BEFORE THE COLUMBIA RIVER GORGE COMMISSION

NORWAY GREEN, LLC, Appellant, v. CLARK COUNTY, Respondent, and FRIENDS OF THE COLUMBIA GORGE, Intervenor-Respondent.	CRGC No. COA-C-22-01 Clark County Nos. OLR 2021-00139, OLR 2022-00045, & OLR 2022-0046 FRIENDS OF THE COLUMBIA GORGE'S RESPONSE BRIEF IN CRGC NO. COA-C-22-01

FRIENDS OF THE COLUMBIA GORGE, Appellant, v. CLARK COUNTY and NORWAY GREEN, LLC, Respondents.	CRGC No. COA-C-22-02 Clark County Nos. OLR 2021-00139, OLR 2022-00045, & OLR 2022-0046

Nathan J. Baker, Senior Staff Attorney
Friends of the Columbia Gorge
123 NE 3rd Ave., Ste 108
Portland, OR 97232-2975
(503) 241-3762 x101
nathan@gorgefriends.org
Attorney for Friends of the Columbia Gorge

David T. McDonald
Sherlag De Muniz LLP
820 NW 12th Ave. Ste 106
Portland, OR 97209-3043
(503) 227-5200
david@sherlagdemuniz.com
Attorney for Friends of the Columbia Gorge

Counsel continued on next page

Stephen E. Archer, Deputy Prosecuting Attorney
Prosecuting Attorney's Office, Civil Division
Clark County
P.O. Box 5000
Vancouver, WA 98666-5000
(564) 397-2478
stephen.archer@clark.wa.gov
Attorney for Clark County

LeAnne Bremer
Miller Nash LLP
500 Broadway, Suite 400
Vancouver, WA 98660-3324
(360) 619-7002
leanne.bremer@millernash.com
Attorney for Norway Green, LLC

TABLE OF CONTENTS

Friends of the Columbia Gorge
123 NE 3rd Ave., Ste 108
Portland, OR 97232
(503) 241-3762

Friends of the Columbia Gorge
123 NE 3rd Ave., Ste 108
Portland, OR 97232
(503) 241-3762

I. INTRODUCTION

This Response Brief is filed on behalf of Friends of the Columbia Gorge ("Friends"), Intervenor-Respondent in appeal CRGC No. COA-C-22-01.[1] Friends is a nonprofit organization with approximately 5,000 members, including members residing in Clark County, dedicated to protecting and enhancing the resources of the Columbia River Gorge.

In this matter, the Applicant, Norway Green, LLC ("Norway Green"),[2] filed a land use application with Clark County seeking permission to build a non-farm dwelling, an agricultural building, a new driveway, and other new structures on an approximately 41-acre parcel located on SE Gibson Road and identified as Clark County parcel number 133692000. The parcel is zoned Gorge Large-Scale Agriculture-40 (GLSA-40), and is in the General Management Area ("GMA") of the Columbia River Gorge National Scenic Area ("National Scenic Area"). The Gibson Road area, including the subject parcel, contains highly productive farmland, a rapidly diminishing resource in both the Columbia River Gorge and Clark County.

Clark County, by and through its Land Use Hearing Examiner, reached the correct ultimate conclusion that Applicant Norway Green failed to meet its burden of demonstrating compliance with the applicable approval criteria, and the Hearing Examiner therefore appropriately denied the land use application. The Gorge Commission should reject Norway

[1] This matter involves two consolidated appeals. The first appeal, CRGC No. COA-C-22-01, was filed by the Applicant below, Norway Green, LLC ("Norway Green" or "Applicant"). The second appeal, CRGC No. COA-C-22-02, was filed by Friends, a party of record below. This Response Brief is filed in Norway Green's appeal. Friends hereby incorporates into this Brief all arguments and factual allegations from its Opening Brief in Friends' appeal.

[2] Applicant Norway Green, LLC is an active corporation first registered with the State of Washington in 2014, and which has as its governors John Warta and Georgiana Warta, husband and wife. Another company owned by the Wartas, named GLW Ventures, LLC, litigated a previous appeal decided by the Gorge Commission. *GLW Ventures, LLC v. Skamania Cty.*, CRGC No. COA-S-13-02 & COA-S-13-03, Final Op. & Order (May 13, 2014), *aff'd*, Skamania Cnty. Super. Ct. No. 14-2-00071-7 (Dec. 17, 2015).

Friends of the Columbia Gorge
123 NE 3rd Ave., Ste 108
Portland, OR 97232
(503) 241-3762

Green's appeal, deny all of Norway Green's Assignments of Error, and uphold Clark County's denial of the land use application. Furthermore, the Commission should reject Norway Green's claims that Clark County unconstitutionally took property from Norway Green.

II. STATEMENT OF THE CASE

A. Nature of the Land Use Decision

The challenged land use decision ("the Decision") consists of three written orders[3] issued on behalf of Clark County by the Clark County Land Use Hearing Examiner:

- Final Order (No. OLR-2021-00139) (Feb. 24, 2022) (Rec. 52–77)
- Final Order on Applicant's Motion for Reconsideration (No. OLR-2022-0045) (Mar. 30, 2022) (Rec. 5–9)
- Final Order on Appellant's Motion for Reconsideration (No. OLR-2022-0046) (Mar. 30, 2022) (Rec. 11–14)

The Decision denies Norway Green's land use application seeking permission to build a non-farm dwelling, an agricultural building, a new driveway, and other new structures on an approximately 41-acre parcel designated Large-Scale Agriculture.

Pursuant to Clark County Code § 2.51.150, the Decision became final on March 30, 2022.

B. Summary of Friends' Responses to the Arguments

Norway Green's Brief does not number its Assignments of Error, which has required Friends to number the Assignments in order to respond to them. Friends has numbered the Assignments of Error as follows:

- First Assignment of Error — presented in section 8.1 and summarized in section 7.1 of Norway Green's Brief.
- Second Assignment of Error – presented in section 8.3 and summarized in section 7.2 of Norway Green's Brief.

[3] All three of these orders are included in the Appendix to Friends' Opening Brief in its appeal, CRGC No. COA-C-22-02.

Friends of the Columbia Gorge
123 NE 3rd Ave., Ste 108
Portland, OR 97232
(503) 241-3762

- Third Assignment of Error – presented in section 8.4 and summarized in section 7.3 of Norway Green's Brief.

- Fourth Assignment of Error – presented in section 8.5 (and in footnote 79 within section 8.3) and summarized in section 7.4 of Norway Green's Brief.

Section 8.2 of Norway Green's Brief (at pages 15–16) does not contain any legal argument[4] or assign any error to the Decision. In fact, Section 8.2 does not even *mention* the Decision, so it cannot be assigning error to the Decision. Nor did Norway Green include a section or any language summarizing or corresponding to Section 8.2 within its summaries of its Assignments of Error in sections 7.1 through 7.4. Simply put, Section 8.2 is *not* an Assignment of Error. It therefore does not require a decision by the Commission.

RESPONSE TO FIRST ASSIGNMENT OF ERROR: Clark County, by and through its Hearing Examiner, correctly determined that the Applicant retained the burden of demonstrating compliance with all applicable approval criteria during the Hearing Examiner's de novo review of the application. The Commission should reject Norway Green's First Assignment of Error and uphold the relevant findings and conclusions in the Decision.

RESPONSE TO SECOND ASSIGNMENT OF ERROR: Contrary to Norway Green's arguments, Clark County did not require or "compel" Norway Green to log or convert the currently wooded portion of the subject parcel. The County's Decision merely recognizes that Norway Green *may* log the wooded portion in order to increase agricultural production from the parcel, which is a highly relevant consideration for whether the parcel is suitable for agricultural production (and in turn whether the application meets the approval criteria for a non-farm dwelling).

[4] The closest that section 8.2 comes to making legal argument is in its final sentence, but even that sentence contains the vague, noncommittal language "does not necessarily compel a conclusion." (Norway Green Br. at 16.) Even this sentence is not legal argument assigning error to the Decision.

Friends of the Columbia Gorge
123 NE 3rd Ave., Ste 108
Portland, OR 97232
(503) 241-3762

In fact, even prior to Clark County's Decision, Norway Green had already announced its intentions to the Clark County Assessor, within its approved timber management plan, to log the property. Norway Green's statements to the Assessor are inconsistent with what it told the Hearing Examiner—that it desires to *not* log the property. At any rate, Clark County has not by any stretch of the imagination "compelled" Norway Green to either log or not log the property.

The County did not violate any of Norway Green's rights. Nor did the County violate the Columbia River Gorge National Scenic Area Act, the Washington Forest Practices Act, or any of these statutes' implementing rules. The Commission should reject Norway Green's Second Assignment of Error and uphold the relevant findings and conclusions in the Decision.

RESPONSE TO THIRD ASSIGNMENT OF ERROR: Although the Hearing Examiner reached some incorrect findings and conclusions regarding the suitability and capability of the subject parcel for agricultural production (several of which are covered separately in Friends' appeal), the Hearing Examiner ultimately reached the correct conclusion that Applicant Norway Green failed to meet its burden of demonstrating compliance with the applicable approval criteria for a non-farm dwelling—in particular, the burden to demonstrate that the parcel is predominantly unsuitable for agriculture.

The applicable approval criteria expressly focus on the characteristics of *the land itself* and therefore whether the *land* is suitable for (and capable of) agricultural production. *See, e.g.*, CCC § 40.240.040 (definitions of "capability" and "suitability"). Although a portion of the parcel is currently wooded, these trees are not part of the land itself. The Hearing Examiner's approach of focusing on the *land* within the parcel (separate from the trees currently growing there) was fully consistent with the applicable approval criteria.

/ / /

Friends of the Columbia Gorge
123 NE 3rd Ave., Ste 108
Portland, OR 97232
(503) 241-3762

The Applicant's arguments regarding forestry use of the parcel are a red herring. The Decision correctly focuses on whether the subject parcel is (or is not) predominantly unsuitable for *agriculture*, because that is the analysis deemed relevant by the criteria for a proposed non-farm dwelling. In contrast, these criteria do not require an evaluation of whether the parcel is (or is not) predominantly suitable for *forestry*; that question is simply not part of the analysis for a proposed non-farm dwelling.

Moreover, the Scenic Area Act itself recognizes that a parcel may be readily converted from forest to agriculture or vice versa, which underscores the fact that some parcels (including this parcel) can be predominantly suitable for both types of uses. 16 U.S.C. §§ 544d(d)(1), (2). In this case, the subject parcel has historically been (and continues to be) used for a combined farm-forestry operation, which pursuant to the National Scenic Area Act and the Gorge Management Plan's Land Use Designation Policies is exactly why the parcel was designated Large-Scale Agriculture in the first place.

The environmental resources (riparian resources and two Oregon white oak trees) on parts of the subject parcel do not render the parcel as a whole predominantly unsuitable for agriculture. These environmental resources have always been, and will continue to be, fully compatible with a farm-forestry operation, which is one of the reasons why this parcel is suitable for continued agricultural use.

Because Applicant Norway Green failed to meet its burden to demonstrate that the subject parcel is predominantly unsuitable for agricultural use, Clark County correctly denied the application. The Commission should reject Norway Green's Third Assignment of Error and uphold the relevant findings and conclusions in the Decision. The County's denial of the application should be upheld.

Friends of the Columbia Gorge
123 NE 3rd Ave., Ste 108
Portland, OR 97232
(503) 241-3762

RESPONSE TO FOURTH ASSIGNMENT OF ERROR: Clark County did *not* unconstitutionally take property from Norway Green. The Commission should reject Norway Green's Fourth Assignment of Error and uphold the relevant findings and conclusions in the Decision.

C. Summary of the Material Facts

Friends hereby adopts and incorporates by reference its Summary of Material Facts from its Opening Brief in Friends' appeal, CRGC No. COA-C-22-02. Friends also responds to the Applicant's Summary of Material Facts and summarizes additional facts below.

1. Response to the Applicant's Summary of Material Facts

Friends rejects the Applicant's Summary of Material Facts in the instant appeal and responds to specific items in that summary as follows.

First, the subject parcel is closer to 41 acres than 40 acres. As explained in footnote 3 on page 5 of Friends' Opening Brief and the sources cited therein, the approximate acreage is 40.82 acres. Moreover, the Hearing Examiner expressly corrected the Decision on reconsideration to specify that the parcel is approximately 41 acres (not 40 acres). (Rec. 13.) No party has assigned error to that corrected finding.

Second, the Hearing Examiner correctly determined that the comment letter sent to the Clark County Department of Community Development ("Community Development") by the Gorge Commission staff was not determinative in this matter, in part because that letter was written and submitted very early in the process—long before the evidentiary record was generated before the Hearing Examiner—and therefore the Commission staff "did not have the opportunity to review and consider all of the information and evidence in the record prior to

Friends of the Columbia Gorge
123 NE 3rd Ave., Ste 108
Portland, OR 97232
(503) 241-3762

submitting their comment letter." (Rec. 56.) Thus, the Hearing Examiner considered, but ultimately chose not to rely on, this letter.

Third, Norway Green cites and quotes findings of fact and conclusions of law from the initial decision of the Clark County Department of Community Development. (Norway Green Br. at 6–7.) The findings and conclusions in that initial decision may be interesting as background information, but they are no longer in effect. The County's final Decision is the Decision of the Clark County Land Use Hearing Examiner, which replaced Community Development's initial decision (and all of its findings and conclusions). The Hearing Examiner Decision is the operative decision, and it is the decision under appeal.

Fourth, Norway Green incorrectly asserts that the Hearing Examiner "agreed" that the parcel is "predominantly suitable for forest uses, not agricultural uses." (Norway Green Br. at 7.) The Hearing Examiner made no such finding. Rather, the Hearing Examiner expressly referred to "the applicant's assertion that the site is 'predominantly suitable for forest production'" as "irrelevant." (Finding/Conclusion D.10.c at Rec. 60.)

2. Additional Material Facts

The evidence in this case shows that the subject parcel is predominantly suitable for agriculture, and that for at least fifty years the parcel was continuously predominantly used for agricultural production and was continuously assessed by Clark County as Farm and Agricultural Land. (Rec. 429–30, 439, 448, 1525–40.)

As detailed in Friends' Brief in its appeal (CRGC No. COA-C-22-01), the parcel not only has been used for decades for agricultural production, it continues to be used for agricultural production today by the Wartas and their companies. Below is a photo dated August 10, 2021 showing the grazing and hay production that continue on the subject farm/ranch, of which the

Friends of the Columbia Gorge
123 NE 3rd Ave., Ste 108
Portland, OR 97232
(503) 241-3762

subject parcel is a constituent parcel.

(Rec. 1461.)

The agricultural uses on the parcel have included the wooded portion, which was used to support the grazing uses in the cleared pasture area, and which was included in the land assessed by Clark County as Farm and Agricultural Land for more than fifty years. (Rec. 429–30, 439, 448, 1525–40; *see also* Amended Declaration of David L. Wechner ("Wechner Am. Decl.") at ¶ 55 (Rec. 190).)

The evidence also shows that the wooded portion of the subject parcel was recently reclassified by the Clark County Assessor as Designated Forest Land shortly before the Applicant acquired the parcel, and that the Applicant has elected to continue the prior

Friends of the Columbia Gorge
123 NE 3rd Ave., Ste 108
Portland, OR 97232
(503) 241-3762

landowner's timber management plan (Rec. 3492–3512) for the wooded portion and has filed its own farm plan for the existing cleared pasture area, alleging that the latter portion will continue to be used for agricultural production (Rec. 448, 1587–89). The timber management plan and farm plan have both been approved by the County Assessor. (Rec. 1596–98.)

Although the approved timber management plan (Rec. 3492–3512) states an intention to commercially log the wooded portion of the parcel, the Applicant has also stated or implied that it has no current desires or plans to do so. (Rec. 42–43 & n. 5 (announcing the Applicant's "wishes . . . to maintain the forest" and asserting that logging and converting the wooded portion would be "against [these] wishes."); *see also* Rec. 678–79 (testimony of John Warta).)

To the best of Friends' knowledge, neither the Applicant nor anybody else has filed any land use or forest practices applications with Clark County or the Washington Department of Natural Resources seeking permission for any commercial forestry, forest practice conversions, new cultivation, or grazing activities on the subject parcel. (Rec. 20.) Nor has the Applicant filed any other land use applications for the subject parcel (other than the non-farm dwelling application denied by Clark County in this matter).

D. Jurisdiction

Under the Scenic Area Act and Commission Rules, the Hearing Examiner Decision is a final county land use decision that is appealable to the Gorge Commission. *See* 16 U.S.C. § 544m(a)(2); Commission Rule 350-60-010.

III. RULES OF STATUTORY CONSTRUCTION

Friends hereby adopts and incorporates by reference the Rules of Statutory Construction section from its Opening Brief in its appeal.

/ / /

Friends of the Columbia Gorge
123 NE 3rd Ave., Ste 108
Portland, OR 97232
(503) 241-3762

IV. ARGUMENT IN RESPONSE

A. RESPONSE TO FIRST ASSIGNMENT OF ERROR: Clark County correctly determined that the Applicant retained the burden of demonstrating compliance with all applicable approval criteria during the Hearing Examiner's de novo review of the application.

