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SKAMANIA COUNTY
AUDITOR

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AUDITOR

GARY M. OLSON

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF SKAMANIA

BRIAN BEA and JODY BEA, husband and wife,

Petitioners,

v.

COLUMBIA RIVER GORGE COMMISSION,
SKAMANIA COUNTY, KENN ADCKOCK,
VAUGHN LEIN, TIM SOUTHWORTH, JANICE
STAYER, L. W. BUD QUINN, KATHARINE A.
SHEEHAN, ANNE SQUIER, BOB THOMPSON,
ART CARROLL, DONALD F. DUNN, and LOUIE
PITT, JR. in their official capacity as members of
the Columbia River Gorge Commission,

Respondents.

No. 99-2-00020-1

SUMMONS
(20 Day)

Reg. served
ordered, by
direct
served
V. 104

ROBIN L. RIVETT
JOHN M. GROEN, WSBA No. 20864
Pacific Legal Foundation
10800 N.E. 8th Street
Suite 325
Bellevue, Washington 98004
Telephone: (425) 635-0970
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Attorneys for Petitioners Bea

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SUMMONS

COPY

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1 A lawsuit has been started against you in the above-entitled court by Brian and
2 Jody Bea, Petitioners. Petitioners' claim is stated in the written complaint, a copy of which is
3 served upon you with this summons.

4 In order to defend against this lawsuit, you must respond to the complaint by
5 stating your defense in writing, and by serving a copy upon the person signing this summons
6 within 20 days after the service of this summons, excluding the day of service, or a default
7 judgment may be entered against you without notice. A default judgment is one where
8 Petitioners are entitled to what they ask for because you have not responded. If you serve a
9 notice of appearance on the undersigned person, you are entitled to notice before a default
10 judgment may be entered.

11 You may demand that the Petitioners file this lawsuit with the Court. If you do
12 so, the demand must be in writing and must be served upon the person signing this summons.
13 Within 14 days after you serve the demand, the Petitioners must file this lawsuit with the Court,
14 or the service on you of this summons and complaint will be void.

15 If you wish to seek the advice of an attorney in this matter, you should do so
16 promptly so that your written response, if any, may be served on time.

17 This summons is issued pursuant to rule 4 of the Superior Court Civil Rules of
18 the State of Washington

19
20 *John M. Groen*
21 JOHN M. GROEN, WSBA No. 20864

22 Attorneys for Plaintiff

23 Pacific Legal Foundation
24 10800 N.E. 8th Street
25 Suite 325
26 Bellevue, WA 98004
27 Telephone: (425) 635-0970

28 Dated: 3/31/99

FIRST AMENDED PET. FOR JUDICIAL REVIEW
& COMPLAINT FOR DAMAGES

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF SKAMANIA

BRIAN BEA and JODY BEA, husband and wife,
Petitioners,
v.
COLUMBIA RIVER GORGE COMMISSION,
SKAMANIA COUNTY, KENN ADCKOCK,
VAUGHN LEIN, TIM SOUTHWORTH, JANICE
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FIRST AMENDED
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Brian Bea and Jody Bea hereby allege as follows:

INTRODUCTION

1. This case involves review of the administrative proceedings and order dated January 25, 1999, by the Columbia River Gorge Commission (Gorge Commission).¹ Among other things, the Gorge Commission's order requires Skamania County (County) to revise its decision (Director's Decision NSA-96-81, Part 2) approving the land use application submitted by Brian and Jody Bea (the Beas). The Gorge Commission also requires the County to issue a revised decision that forces the Beas to move their recently constructed house to an alternative location.

PARTIES

2. Brian and Jody Bea, husband and wife, are individuals residing in the State of Washington. They are the owners of real property located in Skamania County which is the subject of this action. The subject property is a 20-acre parcel located approximately one-half mile northwest of Prindle, in the NW ¼ of Section 11, Township 1 North, Range 5 East, W.M., Washington.

3. The Columbia River Gorge Commission is a bi-state agency created by the States of Oregon and Washington. RCW 43.97.015, ORS 196.150.

4. Skamania County is a municipal corporation of the State of Washington.

JURISDICTION AND VENUE

5. This is a case of actual controversy between the Beas, the Gorge Commission, and Skamania County.

6. Jurisdiction is conferred upon this Court by RCW 2.08.010 and 16 U.S.C. § 544m.

7. Venue is in this Court pursuant to RCW 36.01.050.

¹ In a separate action under Skamania County Superior Court No. 98-2-00099-8, Skamania County filed a supplemental petition to set aside the order of the Columbia River Gorge Commission. This action by the Beas challenges the same Gorge Commission order.

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GENERAL ALLEGATIONS

8. In 1986, the United States Congress adopted the Columbia River Gorge National Scenic Area Act (the Act), 16 U.S.C. § 544, *et seq.*, which became effective through an interstate compact between the States of Oregon and Washington. Among other things, the Act authorized formation by the states of the Columbia River Gorge Commission.

9. One of the early responsibilities of the Gorge Commission was to prepare and adopt a Management Plan that included "land use designations" for the use of nonfederal lands within the Scenic Area. 16 U.S.C. § 544d(b). A primary purpose of the Management Plan is to ensure that land in the Scenic Area is used consistently with the purposes and standards of the Act.

10. In October, 1991, the Gorge Commission adopted the Management Plan for the Columbia River Gorge National Scenic Area. The Management Plan includes provisions for protection of scenic resources.

11. The Gorge Commission has responsibility for administering the Management Plan. 16 U.S.C. § 544e(a).

12. After adoption by the Gorge Commission of the Management Plan, counties within the scenic area may adopt a "land use ordinance" setting land development standards consistent with the Management Plan. 16 U.S.C. § 544e(b)(1).

13. In 1993, Skamania County adopted Ordinance 1993-04 as its land use ordinance (codified as Title 22, Skamania County Code (SCC)) pursuant to 16 U.S.C. § 544e. The Gorge Commission reviewed the ordinance and determined that it was consistent with the Management Plan.

14. Pursuant to the Commission's approval of the ordinance, Skamania County was delegated the land use permitting authority of the Commission for the purpose of administering the Management Plan. Final land use decisions of the County may be appealed to the Gorge Commission by any adversely affected person or entity.

15. On or about November 27, 1996, the Beas submitted an application and site plan to the Skamania County Department of Planning and Community Development proposing

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1 construction of a single-family residence with accessory buildings (shop and barn) on their
2 property in Skamania County.

3 16. The Beas' application (County File No. NSA-96-81) was reviewed by
4 County planning officials to determine whether the proposal was consistent with the
5 requirements of the County land use ordinance.

6 17. On April 4 and 9, 1997, Skamania County planning staff conducted site
7 visits on the Beas' property. The County also received comments from interested parties
8 including a May 6, 1997, comment letter from the Gorge Commission.

9 18. On May 16, 1997, a Staff Report was completed. The Staff Report includes
10 numerous findings of fact, including that an "adequate site plan was submitted." Staff Report
11 at 5. The Staff Report also found that the "proposed development will be visible from several
12 KVA's [key viewing areas]." The Staff Report further found that the "existing vegetation is not
13 sufficient to provide screening" of the proposed building sites. Staff Report at 6. The Staff
14 Report further found:

15 As a condition of approval, applicant should be required to plant
16 10 screening trees at 6 feet in height, 12 foot on center, staggered,
17 with at least half of the trees being coniferous to provide winter
18 screening. The above mentioned screening trees should be
19 located behind the proposed residence between two large existing
20 fir trees, enabling the development to blend in with existing
topography. Also, as a condition of approval, applicant should be
required to plant 10 screening trees in front of the home. Trees
should be 6 feet tall at the time of planting, placed 12 feet on
center, staggered, and should be at least half coniferous to
provide winter screening.

21 Staff Report at 11.

22 19. Based on the entire record, including the Staff Report, the Director of the
23 Skamania County Department of Planning and Community Development found the Beas'
24 proposed house and accessory buildings to be consistent with the County's land use ordinance,
25 Title 22 SCC and, thereby, approved the Beas' application. The approval had various
26 conditions, including Condition No. 30, requiring that the Beas plant 10 screening trees in front
27 of the home and 10 screening trees in back of the home as described in the Staff Report.

28 ///

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20. Notice and a copy of the Director's Decision (NSA-96-81) was provided to all parties including the Columbia River Gorge Commission.

21. No person or entity appealed the Director's Decision. The County's decision, therefore, became final on June 9, 1997.

22. On June 10, 1997, Skamania County approved a revised location for the accessory shop building. A copy of this decision was provided to the Gorge Commission.

23. On August 15, 1997, a County planner inspected and approved the site location for the shop.

24. The Beas completed construction of the shop in September, 1997.

25. The Beas subsequently submitted plans for the actual construction of the house. Condition No. 27 of the Director's Decision states in part:

The house shall be limited to one-story house with a daylight basement. However, the main floor may include a loft so long as the total height of the house, above the floor elevation of the main floor, does not exceed 25 feet.

The plans submitted by the Beas included all structural elements of the proposed house including elevations and floor plan. The County reviewed the plans and determined that the plans were for a one-story house with daylight basement and loft and were consistent with the requirements of the Director's Decision, including the overall height limitation, and, therefore, a building permit was issued to the Beas.

26. On April 10, 1998, a County building inspector approved the excavation, site, and footing for the house.

27. On May 15, 1998, a County building inspector approved the foundation, plumbing, and slab for the house.

28. The Beas continued with construction of the house pursuant to the permits and by July 27, 1998, the outside shell had been completed.

29. On July 27, 1998, pursuant to Commission Rule 350-30, *et. seq.*, the Gorge Commission initiated an enforcement action against Skamania County by serving the County with a Notice of Alleged Violation regarding the Director's Decision approving the Beas' house

1 and accessory buildings. The Beas were not named as a defendant to the Notice of Alleged
2 Violation and there were no allegations against the Beas. The Notice of Alleged Violation was
3 directed solely to Skamania County.

4 30. On September 3, 1998, the Gorge Commission issued a Supplemental and
5 Amended Notice of Alleged Violation (Supplemental Notice). The Beas were not named as a
6 defendant to this supplemental notice of violation and there were no allegations against the
7 Beas. As with the July 27, 1998, Notice of Alleged Violation, the supplemental notice was
8 directed solely at Skamania County.

