BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

LOGAN RAMSEY,
Petitioner,

vs.

MULTNOMAH COUNTY,
Respondent.

LUBA No. 2002-157

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

AFFIRMED 06/18/2003

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 decision that readopts a county ordinance replacing county comprehensive plan and zoning ordinance provisions with City of Portland comprehensive plan and zoning provisions for that part of the county that lies inside the Metro urban growth boundary.

FACTS

This matter is before us for the second time. In *Ramsey v. Multnomah County (Ramsey I)*, 43 Or LUBA 25 (2002), petitioner appealed Ordinance 967, which is the ordinance that was repealed and readopted as Ordinance 997.[1] In adopting Ordinance 967, the county sent individual written notice of the public hearing to affected property owners, as required by ORS 215.503. The county did not, however, give advance public notice of the public hearing in a newspaper of general circulation, as required by ORS 215.060. We held that the county's failure to publish prior notice in the newspaper resulted in the county's action having no legal effect. *Ramsey I* at 32.[2]

On remand, the county held a public hearing on October 31, 2002 regarding Ordinance 997. Eleven days earlier on October 20, 2002, the county published notice of the public hearing in the Oregonian, a newspaper of general circulation in the county. The county did not send individual mailed notices to property owners, as was done prior to the first hearing on Ordinance 967. At the October 31, 2002 public hearing, the county adopted Ordinance 997, which repealed and readopted a number of previously approved ordinances, including Ordinance 967. As pertinent to the present case, Ordinance 997 replaces the

[1] In addition to readopting Ordinance 967, Ordinance 997 also readopts 33 other previously adopted county ordinances.

[2] Because we remanded the decision for failure to provide proper notice, we did not address petitioner's other assignments of error.

Multnomah County Comprehensive Plan and zoning code with the City of Portland Comprehensive Plan and zoning code for unincorporated areas of Multnomah County that are inside the Metro urban growth boundary. As a result of this change, the city's Environmental Conservation overlay zone is placed on a portion of petitioner's property. This appeal followed.

FIRST ASSIGNMENT OF ERROR

When a county amends its comprehensive plan, it must comply with ORS 215.060 which requires a county to hold at least one public hearing and to provide at least 10 days' advanced notice of the public hearing in a newspaper of general circulation (hereafter newspaper notice).[3] In addition, ORS 215.503(3) requires that at least 20 but not more than 40 days before the date of the first public hearing on an ordinance to amend a comprehensive plan, a county must provide written notice of the proposed change to all landowners whose properties' zoning designation could be changed.[4]

In *Ramsey I*, we remanded the county's decision, holding that the county's action had no legal effect because the county did not provide 10-day advance newspaper notice as required by ORS 215.060. 43 Or LUBA at 31. Under ORS 215.060, the requirement for newspaper notice of the public hearing is a legal requirement that must be satisfied for the

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[3] ORS 215.060 provides:

> "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 * * *."

[4] ORS 215.503(3) provides:

> "* * * in addition to the notice required by ORS 215.060, at least 20 days but not more than 40 days before the date of the first hearing on an ordinance that proposes to amend an existing comprehensive plan or any element thereof or to adopt a new comprehensive plan, the governing body of a county shall cause a written individual notice of land use change to be mailed to each owner whose property would have to be rezoned in order to comply with the amended or new comprehensive plan if the ordinance becomes effective."

ordinance to take effect. In the present case, however, the parties do not dispute that newspaper notice was provided following our remand in *Ramsey I*. Petitioner instead argues that the newspaper notice that was given was not adequate.

ORS 215.060 simply requires newspaper notice of the public hearing; it does not specify how detailed that newspaper notice must be.[5] As we explained in *Ramsey I*, a complete failure to give that newspaper notice renders the ordinance of "no legal effect," because the statute itself dictates that result. 43 Or LUBA at 30-31. The statute, however, does not dictate that if newspaper notice of the public hearing is given, any defect or inadequacy in the wording of that newspaper notice also renders the ordinance of no legal effect. Because ORS 215.060 does not dictate that imperfect newspaper notice renders the county's action of no legal effect, we treat petitioner's challenge to the adequacy of the notice as we would any allegation of procedural error.

