BEFORE THE COLUMBIA RIVER GORGE COMMISSION

NORWAY GREEN, LLC, Appellant, v. CLARK COUNTY, Respondent, and FRIENDS OF THE COLUMBIA GORGE, Intervenor-Respondent.	)	CRGC No. COA-C-22-01 Clark County Nos. OLR 2021-00139 & OLR 2022-00045 & OLR 2022-00046 **CORRECTED FINAL OPINION AND ORDER**
FRIENDS OF THE COLUMBIA GORGE, Appellant, v. CLARK COUNTY and NORWAY GREEN, LLC, Respondents.	)	CRGC No. COA-C-22-02

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INTRODUCTION

This appeal challenges Clark County's denial of an application for a single-family dwelling not in conjunction with an agricultural use and a barn and feeder shed in conjunction with agricultural use near Washougal, Washington, in Clark County. The Clark County Department of Community Development staff initially approved the application. Friends of the Columbia Gorge appealed that decision to the Clark County Hearing Examiner, who granted the appeal and denied the application.

The applicant, Norway Green, LLC, and Friends of the Columbia Gorge each appealed the hearing examiner's decision to the Columbia River Gorge Commission pursuant to 16 U.S.C. § 544m(a)(2). Norway Green argued that the hearing examiner should have denied Friends' appeal and approved the application. Friends argued that the hearing examiner correctly denied the application but challenged some of the reasoning in the hearing examiner's decision. The parties filed a stipulated motion to consolidate the appeals, which the Chair of the Gorge Commission granted.

The Gorge Commission met on November 8, 2022, to hear oral argument and deliberate to a decision. The Gorge Commission voted to deny Norway Green's appeal, grant two assignments of error expressed in Friends' appeal, and conclude the remainder of Friends' appeal was moot. Thus, the Gorge Commission affirms the hearing examiner's denial of the application and provides guidance on two points in the hearing examiner's decision.

This corrected final opinion and order responds to the Chair's concurrent order granting Friends of the Columbia Gorge's motion to correct the final order and opinion issued on February 6, 2023. The corrections are described in the Chair's concurrent order. This corrected order does not show side-by-side corrections.

I. PARTIES AND ATTORNEYS

The parties in this consolidated matter are:

- Norway Green, LLC, represented by LeAnne Bremer, Miller Nash, LLP, Vancouver, Washington;
- Friends of the Columbia Gorge, represented by Nathan J. Baker, Senior Staff Attorney, Friends of the Columbia Gorge, Portland, Oregon, and David T. McDonald, Sherlag De Muniz, LLP, Portland, Oregon; and
- Clark County, represented by Stephen E. Archer, Clark County Prosecuting Attorney's Office, Civil Division, Vancouver, Washington.

II. RECORD PRESENT BEFORE THE COMMISSION

The Gorge Commission's proceeding was on the record developed by Clark County. Clark County provided the record to the Gorge Commission in electronic form only. Norway Green and Friends of the Columbia Gorge each filed timely record objections raising issues with the administrative record. The parties resolved their objections and Clark County filed a revised record. The Chair of the Gorge Commission issued an order accepting the revised record as resolving all record objections and settled the record on August 3, 2022. Members of the Gorge Commission received an electronic copy of the settled record approximately two weeks prior to the oral argument.

If a party appeals this Final Opinion and Order, the Gorge Commission will transmit Clark County's record and the record of the Gorge 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 the record of its proceeding and the Gorge Commission is responsible for supplying the paper copy of the record of its proceeding. The Gorge Commission made an oral recording of its hearing. The oral recording is part of the record of the Gorge Commission's proceeding and is available to the parties. The Gorge Commission does not prepare a transcript of its proceeding. If a party chooses

to do so, the Chair of the Gorge Commission will, upon request, assist by answering questions, identifying speakers, and the like. The Chair of the Gorge Commission will review the transcript, and if the transcript is accurate, will issue an order accepting it.

III. PROCEDURAL MATTERS AND RULINGS

A. Disclosure of Conflicts of Interest and Ex Parte Communications

At oral argument, the Chair of the Gorge Commission asked members of the Gorge Commission to disclose conflicts of interest, ex parte communications, and appearance of fairness issues. The following members of the Gorge Commission made the following disclosures.

Casey Gatz[1] stated that he works with the staff of Friends of the Columbia Gorge in his official role at the U.S. Forest Service. Mr. Gatz stated that he could be impartial during deliberations.

Robert Liberty stated that he was a member of the Friends of the Columbia Gorge Board approximately 20 to 25 years ago and that he was a member of Friends of the Columbia Gorge but has not been a member for several years. He has had no communications with Friends of the Columbia Gorge about this case. Commissioner Liberty stated that he can be fair and judge the merits of the case based on the record and law.

Michael Mills stated that he was a past member of Friends of the Columbia Gorge and that his deceased spouse was also a member and is still listed as a member. Commissioner Mills stated that he does not have any interest that would interfere with his vote in the case.

Amy Weissfeld stated that she was a past member of Friends of the Columbia Gorge and that her membership lapsed a year or two ago. She stated she can be impartial.

[1] Mr. Gatz, Acting Deputy Forest Supervisor, attended for Donna Mickley.

Robin Grimwade stated that he is Clark County's representative on the Gorge Commission and that prior to his appointment to the Gorge Commission, he served one term on the Clark County Planning Commission. While on the Clark County Planning Commission, the planning commission received a staff report on the county's tax abatement program, and he can't recall if the subject property was one of the properties referenced in that report.

