

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3  
4 RAYMOND HATTON and  
5 SYLVIA HATTON,  
6 *Petitioners,*

7  
8 vs.

9  
10 CITY OF EUGENE,  
11 *Respondent.*

12 LUBA No. 2006-221

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14  
15 FINAL OPINION  
16 AND ORDER

17  
18 Appeal from City of Eugene.

19  
20 G. David Jewett, Springfield, filed the petition for review. With him on the brief was  
21 Thorp, Purdy, Jewett, Urness & Wilkinson, PC. H. Andrew Clark, Springfield, argued on  
22 behalf of petitioners.

23  
24 Ross M. Williamson, Eugene, filed the response brief and argued on behalf of  
25 respondent. With him on the brief were Emily N. Jerome and Harrang Long Gary Rudnick  
26 PC.

27  
28 HOLSTUN, Board Member; BASSHAM, Board Chair, participated in the decision.

29  
30 RYAN, Board Member, did not participate in the decision.

31  
32 AFFIRMED

03/28/2007

33  
34 You are entitled to judicial review of this Order. Judicial review is governed by the  
35 provisions of ORS 197.850.

**NATURE OF THE DECISION**

Petitioners appeal a hearings official decision that interprets a part of the City of Eugene Code (EC) that governs nonconforming structures.

**REPLY BRIEF**

Petitioners move for permission to file a reply brief. The reply brief attached to petitioners' motion replies to an argument that is advanced by the city in response to petitioners' third assignment of error. Because we do not reach the third assignment of error, we need not and do not consider the reply brief.

**FACTS**

Petitioners' house and attached garage were constructed in 1947. A carport was constructed in front of the garage sometime before city zoning setback requirements were adopted in 1948.<sup>1</sup> Building setbacks under the EC, which were first imposed in 1948, have changed over the years. Under the current EC, an interior yard setback of five feet is required and structures on adjoining properties must be at least 10 feet apart. The eaves of the garage and carport on petitioners' property are approximately 21 inches from the eaves of the house on the adjoining property. This encroachment into the current EC setbacks makes petitioners' garage and carport nonconforming structures under the EC.

Petitioners' flat-roofed car port was attached to the house and garage in a way that allowed moisture and debris to collect. The carport became severely damaged over the years due to rot and insect infestation and was in danger of collapsing. Petitioners had the damaged carport removed and a new carport of similar design was constructed in its place. The removal and new construction was accomplished without the required city building permit. The new carport apparently occupies essentially the same footprint as the old

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<sup>1</sup> The parties dispute whether the evidence shows that construction of the carport predates the zoning setbacks.

1 carport. Although there are some design similarities between the new and old carport, there  
2 are differences as well. The new carport is bulkier in appearance, and the new carport is  
3 taller and has a sloped roof that allows rainwater to drain away from the house and garage.

4 While the new carport was under construction without a building permit, the city  
5 issued a stop work order. In an August 3, 2006 letter, petitioners' attorney requested that the  
6 new carport be allowed to remain as a restoration of the old carport under EC 9.1230(1).<sup>2</sup>  
7 Record 83-85. The city planning department responded that the new carport does not qualify  
8 as a restoration of the old carport. Record 81-82. Petitioners appealed that decision to the  
9 city land use hearings official. The hearings official also concluded that the new carport did  
10 not qualify as a restoration of the old carport, and this appeal followed.

#### 11 **FIRST ASSIGNMENT OF ERROR**

12 The City of Eugene, like most cities and counties, has a policy of disfavoring  
13 nonconforming uses and structures and requiring that they be corrected or removed over  
14 time. EC 9.1200.<sup>3</sup> But the City of Eugene, like most cities and counties, expressly provides  
15 a limited right to continue use of nonconforming structures. EC 9.1230.<sup>4</sup> As relevant here

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<sup>2</sup> We set out the relevant EC sections later in this opinion.

<sup>3</sup> EC 9.1200 provides:

**Purpose for Regulation of Nonconforming Situations.** Nonconforming lots or parcels, uses, and structures are detrimental to the orderly development and general welfare of citizens and property. This land use code provides for the orderly termination of legal nonconforming situations in order to promote the public health, safety, and general welfare, and bring these lots, uses, or structures into compliance with this land use code. Sections 9.1210 through 9.1230 are intended to:

- “(1) Minimize the impacts of the nonconforming situation by establishing standards that limit the expansion of the nonconformity.
- “(2) Provide for the correction or removal of nonconforming situations in an equitable, reasonable, and timely manner.”

