Turning to the merits, the court looked first at whether the impact fee could be used for the spray ground. The plaintiff contended that the impact fee had to be used for a swimming pool, while the defendant contended that the desired improvement was stated more broadly as an aquatic/youth center. The relevant ordinance imposed a fee for "parks, playgrounds and other recreational facilities," and therefore was not specific enough to resolve the dispute. The court turned to a pre-ordinance needs assessment, in which an "aquatic center/youth center" and a "swimming pool *or youth center*" was mentioned. The court concluded that the village was not "locked in" to provide a swimming pool, noting that it had not settled on an indoor/outdoor facility during the needs assessment process and had chosen to leave open the particular use to which the funds could be put. In addition, the costs spelled out in the needs assessment were only required under Wisconsin law to be "estimates" and the village had noted the absence of recreational facilities before the needs assessment was made so that the impact fees could be used to satisfy any portion of the recreational needs of the community. The court also found that municipalities need, and are given, flexibility under state law in recreational planning. Given that the voters had rejected taxes for the remainder of the facility, the defendant could change the proposal so as to stay within budget and use available funds or provide no recreational facilities. The revised plans were well within the description of the aquatic or youth facility objectives, either of which would have been sufficient.

Nevertheless, the court said that the fact that it was permissible to spend these funds on the facility did not mean that more funds than were necessary to construct the facility may stay with the municipality. The court noted that under the needs assessment, 41.35% of the cost of the facility was to be imposed on new developers (because the needs assessment assumed that the remaining portions would be attributable to use by existing development). The court concluded that if the spray ground costs less than the original proposal, the proportional share must be returned to the lot owners under state law and local ordinance. Given that the needs assessment had contemplated only one aquatic/youth center, the village could not keep the excess money to possibly spend on other aquatic or youth recreational opportunities during the time period specified in the impact fees ordinance.

This case is a rare excursion into the authorization and use of impact fee funds (otherwise known as system development charges). While the court was liberal in finding both standing and the revised scheme to be within the authorized scope of the statute, the court did hold the local government to the proportional use of those funds for the authorized improvement.

Edward J. Sullivan

Metro. Builders Ass'n of Greater Milwaukie v. Vill. of Germantown, 2005 WI App 103, ___ Wis. 2d ___, 698 N.W.2d 301 (Wis. Ct. App. 2005).

■ *WASHINGTON COURT OF APPEALS UPHOLDS GORGE COMISSION DECISION TO EXPAND STEVENSON URBAN AREA*

In *Friends of the Columbia Gorge, Inc. v. Columbia River Gorge Commission*, 126 Wn. App. 363, 108 P.3d 134, *reconsideration granted and opinion amended by* ___ Wn. App. ___, ___ P.3d ___ (2005), Division III of the Washington Court of Appeals affirmed the trial court's decision that the Gorge Commission's findings relied upon in granting a petition to revise and expand the City of Stevenson's federally defined urban area boundary were supported by the record and substantial evidence.

The Columbia River Gorge National Scenic Area Act, 16 U.S.C. §§ 544-544p (Scenic Act), enacted by Congress in 1986, regulates land use and development in certain designated areas in the Columbia River Gorge National Scenic Area, a 300,000-acre region encompassing lands in Hood River, Multnomah, and Wasco counties in the State of Oregon, and Klickitat, Clark, and Skamania counties in the State of Washington. The Scenic Act also established the boundaries of certain autonomous urban areas, including the Stevenson Urban Area in Skamania County. In establishing the urban area boundaries, Congress allowed counties within the Scenic Area to request revisions to the boundaries of their urban areas.

This case involved a 36-acre triangle of land in southwest Stevenson that was within the city limits, but which had been excluded from the urban area drawn by congressional staff and placed instead within the restricted general management area. The 36 acres, comprising parts of three parcels that were split by the boundary between the urban and general management areas, included a17.6-acre tract of land that had been developed after the Gorge Commission granted a variance in 1991 to expand the Skamania Lodge golf course. The remaining 16.2- and 2.2-acre tracts of land contained some residential development, and Skamania County argued that these parcels were unsuitable for agriculture or timber production. All 36 acres had been annexed by Stevenson in 1974, and were included in the city's long-range population growth planning.

The owners of the 16.2-acre tract lobbied the city, county, and Gorge Commission to revise the Stevenson Urban Area boundary to coincide with the city limits and include the 36 acres. In 1997, the Gorge Commissioners decided in a 9 to 2 vote that the discrepancy between the urban area boundary and the city limits "appear[ed] to be an unintended mistake." Thereafter, Skamania County filed a request with the Gorge Commission to revise the urban area boundary to coincide with the city limits.