The County correctly determined that the Applicant retained the burden of demonstrating compliance with all applicable approval criteria during the Hearing Examiner's de novo review of the application. The Commission should reject the First Assignment of Error and uphold Clark County's construction of the Clark County Code.

1. Standard of Review: Whether the Decision improperly construes the applicable law.

The applicable standard of review is whether "[t]he decision improperly construes the applicable law." Commission Rule 350-60-220(1)(h).

2. Under the Clark County Code, the Applicant retains the burden of proof to demonstrate compliance with the applicable approval criteria during the Hearing Examiner's de novo review of a land use application

The Hearing Examiner properly construed the applicable law in Finding/Conclusion D.1 in the Decision, set forth below:

> 1. CCC 40.510.020.H(3) authorizes the examiner to hear appeals of planning director decisions as a de novo matter. With the exception of SEPA appeals, the applicant shall have the burden of proving by substantial evidence compliance with applicable approval standards. Where evidence is conflicting, the examiner shall decide an issue based upon the preponderance of the evidence. CCC 40.51.020.H(3)(b).
>
> a. This is consistent with the Gorge Commission's decision in *Bacus v. Skamania County* ("*Bacus II*"), CRGC No. COA-S-04-01 (Aug. 10, 2004), (A de novo hearing typically means that the parties may submit new evidence and the burden of proof remains with the applicant. While an appellant may introduce new evidence the applicant must continue to prove the application meets all applicable standards).

(Finding/Conclusion D.1 at Rec. 55–56 (footnote and citations to record omitted).)

Friends of the Columbia Gorge
123 NE 3rd Ave., Ste 108
Portland, OR 97232
(503) 241-3762

In the above-quoted Finding/Conclusion D.1, the Hearing Examiner summarized and reiterated a lengthier prior order of the Hearing Examiner in this matter, which also correctly construes the applicable law. That prior order, entitled "Motion Order" and found in the record at pages 1310 through 1312, is included in the Appendix to this Brief as Exhibit D.

In the Motion Order, the Hearing Examiner correctly rejected the same arguments that Norway Green now reiterates on appeal. For example, the Hearing Examiner adopted the following findings and conclusions:

> In this case, Norway Green, LLC is the "Applicant" as defined by CCC 40.100.070; Norway Green, LLC is the legal entity that filed an application requesting approval of a Type II Gorge permit. . . . This is not a SEPA appeal. Therefore, Norway Green, LLC, as the applicant, continues to bear the burden of proof on appeal pursuant to the express language of CCC 40.510.020(H)(3)(b) which governs appeals of Type II decisions. This section expressly provides that "[t]he applicant shall have the burden of proving by substantial evidence compliance with applicable approval standards."

(Rec. 1311.) The Hearing Examiner also correctly rejected Norway Green's arguments that CCC 40.510.030[5] and the Washington Administrative Procedures Act applied to this proceeding. (Rec. 1311–12.) The Examiner correctly construed the applicable law; the Decision should be upheld on these points.

Because this matter involved a Type II land use application filed in the National Scenic Area, the application "shall be reviewed [under] Type II procedures as specified in Section 40.510.020." CCC § 40.240.050.A.1. In other words, by operation of the Code, this Type II application was required to be reviewed in a Type II proceeding.

Furthermore, for the appeal before the Hearing Examiner involving a Type II application,

[5] Even if the Code *could* be properly construed to apply CCC 40.510.030 to this proceeding, it must be noted that the language of CCC 40.510.030.H and 40.510.020.H.3.b are identical, and that both of these sections expressly state that "the applicant shall have the burden of proving by substantial evidence compliance with applicable approval standards."

Friends of the Columbia Gorge
123 NE 3rd Ave., Ste 108
Portland, OR 97232
(503) 241-3762

the appeal procedures were governed specifically by Code section 40.510.020.H:

> I. Appeal Process.
>
> Appeals will be handled *pursuant to Section 40.510.020(H) for Type II applications* or Section 40.510.030(H) for Type III applications.

CCC § 40.240.050.I (emphasis added). Thus, contrary to the Applicant's arguments, the matter remained a Type II proceeding while on appeal to the Hearing Examiner, and the appeal procedures were governed by section 40.510.020.H.

The key applicable Code section specifying the appeal procedures for the appeal to the Hearing Examiner is section 40.510.020.H.3, which reads in its entirety as follows:

> 3. Appeal Procedures.
>
> a. The hearing examiner shall hear appeals *in a de novo hearing*. Notice of an appeal hearing shall be mailed to parties of record, but shall not be posted or published. A staff report shall be prepared, a hearing shall be conducted, and a decision shall be made and noticed. The decision can be appealed under a Type III process.
>
> b. Except for SEPA appeals which are governed by RCW 43.21C.075, *the applicant shall have the burden of proving by substantial evidence compliance with applicable approval standards.* Where evidence is conflicting, the examiner shall decide an issue based upon the preponderance of the evidence.

CCC § 40.510.020.H.3 (emphasis added).

Pursuant to the italicized Code language above, the Applicant retained the burden of proving compliance with all applicable approval standards while the matter was on appeal to the Hearing Examiner. That makes perfect sense, because the appeal was a de novo, open-record administrative proceeding that was still pending before the same government entity that made the initial decision—namely, Clark County. Although the Director of the Clark County Community Development Department ("Director") and the Clark County Land Use Hearing Examiner presided over different stages of the land use proceeding at different times, they both

Friends of the Columbia Gorge
123 NE 3rd Ave., Ste 108
Portland, OR 97232
(503) 241-3762

acted on behalf of Clark County in rendering their decisions as to whether the Applicant demonstrated compliance with the applicable approval standards.

Once a Type II National Scenic Area decision made by the Director is appealed to the Hearing Examiner, the Director's decision is no longer "final." CCC § 40.240.050.G.5 ("The decision of the responsible official shall be final *unless* a notice of appeal is filed in accordance with this title.") (emphasis added). When such an appeal is filed, the Hearing Examiner essentially stands in the shoes of the Director, hears new evidence and arguments, decides whether the Applicant has met its burden of proof, and decides whether to deny or approve the application.

The Applicant argues otherwise, and bases its argument on a novel suggestion that the Applicant was no longer the Applicant in the appeal to the Hearing Examiner, and that Friends somehow took the Applicant's place, effectively becoming the Applicant. (*See* Norway Green Br. at 13–15.) But that is not how the Code is written.

First, the Code expressly defines "applicant" to mean "the person, party, firm, corporation, legal entity, or agent thereof *who submits an application for an activity*[6] *regulated*

[6] Although the word "activity" is not separately defined, that word is consistently and repeatedly used throughout the Code to mean a *land use or development activity*. In fact, the Unified Development Code at CCC Title 40 includes *more than eight hundred instances* of the words "activity" and "activities," and *every single one of them* involves a land use or development activity. For example, similar to the definition of "applicant," the Code also defines "developer" to mean "the person, party, firm, corporation, legal entity, or agent thereof who undertakes an *activity* regulated by this title." CCC § 40.100.070 (emphasis added). The word "activity" is also used in the Code definitions of "agricultural market," "clearing permit," "construction," "development site," "forest practices," "land-disturbing activity," "subject property," and "use"—as well as in numerous definitions of the Clark County National Scenic Area ordinance—and in every single one of these definitions, "activity" means a land use or development activity. *See* CCC §§ 40.100.070, 40.240.040. The word "activity" is also used in Table 40.210.010-2 in the Code, which contains a column entitled "Use/Activity." Another helpful example is Code section 40.460.430.B.4.i, which regulates "uses, development, *activities*, and modifications" within aquatic shoreline designation areas (emphasis added). There

Friends of the Columbia Gorge
123 NE 3rd Ave., Ste 108
Portland, OR 97232
(503) 241-3762

by this title." CCC § 40.100.070 (emphasis added). The definition of "applicant" at Code section 40.100.070 applies here and is controlling. Pursuant to that definition, Norway Green was always the Applicant, because it "submit[ted] an application for an activity regulated by [Title 40]." CCC § 40.100.070. Nothing in the Code indicates that the identity of the Applicant in this Type II matter somehow switched to a completely different entity merely because an administrative appeal was filed.

As for who has the burden in a Type II matter on appeal before the Hearing Examiner, *the Code expressly imposes on the Applicant* the "burden of proving by substantial evidence compliance with applicable approval standards." CCC § 40.510.020.H.3.b. Just as with the identity of the Applicant, the Code says nothing about switching the burden to a different party, such as an appellant. The focus of the Code language is whether *the Applicant* can prove "compliance with applicable *approval* standards," *id.* (emphasis added)—something that an adverse appellant will have absolutely no interest in doing.[7] Rather, that burden continues to fall on the Applicant, and an adverse appellant (such as Friends) may submit evidence and argument as to whether the Applicant has met its burden.

The Applicant also asserts that the appeal process below was supposed to be conducted as a Type III proceeding (Norway Green Brief at 13–14), apparently because of the sentence in section 40.510.020.H.3.a that reads "The decision can be appealed under a Type III process." Although the wording of that sentence in the Code is a bit confusing, the context is an appeal of a

---

is no question that, within the context of CCC Title 40, "activity" means a land use or development activity, and does *not* include the filing of an appeal of a land use decision.

[7] Here, if Friends had the burden to prove "compliance with applicable approval standards," CCC § 40.510.020.H.3.b, then Friends will readily concede that the application did *not* comply with numerous applicable approval standards.

Friends of the Columbia Gorge
123 NE 3rd Ave., Ste 108
Portland, OR 97232
(503) 241-3762

Type II appeal *decision made by the Hearing Examiner*. The preceding sentences in the Code make that clear:

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

CCC § 40.510.020.H.3.a (emphasis added).

The intent of the final quoted sentence is to clarify that decisions made by the Hearing Examiner in a Type II appeal can be appealed in the same manner as can a Type III Hearing Examiner decision. Other provisions of the Code help further clarify that context. *See, e.g.*, CCC § 40.510.010.E.3.a (specifying appeal procedures for Type I appeals) ("A staff report shall be prepared, a hearing shall be conducted, and a decision shall be made and noticed and can be appealed *as for* a Type III process.") (emphasis added).

Again, the final sentence in Code section 40.510.020.H.3.a simply explains how a Hearing Examiner's decision in a Type II matter can be appealed (either to the Superior Court, or in the case of National Scenic Area decisions, to the Gorge Commission). The identified sentence in Code section 40.510.020.H.3.a does *not* convert a Type II administrative appeal process as heard by the Hearing Examiner into a Type III administrative appeal process in any way.[8] Nor does it change who the applicant is. Nor does it switch the applicant's burden of proof to any other party.

The Applicant also cites the Washington Administrative Procedure Act ("APA"), RCW Chapter 34.05, and two cases applying that state statute. (Norway Green Br. at 14–15 & n. 62.)

[8] On this note, the Hearing Examiner did get one thing in the Motion Order wrong, with the sentence that reads "*Although the appeal is subject to the Type III procedures*, it remains a Type II application." (Rec. 1311 (emphasis added).) The italicized language was mistaken, was not part of the County's Final Order, and can be disregarded by the Commission.

Friends of the Columbia Gorge
123 NE 3rd Ave., Ste 108
Portland, OR 97232
(503) 241-3762

The APA does not apply here, and the cited cases are inapposite. Those cases involved judicial review of state agency decisions pursuant to RCW 34.05.570, an APA provision that specifies the standards of review and burdens *for cases filed in court* under that statute. In the instant case, this matter was not (and is not) at a judicial review stage. Furthermore, both the Community Development Director and the Hearing Examiner acted on behalf of Clark County in rendering administrative decisions; neither the Director nor the Examiner are courts.

Moreover, the APA applies only to state agencies, and Clark County does not meet the APA's definition of "agency." *See* RCW 34.05.010(2). The APA citations and cases cited by the Applicant have absolutely no bearing on the instant case.

The same is true of the Applicant's citation to RCW 36.70C.130, a section of the Land Use Petition Act ("LUPA") governing judicial review by Superior Courts. (Norway Green Br. at 15 & n. 63.) Contrary to the Applicant's arguments, LUPA does not apply to National Scenic Area matters:

> RCW 36.70C.020(1)(a)(ii) indicates that LUPA does not apply to judicial review of "[l]and use decisions of a local jurisdiction that are subject to review by a quasi-judicial body created by state law . . . .". "Local jurisdiction" is defined as a "county, city or unincorporated town." RCW 36.70C.020(3). LUPA does not apply to the [Clark County decision] in question here because the [Hearing] Examiner's decision was subject to review by the [Gorge] Commission, a quasi-judicial body created by state and federal law.

Zimmerly v. Columbia River Gorge Comm'n, Am. Final Order & J. Aff'g Final Op. & Order of Columbia River Gorge Comm'n, at 13 (Clark Cnty. Super. Ct. No. 19-2-03321-06) (Dec. 14, 2021) (Fairgrieve, J.) (included in Appendix as Exhibit E).

Moreover, just as with the APA section discussed above, the LUPA section cited by Norway Green (RCW 36.70C.130) also specifies the standards of review and burdens *for cases filed in the courts*. Again, none of the decision makers who have reviewed this matter to date are

Friends of the Columbia Gorge
123 NE 3rd Ave., Ste 108
Portland, OR 97232
(503) 241-3762

courts. Thus, RCW 36.70C.130, which governs judicial review, is not relevant in any way, shape, or form—not even by analogy. The appeal before the Hearing Examiner was still an administrative proceeding pending before Clark County. It simply makes no sense (and it would be unlawful) to rely on state statutes that govern *judicial review* and try to apply these statutes to county administrative proceedings while they are still pending before the counties.

In summary, because this matter involved a Type II land use application, it was a Type II matter, and it remained a Type II matter while on appeal to the Hearing Examiner. As required by Code section 40.240.050.I, the procedures for Type II appeals are provided in section 40.510.020.H. Finally and most importantly, pursuant to Code section 40.510.020.H, the Applicant (Norway Green LLC) remained the Applicant during the de novo, open-record appeal before the Hearing Examiner, and the Applicant retained the burden of proof to demonstrate compliance with all applicable approval criteria, as expressly required by Code section 40.510.020.H.3.b. The Gorge Commission should reject the Applicant's arguments to the contrary and deny the Applicant's First Assignment of Error.

B. <u>RESPONSE TO SECOND ASSIGNMENT OF ERROR</u>: Clark County neither "compelled" Applicant Norway Green to log the wooded portion of the subject parcel, nor violated any of Norway Green's rights.

Norway Green asserts or implies that Clark County "compelled" Norway Green to log the currently wooded portion of the subject parcel or convert it to agricultural use. (*See, e.g.*, Norway Green Br. at 18 (asserting that "Norway Green's right to convert [the wooded portion of the property from forest use to agricultural use], however, is its alone to exercise, and government cannot *compel* Norway Green to do so") (emphasis added).) But Clark County did not "compel" Norway Green to log the subject parcel or to take any other action with regard to

Friends of the Columbia Gorge
123 NE 3rd Ave., Ste 108
Portland, OR 97232
(503) 241-3762

the parcel. Once that fact is understood, Norway Green's Second Assignment of Error quickly falls apart.

Rather than *compelling* Norway Green to log the subject parcel, the County's Decision merely recognizes that Norway Green *may* log the wooded portion of the parcel in order to increase agricultural production from the parcel, and that this potential for increased agricultural production is one of the several reasons why the Applicant failed to meet its burden to demonstrate that the subject parcel is predominantly unsuitable for agriculture, and thereby failed to justify a non-farm dwelling on this Large-Scale Agriculture parcel. (Finding/Conclusion D.10 at Rec. 59–61; *see also* Conclusion D.1.a[9] at Rec. 76.)

The Decision also correctly recognizes that, to the extent the existing timber on the property is relevant to the analysis, forestry and agriculture are interchangeable uses under the National Scenic Area Act and implementing authorities, and this parcel (or portions thereof) can be lawfully converted from agriculture to forestry and vice versa. (Finding/Conclusion D.10.c at Rec. 60.)

The County did not violate any of Norway Green's rights. Nor did the County violate the National Scenic Area Act, the Washington Forest Practices Act, or any of these statutes' implementing rules. The Commission should reject Norway Green's Second Assignment of Error and uphold the relevant findings and conclusions in the Decision.

1. <u>Standards of Review</u>: Whether the Decision improperly construes the applicable law, whether the Decision is clearly erroneous, and whether the Decision is arbitrary and capricious.

The applicable standards of review for the Second Assignment of Error are whether "[t]he decision improperly construes the applicable law," whether "[t]he decision was clearly

[9] The Decision inadvertently contains two sections labeled Part "D." (Rec. 55, 76.)

Friends of the Columbia Gorge
123 NE 3rd Ave., Ste 108
Portland, OR 97232
(503) 241-3762

erroneous," and whether "[t]he decision was arbitrary and capricious." Commission Rule 350-60-220(1)(d), (h).

