gives the counties discretion whether to allow various uses, but it requires the counties to give that discretionary consideration on an individualized basis to properties with buildings both on and eligible for listing on the National Register. It does not give the counties the discretion to exclude "eligible" properties from any discretionary consideration, as the county's preferred version of its ordinance would do.

Id. at 430-31.

David F. Doughman

Friends of the Columbia Gorge, Inc., et al. v. Columbia River Gorge Comm'n, 346 Or. 433, 213 P.3d 1191 (2009)

Friends of the Columbia Gorge, Inc., et al. v. Columbia River Gorge Comm'n, 346 Or. 415, 212 P.3d 1243 (2009)

OREGON SUPREME COURT UPHOLDS COLUMBIA RIVER GORGE COMMISSION'S INTERPRETIVE AUTHORITY BUT SENDS REVISED MANAGEMENT PLAN BACK FOR ADDITIONAL WORK

In *Friends of the Columbia Gorge, Inc. v. Columbia River Gorge Commission*, 346 Or. 366, 213 P.3d 1164 (2009), petitioners (collectively, Friends) appealed an Oregon Court of Appeals decision on a petition for review of the Columbia River Gorge Commission's (Commission) 2004 revision of its Management Plan for the Columbia River Gorge National Scenic Area (the Plan). Friends challenged the various standards of review employed by the court in addition to its holdings that the Plan complied with the Columbia River Gorge National Scenic Area Act (Scenic Act). The Oregon Supreme Court affirmed in part, reversed in part, and remanded one question to the Commission for further proceedings.

Congress passed the Scenic Act in 1986 "to protect the scenic, cultural, recreational, and natural resources of the Columbia River Gorge," and to protect the economy of the area "by encouraging growth to occur in urban areas and by allowing future economic development . . . consistent with" resource protection. *See generally* Columbia River Gorge National Scenic Area Act, 16 U.S.C. §§ 544-544p (1986). As part of the Scenic Act, Congress authorized Oregon and Washington to "[e]stablish by way of an interstate agreement a regional agency known as the Columbia River Gorge Commission . . . ." *Id.* § 544c(a)(1)(A). The Commission is to carry out its functions in accordance with the interstate agreement and Scenic Act but is not considered an agency of the United States for the purpose of any federal law. *Id.* The Scenic Act further instructs the Commission to conduct studies, develop land use designations, and adopt a management plan. *Id.* § 544d(a)-(c).

The Plan is subject to periodic review and revision by the Commission. *Id.* § 544d(g). The Commission revised the original Plan in 2004 to address a limited group of issues after several years of public hearings and consultation with federal, state, and local governments. Friends petitioned for judicial review, arguing that various aspects of the revised Plan violated the Scenic Act and that the Commission's review process was incomplete because the act required it to review the entire Plan. The Court of Appeals remanded the Plan to the Commission for reconsideration of one minor issue but otherwise affirmed. Friends appealed.

I. Standard of Review: Facial Challenges

Friends argued that the court applied the wrong standard of review by holding that, in order to prevail on any of its challenges to the Plan, Friends had to show that "the plan could not be applied consistently with the law under any circumstance," a standard most frequently applied to claims that a statute violates a constitutional provision. *Friends of Columbia Gorge, Inc. v. Columbia River Gorge Comm'n*, 215 Or. App. 557, 568, 171 P.3d 942 (2007) [*Friends v. CRGC I*]. Friends argued that the court should have followed the methodology set out in *Planned Parenthood Association v. Department of Human Resources*, 297 Or. 562, 565, 687 P.2d 785 (1984), for reviewing facial challenges to the validity of an administrative rule: (1) Whether the officials exceeded their authority; (2) whether proper procedures were followed; and (3) "whether the substance of the action, though within the scope of the agency's or official's general authority, departed from a legal standard expressed or implied in the particular law being administered, or contravened some other applicable statute."

