

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

3
4 SIMONS INVESTMENT PROPERTIES, LLC

5 and

6 CARLTON B. SIMONS,

7 *Petitioners,*

8
9 vs.

10
11 CITY OF EUGENE,

12 *Respondent.*

13
14 LUBA No. 2019-068

15
16 FINAL OPINION

17 AND ORDER

18
19 Appeal from City of Eugene.

20
21 Bill Kloos, Eugene, filed the petition for review and reply brief and argued
22 on behalf of petitioners.

23
24 Lauren A. Sommers, Assistant City Attorney, filed the response brief and
25 argued on behalf of respondent.

26
27 RYAN, Board Member; ZAMUDIO, Board Chair, participated in the
28 decision.

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

31
32 REMANDED 10/25/2019

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

NATURE OF THE DECISION

Petitioners appeal a planning commission decision denying an application to remove a site review overlay from petitioners' properties.

FACTS

Petitioners' properties are located in the Whiteaker neighborhood of the city, north of West 5th Avenue, south of West 4th Avenue, and generally between Charnelton Street and Washington Street. The properties are zoned S-W Whiteaker Area Special Zone (S-W Zone). According to the information the city provided to petitioners, the properties are also subject to the /SR Site Review Overlay (SR Overlay). Based on that information, petitioners applied for a zone change to remove the SR Overlay from their properties. Petitioners subsequently submitted an amended application to request a determination that the properties are not subject to the SR Overlay. Record 1883. We explain the SR Overlay in more detail below.

The hearings officer held a hearing, and concluded that the SR Overlay applies to the subject properties and that removal of the SR Overlay was not consistent with applicable refinement plan policies. Petitioners appealed the decision to the planning commission, which affirmed the hearings officer's decision. This appeal followed.

1 **FIRST ASSIGNMENT OF ERROR**

2 Petitioners’ first assignment of error argues that the city improperly
3 construed the existing Eugene Code (EC) and a prior, repealed version of the
4 city’s code when it concluded that the SR Overlay applies to the subject
5 properties. Petitioners request that LUBA “remand the decision to the [c]ity for
6 further proceedings.” Petition for Review 37. In order to resolve this assignment
7 of error, we first describe the city’s planning and zoning actions involving the
8 subject properties.

9 **A. A Tale of Two Codes**

10 The subject properties are located in the Whiteaker neighborhood of the
11 city, and accordingly are subject to the Whiteaker Plan, a refinement plan that
12 was first adopted in 1978, seven years after the city adopted its first land use code
13 in 1971 (1971 Eugene Code). In August 1994, the city adopted two ordinances.
14 The first, Ordinance 19979, created the MU-W Whiteaker Mixed Use District
15 (MU-W Zone) and added provisions governing the MU-Zone to the 1971 Eugene
16 Code. Record 2226-32. The second, Ordinance 19978, amended the Whiteaker
17 Plan to require the city to “apply Site Review to all properties zoned MU-W
18 Whiteaker Mixed Use District[.]” Record 641-44. Ordinance 19978 and an
19 accompanying “Final Order” applied the newly created MU-W Zone and the
20 existing SR Site Review subdistrict (SR Subdistrict) to the subject properties.
21 Record 1621-57. At the time the SR Subdistrict was first applied to the subject

1 properties, the standards governing the SR Subdistrict were codified at 1971
2 Eugene Code 9.686 *et seq.* Record 2236-38.

3 In 2001, the city adopted Ordinance 20224, which repealed in its entirety
4 1971 Eugene Code 9.015 through 9.119, including 1971 Eugene Code 9.686 *et*
5 *seq.*, the standards that applied to properties included in the SR Subdistrict.
6 Record 136-37. We refer to the 1971 Eugene Code as the Old Code. Ordinance
7 20224 also repealed Ordinance 19979, which had created the MU-W Zone in
8 1994. *Id.* At the same time, Ordinance 20224 adopted Eugene Code (EC) 9.0010
9 to 9.9710. Rec 137. We refer to the version of the EC that was adopted in 2001
10 as the New Code.

11 Ordinance 20224 accomplished three things that are relevant here. First, it
12 repealed Old Code 9.686 *et seq.*, which, as explained above, was the previously
13 adopted codification of the standards of the SR Subdistrict. Second, it created and
14 applied new base zones to properties in the city, by reclassifying each of the
15 former base zones into a new base zone, in New Code Table 9.1045. Third, it
16 created 10 new overlay zones, including the SR Overlay, codified in New Code
17 9.4400, and applied six of the newly created overlay zones to specific properties
18 by adopting or incorporating official maps into the New Code.

19 **B. The City's Decision**

20 During the proceedings before the city, petitioners argued that the SR
21 Overlay does not encumber their properties because the New Code did not apply
22 the overlay to their properties, and no subsequent planning action by the city has

1 applied it to their properties. The hearings officer rejected the argument,
2 concluding that the SR Subdistrict from the Old Code remained applicable to the
3 subject properties and also that the SR Overlay in the New Code applies to the
4 subject properties. Record 14.

