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

SIMONS INVESTMENT PROPERTIES, LLC  
and  
CARLTON B. SIMONS,  
*Petitioners,*

vs.

CITY OF EUGENE,  
*Respondent.*

LUBA No. 2019-068

FINAL OPINION  
AND ORDER

Appeal on remand from the Court of Appeals.

Bill Kloos, Eugene, represented petitioners.

Lauren A. Sommers, Assistant City Attorney, represented respondent.

RYAN, Board Member; ZAMUDIO, Board Member, participated in the decision.

RUDD, Board Chair, did not participate in the decision.

AFFIRMED 07/09/2020

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 planning commission decision denying an application for a zone change to remove a site review overlay from petitioners’ properties.

**INTRODUCTION**

This matter is on remand from the Court of Appeals. *Simons Investment Properties, LLC v. City of Eugene*, 303 Or App 199, 463 P3d 57 (2020) (*Simons II*). We take the facts from the court’s decision:

“The subject properties in this case are 10 lots located in the Whiteaker neighborhood of the city. The ‘Whiteaker Plan,’ which is a refinement plan that was first adopted by the city in 1978, applies to those properties. In 1994, the city adopted two ordinances that affected that plan and the subject properties.

“Ordinance 19979 created the MU-W Whiteaker Mixed Use District zoning and created standards applicable to that zoning. Ordinance 19978 amended the Whiteaker Plan, which was the culmination of a two-year process to update the 1978 plan. Among other things, the 1994 Whiteaker Plan amended several parts of the plan to apply ‘Site Review’ to properties in the neighborhood. One of those amendments provided: ‘Also apply Site Review to all properties zoned MU-W Whiteaker Mixed Use[.]’

“Also in 1994, in a final rezoning order, the city applied the MU-W zone and SR Site Review subdistrict zone to specific properties in the Whiteaker neighborhood, including the subject properties, such that the zoning designation for those properties became MU-W/SR. That order also updated the Eugene zoning maps to reflect that zone change, including the SR subdistrict zoning on the subject properties. Exhibit B to that final order set out the ‘Site Review Trigger’ and the ‘Site Review Criteria’ that applied to the rezoned properties. The Eugene Code in 1994 also contained provisions for ‘Site Review Procedures,’ which set out the purpose of site review

1 subdistricts, the procedure and criteria for applying a site review  
2 subdistrict to a property, and the procedure for obtaining site plan  
3 approval. EC 9.686 - 9.694 (1996), *repealed by Ordinance 20224*  
4 (Feb. 26, 2001).

5 “Around the same time, the city also initiated an effort to update its  
6 entire land use code, which was passed by the city in 2001, and  
7 finalized in 2002, after a remand from LUBA of the original  
8 ordinance. That updated code is referred to as the Land Use Code  
9 Update (LUCU). The LUCU repealed and replaced Chapter 9 of the  
10 Eugene Code. It also repealed certain ordinances, including  
11 Ordinance 19979, which had created the MU-W zone. As part of  
12 the update, the LUCU includes lists of the zone and overlay zone  
13 titles used in the city. EC 9.1030 sets out all the base zone titles  
14 established by the LUCU, some of which were not reclassified, but  
15 were titles carried over from the ‘use districts’ established in the old  
16 code. *Compare* EC 9.268(a) (1996), *repealed by Ordinance 20224*  
17 (Feb. 26, 2001) (establishing ‘use districts’), *with* EC 9.1030  
18 (establishing ‘zones’); *see also* EC 9.100 (referring to zones as ‘base  
19 zones’). For base zones that were reclassified by the LUCU, EC  
20 9.1045 sets out a table showing the old title and the new title for  
21 those reclassified zones. The MU-W zone was reclassified as the S-  
22 W Whiteaker Special Zone Area (S-W).

