

1                                   BEFORE THE LAND USE BOARD OF APPEALS

2                                   OF THE STATE OF OREGON

3  
4 WEST AMAZON BASIN LANDOWNERS       )  
5 ASSOCIATION, INC., an Oregon       )  
6 nonprofit corporation,               )  
7                                        )  
8                    Petitioner,        )  
9                                        )

10            vs.                        )

11                                        )  
12 LANE COUNTY,                         )  
13                                        )  
14                    Respondent,        )  
15                                        )

16            and                        )

17                                        )  
18 CITY OF EUGENE,                     )  
19                                        )  
20                    Intervenor-Respondent.        )

LUBA No. 92-148

FINAL OPINION  
AND ORDER

21  
22  
23            Appeal from Lane County.

24  
25            Nickolas Facaros, Eugene, filed the petition for review  
26 and argued on behalf of petitioner. With him on the brief  
27 was Gildea & Facaros.

28  
29            Stephen L. Vorhes, Assistant Lane County Counsel;  
30 William Van Vactor, Lane County Counsel; J. Lee Lashway; and  
31 Milo R. Mecham, Eugene, filed a response brief. With them  
32 on the brief was Harrang Long Watkinson Laird & Rubenstein,  
33 P.C. Stephen L. Vorhes argued on behalf of respondent.  
34 Milo R. Mecham, Eugene, argued on behalf of intervenor-  
35 respondent.

36  
37            HOLSTUN, Referee; SHERTON, Chief Referee; KELLINGTON,  
38 Referee, participated in the decision.

39  
40                    AFFIRMED                                   02/16/93

41  
42            You are entitled to judicial review of this Order.  
43 Judicial review is governed by the provisions of ORS  
44 197.850.

1 Opinion by Holstun.

2 **NATURE OF THE DECISION**

3 Petitioners appeal a county ordinance adopting the West  
4 Eugene Wetlands Special Area Study (WEWSAS). The WEWSAS was  
5 adopted as part of the Eugene Springfield Metropolitan Area  
6 General Plan (Metro Plan).<sup>1</sup>

7 **MOTION TO INTERVENE**

8 The City of Eugene moves to intervene on the side of  
9 respondent. There is no objection, and the motion is  
10 allowed.

11 **FACTS**

12 The WEWSAS includes portions of the western part of the  
13 City of Eugene and unincorporated portions of Lane County  
14 lying between the western part of the City of Eugene and the  
15 urban growth boundary.<sup>2</sup> The WEWSAS preface explains the  
16 content of the study as follows:

17 "The [WEWSAS's] first two chapters present Plan  
18 Objectives and Highlights and a general  
19 introduction. The next five chapters address:  
20 Resource Protection; Development, Mitigation;

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<sup>1</sup>As we explained in Stotter v. City of Eugene, 18 Or LUBA 135, 138 n 1:

"The Metro [or Metropolitan] Plan is the general comprehensive plan for Eugene, Springfield, and the adjacent urbanizable portions of Lane County. It was acknowledged in August, 1982. Amendments to the Metro Plan require the consent of Eugene, Springfield and Lane County. The Metro Plan is general in scope. More specific application of plan policies occur[s] through neighborhood plans and special area studies which address issues unique to a specific geographic area. \* \* \*"

<sup>2</sup>The record includes maps depicting the study area. Record 67-8.

1           Operating, Maintaining, and Monitoring; Financing;  
2           and Future Studies. A companion document to this  
3           Plan is the more detailed Technical Report. \* \* \*  
4           The [WEWSAS] focuses attention on the  
5           recommendations of individual wetland sites,  
6           goals, policies, and recommended actions. The  
7           Plan also contains a list of future public  
8           improvement projects that directly and indirectly  
9           affect the study area. \* \* \*" Record 51.

10           The planning process that led to adoption of the WEWSAS  
11           began in 1989 with a series of six wetlands workshops. In  
12           conjunction with these workshops, extensive notice was  
13           provided to interested persons and property owners.<sup>3</sup> In  
14           addition, a number of newsletters concerning the WEWSAS were  
15           sent to interested parties and affected property owners.

