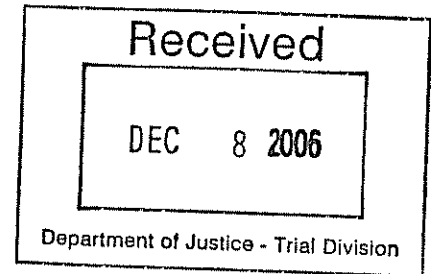




CIRCUIT COURT OF OREGON
THIRD JUDICIAL DISTRICT
MARION COUNTY COURTS
P.O. Box 12869
SALEM, OREGON 97309-0869

JAMESE RHOADES
Circuit Court Judge
(503) 588-7950

December 6, 2006



Wallace Lien
Attorney at Law
1775 32ND PLACE NE
SALEM OR 97303

Darsee Staley
Assistant Attorney General
1162 COURT ST NE
SALEM OR 97301

Re: Marckx v. State of Oregon, et al, Case No. 05C19654

Dear Counsel:

This matter came before the Court on October 25, 2006, for trial. Plaintiffs appeared through counsel, Wallace Lien, and Defendants appeared through counsel, Darsee Staley. The matter, being fully submitted, was taken under advisement on that date.

Issue

Whether this court should affirm the order of the Department of Land Conservation and Development (DLCD) approving plaintiffs' Measure 37 demand but determining that State-Wide Planning Goal 3 applied to plaintiffs' property at the time they acquired it?

Facts

This case came before this court on a stipulated facts trial. The following facts are uncontested:

Plaintiffs acquired the property at issue, a 65-acre tract in Marion County, on November 6, 1975, and have owned it since that time. At the time they acquired the property, it was zoned AR-5, which would have permitted five-acre residential lots. Pursuant to that zoning designation, the property could have been divided into thirteen parcels, with one single-family home on each.

State-Wide Planning Goal 3 was enacted on January 25, 1975, prior to the time plaintiffs acquired the property. In 1979, the zoning for plaintiffs' property was changed to Exclusive Farm Use (EFU).

To: Wallace Lien and Darsee Staley
Re: Marckx v. State, Case No. 05C19654
Date: December 6, 2006
Page: 2

Plaintiffs timely filed a claim for compensation pursuant to Ballot Measure 37 (2004), codified at 197.352.¹ On August 16, 2005, defendant Department of Land Conservation and Development (DLCD) issued a final order on plaintiffs' claim, determining that plaintiffs had a valid claim. In lieu of compensation, DLCD chose not to apply land use regulations that were enacted subsequent to plaintiffs' acquisition of the property. DLCD found, however, that Goal 3 would apply to plaintiffs' use of the property.²

On October 11, 2006, plaintiffs filed a timely petition for judicial review of DLCD's order, as well as a claim for compensation under ORS 197.352(6).

DLCD filed a motion to dismiss or, in the alternative, for judgment on the pleadings. In addition to defending its order, DLCD contends that this court does not have jurisdiction to consider plaintiffs' ORS 197.352 compensation claim because the APA provides the exclusive procedure for review of DLCD actions. The parties agreed to proceed with a stipulated facts trial.

Discussion

As noted, Goal 3 was adopted before plaintiffs acquired the property. The "goal" set forth in Goal 3 was, in part:

To preserve and maintain agricultural lands.

Agriculture lands shall be preserved and maintained for farm use, consistent with existing and future needs for agricultural products, forest and open space. These lands shall be inventoried and preserved by adopting exclusive farm use zones pursuant to ORS Chapter 215. Such minimum lot sizes as are utilized for any farm use zones shall be appropriate for the continuation of the existing agricultural enterprise within the area.

Goal 3 also set forth factors to assess if agricultural land was ever sought to be converted to

¹The only difference between the measure as presented to the voters and as codified are found in sections 1 and 5. The measure refers to land use regulations enacted prior to or after "the effective date" of the measure, while the statute provides the relevant date, December 2, 2004. Therefore, the remainder of this opinion will cite to the codification.

This court notes that the measure withstood a challenge to its constitutionality. *See MacPherson v DAS*, 340 Or 117, 130 P3d 308 (2006). That decision did not address any of the issues currently before this court.