2. The Decision is fully consistent with the National Scenic Area Act, the Washington Forest Practices Act, and these statutes' implementing rules.

The Applicant fails to meet its burden under the applicable standards of review. The Decision properly construes the applicable law, is legally correct, and is not arbitrary and capricious.

First, the Applicant misunderstands, misinterprets, and/or fails to recognize the applicability of several key provisions in Clark County's National Scenic Area ordinance. This ordinance language requires an analysis of the capability and suitability of "land" and "the land itself" for agricultural production, including by "considering [the] soils, terrain, location and size of the parcel." CCC 40.240.040 (definition of "capability") ("characteristics of *the land itself*, such as soil, slope, exposure, or other natural factors") (emphasis added); *id.* (definition of "suitability") ("[t]he appropriateness of *land* for production of agricultural . . . products,") (emphasis added); CCC 40.240.430.A.16.b ("considering soils, terrain, location and size of the parcel").

The Applicant fails to acknowledge and recognize that any vegetative cover (including commercial timber) that may currently exist on a parcel is ultimately not relevant or dispositive under these National Scenic Area rules as to the suitability and capability of the parcel and *the land itself* for agriculture. The focus of the rules is whether the "land" is predominantly suitable or unsuitable for agriculture. If the trees can be logged and removed from the property (and the Applicant freely admits that most of them can[10]), then the existence of the trees does not control

[10] *See* Norway Green Brief at 18 ("[T]he parcel can be logged and presumably converted to agricultural land . . . .").

Friends of the Columbia Gorge
123 NE 3rd Ave., Ste 108
Portland, OR 97232
(503) 241-3762

the outcome (which the Hearing Examiner correctly recognized, *see* Finding D.10 at Rec. 59–61).[11]

The Applicant also misunderstands or misinterprets three key sections of the National Scenic Area Act, starting with sections 6(d)(1) and 6(d)(2):

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

16 U.S.C. §§ 544d(d)(1), (d)(2).

Within the General Management Area, the Gorge Commission has implemented sections 6(d)(1) and 6(d)(2) of the Act by adopting the following provisions into the Gorge Management Plan:

> Conversion of agricultural land to forest land or open space shall be allowed.
>
> * * *
>
> Conversion of forest land to agriculture or open space shall be allowed.

[11] The Commission should also consider the policy ramifications of the Applicant's arguments. If the Applicant were correct here, then all other owners of property in the Large-Scale Agriculture land use designation with trees currently growing on their properties would likewise qualify for non-farm dwellings, since they could similarly argue that they cannot be "compelled" to remove the trees (and that because of the trees they cannot farm their properties). In just Clark County alone, this could mean more than three-quarters of the parcels designated Large-Scale Agriculture that do not currently have dwellings on them may be automatically entitled to non-farm dwellings, just because of the trees on their properties. (Declaration of Michael Lang ("Lang Decl.") at ¶¶ 13–18 (Rec. 219–20).) And that does not even include properties where trees can be grown in the future. If replicated throughout the National Scenic Area, such a result would have a devastating impact on the best remaining farmland in the Gorge, and would violate the purposes and standards of the Scenic Area Act. (*Id.* at ¶ 18 (Rec. 220).)

Friends of the Columbia Gorge
123 NE 3rd Ave., Ste 108
Portland, OR 97232
(503) 241-3762

2020 Gorge Management Plan at 166, 193.

These provisions of the Act and Plan apply in this case. The net result of these provisions, as correctly held by the Hearing Examiner, is to allow forest and agricultural lands in the National Scenic Area to be converted to one another. (Finding/Conclusion D.10.c at Rec. 60.)

The Applicant also misconstrues section 17(c) of the Act, which reads as follows:

> Except for the management, utilization or disposal of timber resources of non-Federal lands within the special management areas, nothing in [the National Scenic Area Act] shall affect the rights and responsibilities of non-Federal timber land owners under the Oregon and Washington Forest Practices Acts or any county regulations which under applicable State law supersede such Acts.

16 U.S.C. § 544*o*(c).

The Applicant relies on section 17(c), but attempts to stretch the reach of this provision beyond the limits of credulity. Although that provision protects "the rights and responsibilities of non-Federal timber land owners" under the Washington and Oregon state forest practices acts, 16 U.S.C. § 544*o*(c), the Applicant fails to cite any rights or responsibilities that might be affected by the Decision.

The Applicant argues that "[u]nder the Washington Forest Practices Act, a forestland owner has the right to grow timber, and harvest that timber upon receipt of a permit, when it chooses to do so," and cites RCW 76.09.050 for these propositions. (Norway Green Br. at 17.) But the actual language of RCW 76.09.050 shows a much different picture than painted by the Applicant.

Nothing in RCW 76.09.050 provides a *right* to the Applicant (or any other landowner) to grow timber, to commercially log their properties, and most importantly, to maintain timber on their land in perpetuity *without* logging it, as the Applicant is apparently arguing. To the contrary, that statute simply establishes a framework for regulating forest practices. For example,

Friends of the Columbia Gorge
123 NE 3rd Ave., Ste 108
Portland, OR 97232
(503) 241-3762

the statute merely says that "forest practices shall be conducted in accordance with the forest practices regulations, orders and directives as authorized by this chapter or the forest practices regulations, and the terms and conditions of any approved applications." RCW 76.09.050(4).

In fact, the only places where RCW 76.09.050 uses the words "right" and "rights" are with reference to the rights of counties, cities, and towns to receive notice of forest practices applications and to file or participate in appeals of forest practice approvals. RCW 76.09.050(7)(b), (8), (10), (11).

The Applicant has failed to identify any *rights* that might in any way be affected by the County's Decision. Nor could the Applicant do so, because no provision of the Washington Forest Practices Act affords or provides any rights to the Applicant to harvest or not harvest timber. *See generally* Chapter 76.09 RCW.

The Applicant also fails to cite any *responsibilities* under state or local forest practices laws that might be affected by the County's Decision. Although the Applicant points out that, were it to receive approval from the Washington Department of Natural Resources to commercially log the property, it might be required to reforest the parcel after logging it, the Applicant also readily admits that these reforestation requirements would *not* apply if the Applicant were to apply for and receive approval of a conversion from forestry use to another use (such as agriculture). (Norway Green Br. at 17 (admitting that "a forestland owner may apply for a forest practices conversion permit to convert land to another uses [*sic*] such as agricultural uses").)

Thus, although reforesting the property might be a "responsibility" for certain types of forest practice activities, it would not be a requirement or responsibility for *other* types of forest practice activities (including the use we are concerned with here, a conversion to agriculture).

Friends of the Columbia Gorge
123 NE 3rd Ave., Ste 108
Portland, OR 97232
(503) 241-3762

Ultimately, the Applicant has failed to identify any binding "responsibility" that would be applicable here.

Finally, even if the Applicant *had* identified some right or responsibility that would be relevant and binding, the Applicant would also have to show that such a right or responsibility is impermissibly affected by the County's Decision in order to run afoul of section 17(c) of the Act. The Applicant fails this test as well.

In particular, the Applicant is incorrect where it argues or implies that the County's Decision somehow "compel[s]" the Applicant to commercially log (and not reforest) the property. (Norway Green Br. at 17–18.) The Decision does nothing of the sort. Instead, it analyzes whether the parcel (*i.e.*, the land itself—separate and independent from the timber that happens to be currently growing on the land) is or is not capable, and ultimately suitable, for agricultural production. (Finding/Conclusion D.10 at Rec. 59–61; *see also* Conclusion D.1.a at Rec. 76.)

It is of course completely up to the Applicant whether it actually wants to commercially log the timber[12] and/or pursue a conversion from forest to agriculture. But contrary to the Applicant's contentions, nothing in the Decision *requires* that the Applicant do so. And for that reason, the Applicant's Second Assignment of Error must be denied.

C. RESPONSE TO THIRD ASSIGNMENT OF ERROR: The Decision correctly holds that the Applicant failed to meet its burden of demonstrating that the parcel is predominantly unsuitable for agriculture.

As argued in Friends' appeal, the Hearing Examiner erred in reaching some of the findings and conclusions in the Decision regarding the parcel's suitability for agricultural

[12] As a matter of fact, Norway Green has already announced its intentions, within its approved timber management plan, to commercially log the property. (Rec. 3492–3512.) The County's Decision recognizes these intentions. (Finding D.10.a.ii(B) at Rec. 59; Finding D.10.a.iii(e) at 61.)

Friends of the Columbia Gorge
123 NE 3rd Ave., Ste 108
Portland, OR 97232
(503) 241-3762

production. Those errors are addressed separately in Friends' appeal and need not be decided in this appeal. Despite these errors, the Decision reaches the correct ultimate conclusion: Applicant Norway Green failed to meet its burden of demonstrating compliance with the applicable approval criteria for a non-farm dwelling—in particular, the burden to demonstrate that the parcel is predominantly unsuitable for agriculture.

1. <u>Standards of Review</u>: Whether the Decision is not supported by substantial evidence in the whole record, whether the findings are insufficient to support the Decision, whether the Decision improperly construes the applicable law, whether the Decision is clearly erroneous, and whether the Decision is arbitrary and capricious.

The applicable standards of review for the Second Assignment of Error are whether "[t]he decision is not supported by substantial evidence in the whole record," whether "[t]he findings are insufficient to support the decision," whether "[t]he decision improperly construes the applicable law," whether "[t]he decision was clearly erroneous," and whether "[t]he decision was arbitrary and capricious." Commission Rule 350-60-220(1)(d), (e), (f), (h).

2. Because the applicable approval criteria focus on the characteristics of "the land itself" and therefore whether the land is suitable for (and capable of) agricultural production, it was correct for the Decision to ultimately focus on the capability and suitability of the *land* within the parcel (separate from the trees currently growing there).

The applicable approval criteria for a non-farm dwelling expressly focus on the characteristics of *the land itself* and therefore whether the *land* is suitable for (and capable of) agricultural production. *See, e.g.*, CCC 40.240.040 (definition of "capability") ("[t]he ability of *land* to produce . . . agricultural products due to *characteristics of the land itself*, such as soil, slope, exposure, or other natural factors") (emphasis added); CCC 40.240.040 (definition of "capability") ("[t]he appropriateness of *land* for production of agricultural . . . products")

Friends of the Columbia Gorge
123 NE 3rd Ave., Ste 108
Portland, OR 97232
(503) 241-3762

(emphasis added); CCC 40.240.430.A.16.b (requiring a consideration of "soils, terrain, location and size of the parcel").

Here, although a portion of the parcel is currently wooded, these trees are not part of the land itself. It was thus correct for the Decision to focus on the capability and suitability of the *land* within the parcel (separate from the trees currently growing there), because that is exactly what the criteria require.

The above-cited authorities establish a burden of proof on applicants for non-farm dwellings to demonstrate that the land within the parcel is predominantly unsuitable for agriculture. Here, the Hearing Examiner found that Norway Green did not meet this burden. (Finding/Conclusion D.10 at Rec. 59–61; *see also* Conclusion D.1.a at Rec. 76.)

Specifically, the Hearing Examiner found (as one example of a potential agricultural use) that the parcel could be suitable for growing vineyard grapes, which are a farm crop. (Finding D.10.a at Rec. 59–60.) The Hearing Examiner based this finding in part on statements by local agriculturalists who have owned and managed vineyards on nearby properties that the subject parcel is suitable and a "good" site for use as a vineyard, and on a report prepared by Norway Green's own consultant, which noted that "[w]ine grapes do have potential and can be planted on quite steep slopes." (Finding D.10.a at Rec. 59 (citing Rec. 638, 1714, 2880).)

As correctly found by the Hearing Examiner, rather than affirmatively disproving the parcel's capability and suitability for establishing a vineyard, Norway Green chose to focus on the agricultural production potential within the (already cleared) existing pasture area of the parcel and "did not address the slope aspects or suitability of the currently forested portions of the site if the site were logged and cleared for planting grapes." (Finding D.10.a.ii(A) at Rec. 59.) Norway Green similarly limited its review of the irrigation potential on the subject property,

Friends of the Columbia Gorge
123 NE 3rd Ave., Ste 108
Portland, OR 97232
(503) 241-3762

asserting only that "[i]t is not clear whether irrigation water is even available at this property, let alone at the volumes that would be needed for these crops." (Rec. 1288 (quoted in Finding D.10.a.ii(C) at Rec. 60).)

In short, Norway Green did not do its homework. Accordingly, the Hearing Examiner found that "the applicant bears the burden of proof that the site is predominantly unsuitable for livestock or crops and the applicant has not met that burden based on the preponderance of the evidence in the record." (Finding D.10.a.ii at Rec. 59.)

It is also worth noting that a vineyard is just *one* potential agricultural use that could be pursued within the currently wooded portion of the property by first clearing the trees and then converting the land within that portion to additional agricultural use (to supplement the already cleared existing pasture area, which is already currently being put to beneficial agricultural use). Other potential agricultural uses within the currently wooded portion would include fruit trees and cattle grazing. The Hearing Examiner did not consider those specific possibilities,[13] but the Examiner was not required to do so—once the Examiner found that Norway Green failed to meet its burden with regard to viticulture, that finding was sufficient to deny the application under the applicable criteria for proposed non-farm dwellings.

Substantial evidence is that "quantum of evidence sufficient to persuade a rational fair-minded person the premise is true." *Sunnyside Valley Irrig. Dist. v. Dickie*, 149 Wn.2d 873, 879, 73 P.3d 369 (2003). Evidence can be substantial "even in the face of contrary evidence." *Friends of the Columbia Gorge, Inc. v. Columbia River Gorge Comm'n*, 126 Wn. App. 363, 375, 108 P.3d 134 (2005). Here, there was substantial evidence from multiple sources corroborating the

[13] The Hearing Examiner found that cattle cannot be grazed for a profit within the wooded portion of the property so long as it is "forested." (Finding D.8.a at Rec. 57.) However, the Examiner did *not* consider the possibility of expanding the existing pasture area by clearing the trees from some of the wooded portion, and then grazing the resulting expanded pasture area.

Friends of the Columbia Gorge
123 NE 3rd Ave., Ste 108
Portland, OR 97232
(503) 241-3762

parcel's viable potential for viticulture, including from a knowledgeable winemaker who is "very familiar with the subject parcel" and who opined that the parcel is "good for a vineyard." (Rec. 638.)

There was certainly substantial evidence on which the Hearing Examiner could properly find that wine grapes are a viable crop on this parcel, including in some of the currently wooded portions of the parcel, and to conclude that this is one of several reasons why the Applicant failed to meet its burden to demonstrate that the parcel is predominantly unsuitable for agriculture. Clark County properly denied this application for a non-farm dwelling.

3. The Applicant's arguments regarding forestry use of the parcel are a red herring.

The Applicant's arguments regarding forestry use of the parcel are a red herring. Clark County's Decision correctly focuses on whether the subject parcel is (or is not) predominantly unsuitable for *agriculture*, because that is the analysis deemed relevant by the criteria for a proposed non-farm dwelling. *See, e.g.*, CCC 40.240.430.A.16.b. In contrast, these criteria do not require an evaluation of whether the parcel is (or is not) predominantly suitable for *forestry*; that question is simply not part of the analysis for a proposed non-farm dwelling.

Norway Green argues that "[t]here can only be one predominant [u]se" of the parcel (Norway Green Brief at 20), but the actual question under the criteria in the Code is not what the *current use* of the parcel is, but rather whether the subject parcel is predominantly *suitable* for agriculture—which could include future agricultural use.

Norway Green also argues that because the Code's definition of "suitability" includes the word "or" in the language referring to "[t]he appropriateness of land for production of agricultural *or* forest products *or* for recreation," this means each parcel can be suitable for only one of these uses. CCC § 40.240.040 (definition of "suitability") (emphasis added) (cited in

Friends of the Columbia Gorge
123 NE 3rd Ave., Ste 108
Portland, OR 97232
(503) 241-3762

Norway Green Br. at 21–22). Norway Green misreads the definition, which provides a means of evaluating a parcel's suitability for various types of uses. Because this is a definition, it must be applied in conjunction with other provisions of the Code specifying whether the decision maker is evaluating suitability for agriculture or some other type of use. Contrary to Norway Green's arguments, the "suitability" definition does not say that each parcel can *only* be suitable for a single type of use.

In fact, a parcel may be predominantly suitable for agriculture, and also be predominantly suitable for forestry. Nothing in the National Scenic Area rules prevents that result. Indeed, it would be contrary to the rules to determine that a parcel cannot be suitable for agriculture just because it would also be suitable for forestry. The Commission should reject Norway Green's nonsensical arguments that each parcel can be suitable for only one type of use. (*See* Norway Green Br. at 20–21.)

Moreover, the Scenic Area Act itself recognizes that a parcel may be readily converted from forest to agriculture or vice versa, which underscores the fact that some parcels (including this parcel) can be predominantly suitable for both types of uses. 16 U.S.C. §§ 544d(d)(1), (2) (allowing forest lands to be converted to agricultural lands and vice versa); *see also* 2020 Gorge Management Plan at 166 (Rec. 2024), 193; Decision at Finding/Conclusion D.10.c (Rec. 60).

