

1 BEFORE THE LAND USE BOARD OF APPEALS
2 OF THE STATE OF OREGON

3
4 OREGON COAST ALLIANCE, LINDA EYERMAN,
5 and JAMES JENSVOLD,
6 *Petitioners,*

7
8 vs.

9
10 CLATSOP COUNTY,
11 *Respondent.*

12
13 LUBA No. 2016-108

14
15 FINAL OPINION
16 AND ORDER

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18 Appeal from Clatsop County.

19
20 Sean T. Malone, Eugene, filed the petition for review and argued on
21 behalf of petitioners.

22
23 Christopher D. Crean, Portland, filed the response brief and argued on
24 behalf of respondent. With him on the brief was Beery, Elsner & Hammond,
25 LLP.

26
27 RYAN, Board Member; HOLSTUN, Board Chair; BASSHAM, Board
28 Member, participated in the decision.

29
30 REMANDED 04/21/2017

31
32 You are entitled to judicial review of this Order. Judicial review is
33 governed by the provisions of ORS 197.850.

NATURE OF THE DECISION

Petitioners appeal a county ordinance, Ordinance 16-03, amending the text of the county’s comprehensive plan.

FACTS

The Clatsop County Comprehensive Plan (CCCP) Goal 1, Citizen Involvement, identifies the Southwest Coastal Community planning area as one of six planning areas in the county, and identifies and describes the Southwest Coastal Community Advisory Committee (Committee) as an active planning area committee. The Southwest Coastal Community Plan, part of the CCCP, provides that the Committee “shall constitute the officially recognized body to represent the community on matters of land use planning.” The county’s Land and Water Development and Use Ordinance (LDO) 4.108 provides that the committee “shall serve as a Design Review Advisory Committee for Arch Cape and will review development proposals and make recommendations to the Community Development Director and Planning Commission concerning the design and scenic view aspects of proposed developments.”

On July 16, 2016, the Committee met to consider whether to recommend to the planning commission that the county adopt amendments to the CCCP and LDO that discontinue the Committee. Notice of the July 16, 2016 Committee hearing was published in the *Daily Astorian* newspaper on July 5, 2016. Record 454. The Committee recommended to the planning commission

1 that the amendments not be adopted and that the county keep the Committee in
2 effect.

3 The county planning commission held hearings on July 26, 2016, and
4 September 13, 2016. Notices of the planning commission hearings were
5 published in the *Daily Astorian* newspaper on July 19, 2016, and on September
6 6, 2016. Record 277, 387. Staff reports that were available at both of the
7 hearings listed dates of future board of county commissioners hearings on the
8 proposed amendments, including the only board of county commissioners
9 hearing that was held on the amendments on September 28, 2016. Record 169,
10 374. At the conclusion of the September 13, 2016 hearing, the planning
11 commission voted to recommend that the board of commissioners adopt the
12 proposed amendments to the CCCP and the LDO that discontinue the
13 Committee.

14 The board of county commissioners held a hearing on September 28,
15 2016. No notice of the board's hearing was published in any newspaper. At the
16 conclusion of the hearing, the board of county commissioners voted to adopt
17 Ordinance 16-03 (Ordinance), which amend the CCCP and the LDO to
18 discontinue the Committee. This appeal followed.

19 **FIRST ASSIGNMENT OF ERROR**

20 Petitioners' first assignment of error includes two subassignments of
21 error that allege that the county failed to follow procedures that apply to the
22 county's adoption of the Ordinance.

1 **A. First Subassignment**

2 ORS 215.050(1) requires counties to adopt a comprehensive plan and
3 authorizes them to revise those plans. ORS 215.060 provides:

4 “Action by the governing body of a county regarding the plan
5 shall have no legal effect unless the governing body first conducts
6 one or more public hearings on the plan and unless 10 days’
7 advance public notice of each of the hearings is published in a
8 newspaper of general circulation in the county or, in case the plan
9 as it is to be heard concerns only part of the county, is so
10 published in the territory so concerned and unless a majority of the
11 members of the governing body approves the action. The notice
12 provisions of this section shall not restrict the giving of notice by
13 other means, including mail, radio and television.”