A procedural error provides a basis for reversal or remand only if the procedural error results in prejudice to a petitioner's substantial rights. ORS 197.835(9)(a)(B); *Furler v. Curry County*, 27 Or LUBA 546, 550 (1994). In the present case, petitioner does not allege that his substantial rights were prejudiced in any way by the allegedly inadequate notice. Because petitioner appeared at the hearing and opposed the ordinance, and he was certainly aware of the information that he alleges the notice should have included, petitioner does not establish that his substantial rights were prejudiced. Petitioner may not assert an alleged injury to other persons' substantial rights as a basis for reversal or remand in this appeal. *Bauer v. City of Portland*, 38 Or LUBA 432, 436 (2000).

The first assignment of error is denied.

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[5] In *Ramsey I*, we discussed the Oregon Supreme Court's decision in *Fifth Avenue Corp. v. Washington Co.*, 282 Or 591, 581 P2d 50 (1978), which, among other things, addressed the amount of detail required to comply with the notice provisions of ORS 215.060.

SECOND ASSIGNMENT OF ERROR

As previously noted, ORS 215.503 requires that a county provide mailed written notice of the first hearing on an ordinance to property owners whose property could be rezoned due to a comprehensive plan amendment. *See* n 4. There is no dispute that the county provided the required notice for the first hearing on Ordinance 967. On remand, the county did not provide additional mailed written notice pursuant to ORS 215.503 for the hearing at which the county repealed Ordinance 967 and readopted the same ordinance, and others, as Ordinance 997. Petitioner argues that Ordinance 997 is a new ordinance, and the first hearing on that ordinance was the hearing after LUBA's remand of Ordinance 967 in *Ramsey I*. Because the county did not send mailed written notice to all property owners subject to rezoning before adopting Ordinance 997, petitioner argues, the county therefore violated ORS 215.503. The county responds that the hearing on remand was merely a continuation of the original local proceedings and was not the first hearing on ordinance 997. Therefore, the county argues, there was no need to send additional mailed written notice under ORS 215.503.[6]

The operative language of ORS 215.503 requires that notice be given for "the first hearing on an ordinance that proposes to amend an existing [comprehensive] plan." According to petitioner, because *Ramsey I* held that the county's failure to provide newspaper notice prior to adopting Ordinance 967 rendered that ordinance of "no legal effect," the notices the county did mail to comply with ORS 215.503 were also of no legal effect. Additionally, petitioner argues that because the ordinances have different numbers, they must also be different ordinances requiring different notices under ORS 215.503.

[6] After the initial public hearing on Ordinance 967, the county held two additional hearings before adopting the ordinance. According to the county, the hearing on remand was actually the fourth hearing on the ordinance.

While we did hold in *Ramsey I* that Ordinance 967 was of no legal effect, that does not mean that the *procedures* followed and *notices* provided were similarly of no legal effect. We do not understand ORS 215.503 to require additional notice every time LUBA remands an ordinance. The present case is a somewhat unique situation because 33 additional ordinances were also readopted by Ordinance 997. Petitioner, however, does not allege that the county failed to give the required notice under ORS 215.503 for any of the other ordinances, and Ordinance 967 was readopted without change in Ordinance 997. We do not believe the mere fact that Ordinance 967 was readopted after remand by an ordinance with a different number dictates that a second mailed written notice is required by ORS 215.503. All property owners who are subject to the comprehensive plan and zoning changes adopted by Ordinance 997 were given prior mailed written notice of the initial hearing for Ordinance 967 and had the opportunity to involve themselves in the land use process that led to the county's adoption of that ordinance, as petitioner did. Those property owners that became involved would also be apprised of subsequent actions in the matter, including hearings on remand. ORS 215.503 does not entitle all property owners, who failed to become involved in the initial processes that led to the adoption of Ordinance 967, to mailed written notice of the county's intent to readopt that ordinance as part of Ordinance 997 following LUBA's remand in *Ramsey I*.