In this case, the subject parcel has historically been (and continues to be) used for a combined farm-forestry operation, which pursuant to the National Scenic Area Act and the Gorge Management Plan's Land Use Designation Policies is exactly why the parcel was designated Large-Scale Agriculture in the first place. (*See* Friends' Br. in CRGC No. COA-C-22-01 at 9–13, 27–28.)

/ / /

Friends of the Columbia Gorge
123 NE 3rd Ave., Ste 108
Portland, OR 97232
(503) 241-3762

The Hearing Examiner's Decision aptly summarizes all of these points as follows:

> The applicant's assertion that the site is "predominantly suitable for forest production", does not mean the site is not also suitable for crops or livestock. Arguments that retaining the forested areas in timber use would be "better" or a more "valued" use of the site are irrelevant. The applicant is seeking approval of a non-farm dwelling. Therefore, the issue is whether the site is predominantly unsuitable for crops or livestock. Whether the site may be arguably superior for forest use is beside the point. Neither the Code nor the Scenic Area Management Plan express a preference for farm or forest use. Both are equally valued. Section 6 of the Scenic Area Act expressly allows the conversion of agricultural lands to forest lands and forest lands to agricultural lands.

(Finding/Conclusion D.10.c at Rec. 14, 60 (citation omitted).)

As duly noted by the Hearing Examiner, the forest use issue is a red herring. What matters is whether the subject parcel is predominantly suitable for *agriculture*, not whether it is predominantly suitable for forestry.

4. Protecting the environmental resources on the subject parcel is and always has been fully compatible with agriculture.

The environmental resources (riparian resources and two Oregon white oak trees) on parts of the subject parcel do not render the parcel as a whole predominantly unsuitable for agriculture. These environmental resources have always been, and will continue to be, fully compatible with agriculture (such as a farm-forestry operation), which is one of the reasons why this parcel is suitable for continued agricultural use.

The definition of "suitability" in pertinent part requires consideration of "compatibility with . . . natural resources." CCC § 40.240.040. There was extensive testimony from expert witness Dave Wechner, a former senior planner for Clark County (Rec. 814–15, 1844), confirming that the protection of natural resources (such as wetlands, streams, and steep slopes), including specifically on the subject parcel, is "compatible with agricultural production, and thus would meet the Code definition of 'suitability,' which requires consideration of compatibility

Friends of the Columbia Gorge
123 NE 3rd Ave., Ste 108
Portland, OR 97232
(503) 241-3762

with natural resource [protection] and compatibility among uses." (Wechner Am. Decl. at ¶¶ 55–75 (Rec. 190–196).)

Mr. Wechner also explained that "[w]etland preservation in an area with agricultural uses is deemed, by law, to be compatible with agricultural production." (*Id.* at ¶ 75 (Rec. 196); *see also id.* at ¶ 73 (Rec. 195–96).) Mr. Wechner cited WAC 458-30-200(2)(w)(v)(C) for this proposition, which states that "wetland preservation" is "compatible with commercial agricultural purposes."

Expert witness Sid Friedman corroborated Mr. Wechner's testimony, stating that "[t]he protection of natural resources . . . is incidental to and compatible with agriculture and does not conflict with its inherent suitability." (Rec. 705.)

As for new agricultural uses involving new cultivation in the wooded portion of the property, the buffers to protect water resources on the property would range from 50 to 150 feet, depending on the specific type of resource involved. (*See* Rec. 605–07 (testimony of Michael Lang); Wechner Am. Decl. at ¶¶ 56, 62–66 (Rec. 190, 192–93)).)

As Mr. Wechner explained, the true environmental constraints on this parcel are rather limited:

> Based on my review of the above-discussed data and information regarding the subject parcel and the applicability of the County Code requirements, I conclude that the only potential "environmental constraints" on the property would be the water resource areas (streams and wetland) and the steep areas in the southeast corner of the parcel. Some of these resources may have buffers and setbacks for certain agricultural activities, but these buffers and setbacks would only comprise relatively small portions of the parcel. Wetland preservation in an area with agricultural uses is deemed, by law, to be compatible with agricultural production. The protection of the wetland and streams on the parcel would be compatible with agricultural production, and thus would meet the Code definition of "suitability," which requires consideration of compatibility with natural resource production and compatibility among uses.

(Wechner Am. Decl. at ¶ 75 (Rec. 196).)

Friends of the Columbia Gorge
123 NE 3rd Ave., Ste 108
Portland, OR 97232
(503) 241-3762

Regarding steep slope areas specifically, Mr. Wechner explained that "[t]he southeast corner of the parcel *may* contain 'steep slope hazard areas,'" but he also explained that "[t]he southeast corner of the parcel, however, has previously been identified as the area that is likely not capable for the production of agricultural products, based on the soil types and slopes. The fact that this portion of the parcel may also contain steep slope hazard areas does not change that likely outcome." (Wechner Am. Decl. at ¶ 71 (Rec. 194–95).)

Regarding the protection of the two Oregon white oak trees on the property, farmer and expert witness Sid Friedman explained the following:

> **A** It is common to have large trees located on farms, often within fields. It is apparent from their size that these oak trees have been on this farm for many decades. Livestock can graze under these trees and often use them for shade. It is apparent from the documents—excuse me, from the photographs in the record, that no fencing prevents cattle from grazing under at least some of the oak trees on the property, and there's no fencing apparent that prevents them from using them for shelter, for shade, or from inclement weather.
>
> If the physical characteristics of the land—the soil, the slopes, the exposure—are capable and suitable for agriculture, the fact that an Oregon white oak tree is growing there doesn't take away from that capability and suitability.
>
> The protection of natural resources like oak trees is incidental to and compatible with agriculture and does not conflict with its inherent suitability.
>
> **Q** So—these cows have been roaming around these trees for several decades, and we have a lot of information in the record that shows that. Which, in your mind, means that these trees are not in any way a negative impact on any agricultural activities that are currently existing or potentially could exist?
>
> **A** That's true.

(Rec. 704–05.)

There is not substantial evidence in the record to support a conclusion that any environmental conditions would render either the wooded portion of the parcel, or the parcel as a whole, predominantly unsuitable for agriculture. On the contrary, the evidence demonstrates that

Friends of the Columbia Gorge
123 NE 3rd Ave., Ste 108
Portland, OR 97232
(503) 241-3762

protecting the natural resources on the property is fully compatible with agriculture, and that the subject parcel as a whole is predominantly *suitable* for agriculture. The Hearing Examiner reached the correct determination regarding the protection of these resources:

> There are environmentally sensitive areas on the site. However, as discussed above, large portions of the forested area on the site are located outside of these sensitive areas. It is possible to clear the upland portions of the site for farming while retaining trees within the wetland and riparian buffer areas on the site. Clearing on the upland portions of the site may expose soils to potential erosion. However, that same issue will occur when the site is logged. It is feasible to install erosion control measures and replant the cleared areas (with trees or farm crops) to stabilize the soils.

(Finding D.10.d at Rec. 61.)

Because Applicant Norway Green failed to meet its burden to demonstrate that the subject parcel is predominantly unsuitable for agricultural use, Clark County correctly denied the application. The Commission should reject Norway Green's Third Assignment of Error and uphold the relevant findings and conclusions in the Decision. The County's denial of the application should be upheld.

D. RESPONSE TO FOURTH ASSIGNMENT OF ERROR: Clark County did *not* unconstitutionally take property from Norway Green.

The County's Decision is constitutional under both the federal and state constitutions. Clark County did *not* unconstitutionally take property from Norway Green.

Contrary to the Applicant's arguments, it has no constitutionally protected right to grow trees on the subject parcel or to *not* log trees on the parcel. No such rights are provided by the Washington Forest Practices Act or any other source.

Further, the County's Decision, which merely applied the National Scenic Area criteria to determine that the subject parcel is not eligible for a non-farm dwelling, did not impose any

Friends of the Columbia Gorge
123 NE 3rd Ave., Ste 108
Portland, OR 97232
(503) 241-3762

exaction on Norway Green's parcel. Thus, the *Nollan*, *Dolan*, and *Koontz* cases cited by Norway Green do not apply here.

Finally, as discussed above, the Decision does not *compel* Norway Green to log (or not log), or to convert (or not convert) its property from forest use to agricultural use. The Commission can and should easily reject Norway Green's arguments that the Decision requires a conversion to agricultural use as a "condition precedent" to obtaining a permit on the property.

The Decision does not effect an unconstitutional taking. The Commission should reject Norway Green's Fourth Assignment of Error and uphold the Decision as constitutional.

1. <u>Standard of Review</u>: Whether the Decision is unconstitutional.

The applicable standard of review is whether "[t]he decision is unconstitutional." Commission Rule 350-60-220(1)(b).

2. The Decision is constitutional.

As discussed above, the Applicant failed to meet its burden to demonstrate that the subject parcel is eligible for a non-farm dwelling. Thus, Clark County was required by law to deny the application.

The Applicant asserts that the Decision has unconstitutionally taken Norway Green's property. (Norway Green Br. at 24–30.) The Applicant tried the same arguments with the Hearing Examiner, who easily rejected these arguments. (Rec. 8, 40–43.) The Commission should likewise reject the arguments.

First, despite what the Applicant states or implies, it does not have a constitutionally protected property right to grow timber on the subject parcel, or to *not* log trees on the parcel.

Second, Clark County's Decision does not impose any development exaction. Rather, the Decision simply reviews Norway Green's land use application for a non-farm dwelling proposed

Friends of the Columbia Gorge
123 NE 3rd Ave., Ste 108
Portland, OR 97232
(503) 241-3762

in a Large-Scale Agriculture designation and applies the relevant National Scenic Area criteria to this application.

Third, the Decision merely determines that Norway Green did not meet its burden of proving that the subject property is predominantly unsuitable for agriculture. The Decision does not *require* Norway Green to convert the property to agricultural use (nor does it require anything else of Norway Green).

a. The Applicant does not have any constitutionally protected right to grow timber on the subject property.

At the heart of Norway Green's takings claim is the assertion that it has constitutionally protected rights to grow timber on the subject property and to *not* log that timber (and that Clark County has conditioned the future approval of a non-farm dwelling on Norway Green giving up these alleged rights):

> Norway Green . . . has rights to log timber, has rights not to log timber, has rights to convert its land to another use, [and] has rights not to convert its land to another use . . . .

(*See* Norway Green Br. at 29.) But as explained above in response to Norway Green's Second Assignment of Error, neither the Washington Forest Practices Act nor any other source of law creates any cognizable right to grow timber (or to *not* log timber once it is grown).

Under the Second Assignment of Error, Norway Green barely attempts to even assert such a right, merely citing RCW 76.09.050, which creates no rights for landowners at all—let alone a right to grow timber (or a right to *not* log timber). (*See* Norway Green Br. at 17 & n. 75.)

Under the Fourth Assignment of Error, Norway Green adds citations to the statutory definitions of the Forest Practices Act at RCW 76.09.020. (Norway Green Br. at 25–26.) However, the definitions of "forestland owner" and "timber owner" merely define these terms to recognize persons or entities who may have ownership, control, or legal interests in timber

Friends of the Columbia Gorge
123 NE 3rd Ave., Ste 108
Portland, OR 97232
(503) 241-3762

afforded by some other source of law. *See* RCW 76.09.020(16), (28). The Forest Practices Act itself does not convey any such interests or rights. (This is important for the second Assignment of Error, because section 17(c) in the National Scenic Area Act only protects rights afforded by the state forest acts (and any county laws that supersede the state forest practices acts). *See* 16 U.S.C. § 544*o*(c).)

Norway Green also cites two cases for the proposition that "[t]he right to log timber can . . . . be a property right associated with real property." (Norway Green Br. at 2 (citing *Hoglund v. Omak Wood Prod., Inc.*, 81 Wn. App. 501, 505, 914 P.2d 1197, 1200 (1996); *Durland v. San Juan Cnty.*, 182 Wn.2d 55, 70, 340 P.3d 191, 199 (2014)).) Despite this recitation of case law, Norway Green fails to show that it (Norway Green) actually has any rights to log timber on this parcel, and more importantly for purposes of resolving Norway Green's claims, it does not show that it has any rights to *grow timber* and leave it *unlogged*. Thus, Norway Green's takings claim, which is premised on the notion that it has a constitutionally protected right to grow timber on the property and *not* log it, must fail.

However, assuming for the sake of argument that Norway Green has such rights, then as explained below, the takings doctrine that Norway Green invokes here applies only to situations in which the government actually takes property, or money in lieu of property, either for itself or for the public, as an exaction or condition of approval for a land use permit. That was not the case here, as will be explained below.

/ / /

/ / /

/ / /

/ / /

Friends of the Columbia Gorge
123 NE 3rd Ave., Ste 108
Portland, OR 97232
(503) 241-3762

b. Because the Decision does not impose any exaction, the *Nollan*, *Dolan*, and *Koontz* cases do not apply.

Norway Green attempts to apply a specific takings doctrine of the U.S. Supreme Court involving exactions.[14] (Norway Green Br. at 17 n. 79, 25–30.) But that doctrine applies *only* to exactions, and *there was no exaction here.* Specifically, Clark County did not require Norway Green to give the County any property or money as a condition of approval for any permit.

In support of its takings arguments, Norway Green cites and relies on three cases: *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); and *Koontz v. St. Johns River Water Management District*, 570 U.S. 595 (2013) (cited in Norway Green Brief at 17 n. 79, 25–30). None of those cases apply here.

In *Nollan*, the U.S. Supreme Court held that a coastal development commission could not condition the approval of a development permit on the conveyance of a public easement across the applicant's beachfront property without compensation. 483 U.S. at 841–42. The Supreme Court found that the permit condition requiring conveyance of an easement lacked an "essential nexus" to the impact of the development, and was therefore unconstitutional. *Id.* at 837.

---

[14] *Black's Law Dictionary* defines "exaction" in pertinent part as follows:

> "**land-use exaction.** (1988) *Property.* A requirement imposed by a local government that a developer dedicate real property for a public facility or pay a fee to mitigate the impacts of the project, as a condition of receiving a discretionary land-use approval. • A land-use exaction confers a public benefit, such as an easement or the payment of an impact fee, and is demanded by government from real-estate developers in exchange for the grant of a development permit. The U.S. Supreme Court has held that an exaction is a compensable taking under the Fifth Amendment unless the benefit exacted serves the same governmental purpose as the development restriction and imposes on the developer a burden roughly proportionate to the public harm the development will cause. *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 107 S.Ct. 3141 (1987); *Dolan v. City of Tigard*, 512 U.S. 374, 114 S.Ct. 2309 (1994).

EXACTION, *Black's Law Dictionary* (11th ed. 2019).

Friends of the Columbia Gorge
123 NE 3rd Ave., Ste 108
Portland, OR 97232
(503) 241-3762

The Supreme Court later extended *Nollan*'s "essential nexus" test in *Dolan v. City of Tigard*, when it held that a city decision conditioning approval of a development permit on the applicant dedicating land for a greenway and bike path, while meeting the "essential nexus" requirement, lacked a "rough proportionality" to the development's impact and was an unconstitutional taking. 512 U.S. at 374–75.

The Supreme Court has subsequently described *Nollan* and *Dolan* together as standing for the proposition that the government may "condition approval of a permit on *the dedication of property to the public* [without compensation] so long as there is a 'nexus' and 'rough proportionality' between the property that the government demands and the social costs of the applicant's proposal." *Koontz v. St. Johns River Water Mngmt. Dist.*, 570 U.S. 595, 605–06 (2013) (emphasis added).

In *Koontz*, the Court extended the *Nollan*/*Dolan* doctrine to "monetary exactions," or demands for money rather than property to offset the putative harms of development, and held that the doctrine applies even when the government denies a permit. *Id.* at 619.

Taken together, *Nollan*, *Dolan*, and *Koontz* apply only to exactions, *i.e.*, to the requirement that an applicant for a permit *convey* property (or money in lieu of property) *to the government* for public use, in order to obtain the desired permit. Washington courts have held as much. *See Olympic Stewardship Found. v. State Envtl. & Land Use Hearings Off.*, 199 Wn. App. 668, 747, 399 P.3d 562 (2017) ("*Nollan*, *Dolan*, and *Koontz* all involve a special application of the "unconstitutional conditions" doctrine protecting federal Fifth Amendment rights to just compensation *for property the government takes* when owners apply for land-use permits.") (emphasis in original); *ABC Holdings, Inc. v. Kittitas Cnty.*, 187 Wn. App. 275, 286, 348 P.3d 1222 (2015) ("[T]he *Koontz* holding applies solely in the context of the land use permit process

Friends of the Columbia Gorge
123 NE 3rd Ave., Ste 108
Portland, OR 97232
(503) 241-3762

where a government approval was conditioned on *coercively compelling a landowner to give up property*.") (emphasis added); *Common Sense All. v. Growth Mgmt. Hearings Bd.*, 189 Wn. App. 1026 (2017) ("It appears that the courts have confined *Nollan*/*Dolan* analysis to land use decisions that condition approval of a specific project on a *dedication of property to public use.*") (unpublished opinion) (emphasis added).