<sup>4</sup> EC 9.1230 provides:

**Legal Nonconforming Structure.** A structure that was legally established but no longer conforms to all development standards of this land use code (such as height or setbacks) is

1 under EC 9.1230(1), “[a] legal nonconforming structure that is damaged to an extent of 50%  
2 or more of its replacement cost may be restored only if the damage was not intentionally  
3 caused by the property owner and the nonconformity is not increased.” There are a number  
4 of elements that must be satisfied before the old carport could be “restored” under EC  
5 9.1230(1). In this appeal, there is no dispute that petitioners satisfied each element in EC  
6 9.1230(1): (1) unintentional damage, (2) damage more than 50% of replacement cost, (3)  
7 nonconformity not increased. Nonetheless, the city disputes petitioners’ contention that the  
8 new carport qualifies as a “restoration” of the old carport. The hearings official considered  
9 petitioners’ arguments to the contrary, but ultimately concluded that the new carport did not  
10 qualify as a restoration of the old carport.

11 “[Petitioners] assert that the carport structure that replaces the prior structure  
12 restores the carport, in that the new structure serves the same function in the  
13 same location as the structure it replaces. In support of that argument,  
14 [petitioners] supplied a dictionary definition of ‘restore’ which provides:

15 “**restore** \* \* \* 1. to put back into existence or use. 2. To bring  
16 back to a former or original condition. 3. To give back: return  
17 \* \* \* **syns:** REINSTATE, RENEW, REVIVE.’ Webster’s II  
18 New Riverside Dictionary 359 (1988).’

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considered a legal nonconforming structure. Notwithstanding development standard requirements in this code, minor repairs and routine maintenance of a legal nonconforming structure are permitted. The continuation of a legal nonconforming structure is subject to the following:

- “(1) A legal nonconforming structure that is damaged to an extent of 50% or more of its replacement cost may be restored only if the damage was not intentionally caused by the property owner and the nonconformity is not increased. Any residential structure(s), including multiple-family, in a residential zone damaged beyond 50% of its replacement cost by a catastrophe, such as fire that is not intentionally caused by the owner, may be reconstructed at the original density provided the reconstruction is commenced within 2 years after the catastrophe.
- “(2) A legal nonconforming structure may be altered to bring the structure closer to compliance with existing regulations, but shall not be altered in a manner that increases its nonconformity.
- “(3) A legal nonconforming structure that is moved loses its nonconforming status and must then conform to all requirements of this land use code.”

1 “[Petitioners] contend that the design of the carport is intended to replicate the  
2 pre-existing carport, which supports their assertion that the project falls within  
3 the definition of ‘restoration’ rather than replacement. According to  
4 [petitioners], EC 9.1230(1) permits such restoration where, as here, the  
5 structure is damaged to more than 50% of its replacement costs and the  
6 property owners did not cause the damage.[<sup>5</sup>]

7 “\* \* \* \* \*

8 “Staff responds that EC 9.1230(1) should be read in context with EC 9.1200.  
9 [See n 3] Read together, staff argues that the code clearly contemplates that  
10 when a nonconforming structure must be completely reconstructed, it must  
11 comply with current development standards.”

12 “\* \* \* \* \*

13 “As the present dispute shows, the provision is ambiguous. In interpreting  
14 ambiguous code provisions, the decision maker must first look to the text and  
15 context of the provision. *PGE v. Bureau of Labor and Industries*, 317 Or 606,  
16 610, 859 P2d 1143 (1993). The definition of ‘restored’ is crucial to whether  
17 the carport at issue in this case is a ‘restored’ structure, or a replacement that  
18 must satisfy current setback standards. The term is not defined in the EC.

19 “Words of common usage typically should be given their plain, natural, and  
20 ordinary meaning. *Id.* at 611, citing *State v. Langley*, 314 Or 247, 256, 839  
21 P2d 692 (1992).

22 “Here, [petitioners] have supplied a dictionary definition that provides support  
23 for their argument that the construction that occurred in August 2006 falls  
24 within the meaning of ‘restore.’ It is true that the purpose of the new structure  
25 is to restore the use of the space as a carport. However, it is the structure, and  
26 not the use, that is nonconforming. Therefore, the pertinent inquiry is whether  
27 the actions taken by [petitioners] ‘restore’ the structure rather than replace it.

28 “The word ‘restore’ implies that there is some original part of the building  
29 that will be brought back as a result of the actions of the contractor. The  
30 evidence shows that the previous structure was completely replaced by a new  
31 structure. The new structure is built of the same materials: wood, cement and  
32 fiberglass, but the design amplifies the height and bulk of the structure it  
33 replaced. By any stretch of the imagination, the use of all new materials and a

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<sup>5</sup> The hearings officer also acknowledged petitioners’ arguments that while the new carport is taller and bulkier than the old carport that it replaced, the relevant inquiries under EC 9.1230(1) are whether a carport is being replaced with a carport with shared design elements and whether the interior setback intrusion is being increased.

1 new design does not ‘restore’ the structure that was irreparably damaged by  
2 water and insects.