²Plaintiffs provide evidence that Marion County did not directly apply Goal 3 to land use applications until January of 1978.

To: Wallace Lien and Darsee Staley
Re: Marckx v. State, Case No. 05C19654
Date: December 6, 2006
Page: 3

urbanizable land, definitions for "Agricultural Land" and "Farm Use," and guidelines for implementing Goal 3 in land use plans (Respondent's Trial Memorandum, Attachment C, pp 7-8).

Marion County's comprehensive plan was acknowledged by the Land Conservation and Development Commission (LCDC) in May of 1982, after plaintiffs acquired the property (Respondent's Trial Memorandum, Attachment D). As noted, the zoning for plaintiffs' property was changed to EFU in 1979, after they had acquired the property.

Accordingly, this court must determine whether the provisions of Goal 3 applied directly to individual land use decisions made after the goal was enacted, or only via the comprehensive plans and zoning regulations enacted as a result of the comprehensive plan.

In one of the first cases to consider this issue, the Supreme Court observed that an amendment to the comprehensive plan must comply with the state-wide planning goals, and determined that the LCDC goals applied to decisions concerning the individual piece of property at issue in the case. *Sunnyside Neighborhood v. Clackamas Co. Comm.*, 280 Or 3, 16-18, 569 P2d 1063 (1977). Despite that conclusion, the court stated that LCDC goals "are directed primarily to the overall planning process. With some few exceptions, they are not designed to guide decisions about the permissible uses or particular pieces of property. The comprehensive plan is expected to provide that guidance." *Id.* at 15. This language may be explained by the fact that, as expressed by the Court of Appeals, the legislature did not expect that it would take longer than one year for local governments to enact comprehensive plans that complied with the goals. *See Willamette University v. LCDC*, 45 Or App 355, 369-70, 608 P2d 1178 (1980).

A later case considered the legislative intent in more depth, finding that the legislature had implied that the state-wide planning goals applied to individual land use decisions when it directed that the goals be enacted. *See Alexanderson v. Polk County Commissioners*, 289 Or 427, 433-34, 616 P2d 459, *reh'g den*, 290 Or 137 (1980).³ The court reached this conclusion by noting that LCDC was authorized to review actions that were alleged to conflict with the state-wide goals. *See id.* at 434; ORS 197.300(1)(b) (1975). The court further relied on the fact that ORS 197.275(2) (1977), which provided that, after a comprehensive plan had been acknowledged, the state-wide goals would apply to individual decisions regarding specific properties "only through the acknowledged comprehensive plan and implementing ordinances." The court concluded that this language implied that, prior to acknowledgment, the state-wide goals applied directly to those

³It is important to note that, in arriving at its decision, the court was addressing the question of whether the legislature intended counties to superimpose state-wide goals on their existing ordinances, rather than basing its decision on the county's policy of applying the state-wide planning goals to the land use request at issue. *See Alexanderson*, 289 Or at 431-32.

To: Wallace Lien and Darsee Staley
Re: Marckx v. State, Case No. 05C19654
Date: December 6, 2006
Page: 4

actions. *See Alexanderson*, 289 Or at 434.⁴

Cases decided after *Alexanderson* provide support for the conclusion that the state-wide goals apply to any individual land-use decisions made subsequent to the adoption of the goals but prior to the acknowledgment of comprehensive plans adopted pursuant to the goals. *See 1000 Friends v. Benton County*, 32 Or App 413, 430, 575 P2d 651, *rev den*, 284 Or 41 (1978) (the County's failure to address whether subdivision plans complied with state-wide goals required reversal, even though plans complied with zoning regulations); *Jurgenson v. Union County Court*, 42 Or App 505, 509, 600 P2d 1241 (1979) ("one basic thrust of ORS ch. 197 is that specific land-use decisions [including partition decisions] during this transition period must be consistent with the goals" (citing ORS 197.300(1)(b) and *Sunnyside Neighborhood*, 280 Or 3)); *see also Dodd v. Hood River County*, 317 Or 172, 185, 855 P2d 608 (1993) (noting, in analyzing whether a post-purchase zoning change resulted in petitioners' property being taken without just compensation, that "where local unacknowledged land use regulations * * * conflicted with the goals, land use decisions were to be made in compliance with LCDC goals"); *1000 Friends of Oregon v. LCDC*, 301 Or 447, 724 P2d 268 (1986) ("Once the goals were adopted, each city and county (local government) in Oregon was required to make its land use decisions and to prepare comprehensive land use plans 'in compliance with the goals'" (quoting ORS 197.175(2))); *Perkins v. City of Rajneeshpuram*, 300 Or 1, 4-6, 10, 706 P2d 949 (1985) (stating that a city must continue to comply with Goal 3 until its comprehensive plan was acknowledged); *Willamette University v. LCDC*, 45 Or App at 365 (noting that local land use decisions "must comply with the statewide planning goals unless and until the local comprehensive plan is acknowledged by LCDC to be in compliance with the statewide planning goals").