The Scenic Act provides that the Gorge Commission may expand an urban area only if four criteria are met. 16 U.S.C. § 544b(f)(2)(A)–(D). Specifically, the Gorge Commission must find that (A) there is a demonstrable need to accommodate future population growth or to meet economic needs, (B) revision of the boundary would be consistent with the Management Plan and the Scenic Act's purposes to protect the scenic, cultural, recreational, and natural resources

of the Columbia River Gorge, (C) revision of the boundary would result in maximum efficiency of land uses within and on the fringe of the existing urban area, and (D) revision of the boundary would not result in the significant reduction of agricultural lands, forest lands, or open spaces.

Friends of the Columbia Gorge challenged the county's revision application, arguing it was in fact a request for an expansion of the urban area, and that it did not meet the expansion criteria under the Act. The county argued it was not asking for an expansion, but simply trying to avoid the negative consequences of a manifest mapping error, and that the application met the expansion criteria in any event. The Gorge Commission approved the revision after a public hearing. Friends appealed to superior court. The court concluded that the Gorge Commission's findings were supported by substantial evidence, the conclusions were supported by the findings, and the order was neither arbitrary nor capricious.

Friends appealed to the court of appeals, arguing that the Scenic Act does not provide a mechanism to administratively correct mapping errors, that the Gorge Commission's sole authority to revise urban boundaries is pursuant to 16 U.S.C. § 544b(f)(2) of the Scenic Act, and that Skamania County's application did not satisfy the applicable criteria. The Gorge Commission responded that irrespective of whether or not the revision resolved a mapping error, the application met all four of the criteria.

Because the Scenic Act and the bistate Columbia River Gorge Compact incorporating federal law govern the Gorge Commission, the Washington Court of Appeals applied federal law. The court of appeals also applied the procedural rules and standards of review of the Washington Administrative Procedure Act, RCW Chapter 34.05, and reviewed the Gorge Commission's decision for substantial evidence supporting the findings of fact. The court found that the Gorge Commission had correctly interpreted the plain language of the Act as permitting it to make minor revisions upon finding the facts set forth in criteria A through D of 16 U.S.C. § 544b(f)(2). The court also held that the Commission had properly determined that all four of the criteria had been met.

Criterion A. The Gorge Commission had concluded that criterion A was satisfied because the revision was necessary to accommodate the city's long-range urban growth population requirements and its economic needs, based on the following findings:

(1) "Because of the disputed triangle's proximity to the Skamania Lodge, its value is enhanced. Adding it to the urban area would permit residential use. This would boost the city's tax base";
(2) "Compatible uses will help protect the atmosphere of the lodge, one of the city's most vital economic assets. Protection of the atmosphere of the lodge is important. The area is not well suited to commercial logging. Logging is one of the few uses allowed in the general management area. A clear-cut adjacent to the lodge could impair its ambiance"; and
(3) "Much of Stevenson's future urban growth will be low density development on the fringe. The subject area lends itself to this sort of growth. If the revision is denied, this housing development will proceed outside the urban area, depriving the city of the tax revenue."

Examining the record, the court found that two of these findings were supported by substantial evidence. The benefit to the municipal tax base was asserted in the petition and was not disputed in the record. As evidence of the economic necessity of conforming the urban area to the city limits, the city administrator had testified that the lodge was the county's biggest private sector employer. Further, though the court agreed with Friends' assertion that there was no evidence that logging was not equally permissible under the municipal ordinances as under the Scenic Area rules, it found that the Gorge Commission could easily have inferred from the city administrator's testimony that the owners were likely to log the property if the revision were denied. On the other hand, the court disputed the Gorge Commission's third finding because it implied that housing development would proceed unabated under the Scenic Area rules, when in fact unregulated residential development is not permitted under these rules.

Criterion B. The Gorge Commission had concluded that criterion B was satisfied because revision of the urban area was consistent with the standards and purposes of the Scenic Act, based on the following findings:

(1) "Four of the standards relevant to this application are protection and enhancement of agricultural lands, forest lands, open spaces, and recreational resources. The subject land is not suitable for agriculture or logging. Therefore, including it in the urban area will not adversely affect scenic area forest lands";
(2) "The land has no 'significant and/or sensitive resources necessary to be considered open spaces.'"; and
(3) "The only recreational resources are the 17 acres of Skamania Lodge golf course and hiking trails, and these are not affected. The land cannot be seen from any key viewing areas, and the anticipated low to moderate density residential development would not adversely affect scenic resources. The land contains no cultural resources."

Examining the record, the court found that these findings were supported by substantial evidence as well. The city administrator testified that only nine to ten acres of the disputed property was timberland, and that logging was not commercially feasible because of fragmented ownership, existing uses, segregation from nearby forest, inadequate road access, a high water table, and wetlands. Further, the court found that the record included a letter from the federal Scenic Area Manager supporting the revision, and saying that no sensitive resources would be affected and that the revision was consistent with the purposes of the Scenic Act.

