

■ COURT OF APPEALS AFFIRMS CONVERSION OF BROUGHTON LUMBER MILL SITE TO RECREATION RESORT

In *Friends of the Columbia Gorge, Inc. v. Columbia River Gorge Commission*, 236 Or. App. 479, 238 P.3d 378 (2010), petitioners sought judicial review of a final order of the Columbia River Gorge Commission (Commission) amending the Columbia River Gorge National Scenic Area Management Plan (Management Plan) to make it possible to convert a former lumber mill site located in the Columbia River Gorge National Scenic Area (Scenic Area) in Skamania County, Washington, to a recreation resort. Petitioners made three assignments of error: 1) the Commission lacked authority to amend the Management Plan because conditions in the Scenic Area had not significantly changed; 2) the amendment is inconsistent with the purposes and standards of the Columbia River Gorge National Scenic Area Act, 16 U.S.C. §§ 544-544p (1986) (Act); and 3) the Commission inappropriately determined that the mill site contains an existing industrial use. The Court of Appeals affirmed, holding that: 1) the Commission's findings that significant changes had occurred in the Scenic Area were supported by substantial evidence in the record; 2) the amendment was consistent with the purposes and standards of the Act given the conditions existing at the time of the amendment; and 3) the Commission did not make a legal determination as to the existing use of the mill site.

The Commission is a bi-state agency that administers the land use rules for the Scenic Area, a 300,000-acre region encompassing lands in Hood River, Multnomah and Wasco counties in the state of Oregon, and Klickitat and Skamania counties in the state of Washington. Congress created the Scenic Area in 1986 to protect both the scenic, cultural, recreational, and natural resources of the Columbia River Gorge and the economy of the area by encouraging growth to occur in urban areas and allowing economic development consistent with resource protection. 16 U.S.C. § 544a (1986). The Act requires the Commission to conduct studies, develop land use designations and adopt a Management Plan for the Scenic Area. *Id.* § 544d(a)-(c).

The Management Plan, adopted in 1991, is subject to periodic review and revision. The Act requires the Commission to review the Management Plan at least every ten years to determine whether revisions are necessary or appropriate. *Id.* § 544d(g). The Act also permits the Commission to amend the Management Plan at any time in response to changes in the Scenic Area. *Id.* § 544d(h). To approve an amendment, the Commission must find that: 1) conditions in the Scenic Area have significantly changed, such as new information or inventory data regarding land uses or resources that could result in a change of a plan designation, classification or other plan provision, or changes in legal, social, or economic conditions not anticipated in the Management Plan; 2) the amendment is consistent with the Act's purposes and standards; and 3) no practicable alternative to the amendment exists that is more consistent with the Act's purposes and standards. OAR 350-050-0030.

In 2006, Broughton Lumber Company, owner of the fifty-acre mill site, proposed to develop the site into a recreation resort. The site was zoned Commercial Recreation, and recreation use there could include an RV campground with up to 175 spaces and thirty-five overnight accommodation units. The director of the Commission determined that the development would require a "legislative" (as opposed to "quasi-judicial") amendment to the

Management Plan. The Commission approved a plan amendment in 2008 allowing a new "recreation resort" review use on Commercial Recreation-designated property that contains "an existing industrial complex," adding new policies, guidelines, and definitions to the Management Plan.

The Commission determined that there had been significant changes in conditions in the Scenic Area, specifically: 1) the decline in the timber industry; 2) changes in the orientation of the gorge economy from the wood products industry to travel and tourism; 3) the decline in the use and condition of the industrial site and possible contamination and cleanup cost issues; 4) a change in legal conditions; and 5) trends in recreation uses and resort development. The Commission also determined that the plan amendment was consistent with the purposes and standards of the Scenic Act, concluding that the amendment provides an incentive to bring a site with scenic impacts into conformance with the Management Plan's scenic standards, an increase in protection for existing adjacent recreation resources over existing Management Plan provisions, and enhancement of scenic, cultural, natural, and recreation resources, thus satisfying the first purpose of the Act. It further concluded that the plan amendment was consistent with the Act's second purpose, reasoning that development of the site as a recreation resort limited to short-term occupancy encourages other economic development in nearby urban areas, commercial uses at the resort would be limited to further support the economies of nearby urban areas, and the plan amendment would enhance Gorge resources on-site and off-site.

Petitioners subsequently petitioned for judicial review, challenging each of the findings on which the Commission based its determination that there had been significant changes in the Scenic Area. In its order allowing the amendment, the Commission observed that one of the most significant changes in the Gorge since the Management Plan was adopted in 1991 has been the socio-economic change triggered by a reduction in timber harvest on private, public, and federal lands. The Commission determined that the change qualified as a significant change under OAR 360-050-0030(1)(c), because while the decline in timber harvest had begun before adoption of the Management Plan, the magnitude, severity and accompanying effects were not known in 1991. Petitioners argued the Commission erred in concluding that the decline in the timber industry was a change not anticipated in the Management Plan, because it was universally known at the time of plan adoption that timber jobs were on the decline, injunctions barring timber harvests on national forest land within the range of the northern spotted owl were in place in 1989, and timber harvests had already begun to decrease considerably by 1991.