3 “For this reason, the Hearings Official concludes that the replacement carport  
4 is a new structure that must comply with setback standards that apply to new  
5 construction.” Record 6-8 (footnotes omitted).

6 In its response brief, respondent offers the following defense of the hearings official’s  
7 decision:

8 “Initially, the Hearings Official looked to the text and sought to apply a plain  
9 and ordinary meaning to the term ‘restore’ as it relates to Petitioners’  
10 construction of a new carport. Petitioners’ own argument cites a dictionary  
11 definition for the term ‘restore’ as including ‘to bring back to a former or  
12 original condition.’ One look at a picture of the original carport in  
13 comparison to the new carport leads to the conclusion that it is unreasonable  
14 to determine that Petitioners’ new carport brings the original carport back to  
15 its original condition. *Compare* [Record] 32-33 (original structure) *with*  
16 [Record] 36, 72 (new structure).

17 “Furthermore, the Hearings Official’s interpretation takes into account the fact  
18 that the ‘structure’ at issue is the original carport that no longer exists. As the  
19 Hearings Official found, and as evidenced by the record, no part of the  
20 original carport ‘structure’ continues to exist in the new structure. The new  
21 carport is made from new materials with a different design, including a  
22 different height, different overall mass, and different appearance.

23 “The Hearings Official’s interpretation is also reasonable and correct when  
24 taking into account the context of the provision—wherein the term ‘restore’ is  
25 prefaced by the term ‘continuation’ and juxtaposed with the term  
26 ‘reconstruct.’ Petitioners replaced the original carport. The original carport  
27 structure was not continued in any manner, but replaced by new materials  
28 using a new design. With the complete replacement of the structure,  
29 Petitioners actions must be considered closer to a ‘reconstruction’ as opposed  
30 to a ‘restoration.’ The terms ‘continuation’ and ‘reconstruct’ provide context  
31 for defining the term ‘restoration.’ It is reasonable to conclude that a  
32 restoration contemplates something less than the complete reconstruction or  
33 replacement of a structure.<sup>6</sup>]

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<sup>6</sup> We understand the hearings official, and respondent in its brief, to distinguish the concepts of *restoration* and *reconstruction* based on the usage of the terms “restored” and “reconstructed” in the first and second sentences of EC 9.1230(1). See n 4. Under the second sentence of EC 9.1230(1), the fire-damaged remains of a residential structure could be entirely removed and a new home at the same density could be “reconstructed” on the property. Under the first sentence of the EC 9.1230(1), the “restored” structure must include some part of damaged structure or the new structure is not property classified as a restoration.

1 “Last, the Hearings Official’s interpretation is reasonable and correct when  
2 considering the purpose of the provisions—stating nonconforming situations  
3 are disfavored and the code intends to end the situations in due course.  
4 Eugene Code 9.1200. Petitioners’ proposed interpretation would swallow the  
5 intended purpose of the provision by allowing nonconforming structures to be  
6 replaced for perpetuity. \* \* \*” Respondent’s Brief 13-14 (citations omitted).

7 We have quoted at length from the hearings official’s decision and respondent’s  
8 defense of the hearings official’s reasoning in its brief in this appeal because we agree with  
9 that reasoning and respondent’s defense of that reasoning and do not have anything material  
10 to add to that reasoning or respondent’s defense of the hearings official’s reasoning. Simply  
11 stated, the dictionary definition of “restore” that petitioners cited and the city relied on calls  
12 for bringing something back but is somewhat obscure about what that something is. To  
13 identify that “something” petitioners would focus on function and use; and the lack of any  
14 increase in the setback intrusion (the carport function is brought back and the setback  
15 intrusion is the same now as it once was). The city focused instead on the different structures  
16 and the lack of continuity (the old structure was discontinued and no part of that structure  
17 was brought back; the new structure is constructed of all new materials, taller and somewhat  
18 different in design). The focus dictates the result under EC 9.1230(1). Even if petitioners’  
19 focus is defensible, we agree with respondent that the hearings officer’s focus is truer to the  
20 text of EC 9.1230(1) and more consistent with the cited contextual provisions.