14 In their first subassignment of error, petitioners argue that the county failed to
15 follow the procedure in ORS 215.060 prior to the board of county
16 commissioners’ September 28, 2016 hearing, and accordingly, the Ordinance
17 “has no legal effect.” Petitioners seek reversal or remand of the decision.

18 The county concedes that no public notice of the board of
19 commissioners’ September 28, 2016 hearing was published in a newspaper of
20 general circulation in the county. However, the county argues that (1) the
21 published notices in the *Daily Astorian* newspaper of the Committee hearing
22 held on July 16, 2016, and of both of the planning commission hearings held
23 on July 26, 2016, and September 13, 2016; and (2) announcement in staff
24 reports of the date or dates scheduled for the board of commissioners’ hearings
25 at the Committee hearing and both planning commission hearings are sufficient
26 to meet the requirements in ORS 215.060. Response Brief 5-6. In support of its

1 response, the county cites *Apalategui v. Washington County*, 80 Or App 508,
2 514, 723 P2d 1021 (1986), and *Ramsey v. Multnomah County*, 43 Or LUBA 25
3 (2002).

4 In *Apalategui*, the county published newspaper notice of most, but not
5 all, of fourteen dates on which the board of county commissioners held
6 hearings on a proposed comprehensive plan amendment, but the date of the
7 hearing at which the board of county commissioners adopted the challenged
8 ordinance was not included in any published notice. The Court held that
9 because the hearings for which no published notice was given were
10 continuations of the hearings held pursuant to published notice, and because
11 the date of each hearing held without published notice was announced at a
12 hearing held pursuant to a published notice or at a hearing which was itself
13 announced at a hearing held pursuant to public notice, the ordinance was not
14 invalid. *Id.* at 514.

15 *Ramsey* involved a failure of the county to publish notice in any
16 newspaper of a board of county commissioners' hearing on a proposed plan
17 amendment. LUBA rejected the county's argument that mailing notice of the
18 board of county commissioners' hearing according to the requirements in ORS
19 215.503 was sufficient to meet the newspaper notice requirements of ORS
20 215.060.

21 The circumstances presented in this appeal are very different from the
22 circumstances presented in *Apalategui* and nearly identical to the

1 circumstances presented in *Ramsey*. Here, the county published newspaper
2 notice of a hearing before the Committee and of hearings before the planning
3 commission, but no newspaper notice of the hearing before the board of county
4 commissioners was ever published, and none of the published notices of the
5 Committee or planning commission hearings mentioned the Board of
6 Commissioners' September 28, 2016 hearing. Record 277, 298, 454. Unlike in
7 *Apalategui*, where multiple continued board of commissioners' hearings
8 occurred after initial and legally compliant newspaper notice of some of the
9 board of commissioners' hearings, here the hearing before the board of county
10 commissioners was not a "continuation" of either the planning commission
11 hearings or the Committee hearing. Rather, it was a separate hearing by the
12 board of commissioners, for which ORS 215.060 notice was required but not
13 given.

14 ORS 215.060 requires "the governing body" to take two actions. It
15 requires the governing body to (1) conduct a hearing (one or more); and (2)
16 conduct those hearings after at least 10 days advance notice of "each of the
17 hearings" is published in a newspaper. The county completely failed to comply
18 with ORS 215.060 and publish in a newspaper of general circulation the notice
19 of the public hearing before the board of county commissioners.

20 Accordingly, the first subassignment of error is sustained. *Apalategui*, 80
21 Or App at 514 n 6 (petitioners are not required to demonstrate prejudice to their

1 substantial rights where the county failed to demonstrate compliance with ORS
2 215.060).

3 **B. Second Subassignment of Error**

4 In their second subassignment of error, petitioners argue that the county
5 failed to comply with LDO 2.315. LDO 2.315 provides:

6 “Notice of a hearing on a legislative decision under this Ordinance
7 need not include a mailing to property owners where the matter at
8 issue does not relate to a specific geographic area. Where such
9 mailing or posting is omitted, the Community Development
10 Director shall prepare a notice program designed to reach persons
11 believed to have a particular interest and to provide the general
12 public with a reasonable opportunity to be aware of the hearings
13 on the proposal.”