16           On May 21, 1991, the planning commissions of Lane  
17           County and the City of Eugene held a joint public hearing on  
18           the WEWSAS. Ten months latter, on March 24, 1992, a letter  
19           was sent to property owners within the WEWSAS study area.  
20           That letter described the WEWSAS and advised the recipients  
21           of a joint public hearing to be held on the proposed WEWSAS  
22           on April 8, 1992, before the Lane County Board of  
23           Commissioners and the Eugene City Council. The March 24,  
24           1992 letter also advised the recipients of petitioner's  
25           organizational meeting, which was held on March 30, 1992.

26           Following the April 8, 1992 public hearing before the  
27           Lane County Board of Commissioners and the Eugene City

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<sup>3</sup>Repondents' Brief App-1 to App-3 sets out a detailed chronology of the notices, workshops and public hearings that preceded adoption of the WEWSAS.

1 Council, an additional workshop and a work session were held  
2 on May 2 and June 3, 1992, respectively. On June 24, 1992,  
3 the Lane County Board of Commissioners held a public hearing  
4 on the WEWSAS. That hearing was continued to July 14, 1992.  
5 On July 22, 1992, the Lane County Board of Commissioners  
6 adopted the disputed ordinance.

7 **FIRST THROUGH TWELFTH ASSIGNMENTS OF ERROR**

8 Petitioner's first twelve assignments of error allege  
9 procedural errors concerning the content of the notices of  
10 hearings on the WEWSAS, and the manner in which the notices  
11 were given.

12 **A. May 21, 1991 Joint Planning Commission Public**  
13 **Hearing**

14 Lane Code (LC) 12.025 imposes the following notice and  
15 hearing requirements:

16 "(1) The planning commission shall hold at least  
17 one public hearing before making a  
18 recommendation to the board [of  
19 commissioners] on a comprehensive plan or an  
20 amendment to such plan.

21 "(2) Notice of time and place of hearing shall be  
22 given, at least ten (10) days in advance, by  
23 publication in a newspaper of general  
24 circulation \* \* \*.

25 " \* \* \* \* \* "4

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<sup>4</sup>Respondents suggest that the notice and hearing requirements of LC 12.025 may not apply to planning commission proceedings leading to adoption of special studies as Metro Plan amendments. However, they do not develop the argument. In view of our disposition of this matter, we assume the provisions of LC 12.025 apply.

1           It is undisputed that the notice for the May 21, 1991  
2 joint planning commission public hearing was published nine  
3 days, rather than the required 10 days, before the public  
4 hearing. Petitioner contends the failure to provide the 10  
5 days prior notice required by LC 12.025(2) requires remand  
6 of the challenged decision.

7           Petitioner also argues that the above notice  
8 requirements are mandatory rather than directory.  
9 Petitioner points out that unlike LC 12.030, which  
10 specifically provides that certain coordination requirements  
11 are "directory, not mandatory," LC 12.015 provides that plan  
12 amendments "shall be adopted in the manner provided in  
13 [chapter 12]."

14           As an initial point, we agree with petitioner that the  
15 10 day notice requirement of LC 12.025(2) is a mandatory  
16 requirement. However, it is a procedural requirement  
17 nevertheless. Therefore, while the city committed an error  
18 in providing nine days prior notice of the joint planning  
19 commission meeting, rather than the ten days prior notice  
20 required by LC 12.025(2), that error provides a basis for  
21 reversal or remand of the challenged decision only if  
22 petitioner's substantial rights were prejudiced.  
23 ORS 197.835(7)(a)(B); Sunburst II Homeowners Assn. v. City  
24 of West Linn, 101 Or App 458, 461, 790 P2d 1142, rev den 310  
25 Or 243 (1990); Muller v. Polk County, 16 Or LUBA 771, 775  
26 (1988); Mason v. Linn County, 13 Or LUBA 1, 4 (1985).

1           In this case, petitioner is a neighborhood association  
2 that did not exist until ten months after the disputed  
3 notice of the joint planning commission public hearing.  
4 Members of the association participated in the May 21, 1991  
5 joint planning commission public hearing. After its  
6 formation, petitioner and its members participated in  
7 subsequent public hearings that led to adoption of the  
8 challenged decision. We conclude there was no prejudice to  
9 petitioner's substantial rights.