The Supreme Court agreed, holding that this standard was consistent with the statutory standard for judicial review of Commission actions in Oregon courts. That standard provides for remand to the agency if a court finds the challenged action to be "[o]utside the range of discretion delegated to the agency by law . . ." or "[o]therwise in violation of a constitutional or statutory provision." *Friends of the Columbia Gorge, Inc. v. Columbia River Gorge Comm'n*, 346 Or. 366, 377, 213 P.3d 1164 (2009) [*Friends v. CRGC II*] (quoting ORS 196.115(3)(d)(A) & (C) (2009)). Thus, the *Planned Parenthood* methodology (which applies only to Oregon courts) was the appropriate standard for reviewing petitioners' facial challenges to the lawfulness of the Plan. *Id.*

II. Standard of Review: Agency Interpretation

Friends further challenged the Court of Appeals holding that Oregon courts reviewing actions by the Commission must apply the federal "deferential standard of review" set out in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984). That case and its progeny hold that courts should defer to a federal agency's interpretation of a statute it is charged with implementing as long as that interpretation is reasonable. *Friends v. CRGC II*, 346 Or. at 378 (citing *Chevron*, supra).

Friends argued that the Commission is a product of an interstate compact that Congress authorized but did not require Oregon and Washington to adopt. The Commission's authority, according to Friends, thus derives not from Congress but from state law. Friends also noted that the Scenic Act specifically states that the Commission "shall not be considered an agency or instrumentality of the United States for the purpose of any Federal law . . . ." 16 U.S.C. § 544c(a)(1)(A).

The Supreme Court nevertheless held that the Commission's interpretations of the Scenic Act are entitled to *Chevron* deference because Congress's delegation of authority implied an expectation that the Commission, when addressing ambiguities and gaps in the statutory scheme, will "speak with the force of law," as required by *United States v. Mead Corporation*, 533 U.S. 218, 229, 121 S. Ct. 2164, 150 L. Ed. 2d 292 (2001). *Friends v. CRGC II*, 346 Or. at 384.

Friends argued alternatively that even if the Commission's interpretations are subject to *Chevron* deference, that standard should not extend to every interpretation, such as arguments raised by the Commission's lawyers during the judicial review process. The court agreed, holding that only interpretations articulated by the agency itself are entitled to deference. *Id.* at 385. However, the court did not find that the Court of Appeals had crossed that line.

III. Application to Substantive Claims at Issue

The court then applied the *Chevron* standard to several substantive challenges. First, Friends argued that the Plan violated the Scenic Act by failing to confine "commercial events" (weddings, receptions, and parties) to urban areas and areas designated by the Commission as Commercial land. The Commission responded that the Scenic Act did not specifically limit all commercial activity to those areas. The court found that, because the act was ambiguous on this point, the Commission's interpretation was entitled to deference.

The court reached a similar decision with respect to small-scale fish processing operations. The revised Plan permits such operations in conjunction with a family-based commercial fishing business on parcels designated GMA Residential, Small Woodland, or Small-Scale Agriculture, subject to certain conditions. Friends argued that the approved fish processing activities under the guidelines violated the Scenic Act's prohibition on industrial development outside of urban areas. 16 U.S.C. § 544d(d)(6).

Friends relied on the definition of "industrial uses" in the Plan, arguing that fish processing activities are industrial uses because they involve processing, handling, and distribution of raw material. The Commission responded that those activities are too limited to qualify as industrial uses. The court, finding that interpretation plausible, deferred to the Commission. *Friends v. CRGC II*, 346 Or. at 411.

The final interpretation question involved Friends' argument that the revised Plan's failure to inventory and protect geological resources violated the Scenic Act. Friends contended that geological resources are natural resources within the meaning of the Scenic Act. The Court of Appeals had rejected this claim but did not directly decide the question. The Supreme Court, however, found that the Scenic Act does not specifically define the term "natural resources" and that it conveys the kind of ambiguity that warrants deference. Friends argued that, since the Commission had construed the term in the Plan's glossary to include geological resources, the Commission was required to review and inventory such resources and establish rules for their protection. However, a second, narrower definition appears in the chapter addressing natural resources. The court found that, under that definition, "natural resources" did not appear to encompass geological features.

