rules for appeal also suggest that the neighbors and Friends need not identify the precise assignments of error at the notice of appeal stage of the proceeding. Commission Rule 350-60-080(3)(d), states, "The Appellant's Brief shall . . . (d) Set forth each assignment of error under a separate heading . . . ." This provision anticipates that the detail the Nutters seek in the notice of appeal is not required until the appellant files its brief. Additionally, Commission Rule 350-60-060 requires the governing body to file the record of its local proceeding with the Commission within 30 days after an appellant files a notice of appeal. Thus, appellants do not receive the record prior to filing a notice of appeal and would thus be unable to evaluate the record to determine what claims they could make and that they believe would give them the relief they desire.

Based on how LUBA has interpreted its substantially similar rule, the fact that the Gorge Commission based its rules for appeal on LUBA and SHB rules, related provisions in the Gorge

Commission's appeal rule, and the notices of appeal that contain the full title of each decision document, a statement of what each decision document is, and a copy of each decision document, we conclude the neighbors and Friends' notices of appeal satisfy Commission Rules 350-60-050(3)(c) and 050(3)(e). We also note that Ms. Zimmerly and the Nutters need not "set up and knock down hypothetical scenarios," but instead would only need argue in their merits brief, instead of a preemptive motion to dismiss, whether the actual issues raised in the neighbors and Friends' briefs raised questions of the Commission's jurisdiction and appealability. For all these reasons, we conclude that the notices of appeal comply with Commission Rules 350-60-050(3)(c) and 050(3)(e).

D. Clark County Code § 32.08.050(2).

Finally, we directly address Ms. Zimmerly's argument that CCC § 32.08.050(2) requires that appeals of code enforcement actions must be appealed to Clark County Superior Court through Washington State's Land Use Petition Act. Section 050(2) states:

> An order which is subjected to the appeal procedure shall become final twenty-one (21) days after a mailing of the Hearings Examiner's decision unless within that time period an aggrieved person initiates review pursuant to RCW 36.70C.010 et seq. in Clark County superior court.

Ms. Zimmerly argues that the Gorge Commission approved the use of LUPA in section 050(2) when it approved Clark County's National Scenic Area ordinance, chapter 40.240. We disagree. First, the National Scenic Area Act, a federal law, requires the Gorge Commission to hear appeals of county actions related to the implementation of the National Scenic Area Act. 16 U.S.C. § 544m(a)(2). The Gorge Commission interpreted the National Scenic Area Act to mean that the Gorge Commission has jurisdiction to hear appeals of county enforcement actions. Appeals to the Gorge Commission Policy 2 (Mgmt. Plan IV-1-5) (cited above). The Gorge Commission must exercise its federal mandate and its prior interpretation of the National Scenic

Area Act for Clark County just as it exercises that mandate and interpretation for the other Gorge counties. Second, as discussed above, LUPA precludes review of National Scenic Area decisions at RCW 36.70C.030(1)(a)(ii) because the Gorge Commission already has express authority to hear appeals. Third, as discussed above, the National Scenic Area Act and Columbia River Gorge Compact did not reserve state judicial review procedures. Fourth, the Gorge Commission has never reviewed and approved Title 32 and thus provisions within Title 32 cannot be applied in a manner that conflicts with the requirements of the National Scenic Area Act. Indeed, the Commission cannot approve a local government provision that conflicts with the National Scenic Area Act.

Finally, we note that prior to these appeals, there had been only one appeal of a Clark County decision to the Gorge Commission, *Friends of the Columbia Gorge v. Clark County and Sylvia Campbell*, CRGC No. COA-C-01-01. Even though the issue of jurisdiction never arose in that appeal and the appeal was ultimately dismissed by motion of the appellants, we conclude that in this case, appeal to the Gorge Commission is consistent with Clark County's prior application of its appeal provisions.

E. Conclusion on Motions to Dismiss

Based on the parties' briefs, oral argument, and the authorities and reasoning explained above, we conclude that the Commission has jurisdiction to hear the appeals, the neighbors and Friends have standing to bring the appeals, and the notices of appeal comply with the Commission's rules.

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VI. THE MERITS: ASSIGNMENTS OF ERROR

A. Standards of Review

Commission Rule 350-60-220(1) specifies the standards of review that the Commission uses in its review of county land use decisions in the National Scenic Area. The rule states:

> 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 appellant(s);
> (h) The decision improperly construes the applicable law; or
> (i) A remand is required pursuant to 350-60-090(3)(d) [special review process for takings claims].

