

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

3
4 EEC HOLDINGS, LLC and GEORGE HAWES,
5 *Petitioners,*

6
7 vs.

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9 CITY OF EUGENE,
10 *Respondent,*

11 and

12
13 FAIRMOUNT NEIGHBORS ASSOCIATION,
14 *Intervenor-Respondent.*

15
16 LUBA No. 2011-114

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18 FINAL OPINION
19 AND ORDER

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22 Appeal from City of Eugene.

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24 Bill Kloos, Eugene, filed a petition for review and cross-response brief and argued on
25 behalf of petitioners/cross-respondents. With him on the brief was the Law Office of Bill
26 Kloos PC.

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28 Emily N. Jerome, City Attorney, Eugene, filed a response brief and argued on behalf
29 of respondent.

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31 Meg E. Kieran, Eugene, filed a response brief and cross-petition for review and
32 argued on behalf of intervenor-respondent/cross-petitioner. With her on the brief was
33 Gartland, Nelson, McCleery, Wade & Walloch, PC.

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35 RYAN, Board Chair; BASSHAM, Board Member; HOLSTUN, Board Member,
36 participated in the decision.

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38 AFFIRMED

04/11/2012

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

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NATURE OF THE DECISION

Petitioners appeal a decision by the city denying an application for a zoning map amendment from R-1 Low Density Residential to R-1.5 Rowhouse to allow development of three rowhouses.

MOTION TO INTERVENE

Fairmount Neighbors Association moves to intervene on the side of respondent. No party opposes the motion and it is granted.

REPLY BRIEF

Petitioners move for permission to file a reply brief. The motion is granted and the reply brief is allowed.

FACTS

The subject property is a .26 acre lot that is zoned R-1 Low Density Residential and contains an existing single family dwelling. The subject property is located in the Fairmount Neighborhood area of the city, an older residential neighborhood located near the University of Oregon. Petitioners applied to change the zoning of the subject property to R-1.5 Rowhouse, and to partition the lot into three rowhouse lots ranging in size from 3,999 to 4,230 square feet in order to construct three attached rowhouses, with the existing single family dwelling to remain on a separate remainder lot.¹

The hearings officer approved the applications, and intervenor appealed the hearings officer’s decision to the planning commission. The planning commission reversed the hearings officer’s decision and denied the zone change application. This appeal followed.

¹ As far as we can tell, the only dwellings allowed in the R-1.5 Rowhouse zone are attached rowhouses. Eugene Code (EC) 9.2740 Table.

1 **ASSIGNMENTS OF ERROR**

2 **A. Introduction**

3 EC 9.8865(2) requires the city to determine that the zone change is consistent with
4 applicable adopted refinement plans. The Fairmount/University of Oregon Special Area
5 Study (Fairmount SAS) refinement plan is the applicable adopted refinement plan for the
6 area of the city in which the subject property is located. The Land Use Diagram for the
7 Fairmount SAS designates the subject property as Low Density Residential. The text that
8 accompanies the Fairmount SAS Land Use Diagram provides:

9 “Low Density Residential (L). This area generally encompasses the south and
10 east portions of the special study area. This area is to remain in low density
11 residential use with emphasis on preserving and maintaining the single family
12 character which currently exists and is considered an integral part of the
13 neighborhood.” Fairmount SAS Land Use Diagram Text 37.

14 We refer to the above-quoted language in this opinion as the Single Family Character Policy.

15 Fairmount SAS Land Use Policy 3 provides in relevant part that “zone changes to
16 increase residential density or commercial intensity are not supported by [the Fairmount
17 SAS].” We refer to that policy in the opinion as the Residential Density Policy.

18 **B. Needed Housing**

19 Petitioners maintain that the zone change application is a proposal for “needed
20 housing” as defined in ORS 197.303, because the subject is redevelopment and infill land,
21 and the city’s adopted residential land inventory identifies “redevelopment and infill” as an
22 aspect of the city’s program for meeting residential land demand during the planning period.²

² ORS 197.303 provides in part:

“(1) As used in ORS 197.307, ‘needed housing’ means housing types determined to meet the need shown for housing within an urban growth boundary at particular price ranges and rent levels, including at least the following housing types:

“(a) Attached and detached single-family housing and multiple family housing for both owner and renter occupancy;

1 In subassignments of error under the first and second assignments of error, petitioners argue
2 that ORS 197.307(6)(2009) bars the city from applying the Single Family Character Policy
3 and the Residential Density Policy as approval criteria for petitioners’ proposed zone change
4 because the language of the policies is not “clear and objective.”³

5 The city responds first that ORS 197.307(6) does not apply to the zone change
6 application because the zone change application is not an application for the *development* of
7 housing. Also according to the city, the city has planned and zoned sufficient land to satisfy
8 the identified need for attached rowhouse housing within its urban growth boundary, and
9 ORS 197.307(6) does not apply to applications to rezone property to provide *additional* land
10 to meet the identified need. In support of its argument, the city cites *Evergreen*

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- “(b) Government assisted housing;
 - “(c) Mobile home or manufactured dwelling parks as provided in ORS 197.475 to 197.490;
 - “(d) Manufactured homes on individual lots planned and zoned for single-family residential use that are in addition to lots within designated manufactured dwelling subdivisions; and
 - “(e) Housing for farmworkers.”