The Chair of the Gorge Commission asked the parties if they had any objections to any Commissioner's participation. The parties affirmatively stated that they did not object to any Commissioner's participation in the appeal hearing.

B. Hearing Procedure

The Commission issued a Notice of Hearing on October 12, 2022, that described the hearing process. The Chair of the Gorge Commission at the time of the hearing, Robin Grimwade, was the presiding officer at the hearing. No party raised any objections or concerns with the hearing process during the hearing. The Commission adhered to the hearing procedure specified in the Notice of Hearing.

C. Norway Green's Errata to its Opening Brief

On November 7, 2022, the day before oral argument, Norway Green filed an errata to its opening brief correcting a citation. The Gorge Commission office sent a copy of the errata to the members of the Gorge Commission. No party objected to the errata. The errata is part of the record of the Gorge Commission's proceeding.

D. Exhibits at Oral Argument

Norway Green and Friends of the Columbia Gorge each showed exhibits during the hearing. There were no objections to any of the exhibits. The parties submitted electronic copies of their exhibits to the Gorge Commission. The exhibits are part of the record of the Gorge Commission's proceeding.

E. Remaining Motions and Objections

All motions and objections not specifically ruled on by the Chair of the Gorge Commission or the full Gorge Commission are denied.

IV. FACTS

The principal issue in this case is the application of Clark County Unified Development Code section 40.240.430.A.16,[2] which allows:

> On lands designated Gorge Large-Scale Agriculture, on a parcel which was legally created and existed prior to November 17, 1986, a single-family dwelling not in conjunction with agricultural use upon a demonstration that all of the following conditions exist:
>
> . . . .
>
> b. The subject parcel is predominantly unsuitable for the production of farm crops and livestock, considering soils, terrain, location and size of the parcel. Size alone shall not be used to determine whether a parcel is unsuitable for agricultural use. An analysis of suitability shall include the capability of the subject parcel to be utilized in conjunction with other agricultural operations in the area.

The subject parcel is 41 acres in size (AR 13) and is identified as Clark County parcel number 133692-000. The parcel is located on SE Gibson Road in Washougal, Washington. The parcel is in the Columbia River Gorge National Scenic Area and is zoned GLSA-40 (General Management Area, Gorge Large-Scale Agriculture, with a 40-acre minimum parcel size). There is no dispute that the subject parcel was legally created prior to November 17, 1986. The parcel contains an existing cleared pasture area of approximately one-third of the parcel and an existing wooded area of approximately two-thirds of the parcel. AR 1406–07, 1413.

[2] Norway Green submitted its application prior to Clark County revising is National Scenic Area Development Code (CCC 40.240) in compliance with the 2020 revisions to the Management Plan for the Columbia River Gorge National Scenic Area. All references to Clark County Code provisions are to its code in effect at the time Norway Green submitted its application.

Norway Green proposed a roughly 5,800 square foot, one-story single-family residence with a daylight basement, a 2,700 square foot barn with an 1,800 square foot loft, and a 1,440 square foot feeder shed. AR 52, 2496.[3] Norway Green proposed to construct the residence and accessory structures in the existing cleared pasture area.

The Clark County Community Development Department staff approved the application. Friends of the Columbia Gorge appealed that approval to the Clark County hearing examiner. On February 24, 2022, the hearing examiner issued a final order granting the appeal and denying the application based on findings of fact and conclusions of law that the applicant did not satisfy its burden of proof that:

> a. "The [site] is predominantly unsuitable for the production of farm crops and livestock…." CCC 40.240.430.A.16.b; and
> b. "The size of the proposed agricultural buildings [will] not exceed the size needed to serve the current…[or] proposed agricultural use." CCC 40.240.200.A.1.

AR 76 (brackets in hearing examiner's decision). On March 30, 2022, the hearing examiner granted Norway Green's motion for reconsideration to "amend[] the Final Order to deny the application 'without prejudice.'" AR 4–9. The hearing examiner denied the other elements of Norway Green's motion for reconsideration. Friends of the Columbia Gorge also filed a motion for reconsideration to correct several scrivener errors, which the hearing examiner granted. AR 10–14.

[3] Friends of the Columbia Gorge's opening brief described larger buildings as measured in square feet. The size of the buildings is not at issue in this appeal, and we do not attempt to resolve any discrepancies between the parties' statement of the size of the proposed buildings.

V. RESOLUTION OF ASSIGNMENTS OF ERROR

Norway Green's First Assignment of Error

Norway Green argues that the hearing examiner erred in concluding that Norway Green had the burden to prove its approved permit was not issued in error. Norway Green's brief did not specify the standard of review. Friends of the Columbia Gorge's brief stated that the applicable standard of review for this assignment of error is whether "[t]he decision improperly construes the applicable law." Commission Rule 350-60-220(1)(h). We concur with Friends' statement of the standard of review. The goal of statutory interpretation is to determine what the Clark County Council intended when adopting its code sections relating to its internal appeal process. *E.g., State v. Keller*, 98 Wn. App. 381, 383, 990 P.2d 423 (1999).[4]

Norway Green points to Clark County Code § 40.510.020.H.2.a, which states:

> The hearing examiner shall hear appeals in a de novo hearing. Notice of an appeal hearing shall be sent to parties of record, but shall not be posted or published. A staff report shall be prepared, a hearing shall be conducted, and a decision shall be made and noticed. The decision can be appealed under a Type III process.