10           **B. April 8, 1992 Joint Board of County Commissioners-**  
11           **City Council Public Hearing**

12           ORS 215.060 imposes the following requirement:

13           "Action by the governing body of a county  
14 regarding the [comprehensive] plan shall have no  
15 legal effect unless the governing body first  
16 conducts one or more public hearings on the plan  
17 and unless 10 days' advance public notice of each  
18 of the hearings is published in a newspaper of  
19 general circulation \* \* \*. The notice provisions  
20 of this section shall not restrict the giving of  
21 notice by other means, including mail, radio and  
22 television." (Emphasis added.)

23           Two aspects of the above requirement are relevant in  
24 this appeal. First, the emphasized portion of the statute  
25 makes it clear that failure to comply with the statute has  
26 the legal consequence of rendering the plan amendment  
27 without legal effect. Thus, while a showing of prejudice to  
28 substantial rights is required for other types of procedural  
29 errors, no such showing is required to obtain a remand where  
30 the procedural requirements of ORS 215.060 are not followed.

1 Second, although ORS 215.060 does not impose specific  
2 content requirements for the required notice of hearing, the  
3 Oregon Supreme Court has determined that the notice required  
4 by ORS 215.060 "must designate the property involved in the  
5 proposed action such that 'the recipients of the notice can  
6 reasonably ascertain from it that property in which they are  
7 interested may be affected by the enactment.'" (Emphasis in  
8 original; citation omitted.) Fifth Avenue Corp. v.  
9 Washington Co., 282 Or 591, 607, 581 P2d 50 (1978).

10 Petitioner contends the published notice of the April  
11 8, 1992 Joint County Board of Commissioners-City Council  
12 Public Hearing failed to comply with the content requirement  
13 of ORS 215.060.<sup>5</sup> That notice provides, in relevant part, as  
14 follows:

15 "Notice is hereby given that on Wednesday, April  
16 8, 1992, 7:00 p.m., at Eugene City Council  
17 Chambers, City Hall, Eugene, OR. 97401, the Lane  
18 County Board of Commissioners and the Eugene City  
19 Council will conduct a joint public hearing on the  
20 following matters:

21 \* \* \* \* \*

22 "2. County Ordinance PA 1019 -- In the matter of  
23 adopting the West Eugene Wetlands Special  
24 Area Study, a refinement to the [Metro] Plan,  
25 and adopting a severability clause.

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<sup>5</sup>ORS 215.060 applies to the proceedings of the governing body (here the board of commissioners and city council) and therefore does not apply to the planning commission hearing discussed in the previous section of this opinion. There is no dispute that the county gave 10 days prior notice of the April 8, 1992 Joint Board of County Commissioners-City Council Public Hearing.

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For further information, contact Lane County  
Land Management Division at 687-3807."  
Record 209.

Petitioner contends the above notice does not provide  
adequate information 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," as  
required by Fifth Avenue. According to petitioner, "West  
Eugene" is not a specifically designated area in any  
planning document, and persons living within the study area  
had no way to determine from the above quoted notice whether  
their property is included in that study area or affected by  
the WEWSAS.

The notice content requirement set out in the Supreme  
Court's decision in Fifth Avenue must be viewed in context  
with the notice the court found to be adequate in that case.  
That notice indicated the comprehensive plan was to be  
amended, but did not specify the nature of the plan  
amendment. Neither did the notice in Fifth Avenue  
specifically identify the geographic area affected by the  
proposed action.<sup>6</sup> Nevertheless, the court concluded the

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<sup>6</sup>In relevant part, that notice of hearing provided as follows:

"[The] hearing will concern a certain proposal to recommend  
adoption by the Board of County Commissioners of Washington  
County of a 'Comprehensive Framework Plan' for Washington  
County consisting of a text of approximately 150 pages and  
maps, a revision of the adopted Comprehensive Plan of

1 notice was adequate and explained that conclusion as  
2 follows:

3 "[T]he contents of the notice in question are in  
4 accord with the [ORS 215.060] notice requirements.  
5 The proposed Comprehensive Plan would affect, at  
6 least potentially, all land in Washington County.  
7 The contents of the notice reasonably apprised its  
8 recipients of the geographical scope of the  
9 proposed action in addition to specifying the  
10 nature of the contemplated action. \* \* \*"  
11 (Footnote omitted.) Fifth Avenue, 282 Or at 607.

