BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

LOGAN RAMSEY,
Petitioner,

vs.

MULTNOMAH COUNTY,
Respondent.

LUBA No. 2001-171

FINAL OPINION
AND ORDER

Appeal from Multnomah County.

Logan Ramsey, Portland, filed the petition for review and argued on his own behalf.

Sandra N. Duffy, Assistant County Counsel, Portland, filed the response brief and argued on behalf of respondent.

HOLSTUN, Board Chair; BASSHAM, Board Member; BRIGGS, Board Member, participated in the decision.

REMANDED 09/17/2002

You are entitled to judicial review of this Order. Judicial review is governed by the provisions of ORS 197.850.

Opinion by Holstun.

NATURE OF THE DECISION

Petitioner appeals a county ordinance that replaces county comprehensive plan and zoning ordinance provisions with City of Portland comprehensive plan and zoning provisions for that portion of the unincorporated county that lies inside the Metro urban growth boundary.

FACTS

The county conducted three hearings in this matter. The county sent individual notice to all property owners more than 20 days before its September 20, 2001 hearing.[1] The September 20, 2001 public hearing was the Board of County Commissioners' first public hearing on the disputed ordinance. Petitioner was among the property owners who were sent individual written notice of the proposed ordinance. The county did not send additional written notices in advance of its October 4, 2001 and October 11, 2001 hearings. However, at the conclusion of the September 20, 2001 and October 4, 2001 hearings the next public hearing date was announced. At the conclusion of the October 11, 2001 public hearing, the county adopted the disputed ordinance.

SECOND ASSIGNMENT OF ERROR

Petitioner argues the challenged ordinance is of "no legal effect" because the county did not comply with ORS 215.060. ORS 215.060 requires that the county hold at least one public hearing when it amends its comprehensive plan and requires at least 10 days' advance public notice "in a newspaper of general circulation."[2]

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[1] This written notice apparently was sent to comply with ORS 215.503, which requires that affected property owners be given written notice at least 20 days and no more than 40 days before the county adopts certain land use legislation. This type of written notice is commonly referred to as Ballot Measure 56 notice, a reference to the ballot measure that approved the legislation in 1998.

[2]The text of ORS 215.060 is as follows:

A. Failure to Give a Second and Third Prior Notice of the October 4, 2001 and October 11, 2001 Public Hearings

As we have already noted, petitioner was given individual written notice more than 20 days before the September 20, 2001 public hearing. If that individual written notice qualifies as the kind of notice that ORS 215.060 requires, the county's failure to repeat that individual written notice before the October 4, 2001 and October 11, 2001 public hearings does not violate ORS 215.060 in the circumstances presented here. This is because the September 20, 2001 public hearing was properly continued to October 4, 2001, and the October 4, 2001 public hearing was properly continued to October 11, 2001. *Apalategui v. Washington County*, 80 Or App 508, 514, 723 P2d 1021 (1986) (ORS 215.060 is satisfied where "[t]he date of each hearing held without published notice was announced at a hearing held pursuant to a published notice or at a hearing which was itself announced at a hearing held pursuant to public notice"). The critical question becomes whether the individual written notice that the county provided to property owners, to comply with Ballot Measure 56, also complies with the public notice requirement of ORS 215.060.

B. Failure to Publish Prior Notice in a Newspaper of General Circulation

Although the county sent individual written notice by mail to affected property owners, the county did not provide any advance published notice of the public hearings that preceded enactment of the disputed ordinance "in a newspaper of general circulation." In arguing that its failure to provide the required published notice in a newspaper does not violate ORS 215.060, the county emphasizes that petitioner was given individual written notice of the September 20, 2001 public hearing and participated throughout the proceedings

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> "Action by the governing body of a county regarding the plan shall have no legal effect unless the governing body first conducts one or more public hearings on the plan and *unless 10 days' advance public notice of each of the hearings is published in a newspaper of general circulation in the county* or, in case the plan as it is to be heard concerns only part of the county, is so published in the territory so concerned and unless a majority of the members of the governing body approves the action. The notice provisions of this section shall not restrict the giving of notice by other means, including mail, radio and television." (Emphasis added.)

that led to the challenged ordinance. According to the county, the actual written notice that petitioner received is *better* than the newspaper notice that ORS 215.060 requires. The county argues that in enacting ORS 215.060 the legislature could not have intended to invalidate ordinances "because landowners received *better* notice than the legislature intended [under ORS 215.060]." Respondent's Brief 13 (emphasis in original).

