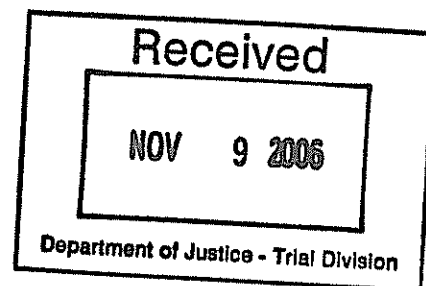


**CIRCUIT COURT  
THIRD JUDICIAL DISTRICT**

Marion County Courthouse  
Temporary Address: 900 Court St NE  
Permanent Address: 100 High St NE  
PO Box 12869  
Salem OR 97309-0869

MARY MERTENS JAMES  
Circuit Court Judge  
PHONE: (503)-986-1643  
FAX: (503) 986-1737



November 7, 2006

DONALD ROACH  
ATTORNEY AT LAW  
3718 SW CONDOR STE 110  
PORTLAND OR 97239

DARSEE STALEY  
ATTORNEY AT LAW  
1162 COURT ST NE  
SALEM OR 97301

RE: COREY, ET AL V STATE OF OREGON, ET AL  
Case # 05C18840

Counsel:

This matter came before the court on August 9, 2006 on respondents' Motion for Summary Judgment. Petitioners Virginia Corey, Bergis Road LLC and Bernita Johnston were represented by counsel Donald Roach. Respondents State of Oregon, Department of Administrative Services, Department of Land Conservation and Development and Land Conservation and Development Commission were represented by Assistant Attorney General Darsee Staley. The court heard oral argument from both counsel, and then took the case under advisement.

I have carefully reviewed the record and counsel's pleadings, together with applicable legal authorities. Now, being fully advised, I make the following findings and conclusions.

**Discussion**

The following facts are uncontested:

Caroline Olson, the mother of Virginia Corey and Bernita Johnston acquired the property at issue in 1973 ("the property"). She died on December 11, 1978, leaving the property in equal thirds to Ms. Corey, Ms. Johnston, and

Wesley Olson, Jr., another of her children.<sup>1</sup>

At the time of this conveyance, the property was zoned RA-2. This zoning designation would have permitted two-acre lots with a dwelling. The State-Wide Planning Goals, including Goal 3, had been adopted at the time of this conveyance. Clackamas County's comprehensive plan was acknowledged by the Land Conservation and Development Commission ("LCDC") on December 31, 1981. As a result, the property was later designated Exclusive Farm Use ("EFU").

In 1992, Ms. Johnston transferred her interest in the property to a revocable trust, with herself as trustee. Subsequently, Ms. Johnston created Bergis Road LLC. The revocable trust is the sole member and manager, and on August 12, 2004, the trust conveyed the property to the LLC.

On January 27, 2005, Ms. Corey and Bergis Road LLC filed a claim pursuant to Measure 37, which is codified at 197.352.<sup>2</sup> On July 21, 2005, the Department of Land Conservation and Development ("DLCD") issued a Final Order finding that petitioners' claim was valid. In lieu of compensation, the DLCD chose not to apply certain land use regulations to the property. The DLCD found that Ms. Corey's use of the property was subject to Goal 3 and the provisions of ORS chapter 215 (1975), both in effect at the time she acquired the property. The DLCD determined that the LLC was subject to all land use planning provisions in effect on August 12, 2004 when the LLC acquired the property.

---

<sup>1</sup>Pursuant to ORS 114.215(1) and 112.355, title to the property vested in these persons upon Ms. Olson's death. Because that distribution was not changed after probate, these persons retained their interest in the title from the time of Ms. Olson's death even though they were not officially granted title until 1982, when probate on the estate closed. See ORS 116.113(1), (3) (providing that court shall enter a judgment of final distribution and that, if the court awards property to persons other than those set forth in the will or entitled to it by intestate succession, "the judgment operates as a transfer of the property between those persons").

<sup>2</sup>The 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.

Petitioners now seek review of the DLCD's order pursuant to ORS 183.484, asserting that the DLCD erred in determining that Goal 3 and provisions of ORS chapter 215 (1975) applied to Ms. Corey's use of the property, that Ms. Johnston is a present owner of the property in her individual capacity, and that the property was erroneously classified as farmland as defined in Goal 3. Respondents seek summary judgment on these issues.

Summary judgment is proper when, viewing the record before the court in the light most favorable to the adverse party, no genuine issue of material fact exists because no objectively reasonable juror could return a verdict for the adverse condition. If the adverse party would have the burden, at trial, to produce evidence on an issue raised in the motion, it also has the burden of producing evidence on that issue for summary judgment. See ORCP 47 C.