The parties argue that several of these standards apply to their assignments of error. We apply the relevant standards below as we resolve the assignments of error.

B. Assignment of Error (Akers, et. al. v. Clark County) – Whether the Hearings Examiner erred in granting the Motion to Strike the neighbors and Friends' Notices of Appearance.

The neighbors and Friends claim that the Hearings Examiner erred in interpreting and applying CCC § 32.08.040 to exclude the neighbors and Friends' participation in the Hearings Examiner's proceeding.

The applicable standards of review are whether the Hearings Examiner's decision granting Ms. Zimmerly and the Nutters' motion to strike was arbitrary and capricious[10] and

[10] Our standard states "clearly erroneous or arbitrary and capricious." Washington courts describe "clearly erroneous" as whether an agency has a "firm and definite conviction that a mistake has been committed." *See Dep't of Ecology v. Pub. Util. Dist. No. 1 of Jefferson County,* 121 Wn.2d 179, 201, 849 P.2d 646 (1993). In contrast, when federal courts apply the

whether that decision improperly construes applicable law. Commission Rule 350-60-220(1)(d) and (h). Washington courts consider an agency's action to be arbitrary and capricious if "it is willful and unreasoning and taken without regard to the attending facts or circumstances." *Wash. Indep. Tel. Ass'n v. Wash. Utils. & Transp. Comm'n*, 148 Wn.2d 887, 905, 64 P.3d 606 (2003). Federal courts will find agency action arbitrary and capricious "based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971).

The neighbors argue that CCC § 32.08.040 (governing appeals of code enforcement actions before a Hearings Examiner) establishes three different classes of persons (noted in italics here). Section 040(1) states that anyone aggrieved by the notice and order can appeal to the Hearings Examiner. That person is referred to as the *appealing party* in section 040(2). Section 040(2) refers to *other interested persons* who can request notice of the time and place of the hearings.[11] Section 040(4) lays out the right each *party* has at the hearing.

The Clark County Code does not define any of these three terms. Thus, the statutory interpretation issue in this assignment of error is whether "other interested persons" in section 040(2) have the rights as a "party" in section 040(4). The goal of statutory interpretation is to

"clearly erroneous" standard in administrative law cases, they typically ask whether a decision is based on clearly erroneous findings of fact or a clear error in judgment. "The clearly erroneous" standard in federal courts is thus similar in practice as the "arbitrary and capricious" standard. Oregon courts do not use "clear error" or "arbitrary and capricious" standards in administrative law cases, but rather use conceptually similar standards of substantial evidence and substantial reason. *See Armstrong v. Asten-Hill Co.*, 90 Or. App. 200, 206, 752 P.2d 312 (1988). Combining all these, we will apply the "arbitrary and capricious" standard as described by Washington state courts and federal courts to approximate a uniform standard throughout the National Scenic Area.

[11] The neighbors and Friends requested and received notice of the time and place of the hearing. Clark County also coordinated the date of the hearing with the neighbors and Friends' attorneys. Rec. 2113.

determine what the Clark County Council intended when adopting this ordinance. *E.g.*, *State v. Keller*, 98 Wn. App. 381, 383, 990 P.2d 423 (1999). In doing so, the Commission must look to the entire ordinance as well as related ordinances and other factors. *E.g., Columbia Physical Therapy, Inc. P.S. v. Benton Franklin Orthopedic Assoc., P.L.L.*C., 168 Wn.2d 421, 432–43, 228 P.2d 1260 (2010).[12] If the ordinance is susceptible to more than one interpretation, it is ambiguous and the Commission must resort to canons of statutory construction to discern the intent. *Id.* We concur with the neighbors and Friends that the ordinance is ambiguous. The term "party" could refer only to the appealing party (and the director who issued the notice and order) as the Hearings Examiner concluded, or it could refer more broadly to also include the interested persons who requested and received notice of the time and place of the hearing.