23 “EC 9.1040 sets out the overlay zone titles established by the  
24 LUCU, most of which were titles carried over from the subdistricts  
25 established in the old code. *Compare* EC 9.268(b) - (i) (1996),  
26 *repealed by Ordinance 20224* (Feb. 26, 2001) (establishing ‘sub-  
27 districts’), *with* EC 9.1040 (2001) (establishing ‘overlay zones’).  
28 The /SR overlay is listed in EC 9.1040, but as explained above, the  
29 SR subdistrict existed in the old code. *See* EC 9.268(d) (1996). The  
30 LUCU also included a section titled ‘Site Review’ that is at EC  
31 9.8425 to 9.8455.

32 “The LUCU did not repeal Ordinance 19978, which was the  
33 ordinance that amended the Whiteaker Plan to require site review  
34 for properties zoned MU-W, nor did it purport to affect the final  
35 rezoning order of the city that applied the MU-W zone and SR site  
36 review subdistrict to the subject properties and updated the Eugene

1 zoning maps to reflect those changes.” *Id.* at 200-02.

2 In *Simons Investment Properties, LLC v. City of Eugene*, \_\_\_ Or LUBA \_\_\_  
3 (LUBA No 2019-068, Oct 25, 2019) (*Simons I*), we sustained petitioners’ first  
4 assignment of error and remanded the city’s decision, concluding that the  
5 planning commission improperly construed the existing Eugene Code (EC) and  
6 the prior, repealed version of the city’s code when it concluded that the SR  
7 Overlay applies to the subject property. Because we concluded that the subject  
8 properties were not subject to the SR Overlay, we did not reach petitioners’  
9 contingent second assignment of error that argued that the planning commission  
10 improperly construed the standards that apply to an application for a zone change  
11 to remove the SR Overlay from the subject properties in denying petitioners’ zone  
12 change application.

13 The court reversed and remanded our decision, concluding that the SR  
14 Overlay continues to apply to the subject properties. Accordingly, because the  
15 SR Overlay applies to the subject properties, petitioners’ application to remove  
16 the overlay is subject to the standards at EC 9.8865(2) that apply to an application  
17 for a zone change. We now address the second assignment of error.

18 **SECOND ASSIGNMENT OF ERROR**

19 Petitioners’ zone change application is subject to EC 9.8865(2), which  
20 requires the city to conclude that “[t]he proposed zone change is consistent with  
21 applicable adopted refinement plans.\* \* \*” The applicable adopted refinement  
22 plan is the Whiteaker Plan, as amended in 1994 by Ordinance 19978. The

1 hearings officer found, and the planning commission agreed, that petitioners  
2 failed to establish that removal of the SR Overlay is consistent with the Whiteaker  
3 Plan.

4 Petitioners' arguments under subheadings 1, 2, and 5 in this assignment of  
5 error are largely derivative of and dependent on petitioners' arguments in the first  
6 assignment of error, which the court of appeals rejected. Petition for Review 40-  
7 41, 44-45. For the reasons set forth in the court's decision, we reject them here  
8 as well.

9 In subheading 3 under the second assignment of error, petitioners argue  
10 that the planning commission was required and failed to find, pursuant to  
11 Whiteaker Plan Policy 2, that the subject properties continue to properly be  
12 subject to the SR Overlay because they "have the most significant potential for  
13 compatibility issues." Petition for Review 41. The city responds, and we agree,  
14 that the city council made that determination in 1994 when it added the SR  
15 Overlay to the subject properties, and the planning commission was not required  
16 to independently determine whether the properties have potential for  
17 compatibility issues in this decision. Response Brief 27.

18 In subheading 4, petitioners argue that the planning commission  
19 improperly failed to agree with petitioner's argument and evidence that  
20 petitioners' application to *remove* the SR Overlay from the subject properties was  
21 equivalent to a previously approved application to *apply* the SR Overlay to other  
22 properties near the subject properties, and that similarity or equivalency

1 mandated approval. For the reasons explained in the planning commission's  
2 decision and in the Response Brief, we agree with the city that the planning  
3 commission properly rejected petitioners' argument. Record 9, 17; Response  
4 Brief 28-29.

5           The second assignment of error is denied.

6           The city's decision is affirmed.