14 We understand petitioners to argue that the county failed to comply with LDO
15 2.315 because it did not provide mailed notice to property owners in the Arch
16 Cape area of the county, and in addition that no notice was provided that was
17 “designed to reach persons believed to have a particular interest and to provide
18 the general public with reasonable opportunity to be aware of the hearings” on
19 the plan amendment.

20 The county responds that the county provided written notice to property
21 owners in the Arch Cape area, which is located in the Southwest Coastal
22 planning area, and also published newspaper notice of the Committee hearing
23 and the two planning commission hearings. Record 142-151. In addition, the
24 county argues, it created a website link to materials related to the plan

1 amendment and listed the upcoming hearing schedule on staff reports.
2 Response Brief 12.

3 Given that the county provided notice to property owners in the Arch
4 Cape area, and that petitioners' argument under this subassignment of error is
5 insufficiently developed for review, we agree with the county that petitioners
6 have not established that the county failed to follow the procedure in LDO
7 2.315.

8 The second subassignment of error is denied.

9 The first assignment of error is sustained, in part.

10 **THIRD ASSIGNMENT OF ERROR**

11 In their third assignment of error, petitioners argue that the Ordinance is
12 inconsistent with Statewide Planning Goal 1 (Citizen Involvement). Goal 1
13 requires in relevant part:

14 "The governing body charged with preparing and adopting a
15 comprehensive plan shall adopt and publicize a program for
16 citizen involvement that clearly defines the procedures by which
17 the general public will be involved in the on-going land-use
18 planning process.

19 "The citizen involvement program shall be appropriate to the scale
20 of the planning effort. The program shall provide for continuity of
21 citizen participation and of information that enables citizens to
22 identify and comprehend the issues."

23 Petitioners argue that the county's decision to rely on future appointment by the
24 board of county commissioners of temporary advisory committees for review of
25 future legislative land use actions is inconsistent with Goal 1's requirement to

1 provide for “clearly define[d] * * * procedures by which the general public will
2 be involved in the on-going land-use planning process” and for the “continuity
3 of citizen participation and of information that enables citizens to identify and
4 comprehend issues.”

5 The county responds that the county planning commission is its
6 recognized committee for citizen involvement, and that the planning
7 commission members are selected through “an open, well publicized process,”
8 consistent with Goal 1’s requirements.¹ Record 16. The county argues that the
9 possible future appointment of “advisory committees to address specific land
10 use issues” would be in addition to the planning commission, which now serves
11 as the committee for citizen involvement for the entire county. Record 30.
12 According to the county, all that Goal 1 requires has been satisfied.

13 The challenged decision simply makes the seven member planning
14 commission the county’s “Committee for Citizen Involvement” for the

¹ Goal 1 requires the county’s citizen involvement program to include in relevant part:

“1. Citizen Involvement -- To provide for widespread citizen involvement. The citizen involvement program shall involve a cross-section of affected citizens in all phases of the planning process. As a component, the program for citizen involvement shall include an officially recognized committee for citizen involvement (CCI) broadly representative of geographic areas and interests related to land use and land use decisions. Committee members shall be selected by an open, well publicized public process.”

1 Southwest Coastal Community Plan area, as it already is for all other areas of
2 the county. Because petitioner's third assignment of error is premised on the
3 mistaken belief that the challenged decision replaced the Committee with
4 temporary committees to be appointed in the future, it challenges an action the
5 county did not take, and for that reason provides no basis for remand.

6 The third assignment of error is denied.

7 **SECOND ASSIGNMENT OF ERROR**

8 In their second assignment of error, petitioners argue that the
9 amendments to the CCCP and the LDO are inconsistent with the CCCP, and
10 that the findings in support of the decision are inadequate and inconsistent.
11 Because we sustain the first assignment of error, the county's decision must be
12 remanded so that the county can provide the published notice of the board of
13 county commissioners' hearing that ORS 215.060 requires. While it may be
14 that any public hearing the county holds pursuant to that notice will result in no
15 changes to the Ordinance, we do not believe it is appropriate to assume that
16 will be the case. It would not be consistent with sound principles of judicial
17 review to consider petitioners' arguments, which are directed at the Ordinance,
18 when a different ordinance may be adopted as a result of our remand. ORS
19 197.805.

20 The county's decision is remanded.