9 31. Pursuant to Gorge Commission rules and procedures in an enforcement
10 proceeding, Skamania County was provided 14 days to file an answer to the notice of violation.
11 Commission Rule 350-30-040. In addition, pursuant to Gorge Commission rules, Skamania
12 County was provided an opportunity to negotiate a resolution with the Gorge Commission.
13 Commission Rule 350-30-050. However, because a resolution was not reached, the
14 enforcement action against Skamania County became a "contested case" proceeding.
15 Commission Rule 350-30-070.

16 32. The contested case proceeding commenced on September 1, 1998. The
17 Beas were not a party to the proceeding.

18 33. On September 1, 1998, the contested case proceeding against Skamania
19 County included opening statements presented by attorneys for Skamania County and for the
20 Executive Director of the Gorge Commission. The proceeding also included taking the
21 testimony of Mr. Allen Bell, a Gorge Commission staff planner.

22 34. In prosecuting its enforcement action against the County, the Gorge
23 Commission repeatedly stated through its attorneys that the enforcement action was not against
24 the Beas, but was directed solely at Skamania County. For example, the Hearing Brief of the
25 Executive Director filed in Skamania County Superior Court No. 98-2-00099-8, on August 28,
26 1998, states at 12 that the enforcement action was brought to "evaluate the County's conduct."
27 The same document states at 23: "The result should place the burden of the violation where it
28 belongs—on the County, not the property owners."

1 35. In an action brought by Skamania County challenging the Gorge
2 Commission's jurisdiction to appeal the Director's Decision, the Gorge Commission's attorney
3 stated in open court to Judge Ladley as follows: "Our position is the County is responsible for
4 administering its own ordinance. Only the County makes decisions in this case, so this is
5 strictly an enforcement action against the County and not against Mr. and Mrs. Bea."
6 Comments of Mr. Lawrence Watters, Transcript of Proceeding (Transcript), August 31, 1998,
7 at 45 (Skamania County Superior Court No. 98-2-00099-8).

8 36. Through its attorneys, the Gorge Commission has stated that its
9 enforcement action against the County was not a proceeding to collaterally challenge the land
10 use decision regarding the Beas' property but was merely a review of the County's actions.
11 Through its attorney, the Gorge Commission stated in open court to Judge Ladley that the
12 enforcement action "is not an action challenging issuance of a decision. . . . [O]ur action is not
13 to collaterally attack this decision." Comments of Mr. Lawrence Watters, Transcript at 45.

14 37. Despite directing its Notice of Alleged Violation solely against Skamania
15 County, and despite the Gorge Commission's written and oral statements characterizing the
16 nature of the enforcement proceeding, the relief requested in the Notice of Alleged Violation
17 directly impacted the rights and interests of the Beas.

18 38. The relief requested by the Notice of Alleged Violation against Skamania
19 County included immediate cessation of all development activity on the Beas' property and
20 revision of the Director's Decision so that the Beas' nearly completed house and shop would be
21 relocated to some alternative location.

22 39. On September 18, 1998, the Executive Director of the Gorge Commission
23 filed a motion entitled Executive Director's Motion Regarding Parties. That motion requested
24 that the Beas be joined as a "party" to the proceeding but did not request that the Beas be joined
25 as a "defendant" to the Notices of Alleged Violation against the County. In support of that
26 motion, the Executive Director stated at 2 as follows:

27 [T]he matter pending before the Gorge Commission is an
28 enforcement action brought solely against the County; . . . the
relief requested by the Executive Director against the County is

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1 solely the responsibility of the County; . . . any costs incurred by
2 the property owners in participating in the hearing or in
3 resolution of the issues should be solely the responsibility of the
4 County.

4 40. In objecting to being named as a party to the contested case proceeding, the
5 Beas stated through their counsel's letter dated September 28, 1998, that they were confused by
6 the motion to name them as a party. The Executive Director's motion states that the Executive
7 Director is not taking any action with respect to the Beas, but would take action only against
8 Skamania County. The Beas stated that it was their "understanding that the real issue here is
9 not their house, but rather the macro issues surrounding the County's development review
10 process in general." The Beas further explained:

11 It has not been the Beas' understanding that [removal or
12 structural alteration of their home] is really what the Gorge
13 Commission has been seeking, but rather, acknowledgment by
14 Skamania County that issues such as these will be dealt with
15 differently, and from the Gorge Commission's perspective, in a
16 more rigorous manner in the future.

15 Finally, the Beas stated:

16 If the Gorge Commission is truly contemplating an order
17 requiring the house to be moved or structurally altered, then the
18 Beas will need substantial time to review the record, hire expert
19 witnesses relating to visual subordination, planning, site
20 engineering, landscape architecture, and 'skyline analysis.' The
21 Beas would anticipate needing at least 90 to 120 days to prepare
22 for a contested case hearing before the Gorge Commission, if
23 such an order were to be contemplated.

21 41. The contested case hearing continued on September 29, 1998, and at that
22 continued hearing the Gorge Commission joined the Beas as a party over their written
23 objection. The Beas were not a participant at the September 29, 1998, hearing.

24 42. In joining the Beas as a party to the proceeding, neither the Gorge
25 Commission nor the Executive Director of the Gorge Commission identified the Beas as a
26 defendant to the Notice of Alleged Violation or Supplemental Notice directed against Skamania
27 County.

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1 43. The Notice of Alleged Violation and the Supplemental Notice were not
2 amended to be directed to the Beas. Although the Beas were joined as a party in the contested
3 case proceeding, as was Friends of the Columbia River Gorge, the Beas were not named as a
4 defendant in the enforcement proceeding against Skamania County.

5 44. In joining the Beas as a party to the contested case proceeding, there was no
6 new Notice of Alleged Violation directed to the Beas under Commission Rule 350-30-030.
7 Similarly, neither the Gorge Commission nor its Executive Director has ever issued a plain
8 statement of any alleged violation by the Beas under Commission Rule 350-30-030(1)(a).

9 45. Neither the Gorge Commission nor its Executive Director provided the Beas
10 an opportunity to file an Answer pursuant to Commission Rule 350-30-040.

11 46. Neither the Gorge Commission nor its Executive Director provided the Beas
12 an opportunity to resolve any alleged violation through the procedures set forth in Commission
13 Rules 350-30-050 and 350-30-060.

14 47. On October 13, 1998, counsel for the Beas received by mail from the
15 Gorge Commission a document list and a copy of the written documents already admitted
16 into the record of the contested case proceeding. The Beas were not provided a transcript
17 of the September 1, 1998, and September 29, 1998, proceedings before the Gorge
18 Commission.

19 48. At a prehearing conference held on October 23, 1998, counsel for the Beas
20 asked counsel for the Executive Director whether any allegations of misconduct were being
21 alleged against the Beas. The Executive Director's counsel stated that there were no allegations
22 against the Beas.

23 49. The contested case hearing was continued on November 16, 19, and 20, and
24 concluded on November 30, 1998. The Beas participated in the hearing on those dates. The
25 Gorge Commission's final order was signed on January 25, 1999.

26 50. Despite the representation that the enforcement proceeding was merely
27 a review of the County's actions and was not a collateral attack on the land use decision,
28 the Gorge Commission's order terminates or sets aside the May 16, 1997, Director's

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1 Decision and requires the County to modify its decision by "adopt[ing] a new or revised
2 decision" that includes relocating the structures to alternative sites.

3 51. In requiring a new or revised Director's Decision that includes relocating
4 the structures, the Gorge Commission's order directly impacts the rights and interests of the
5 Beas. The Gorge Commission's order does not state that Skamania County is to bear any or all
6 costs associated with relocating the Beas' house or other costs to the Beas resulting from the
7 order.

8 52. The Gorge Commission's January 25, 1999, order operates as an injunction
9 against the Beas in that the order requires that the "County shall immediately issue an order
10 stopping the property owners from continuing any development activity on the site." Order
11 at 32:25-26.

12 FIRST CAUSE OF ACTION

13 (Judicial Review and Relief Pursuant to 16 U.S.C. § 544m)

14 53. The Beas repeat, replead, and reallege as though set forth in full each and
15 every allegation contained in Paragraphs 1 through 52 inclusive.

16 Count One

17 54. The Gorge Commission lacks standing, legal authority, and/or jurisdiction
18 to modify, terminate, or set aside the May 16, 1997, Director's Decision approving the Beas'
19 proposal for a house and accessory buildings.

20 55. The authority of the Gorge Commission to modify, terminate, or set aside
21 the May 16, 1997, Director's Decision is by the appeal process pursuant to 16 U.S.C.
22 § 544(a)(2). The Gorge Commission's actions to reopen, modify, terminate, or set aside the
23 Director's Decision are barred by the provisions of the Scenic Act, RCW 43.97.015, and
24 Skamania County Code Title 22.

25 56. The Gorge Commission's conclusion that it has jurisdiction in this matter is
26 contrary to law.

27 ///

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Count Two

57. The Gorge Commission lacks standing, legal authority and/or jurisdiction to enjoin the Beas from utilizing their land or continuing with construction pursuant to permit approvals issued by Skamania County. 16 U.S.C. § 544m(b)(1)(B).

58. In the alternative, assuming the Gorge Commission has authority to impose an injunctive remedy on the Beas, the Gorge Commission's order requiring an alternative location for the Beas' house is inequitable, unlawfully excessive, and unduly burdensome to the Beas in light of the circumstances and equities in the matter, as well as the involvement and unclean hands of the Gorge Commission in contributing to the circumstances which gave rise to this matter.

Count Three

59. The Gorge Commission's order dated January 25, 1999, entitled Findings of Fact, Conclusions of Law, and Final Order, is legally inadequate because the findings of fact are conclusory statements that fail to include the reasons and basis for the findings, the findings fail to consist of a concise statement of the underlying facts supporting the findings, and any findings based substantially upon credibility of evidence or demeanor of witnesses are not identified.

Count Four

60. As applied to the Beas, or as relied upon by the Gorge Commission to justify imposing a remedy against the Beas, the Beas challenge the following findings as not supported by sufficient evidence and/or as legally inadequate and unlawful because they are vague, ambiguous, misleading, incomplete, repetitive, beyond the scope of the Notice of Alleged Violation or the Supplemental and Amended Notice of Alleged Violation, or involve facts or accusations that were required to be alleged against the Beas through a plain statement in a Notice of Alleged Violation pursuant to the Commission Rule 350-30-030, but were not so alleged.

a. Finding B.1: that the house and shop are highly visible from four key viewing areas.