Norway Green also cites Clark County Code § 40.510.020.H.3.b (governing the appeal process before the hearing examiner), which states:

> [T]he applicant shall have the burden of proving by substantial evidence compliance with applicable approval standards. Where evidence is conflicting, the examiner shall decide an issue based upon the preponderance of the evidence.

[4] Oregon state courts and federal courts express a similar goal of statutory interpretation as in *Keller*. *E.g.*, *State v. Gaines*, 346 Or. 160, 165, 206 P.3d 1042 (2009) (citing ORS 174.020(1)(a), which states, "In the construction of a statute, a court shall pursue the intention of the legislature if possible."); *Church v. Grant County*, 187 Or. App. 518, 524, 69 P.3d 759 (2003) (LUBA and appellate courts use the same framework for interpreting local ordinances as for interpretating statutes). *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984) ("If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.").

Norway Green argues that these provisions, when read together, specify that Friends was the applicant initiating a Type III appeal and thus Friends has the burden of proving that the application did not satisfy the development standards.

Norway Green previously made this argument about the burden of proof to the hearing examiner in a motion to clarify whether it or Friends of the Columbia Gorge had the burden of proof in the appeal proceeding before the hearing examiner. The hearing examiner issued a Motion Order resolving Norway Green's motion. AR 1310–12. In that motion order, the hearing examiner explained:

> 6. CCC 40.100.070 defines "Applicant" as "[t]he person, party, firm, corporation, legal entity, or agent thereof who submits an application for an activity regulated by this title."
>
> 7. The planning director reviewed and approved the application through the Type II process set out in CCC 40.510.020. (Exhibit 36). However, the appellant filed a timely appeal. Therefore, the director's decision is not "final." "The decision of the responsible official shall be final unless a notice of appeal is filed…" CCC 40.240.050(G)(5).
>
> 8. Pursuant to CCC 40.240.050(I), this appeal of the director's decision is subject to the appeal process set out in CCC 40.510.020(H).
>
> 9. In this case, Norway Green, LLC is the "Applicant" as defined by CCC 40.100.070; Norway Green, LLC is the legal entity that filed an application requesting approval of a Type II Gorge permit. . . .
>
> 10. CCC 40.510.030, which sets out the review procedures for Type III applications, is not applicable to this appeal of a Type II application. Although the appeal is subject to the Type III procedures, it remains a Type II application. In addition, CCC 40.240.050(I) expressly provides that appeals of Type II applications are subject to 40.510.020(H). CCC 40.510.030(H) only applies to Type III applications.

AR 1311-12.

We concur with and adopt the hearing examiner's explanation and conclusion in the Motion Order that the application remains a Type II application, AR 1311, except that we do not adopt the portion of paragraph 10 of the Hearing Examiner's Motion Order stating, "Although

the appeal is subject to the Type III procedures." We also concur with and adopt the hearing examiner's explanation that Norway Green remains the applicant as the legal entity that filed an application requesting approval of a Type II permit. We believe the hearing examiner's explanation and resolution of Norway Green's argument best expresses the intent of the Clark County Council in applying CCC §§ 40.240.050.I and 40.510.020.H.2.a. We further note that in the final order, the hearing examiner did not describe the appeal procedures as Type III procedures. *See, e.g.,* AR 54-55 (discussing procedural issues).

The hearing examiner did not improperly construe the Clark County Code. Norway Green's first assignment of error is denied.

Norway Green's Second Assignment of Error

Norway Green argues that the subject parcel is predominantly unsuitable for agriculture because much of the parcel is currently being used for forest management, a use that Norway Green prefers to maintain,[5] and that Clark County cannot compel it to convert its forest land to agricultural land. Norway Green's brief did not specify the standard of review. Friends of the Columbia Gorge's brief stated that the applicable standards of review for this assignment of error are whether the decision improperly construes the applicable law, whether the decision was clearly erroneous, and whether the decision was arbitrary and capricious. We understand Norway Green's argument to involve interpretation of Clark County Code § 40.240.430.A.16.b; thus, the applicable standard of review is whether the decision improperly construes the applicable law. Commission Rule 350-60-220(1)(h).

[5] A landowner's preference to maintain a current land use does not appear in CCC § 40.24.430.A.16.b and thus is not a factor that counties or we can consider in determining whether a parcel is predominantly unsuitable for the production of farm crops and livestock.

To approve a dwelling not in conjunction with agricultural use on land designated large-scale agriculture, Clark County Code § 40.240.430.A.16.b requires a finding that states in relevant part:

> The subject parcel is predominantly unsuitable for the production of farm crops and livestock, considering soils, terrain, location and size of the parcel.

This standard comes from the Management Plan that the Gorge Commission adopted, and that Clark County enacted into its local code without change. In this situation, we analyze whether the hearing examiner's interpretation and application of this section is consistent with the intent of the Gorge Commission.[6]

Norway Green's principal argument in this assignment of error—that Clark County cannot compel it to convert its forest land to agricultural land—seems to derive from the hearing examiner's statements that the subject parcel is predominantly unsuitable for the production of farm crops and livestock in its current state in which two-thirds of the parcel is currently used for forest management (Discussion ¶ 9, AR 58), but that the subject parcel is predominantly suitable for production of farm crops and livestock if Norway Green would harvest the forested portion of the parcel and use that land for farm crops and livestock (Discussion ¶ 10, AR 59). We address the first of these statements in our discussion of Norway Green's third assignment of error below. In this assignment of error, we focus on the second of these statements.