Norway Green argues that *Nollan* and *Dolan* stand for the proposition that forgoing *any* "constitutionally protected *property right*"—in this case an alleged "property right to *not* log" (also described by Norway Green as "rights *not* to log timber" and "rights *not* to convert its land to another use")—constitutes a taking. (Norway Green Br. at 27, 29 (emphasis added).) This is incorrect.

In *Koontz* (the case that Norway Green cites for this proposition), the Court was unequivocal: *Nollan* and *Dollan* "protect[] the Fifth Amendment right to just compensation for *property* the government takes when owners apply for a land-use permit." 570 U.S. at 604 (emphasis added). In other words, for these cases to apply, the government must actually take or demand from an applicant either property or money in lieu of property on the basis of offsetting the impact of proposed development; this must involve a conveyance of property or its functional equivalent to the government.

Norway Green attempts to paper over that fact by misquoting *Koontz*, as shown in the bolded language below*:*

> These decisions and their progeny prohibit government from . . . denying a land use permit "on the owner's relinquishment of a **property right** unless there is a "nexus" and "rough proportionality" between the government's demand and the effects of the proposed land use."

(Norway Green Br. at 25 (quoting *Koontz*, 570 U.S. at 599) (emphasis added).) Yet the majority opinion in *Koontz* did not use the term "property right" as shown above in bolded font in the

Friends of the Columbia Gorge
123 NE 3rd Ave., Ste 108
Portland, OR 97232
(503) 241-3762

excerpt taken from Norway Green's brief. Rather, here is the unaltered sentence as it actually appears in *Koontz*:

> In those cases, we held that a unit of government may not condition the approval of a land-use permit on the owner's relinquishment of a portion of his **property** unless there is a "nexus" and "rough proportionality" between the government's demand and the effects of the proposed land use.

Koontz, 570 U.S. at 599 (emphasis added).

Again, the *Koontz* majority opinion does not use the term "property right." Rather, it expressly focuses on "property" and "land," stating that the government "may not condition the approval of a land-use permit on the owner's relinquishment *of a portion of his property*," and that "[i]n this case, . . . the monetary obligation burdened *petitioner's ownership of a specific parcel of land*." 570 U.S. at 599, 613 (emphasis added).

The Commission should reject Norway Green's improper attempts to expand *Nollan*, *Dollan*, and *Koontz* from cases involving the taking of property (*i.e.*, land) to all cases involving regulations that restrict the use of property (such as the nonfarm dwelling criteria applicable here). These cases simply do not stand for the propositions urged by Norway Green.

Norway Green again misleadingly invokes *Koontz* to argue that *Nollan* and *Dolan* apply even where "no property was actually taken" (Norway Green Brief at 28), while failing to note that the injury at the heart of *Koontz* was specifically that *money* was demanded as "a substitute for [the petitioner] deeding to the public a conservation easement." 570 U.S. at 617. The instant case involves no exaction of any money from Norway Green, and it is thus distinguishable from *Koontz*.

Norway Green then cites inapposite cases in which citizens were required to give up other enumerated constitutional rights (such as the right to free speech) in order to secure a privilege for the proposition that *Nollan* and *Dolan* apply to all such rights. (Norway Green Br. at

Friends of the Columbia Gorge
123 NE 3rd Ave., Ste 108
Portland, OR 97232
(503) 241-3762

28.) But the Supreme Court has clearly limited its *Nollan*/*Dolan*/*Koontz* unconstitutional exactions doctrine only to the right not to have property (or money in lieu of property) taken without compensation as required by the Fifth Amendment. *Koontz*, 570 U.S. at 604. Further, the Supreme Court has explained that it has "not extended the rough-proportionality test of *Dolan* beyond the special context of exactions." *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 702–03 (1999).

The non-farm dwelling approval criteria at CCC 40.240.430.A.16.b are development restrictions, not exactions. Under these criteria, applicants are not required to give up any rights to secure a permit. Rather, an applicant must prove that a parcel meets the approval criteria.

Here, there is no question that Clark County had the power to deny Norway Green's land use application in order to protect agricultural lands for agricultural use pursuant to the National Scenic Area Act and its implementing rules, which the County properly did. The requirement in Clark County's National Scenic Area ordinance that a subject parcel must be predominantly unsuitable for agricultural use in order to justify a non-farm dwelling on that parcel is a constitutionally permissible restriction.

Norway Green's arguments to the contrary would produce absurd results. For example, under Norway Green's approach, any building height restriction would suddenly be deemed a "taking" because the government would be conditioning approval of a permit on the applicant giving up her "right" to build a taller building.

Indeed, practically every single rule in the Gorge Management Plan, the county ordinances, and the Gorge Commission Rules could be held unconstitutional under the Applicant's approach here. But "[g]overnment could hardly go on if to some extent values incident to property could not be diminished without paying for every such change." *Dolan*, 512

Friends of the Columbia Gorge
123 NE 3rd Ave., Ste 108
Portland, OR 97232
(503) 241-3762

U.S. at 384–85.

In sum, Clark County's Decision did not impose any exaction, given that Clark County did not demand any property or money in lieu of property as a condition of permit approval. Thus *Nollan*, *Dolan*, and *Koontz* do not apply.

c. The Decision neither states nor implies that Norway Green must convert the subject property to additional agricultural use as a "condition precedent" for a non-farm dwelling permit.

Norway Green bases its entire takings claim on the false proposition that Clark County is requiring Norway Green to actually convert the entire subject parcel to agricultural use in order to secure a permit for a non-farm dwelling. Specifically, Norway Green argues that the only way it can meet its burden for establishing that the property is eligible for a non-farm dwelling would be to log the wooded portion of the property and convert that portion to a vineyard or some other agricultural use. (Norway Green Brief at 29 ("[T]he [Decision] burden[s] constitutionally protected property rights by denying a permit on the basis that Norway Green chose to exercise its property rights to not log its property and convert it to agricultural land.").) Norway Green also complains that it is being forced to convert the property to agriculture and thereby "capitulat[e] to a condition precedent" for permission to build a non-farm dwelling. (*Id.*)

These arguments are incorrect. There is no "condition precedent" for permission to build a non-farm dwelling. Rather, the Hearing Examiner properly denied Norway Green's application because Norway Green failed to demonstrate compliance with the approval criteria for a non-farm dwelling.

In fact, Norway Green's argument that converting the entire property to an agricultural use is a condition precedent to obtaining a permit for a non-farm dwelling, which would then be necessarily precluded by the agricultural use itself, is patently absurd, and Norway Green admits

Friends of the Columbia Gorge
123 NE 3rd Ave., Ste 108
Portland, OR 97232
(503) 241-3762

as much. (*Id.* ("[C]apitulating to a condition precedent for the permit—conversion—*would not even entitle Norway Green to the nonfarm dwelling permit*.") (emphasis added).)[15] Of course, Norway Green created this circular argument through a misreading of the Decision, as part of a fanciful attempt to shoehorn the facts of this case into the clearly inapplicable takings doctrine of *Nollan* and *Dolan*. These attempts fail.

Moreover, even if the Decision *had* compelled the Applicant to convert the wooded portion of the parcel from forestry use to commercial agriculture use (and for the record, it does not), that would be for the sole benefit of the Applicant, not for any public use or benefit. In such a scenario, the Applicant (and its owners and affiliates) would derive *all* of the economic benefits from selling commercial timber and agricultural products produced from the property. This is simply not a case where the Applicant has been deprived of any property or constitutional right or has been required to transfer or give *anything* to the government.

Contrary to the Applicant's arguments, the Decision neither states nor implies that Norway Green is required to convert its property to agricultural use in order to secure a permit—let alone a permit that would then be precluded by the conversion itself.

In this passage from the Decision, the Hearing Examiner summed it up well why he rejected Norway Green's takings claim:

> The examiner concludes that the finding that the forested areas on the site could be cleared and converted to agricultural use does not violate the Washington State Forest Practice Act and does not constitute an unconstitutional taking. The examiner's decision does not require that the applicant remove the timber from the site, convert the forested areas of the site to agricultural use, or take any other actions. The decision merely recognizes that the applicant, or any future land

[15] Norway Green also admitted this same paradoxical fallacy in its arguments to the Hearing Examiner: "If Norway Green did log and convert the property, as the Final Order states could happen, against its wishes, it would have the same effect of permit denial for a nonfarm dwelling because then, presumably, the parcel would be predominantly suitable for farm crops and livestock and *not eligible for a nonfarm dwelling.*" (Rec. 42 (emphasis added).)

Friends of the Columbia Gorge
123 NE 3rd Ave., Ste 108
Portland, OR 97232
(503) 241-3762

> owner, has the ability to clear the forested areas of the site and convert those areas to agricultural use, and therefore, the applicant failed to meet its burden of proof that the site is predominantly unsuitable for agriculture. The examiner's decision does not require that the applicant dedicate property, pay money, or otherwise allow public use of the site. Therefore, the examiner denies [this] part of the applicant's Motion for Reconsideration.

(Rec. 8.) The Commission should uphold the County's Decision as constitutional.

V. CONCLUSION

For the reasons stated above, Friends respectfully requests that the Gorge Commission reject all of Applicant Norway Green's assignments of error and uphold Clark County's final Decision denying the application for a non-farm dwelling.

Dated: October 11, 2022

By: 

Nathan Baker, WSBA No. 35195
Senior Staff Attorney for Friends of the Columbia Gorge

By: *David T. McDonald*

David T. McDonald, WSBA No. 18446
SHERLAG | DE MUNIZ LLP
Of Attorneys for Friends of the Columbia Gorge

Friends of the Columbia Gorge
123 NE 3rd Ave., Ste 108
Portland, OR 97232
(503) 241-3762

APPENDIX

EXHIBIT A

Cited Provisions of the Clark County Columbia River Gorge National Scenic Area Ordinance

(CCC Chapter 40.240)

CITED PROVISIONS OF THE CLARK COUNTY
COLUMBIA RIVER GORGE NATIONAL SCENIC AREA ORDINANCE

40.240.040 Definitions

As used in this chapter, unless otherwise noted, the following words and their derivations shall have the following meanings. The definitions do not apply to areas of Clark County outside of the Columbia River Gorge National Scenic Area.

* * *

Agricultural use	The current employment of land for the primary purpose of obtaining a profit in money by raising, harvesting, and selling crops; or by the feeding, breeding, management, and sale of, or production of, livestock, poultry, furbearing animals or honeybees; or for dairying and the sale of dairy products; or any other agricultural or horticultural use, including Christmas trees. Current employment of land for agricultural use includes: • The operation or use of farmland subject to any agriculture-related government program. • Land lying fallow for one (1) year as a normal and regular requirement of good agricultural husbandry. • Land planted in orchards or other perennials prior to maturity. • Land under buildings supporting accepted agricultural practices. Agricultural use does not include livestock feedlots. (Amended: Ord. 2006-08-21; Ord. 2018-03-04)
* * *	
Capability	The ability of land to produce forest or agricultural products due to characteristics of the land itself, such as soil, slope, exposure, or other natural factors.
* * *	

Suitability	The appropriateness of land for production of agricultural or forest products or for recreation, considering its capability for production; surrounding uses and features associated with development; compatibility with scenic, cultural, natural and recreation resources, compatibility among uses; and other cultural factors, such as roads, powerlines, dwellings, and size of ownership.
* * *	

(Amended: Ord. 2006-05-04)

40.240.050 Applications for Review and Approval.

A. Application for Review and Approval.

1. Applications received under this chapter shall be reviewed as Type II procedures specified in Section 40.510.020, except where specified otherwise herein.

* * *

G. Decision of the Responsible Official.

* * *

5. The decision of the responsible official shall be final unless a notice of appeal is filed in accordance with this title.

* * *

I. Appeal Process.

Appeals will be handled pursuant to Section 40.510.020(H) for Type II applications or Section 40.510.030(H) for Type III applications.

* * *

(Amended: Ord. 2006-05-04)

40.240.430 Review Uses – Agricultural Land

A. The following uses may be allowed on lands zoned Gorge Large-Scale or Small-Scale Agriculture pursuant to compliance with Sections 40.240.800 through 40.240.900:

* * *

16. On lands designated Gorge Large-Scale Agriculture, on a parcel which was legally created and existed prior to November 17, 1986, a single-family dwelling not in conjunction with agricultural use upon a demonstration that all of the following conditions exist:

    * * *

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

* * *

(Amended: Ord. 2006-05-04; Ord. 2008-06-02)

EXHIBIT B

Cited Provisions of the
Clark County Unified Development Code

(CCC Chapter 40.510)

CITED PROVISIONS OF THE CLARK COUNTY UNIFIED DEVELOPMENT CODE

40.510.010 Type I Process – Ministerial Decisions

* * *

E. Appeals.

1. Applicability. A final decision regarding an application subject to a Type I procedure may be appealed by any interested party. Final decisions may be appealed only if, within fourteen (14) calendar days after written notice of the decision is mailed, a written appeal is filed with the responsible official. Final site plan and final construction plan decisions are not subject to administrative appeals under this section.

* * *

(Amended: Ord. 2007-11-13)

40.510.020 Type II Process – Administrative Decisions

* * *

H. Appeals.

1. Applicability. A final decision may be appealed only by a party of record. Final decisions may be appealed if, within fourteen (14) calendar days after written notice of the decision is mailed, a written appeal is filed with the responsible official.

2. Submittal Requirements. The appeal shall contain the following information:

   a. The case number designated by the county and the name of the applicant;

   b. The name of each petitioner, the signature of each petitioner or his or her duly authorized representative, and a statement showing that each petitioner is entitled to file the appeal under Section 40.510.020(H)(1). If multiple parties file a single petition for review, the petition shall designate one (1) party as the contact representative for all contact with the responsible official. All contact with the responsible official regarding the petition, including notice, shall be with this contact representative;

   c. The specific aspect(s) of the decision and/or SEPA issue being appealed, the reasons why each aspect is in error as a matter of fact or law, and the evidence relied on to prove the error; and

d. The appeal fee adopted by the board; provided, the scheduled fee shall be refunded if the applicant files with the responsible official at least fifteen (15) calendar days before the appeal hearing a written statement withdrawing the appeal.

3. Appeal Procedures.

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

b. Except for SEPA appeals which are governed by RCW 43.21C.075, the applicant shall have the burden of proving by substantial evidence compliance with applicable approval standards. Where evidence is conflicting, the examiner shall decide an issue based upon the preponderance of the evidence.

(Amended: Ord. 2005-10-04; Ord. 2007-11-13)

40.510.030 Type III Process – Quasi-Judicial Decisions

* * *

H. Burden of Proof.

Except for SEPA appeals which are governed by RCW 43.21C.075, the applicant shall have the burden of proving by substantial evidence compliance with applicable approval standards. Where evidence is conflicting, the examiner shall decide an issue based upon the preponderance of the evidence.

* * *

(Amended: Ord. 2007-11-13)

EXHIBIT C

Cited Provisions of State Law

(Washington Administrative Procedures Act,
Land Use Petition Act, and
Washington Forest Practices Act)

CITED PROVISIONS OF THE
WASHINGTON ADMINISTRATIVE PROCEDURES ACT

RCW 34.05.010

Definitions.

The definitions in this section apply throughout this chapter unless the context clearly requires otherwise.

* * *

(2) "Agency" means any state board, commission, department, institution of higher education, or officer, authorized by law to make rules or to conduct adjudicative proceedings, except those in the legislative or judicial branches, the governor, or the attorney general except to the extent otherwise required by law and any local governmental entity that may request the appointment of an administrative law judge under chapter 42.41 RCW.

* * *

[2019 c 8 § 701; 2014 c 97 § 101; 2013 c 110 § 3; 2011 c 336 § 762; 1997 c 126 § 2; 1992 c 44 § 10; 1989 c 175 § 1; 1988 c 288 § 101; 1982 c 10 § 5. Prior: 1981 c 324 § 2; 1981 c 183 § 1; 1967 c 237 § 1; 1959 c 234 § 1. Formerly RCW 34.04.010.]

RCW 34.05.570

Judicial review.

(1) Generally. Except to the extent that this chapter or another statute provides otherwise:
(a) The burden of demonstrating the invalidity of agency action is on the party asserting invalidity;
(b) The validity of agency action shall be determined in accordance with the standards of review provided in this section, as applied to the agency action at the time it was taken;
(c) The court shall make a separate and distinct ruling on each material issue on which the court's decision is based; and
(d) The court shall grant relief only if it determines that a person seeking judicial relief has been substantially prejudiced by the action complained of.
(2) Review of rules. (a) A rule may be reviewed by petition for declaratory judgment filed pursuant to this subsection or in the context of any other review proceeding under this section. In an action challenging the validity of a rule, the agency shall be made a party to the proceeding.
(b)(i) The validity of any rule may be determined upon petition for a declaratory judgment addressed to the superior court of Thurston county, when it appears that the rule, or its

threatened application, interferes with or impairs or immediately threatens to interfere with or impair the legal rights or privileges of the petitioner. The declaratory judgment order may be entered whether or not the petitioner has first requested the agency to pass upon the validity of the rule in question.