1. Relevant Terms of ORS 197.352 (Measure 37)

ORS 197.352 requires a public entity that enacted a land use regulation to compensate a property owner if that regulation reduces the fair market value of the owner's property, if that owner or the owner's family member acquired the property before the regulation was enacted. See ORS 197.352(1), (3)(E). Alternatively, and in its discretion, the public entity could choose to permit the owner of the property to use the property "for a use permitted at the time the owner acquired the property" rather than providing compensation to the owner. ORS 197.352(8). The definitions portion of ORS 197.352 defines owner as "the present owner of the property, or any interest therein." ORS 197.352(11)(C).

2. Whether Ms. Johnston or the Trust, or Only the LLC, is an "Owner" of the Property as Defined by ORS 197.352

As noted, the revocable trust Ms. Johnston created is the sole member and manager of the Bergis Road LLC. For the reasons discussed below, this court finds that the LLC, rather than Ms. Johnston or the trust, is the entity holding the property and is the only entity with any interest in the property.<sup>3</sup>

ORS 63.239 specifies that a member of an LLC "has no interest in specific limited liability company property." Similarly, ORS 63.165 limits the debts, obligations, and liabilities incurred by an LLC solely to the LLC, specifying

---

<sup>3</sup>Respondents suggest this court should not reach this issue because Ms. Johnston was not involved in the proceeding before the LCDC and no demand was made on her behalf in this review proceeding. Although that is true, the issue of who holds an ownership interest in the property via the LLC is a ripe issue in this case, as the LLC was involved in both the agency and this proceeding.

that its members and managers are not personally liable. These provisions indicate the legislature's intent to permit individuals (or, in this case, a revocable trust) to create an LLC as a separate entity and to use it, in part, to shield themselves from personal liability. This shield may not, however, be used as a sword to create an interest in the proceeds or assets of the company. *Cf. Magill v. Schwartz*, 197 Or App 334, 342, 105 P3d 867 (2005), *rev den*, 338 Or 681 (2005) (Washington State's LLC law, which, like Oregon law, provides that members of an LLC have no interest in specific LLC property, prohibited member from claiming an interest in expected litigation proceeds of LLC).

This is because ORS 197.352 defines an owner as "the present owner of the property, or any interest therein." ORS 197.352(11)(C). An "owner" under the statute may include a person who has a partial, but present, ownership interest. But to have a meaningful "interest therein" in property for the purposes of ORS 197.352(11)(C), an owner must have "acquired" the property. See ORS 197.352(1), (2) & (3)(E) (providing that the owner of the property is entitled to compensation for the reduction in value to the property caused by land use rules enacted before the property was *acquired* by the owner (or a family member of the owner who owned the property prior to the acquisition or inheritance by the owner)); ORS 197.352(8) (providing that a public entity may "modify, remove, or not \* \* \* apply the land use regulation \* \* \* to allow the owner to use the property for a use permitted at the time the owner *acquired* the property" (emphasis added)). "Acquisition" of the property, in turn, requires an owner to have the right to possess, control, or exercise power over the property. See *Webster's Third New International Dictionary, Unabridged* (2002) (defining "acquire" as "to come into possession, control, or power"). The definition of "owner" contained in ORS 197.352(11)(C) therefore requires that the owner be a present legal owner of the property, or have a present legal ownership interest in the property.

The LLC acquired the property at the time Ms. Johnston's trust conveyed the property to the LLC. At that time, any interest in the property that either the trust or Ms. Johnston held ended, since members of an LLC have no interest in specific assets or property of the LLC. See ORS 63.239. Therefore, once the LLC obtained ownership of the property, only it had the authority to possess, control, or exercise power over the property. Accordingly, the date the LLC acquired the property is the appropriate date for determining which land use regulations will not apply to the property. The LCDL Final Order specifying that only those land use regulations enacted after the LLC became an owner of the property correctly interpreted the law.

### 3. Whether Goal 3 and ORS chapter 215 (1975) Apply to the Subject Property

At the time Ms. Corey acquired the property, Clackamas County had not yet enacted its Comprehensive Plan. The State had, however, adopted State-Wide Planning Goals, including Goal 3. These goals were adopted pursuant to the directive in ORS 197.225 (1977)<sup>4</sup> that the LCDC "adopt state-wide planning goals and guidelines."

Goal 3, the intent of which was "[t]o preserve and maintain agricultural lands," provided that:

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.