We disagree that Clark County's decision compels Norway Green to convert the forest use to agricultural use on the subject parcel. We understand the hearing examiner's statements in

[6] *See* CCC § 40.240.010 (stating in relevant part, "These regulations are intended to be consistent with and implement the Management Plan for the Columbia River Gorge National Scenic Area (CRGSNA) adopted and amended by the Columbia River Gorge Commission."); CCC § 40.240.010.C (stating, "The Gorge Commission, Forest Service, and counties should strive to apply Management Plan provisions uniformly throughout the National Scenic Area, except when a county has adopted a more restrictive provision.").

discussion paragraphs 9 and 10 to mean that the parcel may be *concurrently* suitable for forest use *and* agricultural use. Norway Green may choose to continue using its parcel for forest management. Norway Green may choose to use the parcel for forest management for as long as it likes. Norway Green is not compelled to convert the forest use to any other use. The determination that the parcel is predominantly suitable for production of farm crops and livestock only means that Norway Green cannot qualify for a dwelling not in conjunction with agricultural use of the parcel.[7]

Norway Green also argues that the National Scenic Area Act prioritizes the preservation of forest uses above agricultural use. The hearing examiner's decision disagreed (Discussion ¶ 10.c, AR 60), and we disagree. The National Scenic Area Act treats agricultural land and forest land in the same manner and envisions that agricultural land will be converted to forest land and that forest land will be converted to agricultural land in the following precatory standards for the Management Plan:

> The management plan and all land use ordinances and interim guidelines adopted pursuant to sections 544 to 544p of this title shall include provisions to—
>
> (1) protect and enhance agricultural lands for agricultural uses and to allow, but not require, conversion of agricultural lands to open space, recreation development or forest lands;
>
> (2) protect and enhance forest lands for forest uses and to allow, but not require, conversion of forest lands to agricultural lands, recreation development or open spaces;
>
> * * *

[7] Norway Green also suggests that it must convert its land to agricultural use to qualify for a dwelling in conjunction with agricultural use. Norway Green Opening Brief at 16. Norway Green did not apply for a dwelling in conjunction with agricultural use, and the hearing examiner did not make findings relating to a dwelling in conjunction with agricultural use; thus, we do not address this argument.

16 U.S.C. §§ 544d(d)(1), (2). The use of land in the National Scenic Area for forest management is not prioritized over the use of land for agriculture.

Norway Green also argues that "what use property *might* be put to is not a valid reason to deny a land use permit for a use allowed by the code." Norway Green Opening Brief at 19 (emphasis added here). This is not an accurate characterization of CCC § 40.240.430.A.16.b. That code provision requires an examination and analysis of the potential for the subject parcel to be used for production of farm crops and livestock. That provision ensures that agricultural land is used for agriculture and is not converted to residential use. That provision implements the Agricultural Land GMA Goal in the Management Plan (2020), which states: "Protect and enhance lands that are used for or suitable for agricultural use." Management Plan (2020) at 154.[8]

Agricultural Land GMA Objective 1 in the Management Plan (2020) implements the Agricultural Land Goal, specifying:

> Use regulations establishing allowable land uses and minimum parcels sizes to prevent fragmentation of agricultural lands, ensure agricultural lands are used for agricultural purposes, and to avoid conflicts between agricultural lands and adjacent or nearby non-agricultural land uses.

[8] In 2020, the Gorge Commission adopted a revised Management Plan (including revised text of this goal) before Norway Green submitted its application to Clark County. We cite the 2020 text of this goal because it was the version of the Management Plan in effect at the time Norway Green submitted its application to Clark County even though Clark County had not yet amended its land use ordinance to be consistent with the guidelines in the 2020 revised Management Plan. We also note that the former Agricultural Land GMA Goal in the 2004 Management Plan that formed the basis of the Clark County Code in effect at the time that Norway Green submitted its application to Clark County is substantially similar: "Protect and enhance agricultural land for agricultural uses. Agricultural lands are those lands that are used for or suitable for agricultural use." Management Plan (2004) at II-1-2.

Management Plan (2020) at 154.[9] Agricultural Land GMA Land Use Policies 3.B and 10 in the Management Plan (2020) further implement Objective 1, specifying:

> 3. Minimum lot sizes shall be established that are adequate to maintain agricultural operations and that:
>
> * * * *
>
> B. Are large enough to ensure efficient agricultural management, discourage speculative real estate investment, and prevent conversion of agricultural land to residential use and conflicts from adjacent or nearby land uses.
>
> 10. Single-family dwellings may be allowed in areas designated Large-Scale Agriculture when:
>
> A. A farm dwelling is shown to be in conjunction with and substantially contributes to the effective and efficient current agricultural use of a farm or ranch, or
>
> B. A non-farm dwelling is shown not to convert land from agricultural use and not to interfere or conflict with agriculture on nearby lands.

Management Plan (2020) at 156, 157.[10]

The hearing examiner's decision is consistent with the intent of the Gorge Commission in preserving agricultural land for agricultural use. The hearing examiner's decision did not improperly construe the applicable law in the manner that Norway Green argued in its second assignment of error.

