

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) LUBA No. 92-148
12 LANE COUNTY,)
13) FINAL OPINION
14 Respondent,) AND ORDER
15)
16 and)
17)
18 CITY OF EUGENE,)
19)
20 Intervenor-Respondent.)

23 Appeal from Lane County.

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.

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.

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

40 AFFIRMED 02/16/93

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).¹

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.² 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;

¹As 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. * * *'"

²The 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.³ 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

³Respondents' 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

⁴Respondents 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 215.060.⁵ 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.

⁵ORS 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.

1 * * *

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

5 Petitioner contends the above notice does not provide
6 adequate information such that "the recipients of the notice
7 can reasonably ascertain from it that property in which they
8 are interested may be affected by the enactment," as
9 required by Fifth Avenue. According to petitioner, "West
10 Eugene" is not a specifically designated area in any
11 planning document, and persons living within the study area
12 had no way to determine from the above quoted notice whether
13 their property is included in that study area or affected by
14 the WEWSAS.

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

⁶In 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.

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.⁷ We conclude the
2 notice was adequate to comply with the content requirement
3 of ORS 215.060.⁸

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

⁷As 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.

⁸Petitioner 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.⁹ 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.¹⁰
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

⁹Petitioner 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.

¹⁰Petitioner 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.¹¹ 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.

¹¹The 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).