Criterion C. The Gorge Commission had concluded that criterion C was satisfied because revision of the urban area

boundary would result in maximum efficiency of land uses within and on the fringe of the existing urban area, based on the following findings:

(1) "The subject area has been within the city limits since 1974. Efficient urban growth dictates that growth and provision of urban services should first occur on lands within city limits before spreading outward into unincorporated areas"; and

(2) "The subject area is within the city's long-term infrastructure plans and is more likely to be served by urban services before unincorporated lands in the urban area. It is appropriate for the city to target incorporated lands for provision of urban services before unincorporated areas. The revision also will allow urban service expansion and more urban growth to occur inside city limits before reaching unincorporated areas."

Examining the record, the court found that these findings generally reflected the evidence, particularly the testimony of the city administrator, and supported efficient land use by incorporating what had been a fringe area.

Criterion D. The court did not address criterion D because the Friends did not challenge the Gorge Commission's finding that it was satisfied.

The court also discussed several additional considerations that supported the Gorge Commission's decision, including the fact that the city limits follow a natural boundary formed by the Bonneville Power Administration's power line, the administrative difficulties caused by parcels located within the city limits but outside the urban area boundaries, and evidence in the form of the city administrator's testimony that the county and Gorge Commission staff had consulted with wildlife and cultural resource experts and geologists who reported that the revision would not adversely affect any resources.

Thus, the court concluded that the Gorge Commission's findings and order were supported by substantial evidence and affirmed the trial court. However, the court acknowledged that Friends expressed an important concern that less than strict construction of the restrictions on expansion of urban areas would compromise the integrity of the Scenic Act, and therefore expressly limited its holding to the specific facts of the case.

On a joint motion for reconsideration, the parties requested that the court correct its statement that the applicable law was the Washington Administrative Procedure Act, because the provisions of the Columbia River Gorge Compact and the Scenic Act make the Washington and Oregon APAs jointly applicable to Gorge Commission decisions. In an opinion filed May 5, 2005, the court granted the motion for reconsideration, but amended the original opinion to state "Absent published procedural rules, therefore, we apply the Washington Administrative Procedure Act, chapter 34.05 RCW." In a footnote, the court stated the Gorge Commission had not complied with the statutory requirement to publish its rules. Thus, according to the court, the applicable standards of law for review of Gorge Commission decisions by Washington courts are found in the Washington APA.

Lisa Knight Davies

Friends of the Columbia Gorge, Inc. v. Columbia River Gorge Commission, 126 Wn. App. 363, 108 P.3d 134, *reconsideration granted and opinion amended by* ___ Wn. App. ___, ___ P3d ___ (2005).

■ NEW YORK APPELLATE COURT REQUIRES ZONING SPECIFICITY FOR MULTIPLE DWELLINGS ALLOWED BY PLAN

Bergstol v. Town of Monroe, 790 N.Y.S.2d 460 (N.Y. App. Div. 2005), involved the Town's master (comprehensive) plan, which provided that land meeting certain criteria would be compatible with multifamily use. Subsequently, the town adopted a zoning regulation that precluded multifamily housing from the zone in which the plaintiff's property was located. The plaintiff claimed that the zone was consistent with the plan criteria and that the town could not adopt the regulation. On cross motions for summary judgment in a declaratory judgment proceeding, the town prevailed.

The appellate court noted that state law provided that, on adoption of a master plan, zoning decisions thereafter must be consistent with that plan. However, a challenge to the legislative adoption of a zoning regulation requires a challenger to bear a heavy burden, *i.e.*, if the validity of the regulation is "fairly debatable," the enacting body prevails. In this case, the plan did not provide that multifamily dwellings must be allowed in all locations within the various zones to which the plan applies. Thus, the adoption of the regulation was not inconsistent with the plan.

New York is a state that sometimes gives credence to plans. However, this case appears to analyze a statutory consistency requirement along the lines of what was actually prohibited by the plan. That is an acceptable outcome under most of the precedent analyzing regulations for consistency with plans.

Edward J. Sullivan

Bergstol v. Town of Monroe, 790 N.Y.S.2d 460 (N.Y. App. Div. 2005).

■ HAWAI'I COURT ALLOWS "STEALTH" CELLULAR FACILITY

T-Mobile USA, Inc. v. County of Hawai'i Planning Comm'n, 106 Haw. 343, 104 P.3d 930 (2005), involved the defendant's decision that the plaintiff's cellular facility required a special use (conditional use) permit, despite being a "stealth" facility, *i.e.*, a cellular facility housed in a false chimney and attached to a single-family residential farm dwelling with an accessory equipment facility located within a garage. The issue involved whether such use was allowed outright in a farm zone or was required to go through the special use permit process.