[9] Former Agricultural Land Use Policy 4 in the 2004 Management Plan is substantially similar, stating, "Agricultural land shall be protected from conversion to residential land by establishing minimum lot sizes for the creation of new parcels that are adequate to maintain existing agricultural operations, and by specifying the uses that may occur and the conditions of approval." Management Plan (2004) at II-1-4.

[10] These same policies were in the 2004 Management Plan. Agricultural Land Use Policies 5.B and 10. Management Plan (2004) at II-1-5 and II-1-6.

Norway Green's Third Assignment of Error

Norway Green argues in its third assignment of error that the parcel is not predominantly suitable for the production of farm crops or livestock. Norway Green's brief did not specify the standard of review. Friends of the Columbia Gorge's brief stated that the applicable standards of review for this assignment of error are whether the decision is supported by substantial evidence in the whole record, whether the findings are insufficient to support the decision, whether the decision improperly construes the applicable law, whether the decision is clearly erroneous, and whether the Decision is arbitrary and capricious. We understand Norway Green's argument in this assignment of error is that Clark County improperly construed applicable law and that the decision is not supported by substantial evidence. Commission Rule 350-60-220(1)(f), (h).

We explained our approach to statutory interpretation above and do not repeat it here. "Substantial evidence is evidence in sufficient quantum to persuade a fair-minded person of the truth of the declared premise." *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 819, 828 P.2d 549 (1992).[11]

Initially, we observe that the hearing examiner's decision considered that approximately two-thirds of the subject parcel is currently in forest use, and approximately one-third is cleared pasture. AR 57. We pause here to caution that "predominantly" is not limited to considering the relative acreage of the current uses of a parcel. If the relative acreage of uses of a parcel were the only manner of determining "predominantly," then landowners would have an incentive to adjust the current uses or boundaries of their parcels to make other land uses the majority of the acreage

[11] Oregon state courts and federal courts explain substantial evidence similar to *Cowiche Canyon Conservancy*. *E.g.*, *Dodd v. Hood River County*, 317 Or. 172, 179, 855 P.2d 608 (1993) (substantial evidence is evidence that a reasonable person would rely on in making a decision); *Burch v. Barnhart*, 400 F.3d 676, 679 (9th Cir. 2005) ("Substantial evidence means 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.' . . .").

of a parcel prior to applying for a dwelling not in conjunction with agricultural use. Doing so would conflict with the Agricultural Land goal, objective, and policies in the Management Plan listed above. Other factors may and should be considered as appropriate for determining predominance.

We understand Norway Green's legal argument to suggest that under CCC § 40.240.430.A.16.b, once a parcel is predominantly *used* for one purpose, the parcel—the land itself—cannot be predominantly *suitable* for another land use. We disagree. CCC § 40.240.430.A.16.b lists "soils, terrain, location and size of the parcel" as the considerations for whether a parcel is predominantly unsuitable for the production of farm crops and livestock. Current use of the parcel is not a consideration. The use of the land for forest management does not mean that the soils, terrain, location, and size of the parcel would not also reveal that the subject parcel is predominantly suitable for agricultural use. Current *use* of a parcel for forest management may preclude the land from being predominantly *used* for agriculture at the same time, but it does not change the characteristics of the subject parcel (the soils, terrain, location, and size) that CCC § 40.240.430.A.16.b requires Clark County to consider, and thus does not preclude the subject parcel from being predominantly *suitable* for agriculture.

We note that the definition of suitability in CCC § 40.240.040 includes a consideration of whether the land is committed to another land use that does not allow for agricultural use. We do not rely on this definition here because CCC § 40.240.430.A.16.b precisely specifies the factors that Clark County must consider for applications for dwellings not in conjunction with agricultural use. Even if we would apply the definition of suitability, we do not believe the definition of suitability in CCC § 40.240.040 means that land currently used for forest management is "committed to another land use that does not allow for agricultural use." We refer

back to the precatory standards in the National Scenic Area Act cited above, 16 U.S.C. § 544d(d)(1), (2), which express requirements to allow conversion of agricultural lands to forest lands and forest lands to agricultural lands, and both agricultural and forest lands to recreation development or open space, support a legal conclusion that agricultural lands and forest lands may concurrently be predominantly suitable for both uses and for open space and recreation.

Norway Green's argument that a parcel cannot be predominantly used for timber production and concurrently predominantly suitable for farm crops and livestock is incorrect as a matter of law. The hearing examiner's decision did not improperly construe CCC § 40.240.430.A.16.b.

Norway Green next argues that the subject parcel is predominantly unsuitable for production of farm crops and livestock because it contains "critical areas." Norway Green Opening Brief at 21. This is Norway Green's factual argument, for which we review the hearing examiner's decision for substantial evidence." Critical areas" is a term used in the Washington Growth Management Act that roughly refers to areas of sensitive natural resources. *See* RCW 36.70A.030(6). The Management Plan does not use the term "critical areas." The hearing examiner's decision concluded "[t]here are environmentally sensitive areas on the site. However, as discussed above, large portions of the forested area on the site are located outside of these sensitive areas. It is possible to clear the upland portions of the site for farming while retaining trees within the wetland and riparian buffer areas on the site." (Discussion ¶ 10.d, AR 61). The hearing examiner's decision did not cite the pages in the record that it relied on.