The court remanded for the Commission to specify which of the two conflicting definitions it had used.

IV. Livestock Grazing

Friends argued that the Plan violated the Scenic Act by allowing livestock grazing in almost all land use designations. However, the court found that, while the Scenic Act requires protection from adverse effects caused by commercial, residential, and mineral resource uses, the same is not true of agricultural activities such as grazing. 16 U.S.C. § 544d(d)(7)-(9). Friends argued alternatively that the Scenic Act's focus on natural resources requires such protection, but the court noted that the act seeks also to support the local economy; it does not require the Commission to protect "*all* natural resources in *all* circumstances and in *every* part of the Scenic Area." *Friends v. CRGC II*, 346 Or. at 400.

V. Adverse Cumulative Effects

Friends raised three separate arguments related to potential cumulative adverse effects of development within the Scenic Area. The arguments addressed the Scenic Act's requirement that the Plan prohibit non-urban development that adversely affects scenic, cultural, recreation, or natural resources. 16 U.S.C. §§ 544(d)(7)-(9). Each of these challenges was based on the definition of "adversely affecting" under the Scenic Act, with particular emphasis on "the relationship between a proposed action and other similar actions which are individually insignificant but which may have cumulatively significant impacts . . . ." *Id.* § 544(a)(3).

A. Scenic Resources

First, Friends argued that the revised Plan violates the Scenic Act because it contains "no standards, guidelines, criteria, or methodology for determining what causes cumulative adverse impacts to scenic resources . . . ." *Friends v. CRGC II*, 346 Or. at 386. The Court of Appeals disagreed, concluding that there was no provision requiring the Commission to spell out such standards. *Friends v. CRGC I*, 215 Or. App at 586. The Supreme Court, by contrast, agreed with Friends that the Scenic Act requires management plans to contain provisions minimizing adverse cumulative effects to scenic resources by development.

The Commission responded that the Plan does contain such provisions, such as the "key viewing areas" policy which requires new development to be visually subordinate to the applicable landscape setting. The court agreed that that policy and its related guideline, when read together, require implementing agencies to make a cumulative-effects determination for each development application and to prohibit those that would adversely affect scenic resources. The court concluded that such provisions in the Plan are consistent with the Scenic Act.

B. Natural Resources

Friends next argued that the revised Plan violated the Scenic Act by failing to minimize adverse effects to natural resources in the Scenic Area. The court noted that the chapter of the Plan devoted to natural resources contains no policies or guidelines equivalent to those for key viewing areas and visual subordinance determinations. The Commission countered that the Scenic Act

does not require it to prevent adverse cumulative effects in any particular way and that it has chosen to do so with a landscape setting approach rather than a case-by-case examination. This approach assigns land use designations and minimum parcel sizes, thus pre-defining the types and amount of development appropriate to avoid adverse effects.

The court found that, while some of the Plan's provisions were designed to ensure that development would not adversely affect natural resources, most contain no reference to adverse cumulative effects and no requirement that decision makers select a minimum parcel size, for instance, to eliminate such potential. The court thus agreed with Friends and concluded that the revised Plan violated the Scenic Act in this respect.

C. Cultural Resources

Finally, Friends argued that the revised Plan does not provide any standards for assessing the cumulative effects of development on cultural resources. The Commission argued that its provisions pertaining to land use designations and minimum parcel sizes were designed to eliminate the possibility that such effects would occur. The court, however, finding no provisions actually forbidding adverse cumulative effects to cultural resources, held that the Plan violated the Scenic Act. *Friends v. CRGC II*, 346 Or. at 408.