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- 1 b. Finding B.4: relating to alternative sites.
- 2 c. Finding B.6: regarding use of existing topography to screen the house.
- 3 d. Finding B.7: regarding location of the house.
- 4 e. Finding B.9: that the house could not be visually subordinate within two
- 5 years.
- 6 f. Finding B.10: regarding fuel breaks and landscaping requirements.
- 7 g. Finding B.11: regarding visual subordination.
- 8 h. Finding B.12: regarding visual subordination.
- 9 i. Finding B.14: regarding whether or not the house is a one-story house with
- 10 daylight basement and loft.
- 11 j. Finding B.15: regarding elevation of the house.
- 12 k. Finding B.16: regarding notice, staking, and placement of the house.
- 13 l. Finding B.17: regarding set back from adjacent properties.
- 14 m. Finding B.18: regarding screening by topography and vegetation.
- 15 n. Finding B.19: regarding vegetation.
- 16 o. Finding B.20: regarding elevation drawings and skyline.
- 17 p. Finding B.21: regarding topography.
- 18 q. Finding B.23: regarding design of the home.
- 19 r. Finding B.25: regarding design of the home.
- 20 s. Finding B.26: regarding color contrasts.
- 21 t. Finding B.27: regarding skyline.
- 22 u. Finding B.30: relating to the Beas' site plans and drawings.
- 23 v. Finding B.34: regarding allegations against the Beas.
- 24 w. Finding B.35: regarding Beas' response to an August 12, 1998 letter.

25 A copy of the Gorge Commission decision with these complete findings is
26 attached as Exhibit A.

27 ///

28 ///

Count Five

61. As applied to the Beas, or as relied upon by the Gorge Commission to justify imposing a remedy against the Beas, the Beas challenge the conclusions of law contained in Section VI of the Commission's order as being contrary to law, as not supported by lawfully adopted findings, as unlawfully beyond the scope of the Notice of Alleged Violation and the Supplemental and Amended Notice of Alleged Violation, and as involving allegations or accusations against the Beas that are required to be alleged through a plain statement in a Notice of Alleged Violation pursuant to Commission Rule 330-30-030, but were not so alleged.

SECOND CAUSE OF ACTION

(Declaratory Relief, RCW Chapter 7.24)

62. The Beas repeat, plead, and reallege as though set forth in full each and every allegation contained in Paragraphs 1 through 61 inclusive.

63. There is an actual justiciable controversy regarding the respective rights and duties of the parties which can only be determined by the Court.

64. The Beas contend that as the property owners against whom a remedy was sought, the Beas are an indispensable defending party to the enforcement proceeding against Skamania County. However, the Beas were not timely joined as a party and were never joined as a defendant in the enforcement proceeding. The joinder of the Beas as a party occurred well after meaningful proceedings had commenced, including two days of contested case proceedings. The untimely joinder of an indispensable party such as the Beas requires dismissal of the enforcement proceedings. Alternatively, the enforcement proceedings should be dismissed at least to the extent that any remedy would affect the interests and rights of the Beas. The Gorge Commission denies these allegations.

65. The Beas further contend that the Gorge Commission has unlawfully and arbitrarily deprived the Beas of their right to use, develop, and enjoy their property and, thus, violated the Beas' right to due process. The Beas further contend that the Gorge Commission improperly and unlawfully interfered with the process by which Skamania County issues

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1 permits and has, therefore, arbitrarily deprived the Beas of their property absent the process
2 which is due. The Gorge Commission's interference and actions with respect to the Beas is in
3 excess of lawful authority and arbitrary. The Gorge Commission denies these allegations.

4 66. The Beas further contend that their due process rights have been violated
5 because they were not provided adequate notice or a full and fair opportunity to be heard
6 through the contested case proceeding against Skamania County. The Gorge Commission's
7 procedure of initiating an enforcement proceeding against the County, but therein requesting a
8 remedy against the Beas, while also representing to the Beas and to Judge Ladley that the
9 enforcement action was only against Skamania County and not the Beas, violates the Beas'
10 rights to due process. The Gorge Commission denies these allegations.

11 67. The Beas' rights to due process have been denied by application of
12 unconstitutionally vague terms and criteria. For example, the requirement under the Skamania
13 County Code that their proposed structures be "visually subordinate" is unconstitutionally
14 vague. That criteria is so vague that men and women of common intelligence must necessarily
15 guess at its meaning and differ as to its application. The County Code does not provide
16 ascertainable or workable criteria but leaves broad discretion as to what constitutes "visually
17 subordinate" so that permit determinations are based upon whim, caprice, or subjective
18 considerations. In the same manner, the Beas contend that the requirement under the Skamania
19 County Code that siting of structures be on portions of the property that minimize visibility is
20 unconstitutionally vague. The Gorge Commission and Skamania County contend that these
21 provisions of the County Code are not unconstitutionally vague.

22 68. The Beas further contend that their due process rights have been denied by
23 application of the "visually subordinate" criteria as being a lawful basis to require relocating
24 their house. The Beas contend that relocating the house is not a reasonably necessary means to
25 achieve the public purpose of the regulation and is unduly oppressive against the Beas. The
26 Gorge Commission denies these allegations.

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28 ///

THIRD CAUSE OF ACTION

(Damages Claim Against Gorge Commission; RCW 64.40.020)

69. The Beas repeat, replead, and reallege as though set forth in full each and every allegation contained in Paragraphs 1 through 68 inclusive.

70. The Beas are the owners of a property interest. They filed an application for a land use permit which has now been finally denied by the Gorge Commission.

71. The Gorge Commission is a public body exercising regulatory authority or control over the use of real property in the state.

72. Denial of the Beas' permit approvals was an unlawful action or was in excess of lawful authority and was made with knowledge or should reasonably have been known to be unlawful or in excess of lawful authority and which has caused damages to the Beas. Denial of the Beas' permit approval is also an arbitrary and capricious act based on unconstitutionally vague terms and criteria and has caused damages to the Beas.

73. There are no further administrative remedies available to exhaust.

74. As an incident of bringing and maintaining this action, the Beas have incurred litigation costs and are entitled under RCW 64.40.020(2) to an award of reasonable costs and attorneys' fees.

FOURTH CAUSE OF ACTION

(Civil Rights, 42 U.S.C. § 1983)

75. The Beas repeat, replead, and reallege as though set forth in full each and every allegation contained in Paragraphs 1 through 74 inclusive.

76. The Gorge Commission, the Gorge Commission members acting in their official capacity, and Skamania County, through their official acts, have deprived the Beas of their property without due process of law contrary to the Fourteenth Amendment of the United States Constitution. The Beas have been deprived of their property without constitutionally required procedural and/or substantive due process by the arbitrary and capricious denial of necessary permits to construct and maintain a lawful use of their property, such denial also being without authority of law and without adequate notice and opportunity to be heard. The

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Bellevue, WA 98004
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1 Gorge Commission's termination of the Beas' land use approvals further fails to substantially
2 advance legitimate public purposes, is arbitrary and capricious, is not a normal delay associated
3 with the planning process, and deprives the Beas of property rights and, thereby, takes the
4 Beas' property without payment of just compensation in violation of the Fifth Amendment of
5 the United States Constitution.

6 77. At all times material hereto the Gorge Commission and Skamania County
7 acted or failed to act under color of state law. The Gorge Commission and Skamania County
8 are both "persons" for purposes of 42 U.S.C. § 1983.

9 78. The Beas are entitled to recover their damages against the Gorge
10 Commission and/or Skamania County in an amount to be fully proved at time of trial as well as
11 reasonable attorneys' fees and expenses of litigation pursuant to 42 U.S.C. § 1988.

12 FIFTH CAUSE OF ACTION

13 (Inverse Condemnation, Washington Constitution Article 1, § 16)

14 79. The Beas repeat, replead, and reallege as though set forth in full each and
15 every allegation contained in Paragraphs 1 through 78 inclusive.

16 80. The Gorge Commission has taken or damaged the property of the Beas
17 without just compensation having first been paid contrary to the Washington Constitution
18 Article 1, Section 16, entitling Petitioners herein to a judgment for compensation for a
19 temporary or a permanent taking or damaging, plus interest, plus reasonable attorneys' fees to
20 be awarded pursuant to RCW 8.25.075(3) in an amount to be fully proved at the time of trial.

21 WHEREFORE, the Beas pray for judgment as follows:

- 22 1. the Gorge Commission's order dated January 25, 1999, be invalidated and the
23 enforcement proceeding against Skamania County be dismissed;
- 24 2. the Beas be awarded relief against the Gorge Commission for damages as
25 may be proved at the time of trial, including reasonable attorneys' fees and expenses;
- 26 3. a declaration that the requirement that the Beas' proposed structures be
27 visually subordinate and be located to minimize visibility is unconstitutionally vague and
28 unenforceable; and

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1 4. any such further relief as the Court may deem just and equitable.
2

3 DATED: March 31, 1999.
4

5 Respectfully submitted,
6

7 ROBIN L. RIVETT
8 JOHN M. GROEN
9

10 By John M. Groen
11 JOHN M. GROEN, WSBA No. 20864
12

13 Attorneys for Petitioners Beas
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EXHIBIT A

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4
5 BEFORE THE COLUMBIA RIVER GORGE COMMISSION
6

7 In the Matter of:

8 SKAMANIA COUNTY

9 Director's Decision NSA-96-81

FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND FINAL ORDER

10
11 I. INTRODUCTION

12 A. Background

13 The Columbia River Gorge Commission held a contested case hearing in this matter that
14 was conducted pursuant to the Commission's administrative procedure rules 350-16. The
15 contested case hearing commenced on September 1, 1998, continued on September 29,
16 November 16, 19, and 20, and concluded on November 30, 1998. The presiding officer was Bob
17 Thompson, Chair of the Columbia River Gorge Commission (hereinafter Commission). Ten of
18 the Commission's eleven voting members heard all of the testimony and voted on the resolution
19 for this case.