³ ORS 197.307(6) (2009) limits the approval standards that maybe applied to applications for needed housing, and provides:

“Any approval standards, special conditions and the procedures for approval adopted by a local government shall be clear and objective and may not have the effect, either in themselves or cumulatively, of discouraging needed housing through unreasonable cost or delay.”

In 2011 the legislature enacted revisions to ORS 197.307 that took effect on January 1, 2012. Those revisions essentially renumbered ORS 197.307(6) (2009) as ORS 197.307(4) (2011), which provides:

“Except as provided in subsection (6) of this section, a local government may adopt and apply only clear and objective standards, conditions and procedures regulating the development of needed housing on buildable land described in subsection (3) of this section. The standards, conditions and procedures may not have the effect, either in themselves or cumulatively, of discouraging needed housing through unreasonable cost or delay.”

All statutory references to ORS 197.307 in this opinion are to the 2009 version of the statute except as otherwise noted.

1 *Development, Inc. v. City of Coos Bay*, 38 Or LUBA 470 (2000). In *Evergreen*, we agreed
2 with the city that where the city had planned and zoned sufficient land to satisfy the
3 identified need for mobile home parks in its housing inventory, ORS 197.307 did not require
4 the city to apply clear and objective criteria to an application to change the zoning of a
5 particular property to provide additional land for mobile home park development. *Id.* at 479.

6 Petitioners have not responded to the city’s argument or otherwise explained why the
7 requirements of ORS 197.307(6), or any other provisions of ORS 197.307, apply to their
8 application to change the zoning of the subject property. While petitioners may be correct
9 that attached rowhouse housing is a type of housing that is identified in the city’s housing
10 inventory and therefore meets the definition of “needed housing” set out in ORS 197.303,
11 petitioners do not take the position that their application for a zone change is an “application
12 for development of needed housing” that requires “clear and objective approval standards
13 * * * regulating * * * appearance or aesthetics” under ORS 197.307(3)(b), or that their
14 application for a zone change is a “residential application[] [or] permit” under ORS
15 197.307(3)(d).⁴ We also do not understand petitioners to take the position that the zone
16 change is needed to remedy a deficiency identified in the city’s housing inventory in the
17 particular type of needed housing (attached rowhouses) that petitioners seek to build on the

⁴ ORS 197.307(3)(b) and (d) provide in relevant part:

“(b) A local government shall attach only clear and objective approval standards or special conditions regulating, in whole or in part, appearance or aesthetics to an application for development of needed housing or to a permit, as defined in * * * ORS 227.160, for residential development. The standards or conditions may not be attached in a manner that will deny the application or reduce the proposed housing density provided the proposed density is otherwise allowed in the zone.

“(d) In addition to an approval process based on clear and objective standards as provided in paragraph (b) of this subsection, a local government may adopt an alternative approval process for residential applications and permits based on approval criteria that are not clear and objective provided the applicant retains the option of proceeding under the clear and objective standards or the alternative process and the approval criteria for the alternative approval process comply with all applicable statewide land use planning goals and rules.”

1 property. Absent any such arguments from petitioners, we agree with the city that ORS
2 197.307 does not require the city to apply only clear and objective criteria to petitioners'
3 rezoning application, even if the zone change may be a prerequisite for a future application to
4 develop rowhouses on the property.⁵ Petitioners may have a right under the needed housing
5 statutes to have a request for rezoning reviewed under clear and objective standards, if that
6 rezoning is necessary to eliminate a deficiency in the city's inventory of land that is zoned to
7 meet its identified need for rowhouses. But petitioners do not have such a right under the
8 needed housing statutes where the rezoning is not necessary to eliminate such a deficiency.
9 *Evergreen*, 38 Or LUBA at 479. Therefore, the city did not err in applying the Single
10 Family Character Policy and the Residential Density Policy to petitioners' zone change
11 application.

12 The first subassignment of error under the first assignment of error and the first
13 subassignment of error under the second assignment of error are denied.