Two common canons of statutory construction are applicable here. First, when different words are used in the same or similar ordinances the Commission must presume the Council intended those words to have different meanings. *E.g.*, *State v. Keller*, 98 Wn. App. at 384.[13] Second, the Commission must interpret the ordinance so that all language is given effect with no portion rendered meaningless or superfluous. *E.g., G-P Gypsum Corp. v. Dep't of Revenue*, 169 Wn.2d 304, 309, 237 P.3d 256 (2010).[14]

The neighbors and Friends argue that the Hearings Examiner gave the same meaning to different terms in the same ordinance contrary to the common canon in which courts should

[12] Oregon state courts and federal courts follow similar a similar analytical approach as specified in *Keller* and *Columbia Physical Therapy*. *See, e.g., State v. Gaines*, 346 Or. 160, 206 P.3d 1042 (2009); *Wadler v. Bio-Rad Labs., Inc.*, 916 F.3d 1176 (9th Cir. 2019).
[13] Oregon state courts and federal courts apply a similar canon. *E.g., Scharfstein v. BP West Coast Products, LLC*, 292 Or. App. 69, 82, 423 P.3d 757 (2018); *Wisconsin Central Ltd. v. U.S.*, 138 S. Ct. 2067, 2071 (2018).
[14] Oregon state courts and federal courts apply a similar canon. *E.g., Dish Network Corp. v. Dep't of Revenue*, 364 Or. 254, 278, 434 P.3d 379 (2019); *In re Border Infrastructure Envtl. Litigation*, 915 F.3d 1213, 1225 (9th Cir. 2019).

presume those different terms have different meanings. They cite paragraph C.8 of the Order on Motion to Strike, which states,

> CCC 32.08.040(2) identifies three separate entities that are entitled to notice of the hearing: the 'appealing party,' the 'director,' and 'other interested persons.' Therefore the examiner must interpret the Code to give different meaning to these different terms. Both appealing parties and interested persons are entitled to notice of the hearing. CCC 32.08.040(2) However only a 'party' is entitled to participate in the hearing. CCC 32.08.040(4). *Because the Council used the same term 'appealing party' and 'party' in both ordinances, the examiner must give these words the same meaning.* The term 'party' in CCC 32.08.040(4) must be limited to the 'appealing party,' persons who filed an appeal of the N&O pursuant to CCC 32.08.040(1), and the director, who filed the N&O that is being appealed.

Rec. 201 (emphasis added from original, same from neighbors' brief to the Commission, Neighbors' App. Br. at 7).

The neighbors and Friends argue that the Hearings Examiner erred because only the term "appealing party" is used section 040(2), and only the term "party" is used in section 040(4). Because these are different terms and they are used in different sections of the Code, the neighbors and Friends argue they must be given different meanings. They also argue that there would be no point to giving "other interested persons" notice if they are not a "party" and have no role at the hearing.

In response, the Nutters argue that interpreting chapter 32.08 of the Clark County Code is outside the Commission's jurisdiction because it applies both inside and outside the National Scenic Area, and thus is not related to the implementation of the National Scenic Area Act, and that the Hearings Examiner properly concluded that the neighbors and Friends were not parties in the proceeding. We disagree that the Commission is without jurisdiction to interpret chapter 32.08. Clark County applied chapter 32 in this National Scenic Area matter and, as addressed above, the substance of the appeal is related to the implementation of the National Scenic Area

Act. As such, the Commission has jurisdiction to ensure that Clark County's process for the proceeding was consistent with its own rules.

The Nutters agree that the term "party" in CCC § 32.08.040 is broader than the term "appealing party" in section 040(2). The term party, they argue, includes the Director who issued the notice and order (and cannot be a "appealing party). They further argue that interested persons are not parties because they didn't appeal and can't become parties by merely requesting notice of time and place, which only serve to help the county coordinate a hearing date that interested persons can attend and ensure interested persons receive information about the eventual hearing.

Based on the record and the text of CCC § 32.08.040, we conclude that Hearings Examiner did not err in concluding that the neighbors and Friends were not parties. Section 040(4) is ambiguous; it is capable of more than one meaning. The term "party" could refer to the appealing party and the Director who issued the notice and order, or it could also include interested persons. Both are possible permissible interpretations and thus the Commission cannot conclude Clark County's application of chapter 32.08 was clearly erroneous or arbitrary and capricious or improperly construed applicable law. We deny this assignment of error.

C. First Assignment of Error (Friends of the Columbia Gorge v. Clark County) – Whether the Hearings Examiner erred in failing to conclude that the 1993 permit issued by the Gorge Commission's Executive Director was voided under its own terms when the mining activities were discontinued for more than one continuous year.