20 The contested case hearing stemmed from a Notice of Violation issued by the Executive
21 Director for the Columbia River Gorge Commission (hereinafter Executive Director) to the
22 Skamania County Board of Commissioners (hereinafter County), alleging the County Director's
23 Decision violated the Columbia River Gorge National Scenic Area Act (hereinafter Scenic Act),
24 and the Skamania County Ordinance 1993-04. A Supplemental and Amended Notice of Alleged
25 Violation alleging additional violations was issued to the County on September 3, 1998.
26

1 The Executive Director was represented by Bart Brush at the contested case hearing, and
2 the County was represented by Brad Andersen. A motion for intervention by the Friends of the
3 Columbia Gorge (hereinafter Friends) was granted on September 1, 1998, and the Friends was
4 represented by Gary Kahn. On September 1, 1998, Skamania County moved to join the Beas as
5 a party and/or to dismiss the case for failure to timely name an indispensable party. On
6 September 30, 1998, on the Executive Director's motion, the Commission issued an order joining
7 the property owners Brian and Jody Bea, as parties to the contested case proceeding. They were
8 represented by Brent Boger of the Pacific Legal Foundation. The Commission was advised and
9 represented by Oregon Assistant Attorney General Michael Huston and Washington Assistant
10 Attorney General Colleen Evans.

11 B. Nature of This Proceeding

12 The Scenic Area Act required the Commission and the U.S. Forest Service to develop a
13 Management Plan for the protection of resources and the regulation of all development in the
14 National Scenic Area. Both agencies were required to review and approve land use ordinances
15 adopted by each county in the Scenic Area in conformity with the Management Plan. The
16 Management Plan was adopted in 1991, and in 1993, Skamania County developed its ordinance
17 which was subsequently approved by the Gorge Commission and the Forest Service as required
18 by the Scenic Act. (For purposes of this order, this hierarchy of laws -- namely the Act, the
19 Management Plan and the County ordinance -- is referred to as "the Scenic laws.")

20 This proceeding involves the Skamania County Planning Director's conditional approval
21 of the property owners' proposed development (hereinafter the County Director's Decision or
22 simply the County decision). The development in question involves a house, shop and barn on
23 what is currently a 20-acre parcel owned by Brian and Jody Bea (the property owners). The
24 property is located one-half mile northwest of Prindle.

25 After construction of the structures began, the Executive Director concluded that the
26 County had violated and was continuing to violate, including through failures to enforce, the

1 Scenic Area Act, the Management Plan, the County's approved ordinance and the conditions of
2 the County Director's Decision. The Executive Director so advised the County by a letter dated
3 July 21, 1998. In a formal Notice of Violation dated July 27, 1998, the Executive Director
4 initiated this enforcement proceeding. After the contested case hearing had begun, the Executive
5 Director issued a Supplemental Notice of Violation, which also became the subject of the
6 hearing. Initially, the County was the only named party to the proceeding. On September 1,
7 1998, the Gorge Commission permitted the Friends of the Gorge to intervene. On September 30,
8 1998, on the Executive Director's motion, the Beas were joined as parties. The reasons for
9 joining the Beas are clearly stated in the record and are discussed later in this Order.

10 The Executive Director contends that the County has violated numerous provisions of the
11 Scenic laws through its decision approving the structures at issue in this case, as well as through
12 its failure to enforce several of the conditions of the County Director's Decision. While the
13 County contests some of the Executive Director's alleged violations, it argues primarily that
14 neither the Executive Director nor the Commission has jurisdiction or authority to bring this
15 enforcement proceeding at this time. On the same and some additional grounds, the property
16 owners concur. Generally concurring with the Executive Director, the Friends of the Columbia
17 Gorge support the position that this agency has jurisdiction and authority to bring this
18 enforcement proceeding.

19 II. RULINGS ON OBJECTIONS

- 20 (1) All rulings on objections made during the hearing are affirmed.
21 (2) Any objections not specifically ruled on during the hearing are denied.

22 III. RULINGS ON MOTIONS

- 23 (1) All rulings made on motions during the hearing are affirmed except as noted in
24 (3).
25 (2) Any motions not specifically ruled on during the hearing are denied, except as
26 noted in (3).

1 (3) The Executive Director's motion to conform the Notices of Violations to the
2 evidence is granted. It is applied in one respect, namely to make explicit that the allegations
3 include, wherever appropriate, failure to enforce the conditions of the Director's Decision, as
4 well as the particular terms of that decision. Contrary to motions and argument from the County
5 and the property owners, it was clear from the onset of this contested case hearing that
6 enforcement, and specifically failure to enforce the conditions of approval, was a significant part
7 of the Executive Director's case. That was explicit in the Executive director's July 21 letter to
8 the County, which stated "[t]hese developments may also violate conditions of approval in
9 Director's Decision NSA 96-81, Part 2." It was implicit in the Notices of Violation, as
10 demonstrated in the middle paragraph on Page 2 of the Supplemental Notice of Violation, which
11 refers to the County "allowing the house to be sited less than 200 feet from adjacent property to
12 the south." Given that the Director's written Decision conditions development on locating the
13 house at least 200 feet from adjacent properties, the Executive Director included failure to
14 enforce within the meaning of the alleged violations.

15 (4) Motions relating to the jurisdiction or authority of the Commission to hold this
16 proceeding and consider the alleged violations are discussed in "V. Jurisdiction" below.

17 IV. FINDINGS OF FACT

18 The parties to the proceeding stipulated to the following table of events and time frames
19 described in Section A of this Order. Additional findings of fact are contained in Section B.

20 A. Stipulated Chronology

21	Event/Activity	Date	Description/Comment
22			
23			
24	1. Gorge Commission adopts Management Plan	1991	
25			
26			

1	2.	Skamania County adopts, and Commission approves, ordinances in question	1993	
2				
3	3.	The Beas submit to the County an application for approval of a land division, a house and related structures	11/96	County Record, p. 99
4				
5	4.	The County sends letter to Forest Service and Gorge Commission staff, requesting whether cultural or historical reconnaissance is required; enclosing applicant's site plan and application	12/12/96	
6				
7				
8				
9	5.	Forest Service responds to County letter (see #4 above); including annotated site plan	1/2/97	Administrative Record, p. 60/61
10				
11	6.	The County issues Notice of Development Review	4/16/97	County Record, p. 57
12				
13	7.	Friends comments on the Beas' application	4/25/97	County Record, p. 54
14				
15	8.	Commission staff comments on the Beas' application	5/6/97	County Record, p. 53
16				
17	9.	County deadline for comment	5/7/97	
18				
19	10.	County issues its decision, NSA-96-81, Parts #1 and #2, on the Beas' application; a copy of the Director's Decision and Staff Report was provided to the Director and the Friends	5/19/97	
20				
21	11.	Deadline for appealing NSA-96-81, Parts #1 and #2, to County Board of Adjustment	6/9/97	
22				
23	12.	County approves new site for the shop and sends copy of decision to the Director and the Friends	6/10/97	County Record, p. 26
24				
25				
26				

1	13.	County planner inspects and approves site and location for shop	8/15/97	County Record, p. 22
2	14.	The Beas complete construction on shop	9/97	
3	15.	Deleted		
4	16.	The Beas submit revised site plan to County dated 3/6/98	3/6/98	County Record, p. 15
5	17.	Land division finalized, with quit claim deed, legal description and plat	4/3/98	County Auditor, Book 175, pp. 215-218
6	18.	County planners visit site and take photographs	4/8/98	County Record, p. 12
7	19.	County building inspector approves excavation, site, and footing for house	4/10/98	Inspector's file, App #1706, Permit #34*98
8	20.	The Beas request that County increase residence height	4/13/98	County Record, p. 13
9	21.	The Beas submit survey/lot size information to County	4/27/98	
10	22.	County Planning Department responds to the Beas submittal of survey/lot size letter	4/28/98	
11	23.	County denies request to amend Director's Decision regarding height; copy provided to the Director and the Friends, with Notice of Appeal rights	5/8/98	County Record, p. 8
12	24.	County building inspector approves foundation, plumbing, slab for house	5/15/98	Inspector's file, App #1706, Permit #34*98
13	25.	County building inspector issues building permit for house	5/22/98	Construction Permit #34*98
14	26.	Director sends letter to Skamania County, asking County to correct alleged violations	7/21/98	Document List No. 1
15	27.	Director issues Notice of Violation and Summary Order	7/27/98	Document List Nos. 2 and 3
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1	28.	County issues NOV and Stop Work Order to the Beas	7/28/98	
2	29.	The Beas submit first landscape plan to County	8/5/98	
3	30.	County files an Answer to Director's Notice of Violation	8/10/98	Document List No. 4
4	31.	County rejects first landscape plan and conditionally lifts Stop Work Order	8/12/98	
5	32.	The Friends file Motion to Intervene	8/21/98	
6	33.	The Beas submit second landscape plan to County	8/28/98	
7	34.	Commission starts hearing, provides Notice of Hearing Procedures, acts on some motions and takes others under advisement	9/1/98	Document List No. 5
8	35.	Director issues Supplemental and Amended Notices of Alleged Violation	9/3/98	Document List No. 7
9	36.	Commission Chair issues schedule for Motions and Briefing	9/11/98	Document List No. 8
10	37.	County rejects the Beas' second landscape plan; copy to the Director and the Friends with a deadline for appeal 10/1/98	9/11/98	
11	38.	County identifies additional violations and issues letter to the Beas requiring steps required to be taken to comply with conditions of approval #13, #14 and #20	9/16/98	
12	39.	Director submits Motion Regarding Parties, requesting that the Beas be made parties	9/18/98	Document List No. 12
13	40.	County submits "Various Motions"	9/21/98	Document List No. 13
14	41.	County submits Legal Memorandum in Support of Various Motions	9/21/98	Document List No. 14
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1	42.	Chair issues letter to parties, providing ex parte communication information	9/23/98	Document List No. 15
2				
3	43.	Friends file Memorandum in Opposition to County's Motion to Dismiss for Lack of Jurisdiction	9/24/98	Document List No. 17
4				
5	44.	Director files Response to County's Motions	9/24/98	Document List No. 18
6				
7	45.	Mr. Andersen files Reply Memorandum to Responses of the Director and Friends	9/28/98	Document List No. 21
8				
9	46.	Mr. Printz files letter in response to Director's Motion Regarding Parties	9/28/98	
10	47.	Mr. Brush files request that Mr. Quinn be recused	9/28/98	
11				
12	48.	Commission continues with hearing; approves an order joining the Beas as parties; postpone additional hearing, allowing the Beas time to answer and prepare	9/29/98	
13				
14				
15	49.	Ms. Brending provides additional ex parte communication information to parties	10/1/98	Document List No. 22
16				
17	50.	The Beas' submit third landscape plan and narrative to County	10/5/98	
18	51.	Mr. Brush issues letter to Ms. Evans and Mr. Huston re hearing date and ongoing violations	10/14/98	
19				
20	52.	Mr. Printz issues a letter stating that the Beas will now be represented by the Pacific Legal Foundation	10/14/98	Document List No. 20
21				
22	53.	Chair Thompson issues a letter to Commission and parties re Continuation of Hearing	10/15/98	
23				
24	54.	Ms. Evans and Mr. Huston issue letter to attorneys regarding pre-hearing conference	10/16/98	
25				
26				

1 55. Mr. Andersen writes letter to 10/16/98
2 Ms. Evans and Mr. Huston asking
3 that issue of the nature of Notice of
4 Violation be addressed at the pre-
5 hearing conference

6 B. Other Findings

7 1. The County Director's Decision approved the house and shop on an
8 exposed bluff overlooking the Columbia River Gorge. The house and shop are highly visible
9 from at least four key viewing areas -- Interstate 84, the Historic Columbia River Highway,
10 Multnomah Falls and the Columbia River.

