

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

WARNOCK MCILWAINE and BARBARA MCILWAINE,
Petitioners,

vs.

DOUGLAS COUNTY,
Respondent.

LUBA No. 2024-053

FINAL OPINION
AND ORDER

Appeal from Douglas County.

Zack P. Mittge filed the petition for review and argued on behalf of petitioners. Also on the brief was Hutchinson Cox.

Tiffany Podlesnik represented respondent.

WILSON, Board Member; ZAMUDIO, Board Chair; RUDD, Board Member, participated in the decision.

REMANDED 03/11/2025

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

NATURE OF THE DECISION

Petitioners appeal a board of commissioners decision amending land use and development ordinance provisions regarding animal and fowl shelters in the county's Rural Residential -1 (1R), -2 (2R) and -5 (5R) zones.¹ We refer to those zones, collectively, as the RR zones.

FACTS

This appeal stems indirectly from our decision in *McIlwaine v. Douglas County*, LUBA No 2023-032 (Oct 10, 2023). In that case, we remanded the county's decision approving a conditional use permit for a horse barn and riding arena as an animal shelter accessory use to a residential use on land zoned 5R.

Following our decision, the county began proceedings to legislatively amend its RR zones. The amendments removed "animal or fowl shelters" – which the county had determined that the horse barn and riding arena in the prior case were – from permitted "[b]uildings accessory to a single-family dwelling" in the RR zones. The amendments added a new permitted use in the RR zones allowing "[b]uilding accessory to a farm use, such as animal or fowl shelter (or similar and related accessory use structure), shall not exceed 2,000 square feet per acre and in no case shall exceed 10,000 square feet." The amendments also added a new

¹ The ordinance also amends sign and Rural Commercial (CRE) standards.

1 conditional use in the RR zones of “[b]uilding accessory to farm use in excess of
2 10,000 square feet.”

3 On June 20, 2024, the planning commission considered the proposed
4 amendments at a legislative hearing and recommended approval to the board of
5 commissioners. On July 23, 2024, the county published notice in a local
6 newspaper of a legislative hearing before the board of commissioners for the
7 proposed amendments scheduled for July 31, 2024. The county did not provide
8 individual written notice of the July 31, 2024 legislative hearing. At the July 31,
9 2024 legislative hearing, the board of commissioners considered and adopted the
10 amendments.

11 This appeal followed.

12 **FIRST ASSIGNMENT OF ERROR**

13 Petitioners argue that the county failed to provide the notice required by
14 ORS 215.223(1), which provides:

15 “No zoning ordinance enacted by the county governing body may
16 have legal effect unless prior to its enactment the governing body or
17 planning commission conducts one or more public hearings on the
18 ordinance and unless 10 days’ advance public notice of each hearing
19 is published in a newspaper of general circulation in the county
20 * * *.”

21 ORS 197.835(9)(a) provides that we shall reverse or remand a land use
22 decision under review if we find that the local government:

23 “(A) Exceeded its jurisdiction;

1 “(B) Failed to follow the procedures applicable to the matter before
2 it in a manner that prejudiced the substantial rights of the
3 petitioner;

4 “(C) Made a decision not supported by substantial evidence in the
5 whole record;

6 “(D) Improperly construed the applicable law; or

7 “(E) Made an unconstitutional decision[.]”

8 In the petition for review, petitioners request reversal or remand of the
9 decision. At oral argument, however, petitioners stated that remand is the proper
10 disposition of the first assignment of error.

11 The county has conceded the first assignment of error.² The board of
12 commissioners held a hearing on July 31, 2024, where they adopted the
13 challenged amendments. The only notice provided for that hearing was published
14 in a local newspaper on July 23, 2024 – eight days before the public hearing.

15 The requirements of ORS 215.223(1) are not procedural requirements that
16 may be overlooked if there is no prejudice to a petitioner’s substantial rights.
17 Strict compliance with the published notice requirement is required, as failure to
18 provide the notice results in the ordinance being of no “legal effect.” *Apalategui*

² The county’s respondent’s brief was due on February 11, 2025. On that date, the county did not file a respondent’s brief but did file a motion for voluntary remand, in which the county conceded petitioners’ first assignment of error. Petitioners did not, however, consent to voluntary remand. OAR 661-010-0071(2)(e) provides that we will remand a decision where all parties stipulate in writing to the remand. On February 19, 2025, we issued an order denying the county’s motion because petitioners did not stipulate to a remand.