In this assignment of error, Friends argues that the Hearings Examiner erred in concluding that he could not evaluate whether the Gorge Commission's 1993 permit is still in effect.

Friends does not specify the standard of review for this assignment of error. Friends' argument suggests the standard of review is whether the decision was clearly erroneous or arbitrary and capricious and whether the decision is supported by substantial evidence in the whole record. Commission Rules 350-60-220(1)(c) and (f).

In 1993, the Gorge Commission conducted a *sua sponte* Development Review for the then-existing mining activity on the subject property. The Gorge Commission's authority to do so was contained in Commission Rule 350-20, which adopted the "Final Interim Guidelines" by reference.[15] Section III.A.2 of the Final Interim Guidelines stated,

> Any use or development that existed on the date of the [National] Scenic Area Act, if used in the same manner for the same purposes, is not affected by these guidelines, except: a) the development of sand, gravel or crushed rock . . . .[16]

The 1993 Development Review decision stated,

> As per section 350-20-010(6) the decision of the Director approving a proposed development action shall become void in two years if the development action is not undertaken within that period, or when the development action is discontinued for any reason for one continuous year or more.

Rec. 1003. Here, in the current matter, the Hearings Examiner made the following Findings of Fact.

> h. No mining or other activities occurred on the Property between 2005 and 2015. Aggregate stockpiles remained on the Property. However the stockpiles and disturbed areas had revegetated with voluntary trees and grasses. (Exhibits 77, 78, 80, and 81–89).
>
> . . . .
>
> j. No mining occurred between August 2015 and January 2017. (Exhibits 90 and 91).

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[15] The Commission repealed Commission Rule 350-20 (and thus correspondingly the Final Interim Guidelines) on December 15, 2008.

[16] Ms. Zimmerly did not contest the Commission's authority to conduct a *sua sponte* Development Review. The Commission had used that authority previously, *See, e.g., J. Arlie Bryant, Inc. v. Columbia River Gorge Comm'n*, 132 Or. App. 565, 889 P.2d 383 (1995) (affirming the Gorge Commission's *sua sponte* Development Review decision without reaching the question of authority because it was not raised below).

Findings D.4.h and j (Rec. 21) (internal footnote omitted). No party assigned error to these findings. Ms. Zimmerly and the Nutters did not appeal the Hearings Examiner's decision. Where a party does not challenge a finding, that finding is a verity on appeal. *See Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 808, 828 P.2d 549 (1992).[17]

This assignment of error essentially argues that the Hearings Examiner should have applied the expiration provision of the Commission's 1993 Development Review after finding that the gravel pit had not been used for 10 years between 2005 and 2015 and for 18 months between 2015 and 2017. Instead, the Hearings Examiner stated the following in his Final Order:

> The examiner has no jurisdiction to interpret the Gorge Commission's 1993 decision to determine whether that approval expired because "the development action was "discontinued . . . for one continuous year or more." The examiner's jurisdiction is limited to the application of the County Code. (CCC 32 and 2.51). The Gorge Commission has its own independent authority to enforce its regulations if it determines that the 1993 approval expired.

Rec. 21 (Paragraph F.3) (ellipsis in original). The Hearings Examiner's statement of his jurisdiction in this paragraph is inconsistent with several other findings and discussion in the Final Order, which expressly relied on the 1993 Development Review decision to determine the geographic scope of the gravel pit operations, conclude that rock crushing was not permitted under that permit, and conclude that the gravel pit operations had no adverse impacts on the scenic, cultural, natural, and recreation resources in the National Scenic Area.

Specifically, the Hearings Examiner relied on the Gorge Commission's 1993 Development Review decision to:

[17] Oregon state courts and federal courts follow the same principle. *E.g., BWK, Inc. v. Dep't of Admin Srvs.*, 231 Or. App. 214, 221, 218 P.3d 156 (2009); *Pom Wonderful, LLC v. Hubbard*, 775 F.3d, 1118, 1122 n.1 (9th Cir. 2014).