Courts defer to the Commission's interpretation of its own rule unless no reasonable reading of the rule will sustain the interpretation. *Friends of the Columbia Gorge, Inc. v. Columbia River Gorge Comm'n*, 346 Or. 415, 212 P.3d 1243 (2009). Applying that standard of review, the court found that the Commission's interpretation of its rule to include changes in the degree and duration of the decline in the timber industry was plausible. Reviewing the Commission's findings of fact for substantial evidence under ORS 196.115(3)(e), the court also found that a reasonable person could conclude that the decline in the timber industry was more severe than anticipated in 1991, and that the Commission could consider evidence of changes outside the Scenic Area, such as logging rates and mills that had closed in the Gorge region, as circumstantial evidence of changes within the Scenic Area.

The second significant change identified by the Commission is the shift in the Gorge economy from natural resource extraction to tourism. Given the dramatic changes in the growth of the travel and tourism industry since the mid-1990s, the Commission reasoned that conversion of the Broughton site to a resort would be consistent with and respond to changes that have occurred in Skamania County and elsewhere in the Scenic Area. Petitioners made a strong case that the increase in tourism was anticipated in the Management Plan. However, the court concluded the

Commission's finding of a greater-than-anticipated need to shift from an economy based on timber to one based on tourism was supported by substantial evidence, and the Commission did not err in determining the change was a significant one under OAR 350-050-0030(1)(c).

Under OAR 350-050-0030(1)(b), new information or inventory data regarding land uses or resources that could result in a change of plan designation, classification, or plan provision constitute a significant change for purposes of amending the Management Plan. The Commission identified the potential costs of decommissioning the mill and hazardous waste cleanup at the Broughton site as new information because the Commission had not considered such information in 1991. Petitioners argued there was not substantial evidence that the Broughton site is in fact contaminated. While true, the court pointed out the Commission found only that there was a high likelihood of contamination and substantial evidence there would be significant costs associated with the cleanup. Further, while the Commission was aware when it adopted the Management Plan that a mill operated at the site and that such sites can be contaminated, the court held that information need not be newly-created or newly-available to constitute new information under OAR 350-050-0030(1)(b) and can simply be information the Commission has not considered before. Thus, information regarding costs of decommissioning the mill and cleaning up the site qualify as new information.

Petitioners challenged the fourth significant change identified by the Commission, a change in legal conditions in the area pursuant to the court's ruling in *Friends of the Columbia Gorge, Inc. v. Columbia River Gorge Commission*, 215 Or. App. 557, 605-606, 171 P.3d 942 (2007), *rev'd on other grounds*, 346 Or. 366, 213 P.3d 1164 (2009). There the court held that expansion of "existing industrial uses" in the General Management Area contradicted the Act's requirement that the Management Plan prohibit industrial development in the Scenic Area outside urban areas. There was no evidence Broughton had attempted or intended to expand its industrial operations. Deferring to the Commission's interpretation of its own rule, the court held that expansion of industrial uses at the Broughton site was a possibility until its decision in *Friends of the Columbia Gorge, Inc. v. Columbia River Gorge Comm'n*, 236 Or. App. 479, 505, 238 P.3d 378 (2010). Thus, the Commission did not err in concluding there had been a change in legal conditions within the meaning of OAR 350-050-0030(1)(c).

Finally, petitioners challenged the Commission's findings with respect to trends in recreation uses and resort development since adoption of the Management Plan, because the Commission relied on information outside the Scenic Area. The court held that nothing in the Act precludes the Commission from considering such information. *Id.* at 494. Petitioners also argued substantial evidence did not support the basis for the Commission's findings that there has been a significant change in recreation uses in the area, indicating development of an RV campground at the Broughton site may not be economically viable and may compete with struggling private campgrounds. The court found that the Commission heard conflicting evidence on RV campground occupancy rates and economic viability but, reviewing the record as a whole, held a reasonable person would have made the same findings. *Id.*

Petitioners also contended that the plan amendment was inconsistent with the purposes and standards of the Act because it failed to comply with the Commission's 1990 decision that a smaller scale resort proposed by Broughton on the same site violated the Act. The court disagreed with petitioners' argument that a level of development less than what was rejected in Broughton's previous application is necessary to be consistent with the Act's second purpose of promoting economic growth in existing urban areas. The court noted Congress envisioned the Management Plan would evolve, so it follows that the Commission's understanding as to the type and level of development that would meet the purposes and standards of the Act may also change. Thus, the appropriate inquiry under OAR 350-050-0030(2) is whether the

amendment is consistent given the conditions existing at the time of the amendment. Here, the Commission explained that, because of short-term restrictions on the lodging units, the contemplated recreation resort will draw an influx of short-term visitors to commercial establishments in existing urban areas, consistent with the Act's second purpose.

Lastly, the court ruled that the Commission did not make a legal determination as to the nature of existing use of the mill site, finding that the Commission's use of the descriptive term "existing industrial site" was simply for planning purposes.

Lisa Knight Davies

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