12 From the language of Fifth Avenue quoted above, we  
13 conclude that the notice required by ORS 215.060 need not,  
14 itself, precisely identify the nature of the proposed plan  
15 amendments or the specific properties potentially affected  
16 and how they may be affected. To satisfy ORS 215.060, at  
17 least with regard to proposed legislative plan amendments  
18 such as those at issue in Fifth Avenue and in this appeal,  
19 the notice must be sufficiently detailed to alert a person  
20 reading the notice that his or her interests or property may  
21 be affected. Thereafter, it is sufficient that the local  
22 government make available more detailed information to more  
23 precisely identify the nature of the possible plan amendment  
24 and the particular properties that may be affected.

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Washington County pursuant to ORS chapter 215 \* \* \* and  
Article I of the Community Development Ordinance of Washington  
County.

"The proposed Comprehensive Framework Plan is on file with the  
Director of Records and Elections of Washington County \* \* \*.

"All persons having an interest in the above matter are  
invited to appear and be heard." Fifth Avenue, supra, 282 Or  
at 606.

1 We find little to distinguish the notice provided in  
2 this case from the one found adequate in Fifth Avenue. One  
3 possible distinction is the geographical scope of the  
4 proposed amendments. In Fifth Avenue the entire county was  
5 potentially affected, in the present appeal it is the WEWSAS  
6 study area. However, we find this distinction an  
7 insufficient basis for reaching a different result in this  
8 case.

9 Standing alone, the reference to West Eugene in the  
10 notice of the April 8, 1992 hearing does not clearly advise  
11 a person of the boundaries of the study area or whether his  
12 or her property is included in the study area. While it  
13 would have been preferable for the county to provide more  
14 explanation about the geographic scope of the study in the  
15 published notice, we do not believe Fifth Avenue and ORS  
16 215.060 require such precision. As indicated earlier in  
17 this opinion, the WEWSAS was hardly an unknown project when  
18 the notice of the April 8, 1992 hearing was published on  
19 March 15, 1992. In view of the extensive public planning  
20 process that preceded publication of the notice, we believe  
21 a reasonable person reading the notice either would have  
22 known that his or her property or interests may be affected  
23 by the WEWSAS or at least have been alerted to that  
24 possibility such that he or she could reasonably be expected  
25 to contact the Lane County Land Management Division. Had  
26 that been done, maps showing the WEWSAS study area would

1 have provided more detailed information.<sup>7</sup> We conclude the  
2 notice was adequate to comply with the content requirement  
3 of ORS 215.060.<sup>8</sup>

4 **C. June 24, 1992 Board of Commissioners Public**  
5 **Hearing**

6 Petitioner argues the notice provided by the county for  
7 the June 24, 1992 hearing before the board of commissioners  
8 fails to meet the content requirements of ORS 215.060. The  
9 notice of the June 24, 1992 public hearing is identical to  
10 the notice provided of the April 8, 1992 public hearing.  
11 For the reasons previously explained, the notice is adequate  
12 to comply with ORS 215.060.

13 **D. July 14, 1992 Board of Commissioners Public**  
14 **Hearing**

15 At the close of the June 24, 1992 board of  
16 commissioners public hearing, the board of commissioners  
17 continued that public hearing to July 14, 1992. Petitioner

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<sup>7</sup>As noted earlier in this opinion, on March 24, 1992 a letter was mailed to at least some of the property owners in the WEWSAS study area. That letter included a map of the study area and informed the recipients of the April 8, 1992 public hearing. Record 972-73.

<sup>8</sup>Petitioner also argues that LC 12.040(2) and 12.025(2) impose a notice content requirement similar to that imposed by ORS 215.060. We do not agree; but even if petitioner were correct we would conclude the content of the notice is adequate, for the same reasons explained in the text concerning ORS 215.060. Petitioner additionally suggests that LC 12.040(1) requires notice of the opportunity to be heard by the board of commissioners. Actually, LC 12.040(1) only requires that an opportunity to be heard by the board of commissioners be provided; it says nothing about required notice. In any event, we believe the notice given by the county on March 15, 1992 sufficiently conveyed the message that such an opportunity would be provided on April 8, 1992, and petitioner does not dispute that such an opportunity was in fact provided.