11 2. The subject of the County Director's Decision was at the time a 40 acre parcel
12 with a pending land division. The subsequent approval of the land division resulted in two
13 approximately 20 acre parcels.

14 3. The Management Plan identifies key viewing areas.

15 4. The County Staff Report dated May 16, 1997, states: "The building site for the
16 residence should be located on a portion of the property that minimizes visibility from key
17 viewing areas . . . the proposed building should be setback [sic] 100 feet from the edge of the
18 bluff limiting the visibility of the development from key viewing areas." The house and shop
19 were approved and sited on one of the most prominent portions of the parcel. There are at least
20 three alternative building sites for the house and shop that would be less visible from key
21 viewing areas. These alternative sites are partially screened from key viewing areas by
22 topography and trees. For example, Site A would allow the buildings to be visually subordinate.
23 On Site A, the same house (if it had been built there) would have the first 21 feet of the home
24 screened by existing topography. This location also would have allowed the property owners to
25
26

1 meet the fuel break and 200-foot forest setback requirements. In addition, the alternative sites
2 would not place development in a buffer specified for the protection of water resources, sensitive
3 plants, or sensitive wildlife sites and would not conflict with provisions protecting cultural
4 resources.

5
6 5. County Ordinance section 22.10.020.B.5 states that "New buildings or roads shall
7 be sited on portions of the subject property that minimize visibility from key viewing areas, . . .
8 development shall comply with this provision to the maximum extent practicable." County
9 planners interpret Ordinance section 22.10.020.B.5 only to require that a dwelling does not
10 maximize visibility, not that the home must be placed in the spot on the property where it has the
11 least visibility.

12
13 6. The slopes in front of the home and shop provided no existing topography for
14 screening, since the property slopes away toward the river.

15
16 7. The slopes in front of the home and shop would require significant re-grading to
17 stabilize plantings adequate to provide screening. The home was placed higher on the slope than
18 the Director's Decision permitted.

19 8. Only limited plantings, such as grass, can be placed on the septic tank drainfield.

20 9. The house could not be visually subordinate from the key viewing areas within
21 two years, under the siting allowed in the Director's Decision.

22 10. The County Ordinances and Director's Decision require the home to be
23 surrounded by a maintained fuel break of 50 feet. It must be irrigated or have fire resistant
24 vegetation, and for trees taller than 20 feet, branches within eight feet of the ground must be
25 removed. Within the fuel break, trees must be spaced so that there will be at least 15 feet
26

1 between the tree crowns at maturity. For example, the crown of a mature Douglas-fir is about 45
2 feet in diameter, so Douglas-firs should be planted no less than 60 feet apart within the fuel
3 break. Fires in the western part of the Gorge, where this house is located, tend to jump from
4 crown to crown, so fuel breaks are critical safety features. Given the trees present before
5 landscaping activity began, only one additional Douglas-fir (or comparably sized tree) could be
6 planted within 50 feet of the house and still meet the fuel break requirements. The plantings now
7 in existence, the third landscape plan submitted by the property owners, and the landscaping
8 requirements specified by the County do not meet the fuel break standards because the required
9 distance among tree crowns will not be maintained over time.

11
12 11. A twelve foot high tree in front of the house barely gets above the foundation line for
13 screening purposes. The home won't be visually subordinate within two years.

14 12. The third landscape plan submitted by the property owners will not comply with the
15 scenic area Management Plan because it does not meet the fuel break requirements, nor will it
16 meet the visual subordination requirements.

17 13. A healthy Douglas-fir grows approximately 12 to 24 inches a year.

18
19 14. The County Staff Report dated May 16, 1997, states: "... the height of the house
20 should be limited so as not to break the skyline. This can be achieved by reducing the overall
21 height of the house to one story with a daylight basement." Under the Uniform Building Code
22 and generally accepted terminology, the dwelling as currently constructed is a three-story house.
23 The home was not placed into the earth to qualify as a basement. The top floor does not qualify
24 as a loft because of the amount of floor space and the separate rooms that go beyond the area
25 overlooking the floor below.
26

1 15. Condition 27 of the Director's Decision prohibits the house from being any higher
2 than 25 feet "above the floor elevation of the main floor." The County planner who drafted the
3 Director's Decision intended that the language in this condition was to allow only 25 feet from
4 the ground floor, not the main floor. Because of the wording of the Director's Decision, because
5 the property owner presented blueprints of the proposed home relying on language of the
6 Decision, and because the appeal period had run, the County did not enforce the one story
7 requirement. The County admits that the home does not meet the one story requirement. The
8 County admits that the home is at least 35 feet high from the ground floor.
9

10 16. The Director's Decision required that all building sites be staked and graded prior
11 to framing the foundations or beginning construction for staff to verify locations. County
12 planning staff was to receive 72 hours notice to complete these inspections. The County planner
13 never saw the stakes for placement of the home's foundation, and did not receive 72 hours notice
14 to complete the inspection. The house was placed about ten feet north of where the County
15 planner expected the home to go. The County took no action on either of these issues.
16

17 17. The County Staff Report dated May 16, 1997, states: "Dwellings shall be set back
18 at least 200 feet from adjacent properties. As a condition of approval, applicant should be
19 required to comply with above criterion [forest setback requirement]." On April 3, 1998, the
20 property owners recorded with the County a quit claim deed, legal description, and plat map for
21 the subject parcel. On April 4, 1998, the County Assessor's map was revised to show the
22 boundaries of this new 20-acre parcel. On May 22, 1998, the County issued a building permit,
23 which was approved by the County Planning Department, allowing the house 15 to 20 feet from
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25
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1 the southern boundary of the parcel. At the contested case hearing, the County planners testified
2 they still do not know the location of the boundaries of the parcel.

3 18. The County Staff Report dated May 16, 1997 finds: "[t]he existing topography
4 will be used to screen proposed development from key viewing areas. The proposed home will
5 be cut into the base of a small hill on the property. This topographic feature is covered with
6 existing vegetation including fire [sic] trees that should be maintained to provide screening from
7 key viewing areas. However, existing vegetation will not provide sufficient screening from all
8 key viewing areas." The house and shop are not screened by topography or vegetation. The
9 home is perched on the edge of the bluff and is highly visible from four key viewing areas. As
10 described in Finding 19 below, the vegetation present at the time the County Director's Decision
11 was issued would not have screened the house or shop from key viewing areas.
12

13 19. The County Staff Report dated May 16, 1997 states: "... construction of the new
14 buildings and road will be effectively screened by existing vegetation. . . and will minimize the
15 visibility of grading activities seen from key viewing areas." There is virtually no vegetation in
16 front of the home, shop, or area graded to screen them from key viewing areas. Much of the
17 existing vegetation, including several small fir trees, was removed by the property owners. No
18 action was taken by the County concerning the removal of the existing vegetation. County
19 planners knew that the vegetation originally there would not be enough to screen the home, shop
20 or area graded. This is evident from Condition 30 requiring the property owners "to plant 20
21 screening trees with 10 in front of the proposed home and 10 behind the proposed home."
22

23 20. The elevation drawings submitted by the property owners state: "Barn and shop
24 not visible to key viewing areas." It also states: "House to be built into embankment so as to not
25
26

1 break tree-line" and that only 20 percent of the home is "seen from 2 sites as yard, daylight
2 basement, garage, shop and barn are not seen from any view points." Contrary to these
3 statements, the house and shop are visible to key viewing areas, and the house breaks the tree line
4 or skyline.
5

6 21. Existing topography is the most important aspect for screening structures because
7 topography is permanent. The sites chosen by the property owners and approved by the County
8 for the dwelling and structures make no use of available topography on the parcel as a whole.
9 There was no existing topography in front of where the home or shop were sited that would
10 screen the structures from key viewing areas.
11

12 22. The County Director's Decision states: "A grading plan shall be submitted by the
13 applicant if more than 100 cubic yards of grading or filling will occur. The staff report also
14 states: "Grading will be necessary for the proposed developments. However the construction of
15 the new buildings and roads will be effectively screened by existing vegetation on the bluff
16 (based on the proposed location shown on the site plan) and will minimize the visibility of
17 grading activities seen from key viewing areas." Over 300 cubic yards of material was excavated
18 from the site prior to any construction. County planners visited the site after approximately 300
19 cubic yards of grading and filling had occurred, but did not require the property owners to
20 prepare a grading plan. The altered slopes are visible to key viewing areas and add to the
21 expansiveness of the development and contrast to the natural vegetation and topography of the
22 landscape.
23

24 23. The home has a very strong geometric shape that stands in sharp contrast to the
25 surrounding landscape. The horizontal line of the shop also stands in contrast with the
26

1 surrounding landscape. Shape is an important factor that adds to the reasons the house and shop
2 are not visually subordinate.