1 v. *Washington County*, 80 Or App 508, 514 n 6, 723 P2d 1021 (1986) (construing
2 ORS 215.060, which has nearly identical language concerning comprehensive
3 plan amendments). The county's notice was published eight days before the
4 public hearing, two days short of the statutorily prescribed 10 days. Therefore,
5 the county violated ORS 215.223(1), and the challenged ordinance is of no legal
6 effect.

7 The first assignment of error is sustained.

8 **SECOND ASSIGNMENT OF ERROR**

9 Petitioners also argue that the county failed to provide the individual notice
10 required by ORS 215.503(4) – also known as Ballot Measure 56 – which
11 provides:

12 “In addition to the notice required by ORS 215.223(1), at least 20
13 days but not more than 40 days before the date of the first hearing
14 on an ordinance that proposes to rezone property, the governing
15 body of a county shall cause a written individual notice of land use
16 change to be mailed to the owner of each lot or parcel of property
17 that the ordinance proposes to rezone.”

18 A property is “rezoned” for purposes of the required notice under ORS
19 215.503(4), when the governing body of a county:

20 “(a) Changes the base zoning classification of the property; or

21 “(b) Adopts or amends an ordinance in a manner that limits or
22 prohibits land uses previously allowed in the affected zone.”
23 ORS 215.503(9)

24 Petitioners argue that the county limited or prohibited uses in the 5R zone
25 by eliminating animal or fowl shelters accessory to residential uses that were

1 formerly allowed as outright permitted uses. Under the amendments, the only
2 animal or fowl shelters that are permitted outright in the 5R zone are those that
3 are accessory to a “farm use,” which is defined under both state and local law as
4 “the current employment of land for the primary purpose of obtaining a profit in
5 money” through identified farming activities. ORS 215.203(2)(a); Douglas
6 County Land Use and Development Ordinance 1.090. Animal or fowl shelters
7 that are accessory to a primary residential use are no longer permitted unless they
8 are for the “primary purpose of obtaining a profit in money” by engaging in
9 farming activities. *See Capsey v. Dept. of Rev.*, 294 Or 455, 457-58, 657 P2d 680
10 (1983) (pasturing animals for personal use is not a farm use under ORS 215.203);
11 *but see Moore v. Coos County*, 144 Or App 195, 199-200, 925 P2d 927 (1996)
12 (discussing the amendments to ORS 215.203(2)(a) in response to *Capsey*, but
13 finding that “grazing” alone is not a “farm use”). We agree with petitioners that
14 the ordinance prohibits or limits uses on their property and they were entitled to
15 Measure 56 notice.

16 Failure to provide Measure 56 notice is a procedural error. *Cossins v.*
17 *Josephine County*, 77 Or LUBA 240, 249, *aff’d*, 292 Or App 415, 421 P3d 435
18 (2018). We will remand a land use decision where the local government “[f]ailed
19 to follow the procedures applicable to the matter before it in a manner that
20 prejudiced the substantial rights of the petitioner[.]” ORS 197.835(9)(a)(B).
21 Those rights include the right to an adequate opportunity to prepare and submit
22 one’s case and to a full and fair hearing. *Muller v. Polk County*, 16 Or LUBA

1 771, 775 (1988). The county did not provide Measure 56 notice to petitioners, so
2 they did not have an opportunity to submit their case or receive a full and fair
3 hearing.

4 The second assignment of error is sustained.

5 **THIRD ASSIGNMENT OF ERROR**

6 Petitioners argue that the challenged decision does not comply with
7 Statewide Planning Goal 10 (Housing), the administrative rules implementing
8 Statewide Planning Goal 14 (Urbanization), and the Douglas County
9 Comprehensive Plan. Because we sustain the first and second assignments of
10 error, the county's decision must be remanded so that the county can provide the
11 published notice required by ORS 215.223(1) and the individual notice required
12 by ORS 215.503(4). It would not be consistent with sound principals of judicial
13 review to consider petitioners' arguments when a different ordinance may be
14 adopted on remand. ORS 197.805; *Oregon Coast Alliance v. Clatsop County*, 75
15 Or LUBA 277, 283 (2017).

16 We do not reach the third assignment of error.

17 The county's decision is remanded.