The county relies largely on the Oregon Supreme Court's decision in *Fifth Avenue Corp. v. Washington Co*., 282 Or 591, 581 P2d 50 (1978). In that decision the court reached two potentially relevant conclusions, one involving ORS 215.050 and one involving ORS 215.060. First, the court concluded that the county's adoption of the plan amendment that was at issue in that case by resolution rather than by ordinance did not violate ORS 215.050 or the county charter.[3] ORS 215.050 is ambiguous and can be read to require that a comprehensive plan be adopted by ordinance. However, the court reviewed the history of the statute and concluded that it did not impose that requirement. The court also noted that while the county's decision was nominally a resolution rather than an ordinance, the actual procedures that the county followed in enacting the resolution "were functionally equivalent to the ordinance enactment procedures prescribed by * * * the Washington County Charter." 282 Or at 601. The court also concluded that ORS 215.050 does not impose an absolute requirement that a comprehensive plan be adopted by ordinance. We understand the county to argue that this conclusion supports its substance over form argument.

The second conclusion in *Fifth Avenue* concerned whether the notice given by the county in that case complied with ORS 215.060.[4] In *Fifth Avenue* there was no dispute that

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[3] ORS 215.050 (1973) provided:

> "The county governing body shall adopt and may from time to time revise a comprehensive plan and zoning, subdivision and other ordinances for the use of some or all of the land in the county. The plan and related ordinances may be adopted and revised part by part."

[4] The current text of ORS 215.060 was quoted earlier at n 2. The relevant statutory language was the same in 1973.

the county had provided notice "in newspapers of general circulation in Washington County at least 10 days prior to the hearing on the comprehensive plan[.]" 282 Or at 606. Therefore, the issue presented in this appeal was not presented in *Fifth Avenue*. The issue there concerned whether the content or substance of the notice was adequate. ORS 215.060 does not expressly set out what must be included in a notice. The court looked to other related contexts for a notice content standard:

> "* * * For the standards by which the present notice is to be judged we may look to the law which has developed regarding notice requirements for similar legislative actions, *e.g.*, the adoption of a zoning ordinance.
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> "The law in this regard from all jurisdictions is collected in Anno: Validity and Construction of Statutory Notice Requirements Prerequisite to Adoption of Amendment of Zoning Ordinance or Regulation, 96 ALR 2d 449 (1964). The general requirement given there is that the contents of the notice must 'reasonably apprise those interested that the contemplated action is pending.' 96 ALR 2d at 497. In particular, the notice must designate the property involved in the proposed action such that 'the recipients of the notice can reasonably ascertain from it that property in which they are interested *may* be affected by the enactment.' * * *" 282 Or at 606-07 (emphasis in original; footnote omitted).

We understand the county to argue that this conclusion, while dealing with a different legal issue under ORS 215.060 from the issue presented here, also supports its contention that the individual written notice it provided in this case should be found to comply with ORS 215.060.

We do not agree with the county that the individual written notice that it provided to landowners *necessarily* constitutes *better* notice than the newspaper notice that ORS 215.060 required. The individual written notice is no doubt better notice to the landowners who were actually sent individual written notice, but that notice is not better notice to the county's citizens who do not own affected land and were therefore provided no notice at all. While affected property owners may be more directly impacted by the disputed ordinance, all county citizens have an interest in its land use legislation. Therefore, even if we were free to pursue the substance over form approach to construing ORS 215.060 that the county

suggests, it is not at all clear that would necessarily mean the issue would have to be resolved in the county's favor.

However, there is a more fundamental problem with the county's position. It might be possible to overlook a failure to give the precise kind of notice a statute requires, where the statute simply imposes a requirement for a particular kind of notice and goes no further. In such cases the relevant inquiry is usually whether the petitioner's substantial rights were prejudiced by any deviation from the statutory notice requirements. *West Amazon Basin Landowners v. Lane County*, 24 Or LUBA 508, 512 (1993). However, ORS 215.060 is not such a statute. ORS 215.060 not only requires that the county provide "10 days' advance public notice of each of the hearings * * * published in a newspaper of general circulation in the county," it also specifies the legal consequence if the required notice is not given; the "[a]ction by the governing body of a county regarding the plan shall have no legal effect * * *." The language and structure of ORS 215.060 simply does not permit us to overlook the county's failure to publish notice in the newspaper, as ORS 215.060 requires, even though petitioner's substantial rights may not have been prejudiced.