The second assignment of error is denied.

THIRD ASSIGNMENT OF ERROR

Petitioner asserts that the county violated Goal 5 (Natural Resources, Scenic and Historic Areas, and Open Spaces) in applying the Environmental Conservation overlay zone to his property. Goal 5 requires that the county conserve open space and protect natural and scenic resources. OAR chapter 660, division 16, sets out the process for complying with Goal 5 and requires a local government to (1) inventory the location, quantity, and quality of listed resources within its territory; (2) identify conflicting uses for the inventoried resources;

(3) conduct an analysis of the economic, social, environmental, and energy (ESEE) consequences of negative impacts between conflicting uses and Goal 5 resources; and (4) develop a program to achieve the goal of resource protection.[7] *Gage v. City of Portland*, 28 Or LUBA 307, 314 (1994), *aff'd* 133 Or App 346, 891 P2d 1331 (1995). Where, as here, a plan amendment affects inventoried Goal 5 resources, the local government must apply the requirements of the Goal 5 rules and determine that they are satisfied. *Friends of Cedar Mill v. Washington County*, 28 Or LUBA 477, 487 (1995).

A. Location

Petitioner challenges the adequacy of the county's Goal 5 inventory.[8] A valid inventory must include a determination of location, quality, and quantity of the inventoried resource. Initially, petitioner claims the inventory is inadequate because it is not a site-specific inventory of individual lots.[9] The county's inventory identifies a series of sub-areas

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[7] OAR chapter 660, division 16 has for the most part been replaced by OAR chapter 660, division 23, for post-acknowledgement plan amendments initiated after September 1, 1996. OAR 660-023-0250. The parties do not dispute that OAR chapter 660, division 16 is applicable here.

[8] OAR 660-016-0000 describes some of the requirements for a valid inventory of Goal 5 resources as follows:

> "* * * * *
>
> "(2) A 'valid' inventory of a Goal 5 resource * * * must include a determination of the location, quality, and quantity of each of the resource sites. Some Goal 5 resources (*e.g.*, natural areas, historic sites, mineral and aggregate sites, scenic waterways) are more site-specific than others (*e.g.*, groundwater, energy sources). For site-specific resources, determination of *location* must include a description or map of the boundaries of the resource site and of the impact area to be affected, if different. For non-site-specific resources, determination must be as specific as possible.
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> "(3) The determination of *quality* requires some consideration of the resource site's relative value, as compared to other examples of the same resource in at least the jurisdiction itself. A determination of *quantity* requires consideration of the relative abundance of the resource (of any given quality). The level of detail that is provided will depend on how much information is available or 'obtainable'."

[9] Petitioner's .5-acre lot is included in a 626-acre resource site.

with similar resource characteristics ranging in size from a few acres to nearly 500 acres to comprise the entire 626-acre resource site at issue in this appeal.

In *Columbia Steel Castings Co. v. City of Portland*, 314 Or 424, 840 P2d 71 (1992), the Oregon Supreme Court clarified the scope of the terms "site" and "site-specific resource" as used in the Goal 5 rule. The court stated that the terms referred to *resource sites* rather than smaller parcels such as tax lots within a resource site. *Id*. at 428. The rule requires a description or map of the boundaries of the resource site. The location of the resource site encompassing petitioner's property is documented by both a map and by analysis describing the characteristics and location of the resource site. Record 4891-4903.[10] The county explains that the resource site is composed of a series of sub-areas with similar topography, habitat, and land uses. *Id*. Under *Columbia Steel Castings Co.*, the county's description of the inventory location is adequate.