(ii) From June 10, 2004, until July 1, 2008:

(A) If the petitioner's residence or principal place of business is within the geographical boundaries of the third division of the court of appeals as defined by RCW 2.06.020(3), the petition may be filed in the superior court of Spokane, Yakima, or Thurston county; and

(B) If the petitioner's residence or principal place of business is within the geographical boundaries of district three of the first division of the court of appeals as defined by RCW 2.06.020(1), the petition may be filed in the superior court of Whatcom or Thurston county.

(c) In a proceeding involving review of a rule, the court shall declare the rule invalid only if it finds that: The rule violates constitutional provisions; the rule exceeds the statutory authority of the agency; the rule was adopted without compliance with statutory rule-making procedures; or the rule is arbitrary and capricious.

(3) Review of agency orders in adjudicative proceedings. The court shall grant relief from an agency order in an adjudicative proceeding only if it determines that:

(a) The order, or the statute or rule on which the order is based, is in violation of constitutional provisions on its face or as applied;

(b) The order is outside the statutory authority or jurisdiction of the agency conferred by any provision of law;

(c) The agency has engaged in unlawful procedure or decision-making process, or has failed to follow a prescribed procedure;

(d) The agency has erroneously interpreted or applied the law;

(e) The order is not supported by evidence that is substantial when viewed in light of the whole record before the court, which includes the agency record for judicial review, supplemented by any additional evidence received by the court under this chapter;

(f) The agency has not decided all issues requiring resolution by the agency;

(g) A motion for disqualification under RCW 34.05.425 or 34.12.050 was made and was improperly denied or, if no motion was made, facts are shown to support the grant of such a motion that were not known and were not reasonably discoverable by the challenging party at the appropriate time for making such a motion;

(h) The order is inconsistent with a rule of the agency unless the agency explains the inconsistency by stating facts and reasons to demonstrate a rational basis for inconsistency; or

(i) The order is arbitrary or capricious.

(4) Review of other agency action.

(a) All agency action not reviewable under subsection (2) or (3) of this section shall be reviewed under this subsection.

(b) A person whose rights are violated by an agency's failure to perform a duty that is required by law to be performed may file a petition for review pursuant to RCW 34.05.514, seeking an order pursuant to this subsection requiring performance. Within twenty days after service of the petition for review, the agency shall file and serve an answer to the petition, made in the same manner as an answer to a complaint in a civil action. The court may hear evidence, pursuant to RCW 34.05.562, on material issues of fact raised by the petition and answer.

(c) Relief for persons aggrieved by the performance of an agency action, including the exercise of discretion, or an action under (b) of this subsection can be granted only if the court determines that the action is:

(i) Unconstitutional;

(ii) Outside the statutory authority of the agency or the authority conferred by a provision of law;

(iii) Arbitrary or capricious; or

(iv) Taken by persons who were not properly constituted as agency officials lawfully entitled to take such action.

[2004 c 30 § 1; 1995 c 403 § 802; 1989 c 175 § 27; 1988 c 288 § 516; 1977 ex.s. c 52 § 1; 1967 c 237 § 6; 1959 c 234 § 13. Formerly RCW 34.04.130.]

CITED PROVISIONS OF THE LAND USE PETITION ACT

RCW 36.70C.130

Standards for granting relief—Renewable resource projects within energy overlay zones.

(1) The superior court, acting without a jury, shall review the record and such supplemental evidence as is permitted under RCW 36.70C.120. The court may grant relief only if the party seeking relief has carried the burden of establishing that one of the standards set forth in (a) through (f) of this subsection has been met. The standards are:

(a) The body or officer that made the land use decision engaged in unlawful procedure or failed to follow a prescribed process, unless the error was harmless;

(b) The land use decision is an erroneous interpretation of the law, after allowing for such deference as is due the construction of a law by a local jurisdiction with expertise;

(c) The land use decision is not supported by evidence that is substantial when viewed in light of the whole record before the court;

(d) The land use decision is a clearly erroneous application of the law to the facts;

(e) The land use decision is outside the authority or jurisdiction of the body or officer making the decision; or

(f) The land use decision violates the constitutional rights of the party seeking relief.

(2) In order to grant relief under this chapter, it is not necessary for the court to find that the local jurisdiction engaged in arbitrary and capricious conduct. A grant of relief by itself may not be deemed to establish liability for monetary damages or compensation.

(3) Land use decisions made by a local jurisdiction concerning renewable resource projects within a county energy overlay zone are presumed to be reasonable if they are in compliance with the requirements and standards established by local ordinance for that zone. However, for land use decisions concerning wind power generation projects, either:

(a) The local ordinance for that zone is consistent with the department of fish and wildlife's wind power guidelines; or

(b) The local jurisdiction prepared an environmental impact statement under chapter 43.21C RCW on the energy overlay zone; and

(i) The local ordinance for that zone requires project mitigation, as addressed in the environmental impact statement and consistent with local, state, and federal law;

(ii) The local ordinance for that zone requires site specific fish and wildlife and cultural resources analysis; and

(iii) The local jurisdiction has adopted an ordinance that addresses critical areas under chapter 36.70A RCW.

(4) If a local jurisdiction has taken action and adopted local ordinances consistent with subsection (3)(b) of this section, then wind power generation projects permitted consistently with the energy overlay zone are deemed to have adequately addressed their environmental impacts as required under chapter 43.21C RCW.

[2009 c 419 § 2; 1995 c 347 § 714.]

CITED PROVISIONS OF THE WASHINGTON FOREST PRACTICES ACT

RCW 76.09.020

Definitions.

The definitions in this section apply throughout this chapter unless the context clearly requires otherwise.

(1) "Adaptive management" means reliance on scientific methods to test the results of actions taken so that the management and related policy can be changed promptly and appropriately.

(2) "Appeals board" means the pollution control hearings board created by RCW 43.21B.010.

(3) "Application" means the application required pursuant to RCW 76.09.050.

(4) "Aquatic resources" includes water quality, salmon, other species of the vertebrate classes Cephalaspidomorphi and Osteichthyes identified in the forests and fish report, the Columbia torrent salamander *(Rhyacotriton kezeri)*, the Cascade torrent salamander *(Rhyacotriton cascadae)*, the Olympic torrent salamander *(Rhyacotriton olympian)*, the Dunn's salamander *(Plethodon dunni)*, the Van Dyke's salamander *(Plethodon vandyke)*, the tailed frog *(Ascaphus truei)*, and their respective habitats.

(5) "Board" means the forest practices board created in RCW 76.09.030.

(6) "Commissioner" means the commissioner of public lands.

(7) "Contiguous" means land adjoining or touching by common corner or otherwise. Land having common ownership divided by a road or other right-of-way shall be considered contiguous.

(8) "Conversion to a use other than commercial timber operation" means a bona fide conversion to an active use which is incompatible with timber growing and as may be defined by forest practices rules.

(9) "Date of receipt" has the same meaning as defined in RCW 43.21B.001.

(10) "Department" means the department of natural resources.

(11) "Ecosystem services" means the benefits that the public enjoys as a result of natural processes and biological diversity.

(12) "Ecosystem services market" means a system in which providers of ecosystem services can access financing or market capital to protect, restore, and maintain ecological values, including the full spectrum of regulatory, quasiregulatory, and voluntary markets.

(13) "Fill" means the placement of earth material or aggregate for road or landing construction or other similar activities.

(14) "Fish passage barrier" means any artificial instream structure that impedes the free passage of fish.

(15) "Forestland" means all land which is capable of supporting a merchantable stand of timber and is not being actively used for a use which is incompatible with timber growing. Forestland does not include agricultural land that is or was enrolled in the conservation reserve enhancement program by contract if such agricultural land was historically used for agricultural purposes and the landowner intends to continue to use the land for agricultural purposes in the future. As it applies to the operation of the road maintenance and abandonment plan element of the forest practices rules on small forestland owners, the term "forestland" excludes:

(a) Residential home sites, which may include up to five acres; and

(b) Cropfields, orchards, vineyards, pastures, feedlots, fish pens, and the land on which appurtenances necessary to the production, preparation, or sale of crops, fruit, dairy products, fish, and livestock exist.

(16) "Forestland owner" means any person in actual control of forestland, whether such control is based either on legal or equitable title, or on any other interest entitling the holder to sell or otherwise dispose of any or all of the timber on such land in any manner. However, any lessee or other person in possession of forestland without legal or equitable title to such land shall be excluded from the definition of "forestland owner" unless such lessee or other person has the right to sell or otherwise dispose of any or all of the timber located on such forestland.

(17) "Forest practice" means any activity conducted on or directly pertaining to forestland and relating to growing, harvesting, or processing timber, including but not limited to:

(a) Road and trail construction, including forest practices hydraulic projects that include water crossing structures, and associated activities and maintenance;

(b) Harvesting, final and intermediate;

(c) Precommercial thinning;

(d) Reforestation;

(e) Fertilization;

(f) Prevention and suppression of diseases and insects;

(g) Salvage of trees; and

(h) Brush control.

"Forest practice" shall not include preparatory work such as tree marking, surveying and road flagging, and removal or harvesting of incidental vegetation from forestlands such as berries, ferns, greenery, mistletoe, herbs, mushrooms, and other products which cannot normally be expected to result in damage to forest soils, timber, or public resources.

(18) "Forest practices hydraulic project" means a hydraulic project, as defined under RCW 77.55.011, that requires a forest practices application or notification under this chapter.

(19) "Forest practices rules" means any rules adopted pursuant to RCW 76.09.040.

(20) "Forest road," as it applies to the operation of the road maintenance and abandonment plan element of the forest practices rules on small forestland owners, means a road or road segment that crosses land that meets the definition of forestland, but excludes residential access roads.

(21) "Forest trees" does not include hardwood trees cultivated by agricultural methods in growing cycles shorter than fifteen years if the trees were planted on land that was not in forest use immediately before the trees were planted and before the land was prepared for planting the trees. "Forest trees" includes Christmas trees, but does not include Christmas trees that are cultivated by agricultural methods, as that term is defined in RCW 84.33.035.

(22) "Forests and fish report" means the forests and fish report to the board dated April 29, 1999.

(23) "Operator" means any person engaging in forest practices except an employee with wages as his or her sole compensation.

(24) "Person" means any individual, partnership, private, public, or municipal corporation, county, the department or other state or local governmental entity, or association of individuals of whatever nature.

(25) "Public resources" means water, fish and wildlife, and in addition shall mean capital improvements of the state or its political subdivisions.

(26) "Small forestland owner" has the same meaning as defined in RCW 76.09.450.

(27) "Timber" means forest trees, standing or down, of a commercial species, including Christmas trees. However, "timber" does not include Christmas trees that are cultivated by agricultural methods, as that term is defined in RCW 84.33.035.

(28) "Timber owner" means any person having all or any part of the legal interest in timber. Where such timber is subject to a contract of sale, "timber owner" shall mean the contract purchaser.

(29) "Unconfined channel migration zone" means the area within which the active channel of an unconfined stream is prone to move and where the movement would result in a potential near-term loss of riparian forest adjacent to the stream. Sizeable islands with productive timber may exist within the zone.

(30) "Unconfined stream" means generally fifth order or larger waters that experience abrupt shifts in channel location, creating a complex floodplain characterized by extensive gravel bars, disturbance species of vegetation of variable age, numerous side channels, wall-based channels, oxbow lakes, and wetland complexes. Many of these streams have dikes and levees that may temporarily or permanently restrict channel movement.

[2012 1st sp.s. c 1 § 212. Prior: 2010 c 210 § 19; 2010 c 188 § 6; prior: 2009 c 354 § 5; 2009 c 246 § 4; 2003 c 311 § 3; 2002 c 17 § 1; prior: 2001 c 102 § 1; 2001 c 97 § 2; 1999 sp.s. c 4 § 301; 1974 ex.s. c 137 § 2.]

RCW 76.09.050

Rules establishing classes of forest practices—Applications for classes of forest practices—Approval or disapproval—Notifications—Procedures—Appeals—Waiver.

(1) The board shall establish by rule which forest practices shall be included within each of the following classes:

Class I: Minimal or specific forest practices that have no direct potential for damaging a public resource and that may be conducted without submitting an application or a notification except that when the regulating authority is transferred to a local governmental entity, those Class I forest practices that involve timber harvesting or road construction within "urban growth areas," designated pursuant to chapter 36.70A RCW, are processed as Class IV forest practices, but are not subject to environmental review under chapter 43.21C RCW;

Class II: Forest practices which have a less than ordinary potential for damaging a public resource that may be conducted without submitting an application and may begin five calendar days, or such lesser time as the department may determine, after written notification by the operator, in the manner, content, and form as prescribed by the department, is received by the department. However, the work may not begin until all forest practice fees required under RCW 76.09.065 have been received by the department. Class II shall not include forest practices:

(a) On forestlands that are being converted to another use;

(b) Within "shorelines of the state" as defined in RCW 90.58.030;

(c) Excluded from Class II by the board; or

(d) Including timber harvesting or road construction within "urban growth areas," designated pursuant to chapter 36.70A RCW, which are Class IV;

Class III: Forest practices other than those contained in Class I, II, or IV. A Class III application must be approved or disapproved by the department according to the following timelines; however, the applicant may not begin work on the forest practice until all forest practice fees required under RCW 76.09.065 have been received by the department:

(a) Within thirty calendar days from the date the department receives the application if the application is not subject to concurrence review by the department of fish and wildlife under RCW 76.09.490; and

(b) Within thirty days of the completion of the concurrence review by the department of fish and wildlife if the application is subject to concurrence review by the department of fish and wildlife under RCW 76.09.490;

Class IV: Forest practices other than those contained in Class I or II:

(a) On forestlands that are being converted to another use;

(b) On lands which, pursuant to RCW 76.09.070 as now or hereafter amended, are not to be reforested because of the likelihood of future conversion to urban development;

(c) That involve timber harvesting or road construction on forestlands that are contained within "urban growth areas," designated pursuant to chapter 36.70A RCW, except where the forestland owner provides:

(i) A written statement of intent signed by the forestland owner not to convert to a use other than commercial forest product operations for ten years, accompanied by either a written forest management plan acceptable to the department or documentation that the land is enrolled under the provisions of chapter 84.33 or 84.34 RCW; or

(ii) A conversion option harvest plan approved by the local governmental entity and submitted to the department as part of the application; and/or

(d) Which have a potential for a substantial impact on the environment and therefore require an evaluation by the department as to whether or not a detailed statement must be prepared pursuant to the state environmental policy act, chapter 43.21C RCW. Such evaluation shall be made within the timelines established in RCW 43.21C.037; however, nothing herein shall be construed to prevent any local or regional governmental entity from determining that a detailed statement must be prepared for an action pursuant to a Class IV forest practice taken by that governmental entity concerning the land on which forest practices will be conducted. Unless the application is subject to concurrence review by the department of fish and wildlife under RCW 76.09.490, a Class IV application must be approved or disapproved by the department within thirty calendar days from the date the department receives the application. If a Class IV application is subject to concurrence review by the department of fish and wildlife under RCW 76.09.490, then the application must be approved or disapproved by the department within thirty calendar days from the completion of the concurrence review by the department of fish and wildlife. However, the department may extend the timelines applicable to the approval or disapproval of the application an additional thirty calendar days if the department determines that a detailed statement must be made, unless the commissioner of public lands, through the promulgation of a formal order, determines that the process cannot be completed within such a period. However, the applicant may not begin work on that forest practice until all forest practice fees required under RCW 76.09.065 have been received by the department.

Forest practices under Classes I, II, and III are exempt from the requirements for preparation of a detailed statement under the state environmental policy act.

(2) Except for those forest practices being regulated by local governmental entities as provided elsewhere in this chapter, no Class II, Class III, or Class IV forest practice shall be commenced or continued after January 1, 1975, unless the department has received a notification with regard to a Class II forest practice or approved an application with regard to a Class III or Class IV forest practice containing all information required by RCW 76.09.060 as now or hereafter amended. However, in the event forest practices regulations necessary for the scheduled implementation of this chapter and RCW 90.48.420 have not been adopted in time to meet such schedules, the department shall have the authority to regulate forest practices and approve applications on such terms and conditions consistent with this chapter and RCW 90.48.420 and the purposes and policies of RCW 76.09.010 until applicable forest practices regulations are in effect.

(3) Except for those forest practices being regulated by local governmental entities as provided elsewhere in this chapter, if a notification or application is delivered in person to the department by the operator or the operator's agent, the department shall immediately provide a dated receipt thereof. In all other cases, the department shall immediately mail a dated receipt to the operator.

(4) Except for those forest practices being regulated by local governmental entities as provided elsewhere in this chapter, forest practices shall be conducted in accordance with the forest practices regulations, orders and directives as authorized by this chapter or the forest practices regulations, and the terms and conditions of any approved applications.