1 points out that although individual written notice of the  
2 continued public hearing was given to "163 individuals and  
3 groups," there was no additional published notice provided  
4 beyond that which preceded the June 24, 1992 public  
5 hearing.<sup>9</sup> Petitioner contends such additional published  
6 notice is required by ORS 215.060.

7 Petitioner recognizes that under Apalategui v.  
8 Washington County, 80 Or App 508, 723 P2d 621 (1986), the  
9 notice of public hearing required by ORS 215.060 need not be  
10 replicated where a public hearing, for which the statutorily  
11 required notice of hearing was provided, is continued.<sup>10</sup>  
12 However, petitioner argues the decision to continue a  
13 hearing must identify a definite date, time and place for  
14 the continued hearing. Petitioner contends that while the  
15 time and date for the continued hearing were specified at  
16 the June 24, 1992 hearing, the place was not.

17 Although it is true the minutes of the June 24, 1992  
18 public hearing do not specifically state the location of the  
19 July 14, 1992 continued hearing, the continued hearing was  
20 held in the same building and room as the June 24, 1992

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<sup>9</sup>Petitioner also argues that under LC 12.040(2) a hearing before the board of commissioners may only be continued if it is not concluded. Petitioner contends the June 24, 1992 public hearing was in fact concluded and, therefore, could not be continued. Petitioner's argument relies on language in the minutes taken out of context, and ignores what is otherwise clear from the minutes; the board of commissioners voted to continue the June 24, 1992 public hearing before that hearing was actually concluded.

<sup>10</sup>Petitioner also states that Apalategui was wrongly decided. However, this Board is bound by the decisions of the Oregon appellate courts.

1 public hearing. Petitioner appeared at both hearings and  
2 does not seriously contend that anyone was misled or  
3 confused by the county's failure to state explicitly that  
4 the continued hearing would be held in the same place as the  
5 June 24, 1992 public hearing. In these circumstances, we  
6 conclude it was understood that the continued hearing would  
7 occur in the same place. Any error in failing expressly to  
8 specify the location of the continued hearing was harmless  
9 and does not constitute a violation of ORS 215.060. Because  
10 the board of commissioners properly continued the June 24,  
11 1992 public hearing to July 14, 1992, it was not required to  
12 provide published notice of the July 14, 1992 public  
13 hearing. Apalategui, supra.

14 **E. Conclusion**

15 For the reasons explained above, we conclude  
16 petitioner's arguments that the county failed to follow LC  
17 notice and hearing requirements provide no basis for  
18 reversal or remand because those errors did not prejudice  
19 petitioner's substantial rights. Petitioner's arguments  
20 that the county violated ORS 215.060 are rejected.

21 Assignments of error one through twelve are denied.

22 **THIRTEENTH AND FOURTEENTH ASSIGNMENTS OF ERROR**

23 Petitioner argues the Metro Plan amendments are  
24 required to be supported by findings. Metro Plan IV-3.  
25 Petitioner argues the challenged decision "is not  
26 accompanied by the required findings."

1 Respondents point out the challenged decision is  
2 accompanied by supporting findings. Record 41-43, 153,  
3 1016-17. The decision incorporates a lengthy technical  
4 report as additional findings.<sup>11</sup> Record 4. Respondents  
5 contend petitioner may not simply assert a lack of findings  
6 and fail to explain why the findings that were adopted are  
7 inadequate. We agree with respondents. Brown & Cole, Inc.  
8 v. City of Estacada, 21 Or LUBA 392, (1991); Wethers v. City  
9 of Portland, 21 Or LUBA 78, 84-85 (1991); League of Women  
10 Voters v. Metro Service Dist., 17 Or LUBA 949, 979, aff'd 99  
11 Or App 333 (1989), rev den 310 Or 70 (1990); Deschutes  
12 Development v. Deschutes County, 5 Or LUBA 218, 220 (1982).

13 The thirteenth and fourteenth assignments of error are  
14 denied.

15 The county's decision is affirmed.

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<sup>11</sup>The first page of the technical report is included at Record 153. The technical report was submitted by the county at the time of oral argument. See OAR 661-10-025(2).