- determine the geographic scope of the gravel pit operations (Rec. 22, Finding D.9);[18]
- conclude that the Commission's decision did not permit rock crushing (Rec. 29, Finding F.5.a.i, stating, "The 1993 Gorge Commission approval did not expressly approve rock crushing on the Property");
- reason that "the Gorge Commission has not determined that the use adversely affects the scenic, cultural, natural, or recreation resources of the [National] Scenic Area" (Rec. 27, Finding F.2.b.ii(C)(4));[19]
- determine whether the mining activity had been discontinued for five years prior to the adoption of the Management Plan (Rec. 27, Finding F.2.b.ii(C)(3), stating "the Gorge Commission approved surface mining operations on the Property in 1993" and "the Gorge Commission decision reestablished the use on the Property in 1993"); and
- determine that the surface mining operations are not "unregulated" (Rec. 28, Finding F.4, referring to the Gorge Commission's "expansion of the surface mine operations" and stating "The Gorge Commission's approval merely regulated views of the Property").[20]

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[18] As noted in Section IV – FACTS, above, the Hearings Examiner erred in this finding. All parties agree that the reference to the "123-acre site" in this finding should have been "67-acre site." We note the stipulated mistake here, but do not base our reversal on this mistake.

[19] This finding does not accurately characterize the Commission's 1993 Development Review decision. The Commission concluded that the surface mining operation would not adversely affect National Scenic Area resources if the applicant conducted its mining operation consistent with the Development Review decision, including conditions of approval (and relevant expiration standards).

[20] We note that the 1993 Development Review decision did not merely regulate views of the subject parcel. The National Scenic Area Act requires the Gorge Commission "require that the exploration, development and production of mineral resources, and the reclamation of lands thereafter, take place without adversely affecting the scenic, cultural, recreation and natural resources of the scenic area." 16 U.S.C. § 544d(d)(9). Consistent with this requirement, the 1993 Development Review decision evaluated the gravel pit for adverse effects to scenic, cultural, recreation and natural resources and for other purposes consistent with other applicable law and included conditions of approval for protection of scenic, cultural, and natural resources. Rec. 993–1004.

By expressly relying on the Gorge Commission's 1993 Development Review decision to conclude that rock crushing was not permitted under that permit, conclude that the permit granted approval for the gravel pit operation and continued to regulate the gravel pit, and conclude that the gravel pit operations had no adverse impacts on the scenic, cultural, natural, and recreation resources in the National Scenic Area, but refusing to determine whether that permit was still valid was willful and unreasoning and taken without regard to the attending facts or circumstances and entirely failed to consider an important aspect of the problem and thus was arbitrary and capricious. The Hearings Examiner's decision could not conclude that the 1993 Development Review decision permitted gravel pit operations in 2018 without also determining whether the 1993 decision was still valid.

Finally, had Ms. Zimmerly and the Nutters contested the Hearings Examiner's findings that mining had stopped for a 10-year period and again for 18 months, we would have needed to consider whether those findings were supported by substantial evidence in the whole record, and we likely would have affirmed those findings. Both Friends and Ms. Zimmerly's merits briefs contain long descriptions of the evidence in the record whether the mining had stopped for a one-year period (Friends' App. Br. at 21–23; Ms. Zimmerly's Resp. Br. at 19–21). Friends principally cites Washington State Department of Natural Resources and Department of Ecology reports dating between 2005 and 2015 that stated the site is not operating or is currently inactive; Clark County planning records that show the site is not designated as active; Clark Public Utilities records that show no use of power for many years and that Ms. Zimmerly sought to reestablish power in 2017 right before the Nutters began the gravel pit operation; and statements that mining had not occurred since the late 1990s. Ms. Zimmerly principally argues that mining as a land use activity is much more than just on-the-ground development, citing Clark County's

National Scenic Area code definition of "Exploration, development (extraction and excavation), and production of mineral resources"; case law that notes mining is characterized by cycles of extraction, processing, storage and sale; and the Hearings Examiner's recognition that the level of surface mining fluctuates over time. This, Ms. Zimmerly argues, suggests that the mining occurs when at least one of the activities listed in the code definition is occurring, citing to the record showing some activities on an annual basis. Ms. Zimmerly also argues that Washington Department of Natural Resources reports that mention "no activity" or similar phrasing does not necessarily mean that no mining has occurred, rather the agency only records large scale actions involving acres of disturbance in those reports.