3 24. The Skamania County Staff Report dated May 16, 1998, states that "[t]he exterior
4 of buildings on lands seen from key viewing areas shall be composed of nonreflective materials
5 or materials with low reflectivity, unless the structure would be fully screened from all key
6 viewing areas by existing topographic features." It further states "[t]he submitted application
7 indicates that the proposed color of the development will comply with the above criterion. The
8 applicant should be required to submit color samples to the Department, prior to issuance of a
9 building permit, to verify consistency with the above criterion."
10

11 25. The home has many large areas of unbroken window surface which increase
12 reflectivity, and add to the amount of light seen through the windows at night.
13

14 26. The home has cedar siding of a light color that contrasts with the surrounding
15 landscape and vegetation. The green color of the shop and roof of the house and the white color
16 of the shop doors also contrast with the surrounding landscape.
17

18 27. The Skamania County Staff Report dated May 16, 1997, states: "[t]he silhouette
19 of new buildings shall remain below the skyline of a bluff, cliff or ridge as seen from key
20 viewing areas." The home breaks the skyline, as seen from portions of the Columbia River.
21

22 28. The only comment made by the Columbia River Gorge Commission Staff during
23 the 21-day comment period on the Bea's application, NSA 96-81 was concerning the proposed
24 development being within 1000 feet of a sensitive plant site.

25 29. In another case (NSA 95-104), the Skamania County Board of Adjustment held
26 that the Executive Director of the Columbia River Gorge Commission lacked standing to file an

1 appeal against Skamania County, independent of the Columbia River Gorge Commission. The
2 Board of Adjustment also held in that decision the Gorge Commission "is the appellate body that
3 will hear a future appeal after the Board of Adjustment renders its final decision. . . and [thus] the
4 Gorge Commission cannot appeal Skamania County's decision and then hear the case on any
5 subsequent appeals by the parties." The Board stated the "appeal filed by the Gorge Commission
6 violates the appearance of fairness doctrine and is clearly a conflict of interest." "Neither
7 Jonathan Doherty as staff to the Columbia River Gorge Commission nor the Gorge Commission
8 itself can appeal a County decision that may be appealed to that Commission at some future
9 date."
10

11
12 30. The information sent to the Executive Director by the County, both before and at
13 the time of the County Director's Decision, including the property owners' application, the site
14 plan and the elevation drawings, could reasonably be read to mean that the decision would
15 comply with the Scenic laws. The site plans and elevation drawings provided by the property
16 owners were incomplete, inaccurate, and depicted vegetation that does not actually exist on the
17 property. In addition, some of the findings and conclusions in the County decision inaccurately
18 stated that several aspects of the development would comply with the Scenic laws.
19

20 31. The Commission did not find that there was misrepresentation or fraud on the part
21 of the County in the Director's Decision.

22 32. No County official attempted to improperly influence the Director's Decision.

23 33. The problems with the County's original decision were compounded by the
24 County's failure to enforce several conditions of that decision.
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1 34. At least until after the Executive Director's Notice of Alleged Violation, the
2 County took no action to enforce terms and conditions of the County Director's Decision that
3 were violated by the property owners in the course of the development in at least the following
4 respects: (1) failing to give 72 hours notice to complete the site inspection; (2) removing existing
5 trees and vegetation in front of the home; (3) building a three-story house rather than the
6 permitted one-story house with a loft and daylight basement; (4) siting/placing the house within
7 200 feet of the adjacent property to the south; (5) failing to submit a grading plan when more
8 than 100 cubic yards of grading or filling occurred; (6) building the house in a different location
9 than indicated to the County planners, (7) choosing a design and material that have a high
10 reflectivity and color that does not blend with the surrounding landscape; (8) planting trees
11 within the 50 foot fuel break; (9) failing to submit a new site plan to the County Planning
12 Department before obtaining a building permit for the shop; and (10) beginning construction of
13 the house without a permit from the County.
14

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16 35. On August 12, 1998, the County sent a letter to the property owners stating that if
17 the property owners failed to satisfy certain conditions, the stop work order would go into effect
18 on the 21st day. The conditions were not met, but the County failed to enforce the stop work
19 order.
20

21 36. At no time did any Commission staff person, either past or present, express
22 approval of the current site of the house. In 1993, the Commission staff considered and denied a
23 land division and proposed development of the same property. The comments by Commission
24 staff at that time merely indicated that there would probably be a site for a house on the parcel
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1 that would comply with scenic restrictions. There was no specific consideration, and certainly no
2 approval, of the current site of the house.

3 37. The Commission staff did not make a site visit during the formal process that led
4 to the County Director's Decision in this case. Regular site visits are not typical and are probably
5 not appropriate when a county has chosen to implement the Act. The Commission staff makes
6 routine site visits only in the geographical areas in which the Commission has retained
7 responsibility for implementation.
8

9 V. JURISDICTION

10 The Columbia River Gorge Commission derives its jurisdiction from the Columbia River
11 Gorge National Scenic Area Act and the interstate compact adopted by the States of Washington
12 and Oregon. 16 USC 544 et seq.; RCW Chapter 43.97; ORS 196.150. The Commission
13 conducted this hearing as an enforcement action and a contested case, both of which are
14 governed by Commission rules. 16 U.S.C §§ 544a-544f; 544i; 544m(a)(1); 544m(3); 544(b);
15 Commission Rule 350-30 et seq.; Commission Rule 350-16 et seq. Specifically at issue in this
16 contested case proceeding was Section 15 of the Scenic Act. It reads in part:
17

18 Enforcement

19 (a) Administrative remedies. (1) Commission orders. The Commission shall
20 monitor activities of counties pursuant to this Act and shall take such actions as
21 it determines are necessary to ensure compliance. (2) Appeal to the
22 commission. Any person or entity adversely affected by any final action or order
23 of a county relating to the implementation of this Act may appeal such action or
24 order to the Commission by filing with the Commission within 30 days of such
25 action or order, a written petition requesting that such action or order be modified,
26 terminated, or set aside. (3) Civil penalties. Any person or entity who willfully
violates the management plan or any land use ordinance or any implementation
measure or any order issued by the Commission pursuant to this Act may be
assessed a civil penalty by the Commission not to exceed \$10,000 for each
violation. No penalty may be assessed under this subsection unless such person or
entity is given notice and opportunity for a public hearing with respect to such
violation. The Commission may compromise, modify or remit, with or without
conditions, any penalty imposed under this subsection, taking into consideration

1 the nature and seriousness of the violation and the efforts of the violator to
2 remedy the violation in a timely manner.

3 16 U.S.C. § 544m(a)(emphasis added).

4 Skamania County and the property owners moved to dismiss the Notice of Alleged
5 Violation and Supplemental and Amended Notice of Alleged Violation on several grounds. The
6 Commission rejects these arguments and believes it has jurisdiction over this matter.

7 The arguments of the County and the property owners are based in part on their
8 interpretation of Washington state land use law. They argue that the Commission is bound by
9 this law. The Commission disagrees. Section 5(b) of the Scenic Act states in part:

10 **For the purposes of providing a uniform system of laws, which in addition to**
11 **this Act are applicable to the Commission, the Commission shall adopt**
12 **regulations relating to administrative procedure, the making of contracts,**
13 **conflicts-of-interest, financial disclosure, open meetings of the Commission,**
14 **advisory committees, and disclosure of information consistent with the more**
15 **restrictive statutory provisions of either State.**

16 16 U.S.C. § 544c(b)(emphasis added).

17 The Commission has always interpreted the above provision to mean that the Scenic Act
18 governs all actions of the Commission with the addition of those areas specifically listed above.
19 As to those additional areas, the more restrictive laws of either the State of Washington or the
20 State of Oregon apply to the Commission. Those additional areas do not include land use law.
21 Indeed, they do not include any other state law dealing with substantive environmental and land
22 use regulation. Thus, even if the County's and the property owners' interpretation of Washington
23 land use law is correct, the Commission is not bound by Washington land use law, but rather is
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1 bound by the provisions of law contained in the Scenic Act and the Columbia River Gorge
2 Compact between Washington and Oregon.¹

3 As mentioned above, the Scenic Act requires the Commission to monitor the activities of
4 counties, directing that the Commission "shall take such actions as it determines are necessary to
5 ensure compliance." 16 U.S.C. §544m(a)(1). While the Commission hopes to use its powers
6 under this section sparingly, it is clear that the Act provides for serious situations such as the one
7 presented here. The testimony showed that the County Director's Decision was in violation of
8 the Scenic Act at the time it was issued and that the County did not enforce several provisions of
9 its own decision with which the property owners did not comply. The result is a home and
10 shop on the site that are not in compliance with either the Scenic Act, the County's Ordinance,
11 or the County Director's Decision. The evidence here also showed that because of where the
12 home was allowed to be sited, it would be very difficult, and most likely impossible, to obtain
13 visual subordination within two years. The Scenic Act requires the Commission in these
14 circumstances to take "such actions as it determines are necessary to ensure compliance with the
15 Scenic Act". 16 USC §544m(a)(1).

16 The additional argument that the Commission is bound to the thirty day time frame for
17 filing an appeal of a final action is also not persuasive. To reach the result put forth by the
18 County and the property owners, this Commission would have to interpret Section 15(a)(2) as
19 limiting the duties outlined in Section 15(a)(1) to only those activities of counties that could be
20 discovered within 30 days. The Commission does not agree with this interpretation of the Scenic
21 Act.

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26 ¹ The propositions offered here are well supported by existing case law. However, because the Commission
understands that this order should not become a legal brief, specific case citations have not been provided. The
briefing in the record is complete and available to the reader.

1 Act. The Scenic Act provides for a situation like the present case where the defects in the
2 County Director's Decision could not reasonably have been discovered within 30 days of the date
3 of the decision.

4
5 There are other reasons why the local appeals process should not be binding on the
6 Commission. As a notable example, the Skamania County Board of Adjustment previously held
7 that the Executive Director lacked standing to appeal against Skamania County. Furthermore,
8 the Board of Adjustment concluded that appeals by the Commission would violate the
9 Appearance of Fairness Doctrine and create a conflict of interest, because the Board viewed the
10 Commission as an appellate body that would hear an appeal from the Board. An important
11 additional flaw in the jurisdictional arguments is that the County changed its Director's Decision
12 well after the time period set for appeal. For example, the County approved a revised site for the
13 shop on June, 10, 1997, one day after the deadline for appealing the Director's Decision. See #11
14 and #12 of stipulated chronology.