Lisa Knight Davies and Johnson Dunn

Friends of the Columbia Gorge, Inc. v. Columbia River Gorge Comm'n, 346 Or. 366, 213 P.3d 1164 (2009)

Appellate Cases – Washington

DEVELOPMENT FEES BY ORDINANCE MAY STILL BE ADDED POST-CONTRACT

In an appeal under the Land Use Petition Act, Chapter 36.70C Revised Code of Washington (RCW), the Washington Court of Appeals affirmed the principle that impact fees accrue even against an approved project, especially against the sleepy developer who neglects to act in a timely fashion. In *Belleau Woods II, LLC v. City of Bellingham*, 150 Wash. App. 228, 208 P.3d 5 (2009), the developer Belleau Woods II, LLC (Belleau Woods) planned to develop 7.39 acres of apartments in northern Bellingham. The applicable Bellingham development regulations stated that the area was intended for residential units, subject to a prerequisite consideration of "contribution of land or fees for neighborhood park and trail system." BELLINGHAM, WA., MUN. CODE § 20.00.080 (2009) [hereinafter BMC]. In lieu of payment for capital improvements of the area, the development contract between Belleau Woods and the city allowed the Parks and Recreation Department (Parks Department) to accept "construction of improvements or land dedication . . . ." 150 Wash. App. at 232. Hoping to meet this and a city requirement for a wetland/buffer mitigation plan, in 2004 Belleau Woods offered, and the Parks Department accepted, an agreement to dedicate a conservation easement for a public trail and protection of wetlands.

Two years later, Belleau Woods still had not begun construction. In the meantime, Bellingham adopted a new impact fee ordinance under RCW 82.02.050 "as a means of mitigating residential development's impacts upon the parks and recreation facilities in the City." BMC § 19.04.010(E). This fee was adopted as a way to assure that new developments share in the costs of providing for recreational improvements. BMC § 19.04.030(B). Importantly, the ordinance provided an exemption for developments conditioned upon an agreement to mitigate park impacts, provided that any such agreement predated the fee imposition. 150 Wash. App. at 234 (citing BMC § 19.04.130(A)(6)(b) (deleted by ordinance in 2009)). It also provided a credit against park impact fees for the fair market value of dedications of land made pursuant to the capital facilities plan and accepted by the Parks Department. BMC § 19.04.140.

Under this new ordinance, Belleau Woods was not assessed the park impact fee—amounting to $111,215.13—until it applied for building permits. Surprised, Belleau Woods objected to the Parks Department on the ground that a previous dedication of land, valued at $8,912.34, was intended to satisfy all regulatory conditions relating to the provision of open space. The Parks Department denied the claim, arguing that the dedication was made to satisfy a prerequisite condition under previous rezoning, *not* a park impact fee. The Parks Department also noted that if Belleau Woods had acted in 2004, before the adoption of the 2006 ordinance, the dedication would have been sufficient. In the absence of such timeliness, "there is no prior vesting for the fee based on development approvals," and Belleau Woods was limited to claiming a credit towards the park impact fee for the value of its prior dedication. 150 Wash. App. at 236. After the superior court found that Belleau Woods should be exempt from park impact fees, the court of appeals reversed, finding that "the city intended that a developer is entitled to a full exemption only if the previous contribution of land or money was equivalent to the park impact fees assessed . . . ." 150 Wash. App. at 243.

Key to the opinion is the court's construction of the controversy as a simple question of vested rights under RCW 58.17.033 rather than a contract enforcement case. The court clarified that impact fees do not affect physical aspects of development. Instead, they simply add to the cost of a project and therefore are not "land use control ordinances" (which vest at the time an application is perfected). *Id.* at 238-39. However, the court did recognize that a "development agreement," as described by RCW 36.70B.170(1), could vest rights and foreclose park impact fees. *Id.* at 239. Such agreements, though, could only be made by ordinance or resolution after a public hearing as required by RCW 36.70B.200, and the record did not suggest that the contract in this case was approved through such a process.

Finding no vested rights, the court looked to the ambiguous language of the ordinance's exemption for any "development activity for which park impacts *have been mitigated* pursuant to an agreement." *Id.* at 241 (quoting BMC § 19.04.130(A)(6)(b) (deleted by ordinance in 2009)) (emphasis added). Belleau Woods contended that the exemption applies if any of the park impacts