14 **C. Single Family Character Policy**

15 We repeat the relevant portion of the Single Family Character Policy:

16 "Low Density Residential (L). * * * This area is to remain in low density
17 residential use with emphasis on *preserving and maintaining the single family*
18 *character which currently exists* and is considered an integral part of the
19 neighborhood." Fairmount SAS Land Use Diagram Text 37 (emphasis
20 added).

21 The planning commission found that "* * * 1) the area is predominantly characterized by
22 *detached* single family dwellings; and, 2) the proposed R-1.5 rowhouse zoning would not
23 ensure that existing character is preserved and maintained as required by the [Single Family
24 Character Policy]." Record 8 (emphasis in original).

⁵ Petitioners also argued in the petition for review that ORS 227.173(1) and (2) prohibit the city from applying the Policy to petitioners' zone change application. Petitioners withdrew that argument at oral argument.

1 In the second subassignment of error under their first assignment of error, petitioners
2 challenge the planning commission’s conclusion that rezoning the subject property to R-1.5
3 Rowhouse would be inconsistent with the Single Family Character Policy. We understand
4 petitioners to argue that the planning commission erred in its interpretation of the Single
5 Family Character Policy as meaning that the policy intends to preserve and maintain the
6 neighborhood for detached single-family dwellings, because the language of the Single
7 Family Character Policy does not mention or refer to either detached dwellings or attached
8 dwellings in maintaining the “single family character” of the neighborhood. According to
9 petitioners, in construing the phrase “single family character which currently exists and is
10 considered an integral part of the neighborhood” the planning commission impermissibly
11 added the word “detached” to the Single Family Character policy.

12 LUBA is authorized to reverse or remand a land use decision if the city “[i]mproperly
13 construed the applicable law.” ORS 197.835(9)(a)(D). We review the planning
14 commission’s interpretation of the Fairmount SAS to determine whether it is correct. *Gage*
15 *v. City of Portland*, 133 Or App 346, 349-50, 891 P2d 1331 (1995). We disagree with
16 petitioners that the planning commission’s interpretation of the Single Family Character
17 Policy is incorrect. Petitioners’ arguments fail to give any effect to the phrase “which
18 currently exists * * *” that follows immediately after and describes the “single family
19 character” that the policy seeks to preserve. Fairly read, we understand the planning
20 commission to have found that the “single family character which currently exists * * *” in
21 the neighborhood is *detached* dwellings, and that the policy was intended to preserve and
22 maintain that detached dwelling character, so that allowing a zone change to facilitate
23 construction of attached dwellings would not be consistent with the “character which
24 currently exists * * *.” Petitioners do not dispute that most of the housing that currently
25 exists in the neighborhood is detached dwellings, and the record supports a conclusion that
26 when the Single Family Character Policy was adopted in 1982, the dominant type of housing

1 in the neighborhood was also detached dwellings. Petitioners do not offer any alternative
2 meaning for the phrase in the Single Family Character Policy “* * * which currently exists *
3 * *.” Neither do petitioners establish that the planning commission’s finding that the single
4 family character that currently exists in the neighborhood is predominantly detached
5 dwellings, so that allowing a zone change to R-1.5 Rowhouse, a zone in which the only
6 dwellings allowed are attached rowhouses, is inconsistent with the Single Family Character
7 Policy under EC 9.8865(2). Under petitioners’ apparent understanding of the policy, the
8 entire Fairmount neighborhood could be rezoned to R-1.5 Rowhouse and yet that would be
9 consistent with the single family character as it “currently exists.” The planning
10 commission’s interpretation is more consistent with the language of Single Family Character
11 Policy.

12 The second subassignment of error under the first assignment of error is denied.

13 **D. Residential Density Policy**

14 The city need only adopt a single adequate basis for denying petitioners’ request for a
15 zoning map amendment. *Duck Delivery Produce v. Deschutes County*, 28 Or LUBA 614,
16 616 (1995). We conclude above that the city’s denial of the zone change on the basis that it
17 is inconsistent with the requirement of the Single Family Character Policy provides an
18 adequate basis for denial, and we need not address the portion of petitioners’ second
19 assignment of error that challenges the city’s conclusion that the proposed zone change does
20 not comply with the Residential Density Policy.

21 **E. Cross Petition for Review**

22 In its single cross assignment of error in its cross petition for review, intervenor
23 assigns error the planning commission’s conclusion that Metro Plan Policy A.25 does not
24 apply as an approval criterion for the zone change application. Intervenor requests that if the
25 Board remands the decision to the city because any of petitioners’ assignments of error are
26 sustained, the Board should also sustain intervenor’s cross assignment of error that argues

1 that the city erred in finding that it was not required to determine whether the zone change is
2 consistent with Metro Plan Policy A.25. Because we affirm the city's decision to deny the
3 zone change application, we need not address the cross petition for review or the cross
4 assignment of error.

5 The city's decision is affirmed.