21 Petitioners make two additional arguments that merit brief mention. First, because  
22 EC 9.1230(1) authorizes restoration if a nonconforming structure is “damaged to an extent of  
23 50% or more of its replacement cost,” petitioners argue that a nonconforming structure that is  
24 damaged to the extent of 100 percent of its replacement value could be restored under EC  
25 9.1230(1). From that argument, petitioners advance a second argument: “[t]he only way to  
26 ‘restore’ a structure that has been damaged to an extent of 100% of its replacement cost is to  
27 substitute 100% new materials for the damaged materials.” Petition for Review 10. We  
28 agree with respondent that the EC 9.1230(1), as written, establishes a *minimum* damage of

1 “50% or more of its replacement cost,” and does not necessarily contemplate the restoration  
2 of a structure that has been damaged to the extent of 100 percent of its replacement cost.  
3 Furthermore, even if a structure that is damaged to the extent of 100 percent of its  
4 replacement cost can be restored under EC 9.1230(1), petitioners’ second argument does not  
5 necessarily flow from the first. Notwithstanding that a structure might be damaged to an  
6 extent that an insurance adjuster would conclude equals 100 percent of its replacement cost,  
7 it does not necessarily follow that all structural components are damaged and must be  
8 replaced. Even if all structural components are damaged, it could easily be the case that  
9 some of the damaged structural components could nevertheless be repaired and included in  
10 the restoration.

11 Finally, petitioners fault the city for not considering EC 9.1230(2). *See* n 4. EC  
12 9.1230(2) authorizes *alteration* of a nonconforming structure “to bring the structure closer to  
13 compliance with existing regulations.” Petitioners suggest the new carport design was  
14 selected to “bring it closer to compliance with current building standards.” We are not sure  
15 we understand the argument. If petitioners are arguing that the new carport design qualifies  
16 as an alteration “to bring the structure closer to compliance with existing regulations” under  
17 EC 9.1230(2), petitioners cite no regulation that either prohibits the flat-roof design of the  
18 old carport or requires the taller pitched roof design that was incorporated into the new  
19 carport. Because petitioners cite no regulation that the old carport violated or that the new  
20 carport is “closer to compliance with,” we fail to see how EC 9.1230(2) has any bearing on  
21 this matter.

22 The first assignment of error is denied.

23 **SECOND ASSIGNMENT OF ERROR**

24 Petitioners’ second assignment of error is nominally a substantial evidence challenge  
25 to the hearings official’s interpretation of EC 9.1230(1). With one possible exception, we  
26 agree with respondent that petitioners’ arguments under the second assignment merely repeat



1 the argument they advanced under their first assignment of error and that petitioners' dispute  
2 with the city with regard to EC 9.1230(1) presents a question of legal interpretation rather  
3 than an evidentiary question.

4 The one possible exception is petitioners' quotation of an exchange that occurred  
5 below between the hearings official and petitioners' contractor. In that exchange, the  
6 contractor speculated that even under the city's narrow view of EC 9.1230(1), the old carport  
7 could have been entirely replaced so long as some nominal part of the old carport remained  
8 as part of the new carport. That argument begs the question of whether the taller and bulkier  
9 new carport is accurately described as a restoration. And, in any event, we do not understand  
10 the argument. It is hardly surprising that there may be ways to go about repairing damaged  
11 nonconforming structures that comply with the letter of EC 9.1230(1) but are inconsistent  
12 with the underlying purpose. The question in this appeal is whether petitioners' decision to  
13 entirely remove the damaged old carport and replace it with a new, taller and bulkier carport  
14 resulted in a "restored" carport, within the meaning of EC 9.1230(1). That some other  
15 approach to addressing the problem posed by the old, damaged carport might have been  
16 consistent with EC 9.1230(1) and resulted in something that resembles the new carport is  
17 irrelevant.

18 The second assignment of error is denied.

19 **THIRD ASSIGNMENT OF ERROR**

20 To take advantage of EC 9.1230, petitioners' old carport must have been a structure  
21 that was "legally established." Because the old carport violated the zoning setbacks that  
22 were first imposed in 1948, petitioners had the burden to establish that the old carport was  
23 constructed before 1948. Petitioners relied on city planning staff's agreement, throughout  
24 most of the local proceedings, to assume the old carport predated 1948. That agreement was  
25 based on the *lack* of any evidence that the old carport was constructed after 1948. Petitioners  
26 describe that agreement as a "stipulation" by the city. On October 20, 2006, the same day

1 the evidentiary record in this matter closed, the city withdrew its prior agreement to assume  
2 that the old carport was constructed before 1948. Record 29. The hearings official  
3 ultimately concluded that petitioners failed to carry their evidentiary burden to demonstrate  
4 that the old carport was “legally established.”

5 The hearings official’s finding that the new carport does not qualify as a restoration  
6 of the old carport under EC 9.1230(1) assumes that the old carport was “legally established,”  
7 within the meaning of EC 9.1230. That finding was a separate and independent basis for  
8 rejecting petitioners’ appeal of the planning department’s decision concerning the new  
9 carport. Therefore, the hearings official’s decision would have to be affirmed even if we  
10 sustained petitioners’ third assignment of error. Because the third assignment of error would  
11 not alter our ultimate decision in this appeal, regardless of our disposition of that assignment  
12 of error, we do not consider petitioners’ third assignment of error.

13 The city’s decision is affirmed.