In light of the foregoing, it is clear to this court that Goal 3 would have applied to individual land use decisions made after it was enacted but prior to recognition of the comprehensive plan.

⁴This portion of ORS 197.275 was not in effect at the time plaintiffs acquired their property. Because this law was only part of the grounds on which the court's argument rested, however, the fact that it had not yet been enacted does not undermine the court's conclusion as it applies to plaintiffs' case.

In any event, ORS 197.275 (1975) directed that, although existing zoning and other ordinances and regulations would continue in effect until they were revised, "existing planning efforts and activities shall continue and * * * be utilized in achieving the purposes of ORS 197.005 to 197.430 * * *." ORS 197.040(2)(a) provided for the establishment of state-wide planning goals (which, of course, included Goal 3). Accordingly, the law in effect at the time plaintiffs acquired their property also indicated that the state-wide planning goals were to be directly applied to individual land-use decisions.

The three-judge dissent in *Alexanderson* opined that the state-wide goals were not applicable to individual decisions, as shown by the fact that LCDC had only the *authority* to require that a particular action comply with the goals, and was not required to exercise that authority. *See id.* at 438 (Tongue, J., dissenting).

To: Wallace Lien and Darsee Staley
Re: Marckx v. State, Case No. 05C19654
Date: December 6, 2006
Page: 5

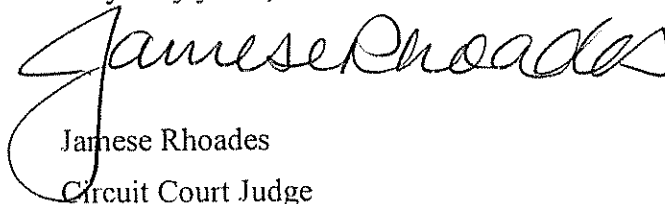
This includes decisions that, even if not required to be approved by the county pursuant to its own rules and procedures, would have been required to be approved pursuant to Goal 3. Thus, despite the fact that it may not have been Marion County's practice to apply Goal 3 to individual land use decisions – or even that the county was not required to approve a minor partition – at the time plaintiffs acquired the property, the legislature intended that the county apply Goal 3 to these types of decisions.⁵ This is because LCDC had authority to require that a particular action comply with the goals. *See* ORS 197.300(1) (1975). Had the legislature not intended that local governments consider and comply with these goals prior to the time their comprehensive plans were implemented, the legislature would not have provided LCDC with this authority. This is also consistent with the provision in ORS 197.275 (1975), that existing planning efforts and activities achieve the purposes of the state-wide planning goals. Therefore, at the time plaintiffs acquired their property, counties were required to consider not only the zoning rules and ordinances in effect, but also Goal 3, in determining whether specific uses were permitted. Consequently, plaintiffs use of their property remains subject to Goal 3.

Because this court's determination on plaintiffs' claim under the APA renders moot their claim for compensation pursuant to ORS 197.352(6), this court will not address that claim.⁶

Conclusion

This court affirms DLCD's August 16, 2005 Order. Ms. Staley will kindly prepare the appropriate General Judgment of Dismissal.

Very truly yours,



James Rhoades
Circuit Court Judge

JLR:nl

⁵Furthermore, even if it would have been possible to partition the property without the county's involvement, the county would have been required to approve any buildings sought to be built on the property.

⁶Plaintiffs' attorney acknowledged that, if this court determined that Goal 3 applied in this case, plaintiffs' ORS 197.352(6) claim would lack merit.