The Goal also provided factors to consider when seeking to convert rural agricultural land to urbanizable land, definitions for agricultural land and farm use, and guidelines for implementing Goal 3 in land use plans (Respondents' Attachment D, pp 7-8).

ORS 215.203 (1977) provided that exclusive farm use zones could be adopted when consistent with the comprehensive plan. If there was "[a]ny proposed division of land included within an exclusive farm use zone" that would result in creating parcels of ten or more acres, that proposal could be reviewed by the governing body of the county. If the proposed division would create parcels of less than ten acres, the proposal must be approved or disapproved by the governing body of the county. If there was review by the governing body – whether it was mandatory or discretionary – the governing body could not approve the division unless it conformed with the legislative intent regarding agricultural land use expressed in ORS 215.243. ORS 215.263(1), (2), (3) (1977).

ORS 197.175(1) (1977) required that cities and counties "shall exercise their planning and zoning responsibilities \* \* \* in accordance with [specified state statutes] and the state-wide planning goals and guidelines." Subsections two and three of that statute required each city and county to adopt a comprehensive

---

<sup>4</sup>The 1977 statutes became effective on October 4, 1977 and were in effect when petitioner acquired the property in 1978.

plan, and to enact zoning and other ordinances to implement the plan. See ORS 197.175(2), (3) (1977).

In *Sunnyside Neighborhood v. Clackamas Co. Comm.*, 280 Or 3, 569 P2d 1063 (1977), the Supreme Court addressed the question of what criteria applied to the county's approval of a proposed amendment to the county's comprehensive plan to change the designation of a specified piece of property. The court observed that the 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. However, the court noted, an amendment to the comprehensive plan must be shown to comply with the state-wide planning goals. *Id.* at 16. Importantly, despite the fact that the county's comprehensive plan was not yet required to conform with the LCDC goals at the time of the amendment, the court found that the LCDC goals applied to the county's determination related to that specific piece of property. See *id.* at 17-18.

Three years later, the court decided *Alexanderson v. Polk County Commissioners*, 289 Or 427, 616 P2d 459, *reh'g den*, 290 Or 137 (1980). There, the petitioner had applied for a partition of his land. The partition was proper pursuant to the county's ordinances, but the county, applying state-wide planning standards – specifically Goal 3 and ORS chapter 215 – refused to approve the partition. See *id.* at 429-30 & n 2. The court determined that, although the legislature had not addressed the question of whether the state-wide goals applied to individual "land conservation and development actions," when it directed the establishment of those goals, it implied that the goals applied both directly and indirectly to those actions. See *id.* at 433-34. This is because the 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) (1977). In addition, the court relied on ORS 197.275(2) (1977), which provided that, after a comprehensive plan was acknowledged, the state-wide goals would apply to land conservation and development actions "only through the acknowledged comprehensive plan and implementing ordinances" (emphasis added). The court found that this permitted the implication that before acknowledgment, the state-wide goals applied directly to those actions, and that the term "land conservation and development action" meant the application of general policies to specific properties. See *Alexanderson*, 289 Or at 434. Although the court noted that Polk County had adopted a policy that it would apply the statewide planning standards to requests for partitions, this was not the basis for its decision. See *id.* at 431-32 (noting that the question the court was addressing was whether the legislature intended counties to superimpose state-wide goals on their existing ordinances).

This decision was not reached without protest. The three-judge dissent argued that Goal 3 was intended only to apply to the adoption of comprehensive plans, ordinances, and regulations, rather than to individual decisions about a specific property. The dissent reasoned that, because the LCDC only had the *authority* to require that a particular action comply with the goals, the statutes did not require the county to directly apply the goals unless the LCDC had exercised that authority. See *id.* at 438 (Tongue, J., dissenting).

Nevertheless, decisions reached after *Alexanderson* have reiterated that local authorities must consider the state-wide goals in approving individual land-use decisions. In *1000 Friends of Oregon v. Benton County Comm.*, 32 Or App 413, 575 P2d 651, *rev den*, 284 Or 41 (1978), a writ of review proceeding, the county had approved subdivision plans that were consistent with current zoning regulations. The court found, however, that the County failed to address whether those plans complied with state-wide goals. This failure required reversal. See *id.* at 430. Similarly, in *Jurgenson v. County Court for Union County*, 42 Or App 505, 600 P2d 1241 (1979), the court noted that "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." *Id.* at 509 (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))).