15
16 The Commission also considered all the other arguments concerning jurisdiction by the
17 County and the property owners and found them unpersuasive, including those put forward by
18 the property owners regarding agency and collateral estoppel. The property owners claim that an
19 agency relationship exists between the County and the Commission, and that therefore the
20 Commission is limited in its actions to the enforcement of the County Director's Decision. While
21 the Commission intends relationships with the counties to be a partnership in practical terms, the
22 Commission does not agree that a legal principal-agency relationship has been formed to the
23 effect of binding the Commission to the acts of the County. To the contrary, the Act dictates a
24 different relationship, with the Commission bearing ultimate responsibility to ensure compliance.
25
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1 Finally, the Commission rejects the argument put forward by the property owners that it
2 lacks jurisdiction to hear this matter under the doctrine of collateral estoppel. This argument can
3 readily be dismissed because, among other reasons, there has been no prior adjudication of this
4 matter.
5

6 VI. CONCLUSIONS OF LAW

7 A. Violations of the County's Ordinance and Other Scenic Laws by the County 8 Planning Director's Decision 9

10 In this part of the order, the Commission first states the applicable law for each major
11 subject. The Commission then states its conclusion on whether that law was violated, along with
12 the ultimate fact or the basic reason for that conclusion. Often, the ultimate fact and the basic
13 reason are the same. The Commission's broader analysis and reasoning is set forth in VII.
14 Opinion and Reasons.

15 The first topic addressed below is scenic resources and visual subordination. Because this
16 case involves damage to important scenic resources, visibility and visual subordination are of
17 primary concern. Indeed, with the possible exception of the setback requirements, all of the
18 topics addressed below involve some aspect of the visibility of the development in question.

19 1. Scenic Resources and Visual Subordination

20 1a. The federal Scenic Area Act states that "The purposes of the Act are . . . to
21 protect and provide for the enhancement of the scenic . . . resources of the Columbia River Gorge
22 . . ." Section 3; 16 USC §544a.

23 1b. The Scenic Area Act also requires that "... residential development outside
24 urban areas take place without adversely affecting the scenic . . . resources of the scenic area . . ."
25 .Section 6(d)(8); 16 USC §544d(d)(8).
26

1 1c. The Management Plan states that "... new development lands seen from
2 key viewing areas shall be visually subordinate to its landscape setting." Policy 1, GMA
3 Policies, Scenic Resources Chapter, p. I-7 (emphasis added).

4 1d. Section 22.04.010.153 of Skamania County Ordinance 1993-04 states:

5 'Visually Subordinate' means a description of the relative visibility of a structure
6 where the structure does not noticeably contrast with the surrounding landscape,
7 as viewed from a specified vantage point, generally a key viewing area. As
8 opposed to structures that are fully screened, structures that are visually
subordinate may be partially visible. They are not visually dominant in relation to
their surroundings.

9 1e. The County's decision violates these provisions of the federal Scenic Area Act
10 and Management Plan because the development in this case adversely affects scenic resources
11 and is not visually subordinate. Location of the home and other structures makes it extremely
12 difficult, and most likely impossible, to obtain visual subordination. The home will definitely not
13 meet visual subordination within two years.

14 2. Siting

15 2a. Section 22.10.020.B.5 of Ordinance 1993-04 provides:

16 New buildings or roads shall be sited on portions of the subject property that
17 minimize visibility from key viewing areas, unless the siting would place
18 development in a buffer specified for protection of water resources, sensitive
19 plants; or sensitive wildlife sites or would conflict with provisions protecting
20 cultural resources. In such situations, development shall comply with this
21 provision to the maximum extent practicable.

22 (Emphasis added.)

23 2b. Because the house and shop were located on an exposed bluff on one of
24 the most prominent portions of the property and are visible from at least four key viewing areas,
25 despite the availability of alternative sites, the County's decision violates this part of its
26 ordinance. County Planners interpret Ordinance section 22.10.020B.5 only to require that a
dwelling does not maximize visibility. This is not a correct interpretation of the Ordinance.

3. Topography/Vegetation

1 3a. Section 22.10.020.B.6. of Ordinance 1993-04 provides:

2 In siting new buildings and roads, use of topography and vegetation to screen such
3 development from key viewing areas shall be given priority over other means of
4 achieving visual subordination, such as planting of new vegetation or using
5 artificial berms to screen the development from key viewing areas.

6 (Emphasis added.)

7 3b. Because the County approved sites for the house and shop that did not give
8 priority to topography and vegetation to screen the development, the County's decision violates
9 this part of its ordinance. There was no topography in front of the house that would screen the
10 development, and the vegetation that was on the site at time of the approval would not adequately
11 screen the home or shop. Alternative sites A, B and C are well screened by existing topography
12 and vegetation as seen from key viewing areas.

13 4. Grading/Cut Banks

14 4a. Section 22.10.020.B.7. of Ordinance 1993-04 provides:

15 New buildings and roads shall be designed and sited to minimize activities and
16 visibility of cut banks and fill slopes from key viewing areas.

17 4b. Because the County approved a house with a daylight basement on a south-
18 facing slope that is highly visible from at least four key viewing areas, and allowed the relocation
19 of the shop to the west of the home where grading and the structure were highly visible, the
20 County's decision violates this part of its ordinance.

21 5. Size, Height, Color, Etc.

22 5a. Section 22.10.020.B.1. of Ordinance 1993-04 provides:

23 Size, height, shape, color, reflectivity, landscaping, siting or other aspects of
24 proposed developments shall be evaluated to ensure that such development is
25 visually subordinate to its setting as seen from key viewing areas.

26 (Emphasis added.)

5b. Because the County approved a house and shop that are very large and
geometric in shape, have strong horizontal lines, have large unbroken window surfaces, have a

1 light cedar color for siding (home) and a green color (shop and roof of house) that does not blend
2 into the surrounding landscape and is reflective, as well as the lack of available landscaping due
3 to fuel break requirements and constraints of the location, the house and shop are not visually
4 subordinate and the County decision violates this part of its ordinance.

5 6. Breaking Skyline

6 6a. Section 22.10.020.B.12. of Ordinance 1993-04 provides:

7 The silhouette of new buildings shall remain below the skyline of a bluff, cliff or
8 ridge as seen from key viewing areas.

9 (Emphasis added.)

10 6b. Because the house protrudes above the skyline as seen from the Columbia
11 River, the County violated this part of its ordinance. The Director's Decision was interpreted to
12 allow a house at least 35 feet tall, because the language of the Director's Decision stated that the
13 total height of the house shall not exceed 25 feet from the main floor. This was interpreted not to
14 be the ground floor. The County did not enforce its intent.

15 7. Forest Setback

16 7a. Section 22.08.070.B.2.a of Ordinance 1993-04 provides:

17 The approval of new dwellings and accessory structures on forest lands shall
18 comply with the following standards:

19 Dwellings shall be set back at least 200 feet from adjacent properties.

20 (Emphasis added.)

21 7b. Because the County allowed the house to be sited before the land division
22 was finalized, and because the County was not aware of where the property lines were until
23 sometime after the land division was approved on April 3, 1998, the County violated this part of
24 its ordinance. The Director's Decision resulted in siting the home less than 200 feet from the
25 adjacent property to the south.
26

1 B. Violations in the Implementation of the County's Planning Director's Conditions
2 of Approval

3 As discussed above, the County's decision imposed a number of conditions that appeared
4 to require compliance with the Scenic Area Act, the Management Plan and the implementing
5 ordinances. However, by subsequent failure to enforce these conditions, the County has allowed
6 additional violations of the Scenic laws to occur. Based upon the findings of fact set forth above,
7 the Commission concludes that the County has further violated the Scenic laws by failure to
8 enforce the conditions of approval as follows:

9 1a. Condition #1: "All developments shall be consistent with the enclosed site plan,
10 unless modified by the following conditions of approval. If modified, the site plan shall be
11 consistent with the conditions of approval."

12 1b. As constructed to date, the house is not consistent with the site plan. Furthermore,
13 the property owners have still not submitted a site plan that is consistent with the conditions of
14 approval.

15 2a. Condition #2: "All buildings shall be surrounded by a maintained fuel break of 50
16 feet"

17 2b. The testimony showed that the third landscape plan submitted by the property owners
18 does not meet either the County landscape requirements (of July 28, 1998, and September 11,
19 1998) or the fuel break requirements.

20 3a. Condition #13: "Dwellings shall be set back at least 200 feet from adjacent
21 properties."

22 3b. At the time of the hearing, the house clearly violated this condition because it was
23 approximately 15 feet from the adjacent property to the south.

24 4a. Condition #22: "A grading plan shall be submitted by the applicant if more than 100
25 cubic yards of grading or filling will occur."

1 4b. The property owners excavated or disturbed more than 300 cubic yards of material
2 without submitting a grading plan.

3 5a. Condition #23: "A new site plan shall be submitted prior to issuance of any building
4 permits. The new site plan shall show one location for each of the proposed buildings. All
5 required screening trees, especially those required for the barn and shop location northeast of the
6 home site (if those sites are chosen), shall also be shown on the new site plan."

7 5b. The property owners submitted a new site plan, but it did not comply with County
8 requirements.

9 6a. Condition #27: "The proposed residence shall be limited in height so as not to break
10 the skyline nor the tree canopy. The house shall be limited to one story with a daylight basement.
11 However the main floor may include a loft so long as the total height of the house, above the
12 floor elevation of the main floor, does not exceed 25 feet."

13 6b. In addition to violating the ordinance (see finding of fact # 8 above), this condition
14 has not been complied with by the property owners or enforced by the County. The house clearly
15 breaks the skyline from the Columbia River, a key viewing area.

16 6c. The county did not enforce its decision that the home was to be one story. The
17 County and the property owners admit that the home is more than a one story home.

18 7a. Condition # 28: "The building sites for all buildings shall be graded and staked prior
19 to framing the foundations or beginning construction for staff to verify locations. Planning staff
20 needs 72 hours notice to complete these site inspections."

21 7b. The building site for the house was not graded and staked prior to construction as
22 required by this condition.

23 7c. The County did not and has not enforced this condition, including the 72 hour notice
24 requirement.

25 8a. Condition #29: "Applicant shall be required to retain all existing vegetation cover
26 screening development from key viewing areas except for the small alders and berry bushes to be

1 removed at building sites. The two existing fir trees, the proposed home will be located between,
2 shall be retained for screening purposes."

3 8b. The property owners did not comply with, and the County did not enforce, this
4 condition. Much of the existing vegetation was removed, and the house was not located between
5 the two existing fir trees in a way that provided screening.