Norway Green and Friends of the Columbia Gorge point to conflicting evidence in the record about whether the parcel is predominantly unsuitable for production of farm crops and livestock when considering protection of the wetland and stream and considering the slopes on a

portion of the property. Norway Green principally points to evidence at page 1280 of the record, which is a map of natural constraints on the subject parcel that came from a report prepared by Norway Green's consultant. Norway Green asserts that the map demonstrates that the majority of the land area on the parcel has natural constraints and thus is predominantly unsuitable for production of farm crops and livestock. Friends of the Columbia Gorge principally relies on a long declaration from a consulting land use planner (AR 170-213) and witness testimony at the hearing (AR 494-779).

The hearing examiner reviewed the conflicting evidence in the record as stated in the following paragraph:

> 2. After reviewing all of the conflicting evidence in the record, the examiner finds that the applicant failed to meet its burden of proving by a preponderance of the substantial evidence in the record that the site is predominantly unsuitable for the production of farm crops and livestock. CCC § 40.240.430.A.16.b.

Discussion ¶ 2, AR 56. The hearing examiner's decision summarizes the evidence and reasoning principally in discussion paragraph 10.a.ii. AR 59–60. We reviewed the evidence that the hearing examiner's decision summarized and independently reviewed the whole record and concur that the hearing examiner's decision is supported by substantial evidence. We do not summarize all of the evidence here, but we provide an example from the record that illustrates why the hearing examiner's decision is supported by substantial evidence. Friends of the Columbia Gorge's expert pointed out:

- In the past, cattle were allowed to cross the stream and access the eastern half of the property. AR 190, ¶ 55, AR 568.
- the National Scenic Area buffers for the water resources on the parcel would range from 75 feet for a forested wetland to 100 feet for a fish-bearing stream (*if* the stream on the parcel is fish-bearing, but the credible, uncontradicted testimony at the hearing was that the stream has never contained fish, and even the Applicant's witnesses admit in the Application materials that the waterfall at the southern end of the parcel likely blocks fish passage). AR 190, ¶ 56.

- The widths shown on Norway Green's environmental constraints map show "the habitat itself, not necessarily the widths of the buffers." AR 192, ¶ 61.

These bullet point summaries of Friends' evidence contradict Norway Green's assertion that two-thirds area of the subject parcel is environmentally constrained such that it is predominantly unsuitable for production of farm crops and livestock. Norway Green's experts responded to portions of Friends' expert's testimony about suitability, AR 478–79, but did not address all of the testimony. Specifically, Norway's Green's experts did not address the bullet points above.[12] In our review of the complete record, we concur with the hearing examiner's decision that Norway Green did not satisfy its burden of demonstrating that the subject parcel is predominantly unsuitable for production of farm crops and livestock. Our review and understanding of the evidence in the whole record is that Friends produced evidence that contradicted Norway Green's evidence about environmental constraints; demonstrated past agricultural uses of the property including livestock in the forested portion of the property; provided examples of possible agricultural uses consistent with continued forest use; and cited to smaller setbacks required under the National Scenic Area standards than shown on Norway Green's natural constraints map. AR 190–96. The hearing examiner's decision that Norway Green did not satisfy its burden of proof to demonstrate that the subject parcel is predominantly unsuitable for production of farm crops and livestock is supported by substantial evidence in the whole record.

Norway Green's Fourth Assignment of Error

Norway Green's Fourth Assignment of Error argues that the hearing examiner's decision is an unconstitutional taking. Norway Green's brief did not specify the standard of review.

[12] Friends submitted additional testimony contradicting Norway Green's response about suitability. AR 128–31.

Friends of the Columbia Gorge's brief stated that the applicable standard of review for this assignment of error is whether the decision is unconstitutional. Commission Rule 350-60-220(1)(b). We agree with Friends' statement of the standard of review.

Norway Green argues that Clark County's decision compelling it to harvest the forested portion of its land is like an exaction. Norway Green cites *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), *Dolan v. City of Tigard*, 512 U.S. 374 (1994), and *Koontz v. St. Johns River Water Management District*, 570 U.S. 595 (2013).

We have already explained above that Clark County did not compel Norway Green to harvest its forest or compel it to do anything or refrain from doing anything in exchange for a decision allowing a dwelling not in conjunction with agriculture. Norway Green's property simply does not meet the "predominantly unsuitable" standard in CCC § 40.240.430.A.16.b considering the factors required in that standard.

We also observe, as Friends cited, that *Nollan*, *Dolan*, and *Koontz* apply only to exactions of property or money in lieu of property.[13] Friends cited *Olympic Stewardship Found. v. State Envtl. & Land Use Hearings Off.*, 199 Wn. App. 668, 747, 399 P.3d 562 (2017), which explains that *Nollan*, *Dolan*, and *Koontz* involve giving up a portion of property or money. The Washington Court of Appeals summarized:

> *Nollan*, *Dolan*, and *Koontz* all involve a special application of the "unconstitutional conditions" doctrine protecting federal Fifth Amendment rights to just compensation for property the government takes when owners apply for land-use permits. *Koontz*, 133 S. Ct. at 2594. *Nollan* and *Dolan* stand for the

[13] Friends of the Columbia Gorge points out in its brief that Norway Green erred in citing an excerpt from the *Koontz* case. That error was material and could have misled members of the Commission. Norway Green provided several paragraphs of briefing explaining that *Nollan* and *Dollan* involved exactions of property and that *Koontz* extended *Nollan* and *Dollan* to non-property exactions. Norway Green's citation to *Koontz* erroneously referred to a landowner's "relinquishment of a property right." Friends pointed out and we verified that the *Koontz* decision actually referred to a landowner's relinquishment of a portion of his property."