Considering all the evidence in the record, we would very likely have concluded that the Hearings Examiner considered all the relevant evidence and that his finding that no mining occurred for a 10-year period between 2005 and 2015[21] is supported by substantial evidence. There is ample evidence from the annual reports from the Washington Department of Natural Resources stating that the site was inactive and that the number of acres disturbed was zero; the neighbors' testimony in declarations state that no mining occurred for more than 10 years prior to 2017; Clark County planning records showing active mines, but not listing this surface mine as active; Clark Public Utilities records showing virtually no electricity use until a 2017 request to reestablish power to the site; and Washington State Department of Natural Resources site visits resulting in reports of the site being overgrown with trees and grasses. The most significant contrary evidence is an email from John Bromley at Washington Department of Natural Resources that explains notations on state agency records that a site is not active should not be

[21] The Hearings Examiner noted that CEMEX had moved topsoil for reclamation on the site in 2012 and 2013 but had done so without the landowner's permission and thus removed it. The Hearings Examiner apparently did not consider this to be mining activity.

narrowly interpreted to mean that no mining activity was occurring. Rec. 1319–21. This email about general practices and intent does not contradict the many annual reports that Ms. Zimmerly filed (and that the state confirmed) reporting "0 acres disturbed" and other evidence of no activity that is unrelated to the annual reports. The entirety of the record shows that the notations of "not active" on the reports for Ms. Zimmerly's surface mine meant no mining activity had occurred on this site at the times that the Hearings Examiner found there was no mining activity.

We reverse the decision of the Hearings Examiner. The Hearings Examiner's Finding (F)(3) claiming that he was without jurisdiction to interpret the 1993 development review decision to determine whether it was expired was arbitrary and capricious because the decision relied on the 1993 Development Review Decision for five different findings of fact or legal conclusions, but refused to consider whether it had terminated by its own terms. We do not remand because the Hearings Examiner's uncontested findings that no mining occurred between 2005 and 2015, and again between August 2015 and January 2017 can only allow for a single legal conclusion—that the 1993 Development Review Decision is no longer valid by its own terms, which specify the "development action shall become void . . . when the development action is discontinued for any reason for one continuous year or more."

D. Second Assignment of Error (Friends of the Columbia Gorge v. Clark County) – Whether the Hearings Examiner erred in concluding that CCC § 40.240.170.D.4 allows mining to continue on the property indefinitely without any land use regulation under the Scenic Area Act and implementing rules.

In this assignment of error, Friends argues, "The Hearings Examiner erroneously held 'that surface mining operations are permitted on the Property as a continuation of a legally established nonconforming uses, pursuant to CCC 40.240.170.D(4).' The Hearings Examiner's Decision erroneously construes this rule . . . ." Friends' App. Br. at 27 (citation to record omitted).

Friends' argument suggests the standard of review is whether the decision improperly construes the applicable law. Commission Rule 350-60-220(1)(h).

We again start with the applicable provisions of law, which for this assignment of error are CCC §§ 40.240.170(D) and (E). These sections specify:

> **40.240.170 Existing and Discontinued Uses**
> . . . .
> D. Changes to Existing Uses and Structures
> Except as otherwise provided, any change to an existing use or modification to the exterior of an existing structure shall be subject to review and approval pursuant to this chapter.
> . . . .
> 4. Existing Development or Production of Mineral Resources. In the GMA, existing development or production of mineral resources may continue unless the Gorge Commission determines that the uses adversely affect the scenic, cultural, natural or recreation resources of the Scenic Area. These uses will be considered discontinued and subject to this chapter if any of the following conditions exist:
> (a) The mined land has been reclaimed naturally or artificially to a point where it is revegetated to fifty percent (50%) of its original cover (considering both basal and canopy) or has reverted to another beneficial use, such as grazing. Mined land shall not include terrain which was merely leveled or cleared of vegetation.
> (b) The site has not maintained a required state permit.
> (c) The site has not operated legally within five (5) years before the date of adoption of the Management Plan.
> . . . .
> E. Discontinuance of Existing Uses and Structures.
> Except as provided in Section 40.240.170(C), any use or structure that is discontinued for one (1) year or more shall not be considered an existing use or structure. Proof of intent to abandon is not required to determine that an existing use or use of an existing structure has been discontinued.

These provisions are the same as the corresponding provisions in the *Management Plan for the Columbia River Gorge National Scenic Area*, which the Gorge Commission and U.S. Forest Service adopted. Clark County adopted these provisions into its unified development code with only different codification numbers than the Management Plan. The substance of Clark County's provisions is unchanged from the Management Plan. As the drafter of these provisions,

the Commission is the most-qualified entity to construe these provisions. The application of these provisions is related to the implementation of the National Scenic Area Act.