The conclusion that the state-wide goals applied to individual decisions was reiterated in *Willamette University v. LCDC*, 45 Or App 355, 365, 608 P2d 1178 (1980), wherein the court noted that local land use decision "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." The court noted that the fact that the goals do not provide specific guidance is a result of the fact that the legislature did not anticipate that it would take more than one year for local governments to enact comprehensive plans that complied with the goals. See *id.* at 369-70. This reasoning explains the language in *Sunnyside Neighborhood* that the goals were not expected to guide decisions about individual pieces of property (see *Sunnyside Neighborhood*, 280 Or at 15), because, at the time *Sunnyside Neighborhood* was decided in 1977, the court and the legislature expected comprehensive plans to be developed and

acknowledged more quickly than actually occurred.

The rule that the state-wide goals controlled local land-use decision was applied in a different manner in *Perkins v. City of Rajneeshpuram*, 300 Or 1, 706 P2d 949 (1985). There, the city had attempted to permit urban uses of land before the comprehensive plan designating that land as within its Urban Growth Boundary had been acknowledged. The Supreme Court rejected that approach, stating that a city must continue to comply with the state-wide goals – specifically Goal 3 – until its comprehensive plan has been acknowledged. See *id.* at 4-6, 10.

At first blush, it seems to this court more logical for a local government to continue to apply its preexisting zoning and other ordinances until it has enacted a comprehensive plan and that plan has been acknowledged.<sup>5</sup> However, the above line of cases make clear to this court that the law provides otherwise. The fact is that the LCDC has authority to require that a particular action comply with the goals. See ORS 197.300(1)(b) (1977). If the legislature did not intend local governments to 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 consistent with the provision in ORS 197.275(2) (1977), that the state-wide goals would apply only through the comprehensive plan – once it was enacted.

Therefore, instead of continuing to simply apply their preexisting zoning rules and other ordinances, local governments must apply the state-wide goals in approving individual land use decisions. This is true even if the decisions are clearly permitted by the existing zoning rules and other ordinances. Consequently, respondent DLDC was correct to state, in its final order, that Goal 3 and ORS chapter 215 (1977), enacted prior to the time petitioner Corey acquired her property, would continue to apply to petitioner's use of the property.

#### 4. Whether the Property was Properly Classified as Farmland

Petitioners assert that there is a factual question as to whether the subject property was properly classified as agricultural land. This court notes that this question becomes relevant only if and when petitioner Corey is denied the ability to make a specific use of her land on the basis that it is agricultural land and

---

<sup>5</sup>This court also recognizes the practical and proof issues involved in requiring parties in an ORS 197.352 action to proceed on the basis of what decisions would have been made in the past, had the opportunity to make them arisen

Donald Roach  
Darsee Staley  
November 7, 2006  
Page 9

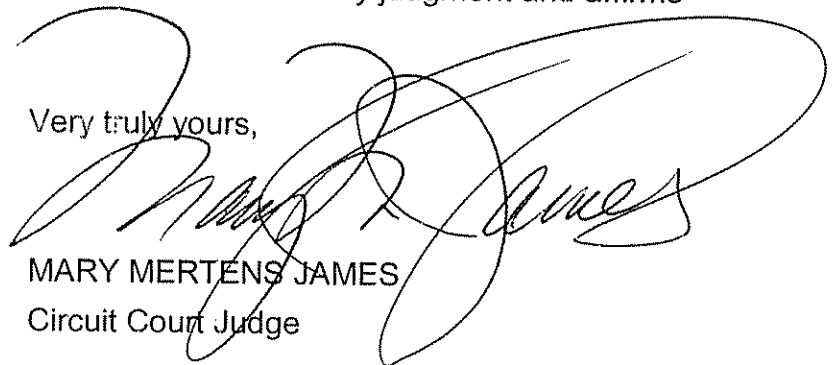
such use would be inconsistent with Goal 3 or the provisions of ORS chapter 215 (1977). No such instance has yet occurred, as petitioner has not yet made any application for use. As such, it is premature for this court to determine what uses petitioner could make of her property.

To the extent petitioners seek review of the initial designation of the subject property as agricultural land, that designation was made on August 23, 1979, when the property was zoned EFU20 (Record, Tab 5, p 2). Any review of that designation in this court must have occurred within 60 days of that order. See ORS 183.484(2). This litigation was commenced in 2005, long after the 60-day deadline passed. Therefore, any attempt by petitioners to seek such review in the current case is untimely.

### **Conclusion**

This court grants respondents' motion for summary judgment and affirms the DLCD's order.

Very truly yours,

A large, stylized handwritten signature in black ink, appearing to read 'Mary Mertens James', is written over the typed name and title.

MARY MERTENS JAMES  
Circuit Court Judge

MMJ/sg

cc: Court File