> proposition that the government may not condition approval of a land-use permit on the owner's relinquishment of a portion of his property unless there is a nexus and rough proportionality between the government's demand and the effects of the proposed land use. *Koontz*, 133 S. Ct. at 2591. In *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 702-03, 119 S. Ct. 1624, 143 L. Ed. 2d 882 (1999), the Supreme Court made clear the limited scope of the *Nollan*/*Dolan* test:
>
> > [W]e have not extended the rough-proportionality test of *Dolan* beyond the special context of exactions—land-use decisions conditioning approval of development on the dedication of property to public use. *See Dolan*, [512 U.S.] at 385; [*Nollan*, 483 U.S. at 841].
>
> Later, in *Koontz*, 133 S. Ct. at 2599, the Court extended the *Nollan*/*Dolan* test to certain "monetary exactions."

Id. Here, the hearing examiner's decision did not require Norway Green to give up a portion of its property or require a monetary payment in exchange for approving its application for a dwelling not in conjunction with agricultural use. Again, Clark County merely concluded that Norway Green's application did not demonstrate compliance with the approval criteria. We conclude that the hearing examiner's decision did not create an unconstitutional taking.

Friends of the Columbia Gorge's First and Second Assignments of Error

Friends of the Columbia Gorge stated in its briefing that if the Gorge Commission denied all of Norway Green's assignments of error, then the assignments of error in its own appeal would be moot. We agree, except that we chose to address Friends of the Columbia Gorge's third and fourth assignments of error. Our resolution of those two assignments of error do not affect our primary decision affirming the hearing examiner's decision. We offer these as guidance if an appellate court reverses our decision on any one of Norway Green's assignments of error or if Norway Green submits a new application, and for counties to consider when reviewing applications for new dwellings not in conjunction with agricultural use.

Friends' first and second assignments of error are denied as moot and we do not address the merits of them. If an appellate court reverses our decision on any one of Norway Green's

assignments of error or if Norway Green submits a new application, we would allow Friends of the Columbia Gorge or another party to raise the same arguments again on remand or appeal.

Friends of the Columbia Gorge's Third Assignment of Error

In this assignment of error, Friends of the Columbia Gorge argues that the hearing examiner's decision erred by refusing to evaluate "the capability of the subject parcel to be utilized in conjunction with other agricultural operations in the area," as required by CCC § 40.240.430.A.16.b. Friends stated that the standards of review for this assignment of error are whether the decision improperly construes the applicable law, whether the decision is clearly erroneous, and whether the decision is arbitrary and capricious.

We chose to address Friends of the Columbia Gorge's third assignment of error because we believe it raises an interpretation of the Management Plan that is likely to arise again if an appellate court reverses our decision on any one of Norway Green's assignments of error or if Norway Green submits a new application, and in other applications for a dwelling not in conjunction with agriculture in Clark County and other National Scenic Area counties. We therefore limit our review to only whether the hearing examiner's decision improperly construed applicable law. We conclude that the hearing officer improperly construed CCC § 40.240.430.A.16.b. That provision states:

> b. The subject parcel is predominantly unsuitable for the production of farm crops and livestock, considering soils, terrain, location and size of the parcel. Size alone shall not be used to determine whether a parcel is unsuitable for agricultural use. *An analysis of suitability shall include the capability of the subject parcel to be utilized in conjunction with other agricultural operations in the area.*

(Emphasis added). Friends argued that the hearing examiner's decision did not follow the italicized sentence in the above quoted standard in the following discussion paragraph in the decision:

> The site, in its current, forested, condition, is not suitable for agricultural use in conjunction with other agricultural operations in the area. The examiner agrees with the applicant that the analysis must start with the site. ***If the site itself is not suitable due to conditions other than the size of the site, than [sic] the site is not suitable for farming in conjunction with other parcels in the area.*** As Ms. Bremer puts it, other farming operations in the area may theoretically enhance or supplement the growing of hay and raising of livestock on the existing pasture area of the site, but that would not convert the entire site to one that is predominantly suitable for farm crops or livestock. This is consistent with the Gorge Director's decisions in *Jamieson*, *Sanchez/Murray*, and *Moore*. . . . In all of those cases the decision maker first determined that the subject parcels themselves were suitable for livestock but for the size of the parcels. Only then did the decision maker consider whether the parcels could be used in conjunction with other parcels. In this case only a small portion of the site is suitable for farm crops or livestock. The entire site is predominantly unsuitable due to its forested condition, not due to the size of the site. ***Therefore, there is no need to consider the feasibility of farming this site in conjunction with other parcels.***

Discussion paragraph D.9, AR 58–59 (emphases in Friends' briefing). In the first emphasized sentence, we note that the hearing examiner's decision began the suitability analysis by considering whether the size of the parcel made the parcel predominantly unsuitable for production of farm crops and livestock, noting that prior decisions began with considering the size of the subject parcel. We caution that the definition of suitability does not establish a priority or hierarchy of considerations and does not specify that an analysis of suitability must start with considering the size of a parcel.