B. Quality and Quantity

Petitioner claims that the county's analysis addressing quality and quantity of the Goal 5 resources is too vague and non-specific. Petitioner primarily argues that the county fails to explain why some properties in the resource site were placed in environmental overlay zones while others were not. According to petitioner, the decision is based solely on county planners' unsubstantiated opinions.

While petitioner directs us to a one-paragraph significance analysis as proof of the inadequacy of the county's analysis, Record 4903, he does not address the supporting documentation that was used to prepare the significance analysis. As the county points out, the significance determinations were the culmination of a lengthy analysis and documented methodology. Field inventory work was conducted in the planning area and information on the location, quality, and quantity of resources was collected. This information included data

[10] The Goal 5 analysis is contained in the record from *Ramsey I*, which was incorporated into the record of the present case on remand. Unless otherwise noted, all references to the record refer to the record in *Ramsey I*.

on plant communities, wetland and water resources, fish and wildlife habitat, special status species, soils and geology, resource impacts, and current and historic land. Record 4869-4871.

The county offers the following explanation for why petitioner's property is affected by the Environmental Conservation Zone:

> "The fact that Petitioner's undeveloped tax lot is subject to environmental zoning is a reflection of inventoried significant resources as determined by scoring the functional values within the resource site. Petitioner's undeveloped property contains a headwaters drainageway that flows down to protected creeks within the City of Portland. Additionally, the property contains riparian forest vegetation. This water resource feature is a decisional factor, triggering an automatic significance determination of Petitioner's property. All water resources are significant. All riparian forest vegetation, and all upland vegetation that is not managed residential landscaping is significant. These resources provide important functional values associated with water quality, flood attenuation and storage, slope stabilization, fish and wildlife habitat, groundwater recharge, and water supply. They also provide auxiliary benefits in the form of sediment trapping and nutrient removal. The answer therefore to Petitioner's query as to why some properties have environmental zoning while others do not is due to the simple fact that some properties do not have significant resources worthy of protection; his does." Respondent's Brief 14-15 (record citations omitted).

Finally, the county also points out that the process that the county went through allowed property owners to object to proposed planning and zoning designations for individual properties and in some cases the county modified its proposal. Record 24-25, 43-44, 356-357, 3617-3618. While the county did not change its proposed planning and zoning for petitioner's property, his objection was noted and responded to.[11]

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[11] In response to petitioner's objection to the county's proposal to apply environmental zoning to his property, the city noted that petitioner's property includes a headwaters drainageway and explained the impact of the proposed environmental zoning for petitioner's property:

> "* * * Staff has proposed a 75-foot wide Environmental Conservation overlay centered on the drainageway with 37.5 feet on each side of the centerline. This means that effectively there is a 12.5-foot wide regulated area on either side of the drainageway because the outer 25 feet of the environmental zone is a 'transition area.' Depending on the exact location of the drainageway centerline there may be even less conservation area on Mr. Ramsey's property because the drainageway is very close to his south property line. Staff believes that the

We agree with the county, that petitioner has failed to demonstrate that the county's reasons for placing environmental zoning on a portion of petitioner's property are inadequate.

The third assignment of error is denied.

FOURTH ASSIGNMENT OF ERROR

In his final assignment of error, petitioner makes the very general charge that the county's decision was "arbitrary and capricious and prejudices [his] substantial rights to due process and equal protection under the law." Petition for Review 6. Petitioner's argument appears to be that his due process rights were violated due to a lack of findings and that his equal protection rights were violated because an environmental overlay zone was placed on his property but not on the property of others. As we explained above, the county complied with the Goal 5 process, including providing an adequate explanation as to why the environmental overlay zone was placed on petitioner's property. To the extent petitioner presents any additional constitutional claims that go beyond the allegations presented in his first three assignments of error, they are not sufficiently developed for our review, and we will not consider them. *Sparks v. Tillamook County*, 30 Or LUBA 325, 330 (1996).

The fourth assignment of error is denied.

The county's decision is affirmed.

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decision to limit conflicting uses through application of the Environmental Conservation overlay is appropriate and recommends no change." Record 3624.