(5) Except for those forest practices being regulated by local governmental entities as provided elsewhere in this chapter, the department of natural resources shall notify the applicant in writing of either its approval of the application or its disapproval of the application and the specific manner in which the application fails to comply with the provisions of this section or with the forest practices regulations. Except as provided otherwise in this section, if the department fails to either approve or disapprove an application or any portion thereof within the applicable time limit, the application shall be deemed approved and the operation may be commenced: PROVIDED, That this provision shall not apply to applications which are neither approved nor disapproved pursuant to the provisions of subsection (7) of this section: PROVIDED, FURTHER, That if seasonal field conditions prevent the department from being able to properly evaluate the application, the department may issue an approval conditional upon further review within sixty days. Upon receipt of any notification or any satisfactorily completed application the department shall in any event no later than two business days after such receipt transmit a copy to the departments of ecology and fish and wildlife, and to the county, city, or town in whose jurisdiction the forest practice is to be commenced. Any comments by such agencies shall be directed to the department of natural resources.

(6) For those forest practices regulated by the board and the department, if the county, city, or town believes that an application is inconsistent with this chapter, the forest practices regulations, or any local authority consistent with RCW 76.09.240 as now or hereafter amended, it may so notify the department and the applicant, specifying its objections.

(7) For those forest practices regulated by the board and the department, the department shall not approve portions of applications to which a county, city, or town objects if:

(a) The department receives written notice from the county, city, or town of such objections within fourteen business days from the time of transmittal of the application to the county, city, or town, or one day before the department acts on the application, whichever is later; and

(b) The objections relate to forestlands that are being converted to another use.

The department shall either disapprove those portions of such application or appeal the county, city, or town objections to the appeals board. If the objections related to (b) of this subsection are based on local authority consistent with RCW 76.09.240 as now or hereafter amended, the department shall disapprove the application until such time as the county, city, or town consents to its approval or such disapproval is reversed on appeal. The applicant shall be a party to all department appeals of county, city, or town objections. Unless the county, city, or town either consents or has waived its rights under this subsection, the department shall not approve portions of an application affecting such lands until the minimum time for county, city, or town objections has expired.

(8) For those forest practices regulated by the board and the department, in addition to any rights under the above paragraph, the county, city, or town may appeal any department approval of an application with respect to any lands within its jurisdiction. The appeals board may suspend the department's approval in whole or in part pending such appeal where there exists potential for immediate and material damage to a public resource.

(9) For those forest practices regulated by the board and the department, appeals under this section shall be made to the appeals board in the manner and time provided in RCW 76.09.205. In such appeals there shall be no presumption of correctness of either the county, city, or town or the department position.

(10) For those forest practices regulated by the board and the department, the department shall, within four business days notify the county, city, or town of all notifications, approvals, and disapprovals of an application affecting lands within the county, city, or town, except to the extent the county, city, or town has waived its right to such notice.

(11) For those forest practices regulated by the board and the department, a county, city, or town may waive in whole or in part its rights under this section, and may withdraw or modify any such waiver, at any time by written notice to the department.

(12) Notwithstanding subsections (2) through (5) of this section, forest practices applications or notifications are not required for exotic insect and disease control operations conducted in accordance with RCW 76.09.060(8) where eradication can reasonably be expected. [2012 1st sp.s. c 1 § 205; 2011 c 207 § 1; 2010 c 210 § 20; 2005 c 146 § 1003; 2003 c 314 § 4; 2002 c 121 § 1; 1997 c 173 § 2; 1994 c 264 § 49; 1993 c 443 § 3; 1990 1st ex.s. c 17 § 61; 1988 c 36 § 47; 1987 c 95 § 9; 1975 1st ex.s. c 200 § 2; 1974 ex.s. c 137 § 5.]

EXHIBIT D

Hearing Examiner's Motion Order

(No. OLR-2021-00139)

(Nov. 29, 2021)

(Rec. 1310–12)

BEFORE THE LAND USE HEARINGS EXAMINER
OF CLARK COUNTY, WASHINGTON

Regarding an appeal by Friends of the Columbia River Gorge of an administrative decision approving a single-family residence and agricultural building in the GLSA 40 zone in unincorporated Clark County, Washington	))))	**MOTION ORDER** **OLR-2021-00139** **(Norway Green)**

A. SUMMARY

1. Norway Green, LLC (the "applicant") filed an application with the County requesting Type II approval of a Gorge Permit for the construction of a single-family residence, barn and a feeder shed, not in conjunction with an agricultural use within the Gorge Large-Scale Agriculture 40 (GLSA 40) zone. The development is proposed on an existing 40-acre parcel known as tax assessor's parcel 133692-000.

2. In a written decision dated August 12, 2021, the director approved the application subject to conditions. (Exhibit 36).

3. Friends of the Columbia River Gorge (the "appellant"), filed a written appeal of the director's decision on September 13, 2021. (Exhibit 38).

4. On November 10, 2021, LeAnne Bremer, the applicant's attorney, filed a "Motion to clarify burden of proof." (Exhibit 69). Clark County Hearing Examiner Joe Turner (the "examiner") issued an email "Order" allowing the appellant until December 3, 2021, to respond to Ms. Bremer's motion. (Exhibit 70). Friends filed a response to the motion on November 19, 2021. (Exhibit 73). This Order is the examiner's response to Ms. Bremer's motion.

B. ISSUES

Whether the applicant retains the burden of proof when a Type II planning director's decision is appealed to the examiner.

C. OPINION

1. Pursuant to CCC 40.240.010, all development within the Columbia River Gorge National Scenic Area Districts is subject to the regulations set out in CCC 40.240.

2. CCC 40.240.050(A)(1) provides "Applications received under this chapter shall be reviewed as Type II procedures specified in Section 40.510.020, except where specified otherwise herein."

3. CCC 40.240.050(G)(5) provides "The decision of the responsible official shall be final unless a notice of appeal is filed in accordance with this title."

4. CCC 40.240.050(I) provides "Appeal Process. Appeals will be handled pursuant to Section 40.510.020(H) for Type II applications or Section 40.510.030(H) for Type III applications.

5. CCC 40.510.020(H)(3)[1] provides:

> 3. Appeal Procedures.
>
> a. The hearing examiner shall hear appeals in a de novo hearing. Notice of an appeal hearing shall be sent to parties of record, but shall not be posted or published. A staff report shall be prepared, a hearing shall be conducted, and a decision shall be made and noticed. The decision can be appealed under a Type III process.
>
> b. Except for SEPA appeals which are governed by RCW 43.21C.075, the applicant shall have the burden of proving by substantial evidence compliance with applicable approval standards. Where evidence is conflicting, the examiner shall decide an issue based upon the preponderance of the evidence.

6. CCC 40.100.070 defines "Applicant" as "[t]he person, party, firm, corporation, legal entity, or agent thereof who submits an application for an activity regulated by this title."

7. The planning director reviewed and approved the application through the Type II process set out in CCC 40.510.020. (Exhibit 36). However, the appellant filed a timely appeal. Therefore, the director's decision is not "final." "The decision of the responsible official shall be final unless a notice of appeal is filed…" CCC 40.240.050(G)(5).

8. Pursuant to CCC 40.240.050(I), this appeal of the director's decision is subject to the appeal process set out in CCC 40.510.020(H).

9. In this case, Norway Green, LLC is the "Applicant" as defined by CCC 40.100.070; Norway Green, LLC is the legal entity that filed an application requesting approval of a Type II Gorge permit. (Attachment 2 of Exhibit 1). This is not a SEPA appeal. Therefore, Norway Green, LLC, as the applicant, continues to bear the burden of proof on appeal pursuant to the express language of CCC 40.510.020(H)(3)(b) which governs appeals of Type II decisions. This section expressly provides that "[t]he applicant shall have the burden of proving by substantial evidence compliance with applicable approval standards."

10. CCC 40.510.030, which sets out the review procedures for Type III applications, is not applicable to this appeal of a Type II application. Although the appeal is subject to the Type III procedures, it remains a Type II application. In addition, CCC

[1] Incorrectly cited as CCC 40.510.020(H)(2) in the applicant's motion, Exhibit 69. CCC 40.510.020(H)(2) sets out the submittal requirements for appeals of Type II decisions.

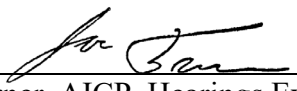
40.240.050(I) expressly provides that appeals of Type II applications are subject to 40.510.020(H). CCC 40.510.030(H) only applies to Type III applications.

11. The Administrative Procedures Act cited by the applicant is also inapplicable. As the appellant notes, the APA only applies to state agencies, and the County is not an "agency" as defined by RCW 34.05.010(2).

D. ORDER

In this *de novo* appeal proceeding the applicant, Norway Green, LLC, continues to bear the burden of proving by substantial evidence compliance with all of the applicable approval standards. Where evidence is conflicting, the examiner will decide the issue based upon the preponderance of the evidence.

DATED this 29th day of November 2021.



Joe Turner, AICP, Hearings Examiner

EXHIBIT E

Zimmerly v. Columbia River Gorge Commission, Amended Final Order and Judgment Affirming the Final Opinion and Order of the Columbia River Gorge Commission

(Clark County Superior Court
No.19-2-03321-06)

(Dec. 15, 2021)

(6)

File
FILED

16 pages

2021 DEC 15 AM 11:40
SCOTT G. WEBER, CLERK
CLARK COUNTY

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR CLARK COUNTY

JUDITH ZIMMERLY, JERRY NUTTER, and NUTTER CORPORATION, Petitioners, v. COLUMBIA RIVER GORGE COMMISSION, and CLARK COUNTY, Respondents, and FRIENDS OF THE COLUMBIA GORGE, and JODY AKERS, PAUL AKERS, DANNY GAUDREN, KATHEE GAUDREN, RACHEL GRICE, ZACHARY GRICE, GREG MISARTI, EDMOND MURRELL, KIMBERLY MURRELL, RICHARD J. ROSS, KAREN STREETER, SEAN STREETER, and ELEANOR WARREN, Respondents.	Clark County Superior Court No. 19-2-03321-06 (consolidated with No. 19-2-01896-06) CRGC No. COA-C-18-01 Clark County No. CDE2017-Z-1069(A) **AMENDED FINAL ORDER AND JUDGMENT AFFIRMING THE FINAL OPINION AND ORDER OF THE COLUMBIA RIVER GORGE COMMISSION** **PRESENTMENT DATE** **December 17, 2021**

Columbia River Gorge Commission
57 NE Wauna Ave., P.O. Box 730
White Salmon, WA 98672
Ph: (509) 493-3323

This consolidated matter came before the Court on the parties' briefing. This Court heard oral argument on May 27, 2020. The Court considered the oral and written arguments of the parties, and being fully advised, on October 14, 2021, entered the Court's Ruling Affirming the Final Opinion and Order of the Columbia River Gorge Commission Under National Scenic Area Act (16 U.S.C. Section 544). The Court's October 14, 2021, Ruling concluded:

> The Gorge Commission properly applied 16 U.S.C. section 544m(a)(2) of the National Scenic Area Act, considered the evidence and properly applied the law. The decision of the Gorge Commission in this matter is affirmed in full and the Petitioners' appeal is denied.

Sub. No. 57 at 8. The Court resolves the following additional matters in this final order and judgment:

Scrivener's Error in the Court's October 14, 2021, Ruling

On page 5, line 10 of the Court's October 14, 2021, Ruling, the citation to "section 544(a)(2) of the National Scenic Area Act" is corrected to "section 544m(a)(2) of the National Scenic Area Act."

Petitioners' Motion to Strike

In their Reply Brief, Petitioners moved to strike Exhibit A attached to the Response Brief of Respondents Jody Akers, *et al.* The exhibit in question provides those Respondents' summary of pertinent facts and dates. Exhibit A does not create any new facts. Any inconsistencies between Exhibit A and the records of this proceeding are resolved by referring directly to the records in this proceeding. This motion is denied.

Petitioner's Motion to Supplement the Record

Also in their Reply Brief, the Petitioners moved the Court to order the Respondents to supplement the administrative record if the Court concludes it needs more information regarding *ex parte* communications between the Respondents. Petitioners' Reply Brief refers to exhibits

Columbia River Gorge Commission
57 NE Wauna Ave., P.O. Box 730
White Salmon, WA 98672
Ph: (509) 493-3323

Exhibit E

(principally a joint defense agreement between the Respondents) that Petitioners claim show *ex parte* communication between the Commissioners of Respondent Columbia River Gorge Commission and the other Respondents. The Court does not require more information. The motion is denied.

Petitioners' Appearance of Fairness, Due Process, Ex Parte Communication, and Conflict of Interest Claims

Although the Court's October 14, 2021, Ruling affirmed the Gorge Commission's decision in full and denied the Petitioners' appeal, the Petitioners submitted a proposed order that includes proposed findings and conclusions regarding their appearance of fairness, due process, *ex parte* communication, and conflicts of interest claims. The Court does not adopt the Petitioners' proposed findings and conclusions. The Court enters the following findings of fact and conclusions of law regarding the Petitioners' appearance of fairness, due process, *ex parte* communication, and conflicts of interest claims.

Findings of Fact

1. On October 9, 2018, Respondents Jody Akers, *et al.* and Friends of the Columbia Gorge ("Friends") filed appeals with the Gorge Commission challenging Clark County's final order relating to enforcement at a gravel mine in the Columbia River Gorge National Scenic Area owned and leased by Petitioners.

2. On April 13, 2019, the Gorge Commission orally denied the Petitioners' motion to dismiss Respondents Akers' and Friends' appeals.

3. On June 20, 2019, Petitioners filed Clark County Superior Court Case No. 19-2-01896-06, seeking judicial review of the Gorge Commission's oral decision and a stay of the Gorge Commission's appeal proceeding, among other claims.

Columbia River Gorge Commission
57 NE Wauna Ave., P.O. Box 730
White Salmon, WA 98672
Ph: (509) 493-3323

Exhibit E

4. On July 13, 2019, the Court heard argument on the Petitioners' motion for stay of the Gorge Commission's proceedings and orally denied that motion.

5. The Gorge Commission and the other Respondents entered into a joint defense agreement for the case referred to above. The joint defense agreement states that it does "not include[] the two pending appeals before the Gorge Commission entitled *Jody Akers, et al. v. Clark County*, CRGC No. COA-C-18-01, and *Friends of the Columbia Gorge v. Clark County*, CRGC No. COA-C-18-02."

6. On August 13, 2019, the Gorge Commission heard oral argument on the two administrative appeals. On October 16, 2019, the Gorge Commission issued a final opinion and order in the appeals. On October 22, 2019, the Gorge Commission issued an errata sheet with corrections to its final opinion and order.

7. On November 6, 2019, the Petitioners filed Clark County Superior Court Case No. 19-2-03321-06, seeking judicial review of the Gorge Commission's final opinion and order.

8. The Petitioners received a copy of the joint defense agreement on November 20, 2019, in response to a public records request they filed with Clark County. In January 2020, the Petitioners' counsel discussed the joint defense agreement by email with counsel for the Gorge Commission. The Petitioners received another copy of the joint defense agreement on February 25, 2020, in response to a public records request they filed with the Gorge Commission.

9. The Petitioners filed their Opening Brief in this matter on March 13, 2020. The Petitioners did not raise any appearance of fairness, due process, ex parte communication or conflict of interest claims in their Opening Brief.

Columbia River Gorge Commission
57 NE Wauna Ave., P.O. Box 730
White Salmon, WA 98672
Ph: (509) 493-3323

Exhibit E

10. The Petitioners raised appearance of fairness, due process, ex parte communication, and conflict of interest claims for the first time in their Reply Brief on May 11, 2020.

11. The Petitioners did not attempt to pursue discovery in either of these consolidated cases.

Conclusions of Law

1. The Petitioners had prior knowledge and ample time to raise appearance of fairness, due process, ex parte communication, and conflict of interest claims in their Opening Brief, or in the alternative they could have sought leave to amend the Complaint, requested an extension of time to file their Opening Brief, or sought discovery. The Petitioners' appearance of fairness, due process, ex parte communication, and conflict of interest claims, raised for the first time in their Reply Brief, were untimely. *See White v. Kent Med. Ctr.*, 61 Wn. App. 163, 168–69, 810 P.2d 4 (1991) ("[I]n the analogous area of appellate review, the rule is well settled that the court will not consider issues raised for the first time in a reply brief."); *see also Dewey v. Tacoma School Dist. No. 10*, 95 Wn. App. 18, 974 P.2d 847 (1999) (Div. 2 following *White*).

2. In the case *In re Scannell*, 169 Wn.2d 723, 742–43, 239 P.3d 332 (2010), the Washington Supreme Court concluded that there were no appearance of fairness or due process violations when WSBA hearing officers adjudicated an attorney disciplinary matter after those hearing officers and WSBA disciplinary counsel jointly defended the accused's lawsuit against the hearing officers and WSBA disciplinary counsel. Similarly, here, there is no appearance of fairness or due process violations where the Respondents, through their legal counsel, jointly defended against litigation brought by the Petitioners.