The requirement in CCC § 40.240.430.A.16.b that, "An analysis of suitability shall include the capability of the subject parcel to be utilized in conjunction with other agricultural operations in the area" is mandatory. There is no express, implied, or conditional exception in that provision to considering the capability of the parcel to be used in conjunction with other agriculture in the area. We especially note that in this case, the subject parcel is one of three parcels that were in a single ownership and were farmed as a single farm for decades until Norway Green purchased the parcel. AR 561–69, 618, 726, 1525–40.

As guidance, we conclude that the hearing examiner's decision improperly construed CCC § 40.240.430.A.16.b by concluding that it did not need to consider the use of the parcel in conjunction with other agriculture in the area.

Friends of the Columbia Gorge's Fourth Assignment of Error

In this assignment of error, Friends of the Columbia Gorge argues that the hearing examiner's decision erred by limiting the agricultural suitability analysis solely to the potential for producing crops and livestock, impermissibly excluding all other agricultural uses and products from the analysis required in CCC § 40.240.430.A.16.b. Friends stated that the standards of review for this assignment of error are whether the decision improperly construes the applicable law and whether the decision was clearly erroneous.

We chose to address Friends of the Columbia Gorge's fourth assignment of error because we believe it raises an interpretation of the Management Plan that is likely to arise again if an appellate court reverses our decision on any one of Norway Green's assignments of error or if Norway Green submits a new application, and in other applications for a dwelling not in conjunction with agriculture in Clark County and other National Scenic Area counties. We therefore limit our review to only whether the hearing examiner's decision improperly construed applicable law. We again conclude that the hearing officer improperly construed CCC § 40.240.430.A.16.b. Again, that provision states:

> b. The subject parcel is predominantly unsuitable for the production of farm crops and livestock, considering soils, terrain, location and size of the parcel. Size alone shall not be used to determine whether a parcel is unsuitable for *agricultural use*. An analysis of suitability shall include the capability of the subject parcel to be utilized in conjunction with other agricultural operations in the area.

(Emphasis added). Friends argues that the hearing examiner's decision did not apply the applicable definition of the term "agricultural use." Here, unlike in Norway Green's third

assignment of error, we do refer to the definition of "agricultural use" because CCC § 40.240.430.A.16.b does not list specific agricultural uses. CCC § 40.240.040 defines "agricultural use" as:

> The current employment of land for the primary purpose of obtaining a profit in money by raising, harvesting, and selling crops; or by the feeding, breeding, management, and sale of, or production of, livestock, poultry, furbearing animals or honeybees; or for dairying and the sale of dairy products; or any other agricultural or horticultural use, including Christmas trees. Current employment of land for agricultural use includes:
>
> • The operation or use of farmland subject to any agriculture-related government program.
>
> • Land lying fallow for one (1) year as a normal and regular requirement of good agricultural husbandry.
>
> • Land planted in orchards or other perennials prior to maturity.
>
> • Land under buildings supporting accepted agricultural practices. Agricultural use does not include livestock feedlots.

In discussion paragraph D.8.a.i, the hearing examiner's decision stated, "Bees are not crops or livestock as defined by state law or as used in the Code definition of 'agricultural use.'" We note that honeybees are specifically mentioned in the above definition of agricultural use. We also note that the hearing examiner's decision uses definitions in state law.[14] We caution that state laws may not apply in all situations when interpreting National Scenic Area standards. Here, the Management Plan provides the relevant definition of agricultural use, not state law. In another example, in past guidance, we have cautioned counties that state laws allowing cannabis land uses do not apply in the National Scenic Area. Thus, state laws that define cannabis (and now psilocybin in Oregon) as farm crops would not be applicable considerations for determining

[14] We also note that discussion paragraphs D.5 and D.6 in the hearing examiners' decision (AR 56-57) refer to sections of Washington law to define "crops" and "livestock."

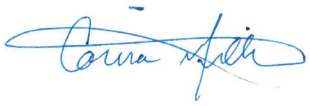
whether a parcel is predominantly unsuitable for production of farm crops and livestock in CCC § 40.240.430.A.16.b.

Friends argues that not analyzing the potential for using the subject parcel for beekeeping and growing Christmas trees is not consistent with the definition of agricultural use. We agree. CCC § 40.240.430.A.16.b uses the term "agricultural use" and CCC § 40.240.040 defines the term "agricultural use." The term "agricultural use" specifically includes honeybees and Christmas trees. The hearing examiner's decision improperly construed the applicable law by not analyzing these agricultural activities. We also note that the definition of "agricultural use" is broad and includes the phrase, "or any other agricultural or horticultural use." Our guidance in this opinion is limited, but we also note that phrase suggests that counties are not limited to considering only those types of agriculture specifically listed in the definition.

As guidance, we conclude that the hearing examiner's decision improperly construed CCC § 40.240.430.A.16.b and CCC § 40.240.040 by not considering the uses listed in the definition of agricultural use and any other agricultural or horticultural use when analyzing the suitability or capability for agricultural use.

The decision of the hearing examiner is affirmed.

DATED this 1st day of May 2023



Carina Miller
Chair
Columbia River Gorge Commission

NOTICE: You are entitled to seek judicial review of this Corrected Final Opinion and Order within 60 days from the date of service of this order, pursuant to section 15(b)(4) of the National Scenic Area Act, 16 U.S.C. § 544m(b)(4).

NOTICE OF MAILING

I certify that on May 1, 2023, I mailed the attached CORRECTED 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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