The Commission reaches three different conclusions in addressing this assignment of error. First, we conclude that the Hearings Examiner improperly construed CCC §§ 40.240.170(D) and (E). The Hearings Examiner concluded that section .170(E) was less specific than subsection .170(D)(4) and therefore not applicable. We disagree. Section .170(E) cross references section .170(C) as an exception. It does not cross-reference section .170(D), so section .170(E) remains applicable by its own terms. The Hearings Examiner decision thus improperly construed the applicable law.

Second, we do not need to further address the interplay between these provisions in this decision because in this case, these standards do not apply. The Gorge Commission issued the 1993 permit authorizing the surface mining use under the prior set of National Scenic Area standards—former Commission Rule 350-20 and the *Final Interim Guidelines*. The standard for discontinuing the surface mining use is thus contained in those rules and the 1993 permit. The later-enacted Management Plan and Clark County Code do not apply retroactively to this use that received a permit under former Commission Rule 350-20 and the *Final Interim Guidelines*. The Management Plan and Clark County Code make this clear in a guideline entitled, "Applying New Less-Stringent Regulations to Development Approved Under Prior Scenic Area Regulations." This guideline requires,

> A landowner may submit a land use application to alter conditions of approval for an existing use or structure approved under prior Scenic Area regulations (e.g., Columbia River Gorge National Scenic Area Final Interim Guidelines, original Management Plan) . . . .

Management Plan at II-7-10. CCC § 40.240.160 contains the same provision. Neither Ms. Zimmerly, nor anyone else has submitted any new application for the surface mine after receiving the 1993 permit.

Finally, we note that if section .170(E) would apply to the gravel pit operation, we would reverse the decision of the Hearings Examiner because the gravel pit operation was discontinued for more than one year. We would not remand because the Hearings Examiner's uncontested findings that no mining occurred between 2005 and 2015, and again between August 2015 and January 2017 can only allow for a single legal conclusion—that the gravel pit operation is not an existing use under section .170(E), which states that "any use or structure that is discontinued for one (1) year or more shall not be considered an existing use or structure."

We further note that if section .170(D)(4) would apply to the gravel pit operation, we would remand the matter because the findings are insufficient to support the Hearings Examiner's decision. The Hearings Examiner concluded that the mining use was not discontinued when he found that the site had revegetated with trees and grasses. However, the Hearings Examiner's findings did not address how much of the site was revegetated. The findings were not specific enough for him to conclude whether "the reclaimed naturally or artificially to a point where it is revegetated to fifty percent (50%) of its original cover (considering both basal and canopy)" as required in section .170(D)(4)(a). The findings are therefore insufficient to support the Hearings Examiner's decision.

VII. SUMMARY OF CONCLUSIONS AND ORDER

The Commission has jurisdiction to decide the neighbors and Friends' appeals; the neighbors and Friends have standing to bring the appeals; and the notices of appeal comply with the Commission's rules. The Hearings Examiner's Conclusion G.1 that "Surface mining

operations are allowed as an existing use on the Property pursuant to CCC 40.240.170.D(4). No County permits or approvals are required for this existing use" is arbitrary and capricious because the decision relied on the 1993 Development Review Decision for five different findings of fact or legal conclusions but refused to consider whether it had terminated by its own terms. That conclusion also improperly construed applicable law in concluding that CCC § 40.240.170(D)(4) was applicable and that CCC § 40.240.170(E) was not applicable. We thus reverse the Hearings Examiner's decision H.1 that "grant[ed] the appeal in part and dismiss[ed] that portion of N&O CDE2017-Z-1069(A) alleging violations of 250.022.E, 40.250.022.F(l), and 40.240.010.8 for conducting surface mining operations on the Property" because the Hearings Examiner found that no mining occurred between 2005 and 2015, and again between August 2015 and January 2017. These findings are uncontested. Thus, the only possible conclusion when applying the terms of the 1993 Development Review Decision is that mining had been discontinued and a new permit is necessary. We would reach the same conclusion applying CCC § 40.240.170(E).

The Hearings Examiner's decision H.1 is REVERSED. The May 18, 2018 Amended Notice and Order are AFFIRMED.

IT IS SO ORDERED this 16th day of October 2019.

Loretta J. DeKay

Loretta S. DeKay
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 U.S.C. § 544m(b)(4).

NOTICE OF MAILING

I certify that on October 16th, 2019, 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:

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