Columbia River Gorge Commission
57 NE Wauna Ave., P.O. Box 730
White Salmon, WA 98672
Ph: (509) 493-3323

3. In their joint defense agreement, the Respondents included a statement specifying that the joint defense agreement does "not include[] the two pending appeals before the Gorge Commission entitled *Jody Akers, et al. v. Clark County,* CRGC No. COA-C-18-01, and *Friends of the Columbia Gorge v. Clark County,* CRGC No. COA-C-18-02." This statement refutes Petitioners' claims that the joint defense agreement involved or resulted in ex parte communications in those appeals.

4. No evidence in these consolidated cases indicates that any member of the Gorge Commission had undisclosed *ex parte* communications with the other Respondents involving the administrative appeals or that any member of the Gorge Commission had an undisclosed conflict of interest.

Judgment

Based on the Court's October 14, 2021, Ruling and the matters discussed above, and the Court being fully advised, NOW THEREFORE, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED as follows:

1. The Court adopts the findings of fact and conclusions of law in the Gorge Commission's Final Opinion and Order.

2. This final order and judgment incorporates the Court's October 14, 2021, Ruling, a copy of which is attached hereto. As provided in that ruling, the Petitioners' appeal is denied and the Gorge Commission's Final Opinion and Order is affirmed in full.

3. All objections, motions, and claims brought by Petitioners not specifically granted or denied are hereby denied.

4. Respondent Gorge Commission, Respondent Jody Akers, *et al.*, and Respondent Friends of the Columbia Gorge are the prevailing parties for purposes of an award of costs and

Columbia River Gorge Commission
57 NE Wauna Ave., P.O. Box 730
White Salmon, WA 98672
Ph: (509) 493-3323

Exhibit E

disbursements under Chapter 4.84 RCW. Each of these prevailing parties may file a bill of costs and disbursements incurred in this action consistent with applicable rules within ten (10) days of the entry of this final order and judgment. Petitioners shall be jointly and severally liable for any awarded costs and disbursements.

DATED this 15th day of December 2021.

HONORABLE JOHN P. FAIRGRIEVE

PRESENTED BY:

s/ Jeffrey B. Litwak
Jeffrey B. Litwak, WSBA No. 31119
jeff.litwak@gorgecommission.org
Attorney for Respondent Columbia River Gorge Commission

s/ Gary K. Kahn
Peggy Hennessy, WSBA No. 17889
phennessy@rke-law.com
Gary K. Kahn, WSBA No. 17928
gkahn@rke-law.com
Attorneys for Jody Akers, et al.

s/ Nathan J. Baker
Nathan J. Baker, WSBA No. 35195
nathan@gorgefriends.org
Attorney for Respondent Friends of the Columbia Gorge

Columbia River Gorge Commission
57 NE Wauna Ave., P.O. Box 730
White Salmon, WA 98672
Ph: (509) 493-3323

Exhibit E

CERTIFICATE OF FILING AND SERVICE

I certify that on November 30, 2021, I filed the original of the attached AMENDED [PROPOSED] FINAL ORDER AND JUDGMENT AFFIRMING THE FINAL OPINION AND ORDER OF THE COLUMBIA RIVER GORGE COMMISSION by electronic filing, with the Clark County Superior Court.

I further certify that on November 30, 2021, I served a true and correct copy of the attached AMENDED [PROPOSED] FINAL ORDER AND JUDGMENT AFFIRMING THE FINAL OPINION AND ORDER OF THE COLUMBIA RIVER GORGE COMMISSION by electronic mail (with prior written permission as required by CR 5(b)(7)) on the attorneys of record listed below.

James D. Howsley
Jordan Ramis PC
1499 SE Tech Center Pl., Suite 380
Vancouver, WA 98683
Attorneys for Petitioner
Judith Zimmerly

Gary K. Kahn
Peggy Hennessy
Reeves, Kahn, Hennessy & Elkins
P.O. Box 86100
Portland, OR 97286
Attorneys for Jody Akers, et al.

Stephen W. Horenstein
Maren L. Calvert
Horenstein Law Group
500 Broadway St., Suite 370
Vancouver, WA 98660
Attorneys for Petitioners
Jerry Nutter and Nutter Corporation

Nathan J. Baker
Friends of the Columbia Gorge
333 SW Fifth Ave., Suite 300
Portland, OR 97204
Attorney for Friends of the Columbia Gorge, Inc.

Curtis Burns
Clark County Prosecuting Attorney's Office
Civil Division
1300 Franklin St., Ste. 380
P.O. Box 5000
Vancouver, WA 98666-5000
Attorneys for Clark County

s/ Jeffrey B. Litwak
Jeffrey B. Litwak, WSBA No. 31119
Attorney for Respondent
Columbia River Gorge Commission

Columbia River Gorge Commission
57 NE Wauna Ave., P.O. Box 730
White Salmon, WA 98672
Ph: (509) 493-3323

8 VC

FILED

2021 OCT 14 PM 1:42

SCOTT G. WEBER, CLERK
CLARK COUNTY

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

JUDITH ZIMMERLY, JERRY NUTTER, and NUTTER CORPORATION, Petitioners, v. COLUMBIA RIVER GORGE COMMISSION, and CLARK COUNTY, Respondents, and FRIENDS OF THE COLUMBIA GORGE, and JODY AKERS, PAUL AKERS, DANNY GAUDREN, KATHEE GAUDREN, RACHEL GRICE, ZACHARY GRICE, GREG MISARTI, EDMOND MURRELL, KIMBERLY MURRELL, RICHARD J. ROSS, KAREN STREETER, SEAN STREETER, and ELEANOR WARREN, Respondents.	No. 19-2-03321-06 (consolidated with 19-2-01896-06) CRGC No. COA-C-18-01 Clark County No. CDE2017-Z-1069(A) COURT'S RULING AFFIRMING THE FINAL OPINION AND ORDER OF THE COLUMBIA RIVER GORGE COMMISSION UNDER NATIONAL SCENIC AREA ACT (16 U.S.C. SECTION 544)

JSS

Exhibit E

I. Summary of facts and procedural history relevant to this petition

On March 29, 2018, the Clark County Code Enforcement Coordinator and Director of Community Development issued a Notice and Order to Norma Zimmerly, Jerry Nutter and Nutter Corporation. On May 17, 2018 an Amended Notice and Order ("N&O") was issued to the petitioners alleging violations of the Clark County Code ("CCC"). On May 25, 2018 the petitioners appealed the N&O pursuant to the CCC and requested a hearing before an examiner. On August 4, 2018 the Hearings Examiner issued a decision concluding the petitioners were permitted to continue mining but were not permitted to operate a rock crusher without obtaining a surface mining conditional use permit from Clark County. On September 8, 2018, the Hearing Examiner issued a final order on reconsideration. On October 9, 2018 respondents Friends of the Columbia Gorge ("Friends") and Jody Akers, Paul Akers, Danny Gaudren, Kathee Gaudren, Rachel Grice, Zachary Grice, Greg Misarti, Edmond Murrell, Kimberly Murrell, Richard J. Ross, Karen Streeter, Sean Streeter, and Eleanor Warren (collectively referred to as "Neighbors") appealed the examiner's order to the Columbia River Gorge Commission (the "Commission").

On August 13, 2019 the Commission issued an oral ruling affirming Clark County's May 17, 2019 N&O and on October 16, 2019 entered a written Final Opinion and Order. The petitioners filed a Petition for Judicial Review of the Commission's Final Opinion and Order on November 6, 2019.

II. Standard of review

The parties seem to generally agree that in matters concerning the Columbia River Gorge National Scenic Area in Washington state court the standards of review found in the Washington Administrative Procedure Act, RCW 34.05.370(3) (APA) should be used. Additionally, the court also adopts the suggestion of respondent Columbia River Gorge

Commission that it use two additional methods. First are the federal statutory and regulatory interpretation methods that were found proper in *Skamania County v. Columbia River Gorge Comm'n,* 144 Wn.2d 30, 42-43, 26 P.3d 241 (2001) and *Friends of the Columbia River Gorge v. Columbia River Gorge Comm'n,* 213 P.3d 1164, 1171-75, 1189, 346 Or. 366 (2009). Second is the practice of the Gorge Commission of harmonizing the application of Washington's APA with Oregon and federal law.

Washington state courts will uphold Gorge Commission decisions "absent a clear showing of arbitrary, unreasonable, irrational or unlawful zoning action or inaction." *Tucker v. Columbia River Gorge Comm'n,* 73 Wn. App 74, 78, 867 P.2d 686 (1994).

III. Analysis

A. The National Scenic Act provides the Gorge Commission jurisdiction to review the appeal of the Clark County Examiner's final decision.

1. The Gorge Commission's jurisdiction to hear this appeal is provided in 16 U.S.C. section 544m(a)(2).

16 U.S.C. section 544m(a)(2) provides:

> Any person or entity adversely affected by any final action or order of a county relating to the implementation of this Act may appeal such action or order to the Commission by filing with the Commission within thirty days of such action or order, a written petition requesting that such action or order be modified, terminated, or set aside.

Applying the method developed in *Chevron v. Natural Resources Defense Council,* 467 U.S. 837 (1984), to the instant case, the court finds that the National Scenic Area Act unambiguously grants authority to the Gorge Commission to hear appeals of county enforcement actions.

2. The Notice and Order issued to the petitioners alleged a violation of Clark County's Scenic Area code.

The dispute here is whether the subject matter of the Amended Notice and Order related to the implementation of the National Scenic Area Act. The Amended Notice and Order alleged a violation of Clark County's National Scenic Area code, CCC 40.240.010(B). In making his decision, the Hearings Examiner interpreted and applied National Scenic Area standards to regulated action on land within the National Scenic Area. His decision clearly related to the implementation of the National Scenic Area Act. Consequently, the Gorge Commission properly applied section 544m(a)(2) to the appeal of the Hearing Examiner's decision.

3. Clark County's appeal provisions do not preclude appeals pursuant to the National Scenic Area Act.

a. Factual argument

The Petitioners assert as fact that the Gorge Commission approved a Clark County ordinance directing that appeals would go to superior court through LUPA when approving an ordinance amendment in 2003. However, as Respondent Columbia River Gorge Commission points out, this is based on an incorrect summary of former Clark County Code. Former Clark County Code 18.600.100.D.3 did not confer a jurisdictional requirement to appeal to superior court.

b. Legal argument

As Respondent Columbia River Gorge Commission argues, a local ordinance cannot confer LUPA review of county final actions and orders relating to implementation of the National Scenic Area Act for three reasons. First, RCW 36.70C.020(1)(a)(ii) indicates that LUPA does not apply to judicial review of "[l]and use decisions of a local jurisdiction that are subject to review by a quasi-judicial body created by state law...". "Local jurisdiction" is defined as a "county, city or

unincorporated town." RCW 36.70C.020(3). LUPA does not apply to the N&O in question here because the Examiner's decision was subject to review by the Commission, a quasi-judicial body created by state and federal law. Additionally, LUPA does not apply here because the Commission is not a "county, city, or unincorporated town." *See Samuel's Furniture, Inc. v. Dep't of Ecology,* 147 Wn.2d 440, 453 n. 12, 54 P.3d 1194 (2002) (state agencies are not covered by the definition of "local jurisdiction").

Additionally, such an ordinance would be in violation of article XI, section 11 of the Washington State Constitution which permits local governments to make only such "regulations as are not in conflict with general laws." Finally, an attempt to confer superior court appellate review under LUPA would conflict with section 544(a)(2) of the National Scenic Area Act which expressly grants jurisdiction to the Gorge Commission for such appeals.

4. Cited case law does not hold that the Gorge Commission lacks jurisdiction to hear the appeal.

The Petitioners cite to two cases, *BNSF Ry. Co. v. Clark Cnty.,* No. C18-5926 BHS, 2020 U.S. Dist. LEXIS 22830, 2020 WL 618368 (W.D. Wash. Feb. 10, 2020) and *Skamania County v. Woodall,* 104 Wn. App. 525, 16 P.3d 701 (2001), for the proposition that the Gorge Commission's authorities are not as broad as it asserts, and the Gorge Act defers significantly to local government administration and control. Neither case is persuasive.

BNSF Ry. Co. v. Clark Cnty, supra, involved a railroad bringing an action against a county and individual county employee, seeking a declaration that federal law preempted the county's permitting process and requirements the county threatened against the railroad. The court ultimately decided that the Clark County Code was preempted by the Interstate Commerce Commission Termination Act. *Id.* at 1205. The case does not address the scope of the Gorge Commission to hear the appeal at issue in this case.

Skamania County v. Woodall, supra, involved a challenge to a permit issued by Skamania County for a landowner to operate a mobile home park. The matter was eventually appealed to

the Gorge Commission which reversed the Skamania County Board of Adjustment's decision, and in doing so declined to apply state law. The Washington state Court of Appeals reversed, holding that federal law required the Gorge Commission to apply Washington common law when deciding a zoning matter of this type. *Id.* at 533. This case does not specifically address the jurisdiction of the Gorge Commission to hear the type of appeal at issue in this case. In fact, although the case involves an appeal brought before the Gorge Commission pursuant to 16 U.S.C. section 544m(a)(2), the appellants in *Skamania County* did not challenge the jurisdiction of the Gorge Commission to hear the appeal.

5. The Gorge Commission's rules do not preclude it from reviewing county enforcement actions.

The court finds the Gorge Commission's rationale on this issue persuasive: "[differences in nomenclature are not a significant departure for us to conclude that the Commission's appeal rules are inapplicable in their entirely." Further, that the rule cannot be interpreted to limit the Commission's authority under the Act to hear appeals of "any final action or order.' 16 U.S.C. section 544m(a)(2)."

B. The Gorge Commission's determination that the Hearing Examiner's decision was arbitrary and capricious was correct.

1. The Hearing Examiner had to consider the validity of the 1993 permit to determine whether the Petitioners violated CCC 40.240.010(B).

The Gorge Commission determined that the validity of the 1993 permit was at issue because the Hearings Examiner relied on its terms in determining that the current mining operation satisfied CCC 40.240.170(D)(4). In paragraph F.3 the Hearings Examiner recognized that the 1993 permit had expired after development activity was discontinued for two continuous

one-year periods. The Gorge Commission's conclusion was that the Hearing Examiner's refusal to determine whether the 1993 permit was still valid was willful and unreasoning and thus arbitrary and capricious. This was a proper conclusion.

2. The Gorge Commission's decision to reverse the Hearing Examiner rather than remanding the decision was proper.

Remanding the decision to the Hearings Examiner would have been pointless. As Respondent Columbia River Gorge Commission points out, no party assigned error to the Hearings Examiner's findings that no mining activity occurred for two periods of over one year. The Hearings Examiner would have had to apply those findings and conclude that the 1993 permit had in fact expired.

3. The Gorge Commission applied the correct standard of review for arbitrary and capricious.

In this case the National Scenic Area Act does not specify the standards of review the Gorge Commission must use when exercising its appellate authority pursuant to 16 U.S.C. section 544m(a)(2). The Gorge Commission must interpret and apply the National Scenic Area Act to determine the standards of review and, doing so, follows the lead of the Washington and Oregon supreme courts and uses federal methods to interpret and apply the act, not *Skamania County v. Woodall,* 104 Wash.App. 525, 16 P.3d 701 (2001). Additionally, there was no error because the Gorge Commission applied the "arbitrary and capricious" standard as described by Washington State courts and federal courts to approximate a uniform standard throughout the National Scenic Area.

C. The Commission properly determined that CCC 40.240.170(E) applied and also determined that the 1993 permit determined whether mining was discontinued.

The Gorge Commission concluded that the 1993 permit, not CCC 40.240.170(D)(4) or 170(E) provided the applicable standard for determining whether mining on the property in question was discontinued. There is no indication that Ms. Zimmerly took the necessary actions to have current standards apply rather than the terms of her 1993 permit. The Gorge Commission did not erroneously interpret and apply CCC 40.240.170(D)(4) or 170(E).

IV. Conclusion

The Gorge Commission properly applied 16 U.S.C. section 544m(a)(2) of the National Scenic Area Act, considered the relevant evidence and properly applied the law. The decision of the Gorge Commission in this matter is affirmed in full, and the Petitioners' appeal is denied.

Dated this 13th day of October, 2021.

John P. Fairgrieve
Superior Court Judge

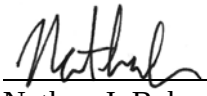
CERTIFICATE OF SERVICE

I hereby certify that on the date indicated below, I served true and correct copies of the foregoing FRIENDS OF THE COLUMBIA GORGE'S RESPONSE BRIEF IN CRGC NO. COA-C-22-01 by email on the following persons:

Stephen E. Archer
Prosecuting Attorney's Office, Civil Division
stephen.archer@clark.wa.gov
Attorney for Clark County

LeAnne Bremer
Miller Nash LLP
leanne.bremer@millernash.com
Attorney for Norway Green, LLC

Dated: October 11, 2022

By: 

Nathan J. Baker, Senior Staff Attorney
Friends of the Columbia Gorge

Friends of the Columbia Gorge
123 NE 3rd Ave., Ste 108
Portland, OR 97232
(503) 241-3762