6 9a. The County stop work order provides: "If you fail to satisfy these conditions, then
7 the stop work order will immediately go into effect on the 21st day."

8 9b. The conditions were not met but the County failed to enforce the stop work order.
9

10 VII. OPINION AND REASONS

11 A. The Significance of this Case

12 From both a policy and legal perspective, this is the most significant enforcement case in
13 the 12 year existence of the Commission. This is the first circumstance where a combination of
14 ambiguities and inaccuracies in the application and in the County Director's Decision, together
15 with lack of compliance with and enforcement of the conditions of the County Director's
16 Decision, have made it necessary to challenge a development already under way. The
17 Commission found it necessary to invoke Section 15(a)(1) in this case because of the
18 development's egregious impacts on scenic values of the Gorge, which did not become evident
19 until construction was well under way.

20 For instance, the elevation drawing submitted by the property owners, upon which
21 analysis of the application had to rely states: "[h]ouse only seen directly from I-84 and Columbia
22 River, as vegetation hides all else. Only 20% of home seen from 2 sites, as yard, daylight
23 basement, garage, shop and barn are not seen from any view points." The Director's Staff Report
24 finds "[t]he existing topography will be used to screen proposed development from key viewing
25 areas. The proposed home will be cut into the base of a small hill on the property. This
26 topographic feature is covered with existing vegetation including fire [sic] trees that should be

1 retained to provide screening from key viewing areas." The Director's Decision states that
2 "applicant shall be required to retain all existing vegetation cover screening development from
3 key viewing areas . . .". Yet the record demonstrates the reality that the house is not screened to
4 any meaningful degree by either topography or vegetation, and is virtually 100% visible from
5 several key viewing areas. If the Gorge Commission could not correct situations like this
6 through its use of 15(a)(1), the scenic resources of the Gorge have no secure protection.

7 Under Section 15 of the Scenic Area Act, the Commission is explicitly charged with the
8 duty to monitor County "activities," and this means the full range of county actions -- permit
9 procedures, approval of development and enforcement of its ordinance. 16 U.S.C. § 544m.
10 However, Congress did not stop there. The Scenic Act directs this Commission to "take such
11 actions as it determines are necessary to ensure compliance." 16 U.S.C. § 544m (emphasis
12 supplied). Thus, the Commission believes that, under the laws of United States and laws of both
13 the State of Washington and the State of Oregon, it has a mandatory duty to ensure compliance
14 with the Scenic laws. That is all the Commission seeks to do in this case.

15 B. The County's and the Property Owners' Case

16 As both the Findings of Fact and the section on Jurisdiction make clear, the County and
17 the property owners relied almost entirely on procedural or jurisdictional defenses.

18 Indeed, the Skamania County Prosecutor Brad Andersen has been quite open and candid
19 with the Commission on this point. For example, in his brief summary of the County's position,
20 Mr. Andersen states:

21 Skamania County is only defending against the Executive Director's challenge
22 because it believes the Executive Director was (and still is) asking the Columbia
23 River Gorge Commission to take action against a final land-use decision. Right or
24 wrong, its [sic] a final decision that cannot be disturbed.

24 Skamania County Position, November 18, 1998 (see document with yellow cover titled
25 "Revised Chronology and Parties' Summaries" -- pages in this document are not sequentially
26 numbered, but the document in question is the third page of the County's materials). As

1 discussed above, none of these jurisdictional defenses were well founded, in the Commission's
2 judgment.

3 As to the merits of the case, namely the alleged violations of the Scenic laws and the
4 County's own conditions of approval, even the testimony of the County's and the property
5 owner's own witnesses only served to confirm the alleged violations. For example, the county
6 planners, including both Mr. Mazeski and Ms. Fagerness, testified that to "minimize" visibility,
7 the County only sought to find a site that was not the worst. This approach contradicts both the
8 professional and lay understanding of the word "minimize", which is "to reduce to the smallest
9 possible number, degree, or extent." Webster's Third New International Dictionary (1993). As a
10 second example, the same County planners acknowledged that the condition on the height of the
11 house was poorly drafted and might not assure compliance with the County's ordinance. As a
12 final example, when asked to explain why he did not adhere to a particular condition of approval,
13 Mr. Bea candidly testified that he did not pay much attention to and was only generally familiar
14 with the conditions.

15 C. County Violations of the Scenic Laws and Its Own Land Use Ordinance A
16 preponderance of the evidence in this case clearly shows that Skamania County violated the
17 Scenic laws and its own land use ordinance in the approval of the permit in this matter and its
18 subsequent actions. This includes failing to ensure the conditions were enforced.

19 The violations are demonstrated through objective evidence that goes beyond mere
20 interpretation. Photographs and documents depict the results of a decision that does not comply
21 with the Scenic laws and the County's ordinance. Moreover, as just noted, the violations are
22 further confirmed in admissions made by the staff of the County planning and building
23 departments. The construction of the house and shop and the buildings themselves violated, and
24 in most instances continue to violate, several key requirements of the Scenic laws. The dwellings
25 adversely affect scenic resources and are not visually subordinate. They were sited in locations
26 that did not minimize visibility, take advantage of existing topography and vegetation, or

1 minimize grading. The size, height, shape, reflectivity and color of the dwelling and shop all
2 contribute to the visual dominance of the structures. The house protrudes above the skyline as
3 seen from the Columbia River, a key viewing area.

4 Whenever the Commission considers development decisions that affect scenic resources,
5 the Commission is attentive to the cumulative impacts of such decisions. In some related
6 instances, the Scenic Area Act specifically requires consideration of cumulative impacts. This is
7 true, for example, in the enforcement cases that involve appeals to the Commission of county
8 decisions implementing the Act. 16 U.S.C. § 544(m)(a)(2) (see definition of "adversely affect"
9 in 16 U.S.C. § 544 (a)).

10 Standing alone, the development in this case has significance. With the possibility of
11 additional, similar developments, the significance increases dramatically. Furthermore, this case
12 involves a county that has chosen to implement the Scenic Area Act and that will be faced with
13 similar development decisions in the future. The Commission strongly believes that the
14 erroneous decision of the County in this case should not stand as a precedent for future cases.

15 D. Choice of Remedies

16 In choosing a remedy, the Commission's overriding duty is "to ensure compliance." 16
17 USC §544m(a)(1). To ensure compliance in this case, the Commission concludes in the
18 following section of this order that the County must, first, correct the violations in its original
19 decision, second, issue a lawful decision, and third, enforce the lawful decision. Finally, because
20 virtually every aspect of the work done on the site to date has violated the Scenic laws, the
21 Commission has concluded that further development must be stopped until the County has
22 revised its decision.

23 The Commission joined the property owners because of its belief that their participation
24 was needed for a just adjudication of this action. The Commission ruled in joining the property
25 owners that without their participation, they would not adequately be able to protect their
26 interests, and complete relief could not be afforded. Without joinder of the property owners the

1 Commission also believed that Skamania County might be placed in a position of incurring
2 inconsistent obligations. The property owners were given opportunity to prepare for the hearing,
3 which was delayed to give them adequate preparation time, and they were allowed to submit
4 briefing, present testimony and, conduct cross examination and were given all procedural rights
5 equal to the other parties.

6 The Commission recognizes that the actions directed by this Order are quite forceful.
7 Nonetheless, in determining an appropriate remedy, the Commission must make a case-by-case
8 decision that carefully and fully considers the full record. This case is replete with factors that
9 the Commission sincerely hopes will not repeat themselves:

- 10 • A county responsible for implementing the Scenic laws has instead committed numerous and
11 serious violations of those laws.
- 12 • The County has compounded the problem by failing to enforce even the lawful terms of its
13 original decision.
- 14 • The affected property owners have themselves seriously contributed to the problem by
15 actions that did not comply with the conditions imposed by the County.
- 16 • The result is construction activity and a dwelling and shop that, unless remedied, will
17 permanently and significantly damage the unparalleled scenic resources that Congress and the
18 two states have sought to protect.

19 In summary, nothing short of the actions dictated by this order will fulfill the
20 Commission's legal duty to ensure compliance with the Scenic laws.

21 VIII. ORDER

22 It is ordered that all of the following actions be taken in accordance with the specified
23 timelines:

24 Cessation of Development

- 25 1. The County shall immediately issue an order stopping the property owners from
26 continuing any development activity on the site until and unless in accord with a County

1 Decision issued in compliance with the remaining portions of this order, or unless it is activity
2 designed to achieve full compliance with Scenic Laws which has been approved in writing by
3 both the County and Commission. The County may cite this Commission's authority and order
4 as the basis for the County's order.

5 2. Notwithstanding paragraph one, the County may exempt from its order any reasonable
6 actions taken to protect the structures in question from weather damage. Any provisions of the
7 County's order dealing with weather damage shall be reviewed and approved in advance of
8 adoption by the Executive Director.

9 Revising the County's Decision and Issuing a Lawful Decision

10 3. No later than sixty (60) days after adoption of this order, the County shall revise
11 Director's Decision NSA-96-81, Part #2 and adopt a new or revised decision that is in full
12 compliance with the provisions of the Scenic Area Act, Management Plan and Skamania County
13 Land Use Ordinance 1993-04, including but not limited to siting the structures at alternative sites
14 in compliance with Sections 22.10.020.B5-7 and 22.10.020.B1 of Skamania County Land Use
15 Ordinance 1993-04.

16 Bringing the Development into Full Compliance

17 4. The County shall take all necessary steps to assure that development on the property in
18 question is brought into full compliance with the Scenic Act, the Management Plan and the
19 County's ordinances no later than 180 days from the adoption of this order.

20 It is further ordered that:

21 Continuing Jurisdiction

22 5. The Commission retains continuing jurisdiction over this case.

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2 Severability

3 6. If any provision in this order is found to be unconstitutional or otherwise unlawful, the
4 Commission intends and directs that all other provisions remain in effect.
5

6 DATED this 25 day of JANUARY, 1999.

7 
8 Chair, Columbia River
9 Gorge Commission

10 DATE of Service:

11
12 NOTICE: You are entitled to judicial review of this Order. Judicial review may be obtained by
13 appeal to the Washington State Superior Court within 60 days after the date of service of this
14 order. 16 U.S.C. § 544 (b)(4), (6).
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