> "Substantial compliance with requisite procedure in enactment of an ordinance is prerequisite to its validity, and no ordinance is valid unless and until mandatory prerequisites to its enactment and promulgation are substantially observed. * * * However, an ordinance passed in pursuance of authority is not necessarily invalid because it omits some of the details of method or procedure mentioned in the charter or statute *unless the details are made prerequisite to its validity, as where it is declared that the ordinance shall be void if the method or procedure prescribed is not followed*." 5 *McQuillin Mun. Corp*. § 16.10 (3d ed 1996) (footnotes omitted; emphasis added).

The legislature has prescribed the consequence of any failure to provide the notice required by ORS 215.060, and we must give effect to the legislature's prescription.[5]

[5] We reached a similar conclusion concerning the mandatory nature of ORS 215.060 in *dicta* in *West Amazon Basin Landowners v. Lane County*, 24 Or LUBA at 512-13.

Finally, we note two additional points, one raised by the county and one we raise on our own. The county suggests that it complied with the ORS 215.060 requirement to publish notice "in the territory * * * concerned," because the county "self-published with the individual mailed notices." Respondent's Brief 9. That is a creative argument, but the county cites no authority to support it. As we have already noted, the individual mailed notice did not provide notice to anyone in the county or the affected area who is not a property owner. For that reason alone, we do not view the individual mailed notice as the equivalent of published notice "in a newspaper of general circulation" or "in the territory * * * concerned."

Finally, there is an arguable ambiguity in ORS 215.060. The final sentence of ORS 215.060 states "[t]he notice provisions of this section shall not restrict the giving of notice by other means, including mail, radio and television." When that sentence is viewed in context with the rest of the statute, it is reasonably clear that it was included to make it clear that the governing body is free to provide *additional notice* by other means. *See* n 2. Three such other means of providing notice are mentioned: "mail, radio and television." Another common method of providing public notice is to post it on the front of the courthouse or on a sign, tree or utility pole. To the extent it is possible to read that final sentence of ORS 215.060 to provide that the governing body need not provide "published [notice] in a newspaper of general circulation" so long as it gives any other kind of notice the governing body decides to give, we do not believe that is what the legislature intended. It may be that "[a] notice published in the public notifications section of the newspaper is the notice of last resort used by the judicial system," as the county argues. Respondent's Brief 11. However, we believe it is the mandatory minimum notice that the legislature has decided must be given before ordinances affecting comprehensive plans can have "legal effect." The county is free to give additional notice, but the required published newspaper notice is mandatory. While publication notice has all the shortcomings that the county notes, it does have the virtues of

being both relatively inexpensive and, at least in theory, a way to communicate notice to all citizens of the county who have access to a newspaper. It is simply implausible that the legislature intended the final sentence of ORS 215.060 to leave the method of providing notice entirely to the governing body.

The second assignment of error is sustained.

FIRST, THIRD AND FOURTH ASSIGNMENTS OF ERROR

In his first assignment of error, petitioner argues the county erred by amending the challenged ordinance on the date it was adopted. Petitioner contends a second reading of the amended ordinance was required by the county's charter. In his third assignment of error petitioner contends the challenged ordinance is inconsistent with Goal 5 (Open Spaces, Natural Resources, Scenic and Historic Areas and Natural Resources). In his final assignment of error, petitioner contends the county's decision to apply environmental zoning to some properties, such as his, but not apply environmental zoning to other properties is not supported by adequate findings or substantial evidence, and the the county's decision violates his constitutional rights to due process of law and equal protection of the law.

Because we sustain the second assignment of error, the county's decision must be remanded so that the county can provide the published notice of public hearing that ORS 215.060 requires. While it may be that any public hearing the county holds pursuant to that notice will result in no changes to the challenged ordinance, we do not believe it is appropriate to assume that will be the case. It would not be consistent with sound principles of judicial review to consider petitioner's arguments, which are directed at the ordinance that is before us, when a different ordinance may be adopted as a result of our remand. ORS 197.805.

We do not consider petitioner's first, third or fourth assignments of error.

The county's decision is remanded.