5 The hearings officer concluded that nothing in the text of Ordinance 20224
6 indicates that the city intended “discontinuation of the term ‘subdistrict’” or that
7 the city “intended to ‘discard’ the [SR Subdistrict] review requirements” with the
8 adoption of the New Code. Record 14. She reasoned that

9 “there is no language in Ordinance 20224 or the [New Code] that
10 ‘explicitly’ removes or ‘discards’ the /SR Site Review that had been
11 attached [to] the subject propert[ies] in 1994. Unlike the S-W * * *
12 Zone, which affirmatively and explicitly replaced the [MU-W
13 Zone], the [New Code] did not impact the continuation of the /SR
14 Site Review that was legislatively attached to the subject
15 propert[ies] in 1994.” *Id.*

16 The hearings officer also relied on minutes from a 2000 planning commission
17 meeting regarding the adoption of the New Code in which a member of the city’s
18 planning staff stated that “generally the overlay zones were reformatted and
19 renumbered for clarity, but where they applied had not changed.” Record 15. The
20 hearings officer also relied on a map introduced into the record by the city
21 planning staff entitled “Eugene Overlay Zone Map” (Overlay Map) that shows
22 the subject properties as subject to the SR Overlay. Record 15, RE-E.

23 The planning commission affirmed the hearings officer’s decision. The
24 planning commission found:

1 “The Planning Commission agrees with the Hearings Official’s
2 determination. The Planning Commission finds that when the
3 Whiteaker Refinement Plan was adopted in 1994, the City Council
4 adopted Ordinance No. 19978 applying the /SR Site Review
5 Subdistrict to the subject properties as required by the Whiteaker
6 Refinement Plan. The Planning Commission further finds that
7 nothing in Ordinance No. 20224 or LUCU affirmatively removed
8 the previously applied site review requirements from the subject
9 properties. The legislative history surrounding LUCU, previously
10 adopted ordinances, and adopted Eugene Code (with relevant
11 excerpts provided as part of the record materials for consideration)
12 collectively demonstrate the continuity of the legislative intent to
13 retain site review requirements (which after the adoption of the New
14 Code, were implemented through the [SR Overlay]) on the subject
15 properties, consistent with the Whiteaker Plan. While it is true that
16 the City has reformatted, renumbered and renamed various base
17 zones and overlays (previously referred to as districts and
18 subdistricts in the ‘Old Code’ prior to the City’s land use code
19 update in 2001), the Planning Commission disagrees with the
20 applicant’s argument that the City somehow inadvertently removed
21 Site Review from the subject properties.” Record 6-7.

22 It is not clear from the planning commission’s findings whether it concluded that
23 what it generically describes as “site review requirements” apply to the subject
24 properties by virtue of the Old Code, the New Code, or both. In essence, we
25 understand the planning commission to have concluded that the Old Code’s “site
26 review requirements,” which we understand to mean the standards of the SR
27 Subdistrict, encumber the subject properties under two theories. First, the
28 planning commission concluded that nothing in Ordinance 20224 “removed” the
29 SR Subdistrict standards from applying to the subject properties. Second, we
30 understand the planning commission to have concluded that the New Code
31 merely renamed and renumbered the Old Code’s SR Subdistrict standards but

1 otherwise left them in place. Third, and in the alternative, we understand the
2 planning commission to have concluded that the New Code applied the SR
3 Overlay to the subject properties.

4 **C. Petitioners' First Assignment of Error**

5 In their first assignment of error, petitioners argue that the planning
6 commission improperly construed the Old Code and the New Code to the extent
7 it concluded that generically described "site review requirements" continue to
8 apply to the subject properties or that the properties are subject to the SR Overlay.
9 ORS 197.835(9)(a)(D). We review the planning commission's construction to
10 determine whether it is correct. *McCoy v. Linn County*, 90 Or App 271, 275, 752
11 P2d 323 (1988).

12 **1. The SR Subdistrict Standards in the Old Code Were** 13 **Repealed**

14 Petitioners first argue that Ordinance 20224 unambiguously "repealed" the
15 entirety of the Old Code, including all of the prior Old Code provisions regarding
16 zoning districts and subdistricts. Accordingly, petitioners argue, the planning
17 commission erred when it concluded that "nothing in Ordinance 20224 or the
18 [New Code] affirmatively removed the previously applied Site Review
19 requirements from the subject properties." Record 6-7.

20 The city's response is somewhat confusing, but we understand the city to
21 respond that the SR Subdistrict standards that applied by application of the MU-
22 W Zone and SR Subdistrict to the subject properties in 1994 through Ordinance

1 19978 continue to apply because Whiteaker Plan Policy 2 requires the city to
2 “apply Site Review to all properties zoned [MU-W Zone].” The city also
3 observes, correctly, that Ordinance 20224 did not repeal Ordinance 19978, which
4 was the ordinance—and accompanying final order—that applied the MU-W
5 Zone and SR Subdistrict to the subject properties. Under the city’s theory, “the
6 [SR Overlay] was merely a renaming of the [SR Subdistrict]” to implement
7 Whiteaker Plan Policy 2. Response Brief 13-14.

8 We agree with petitioners that the planning commission improperly
9 construed Ordinance 20224 to the extent it concluded that the properties are
10 subject to the “site review requirements” in the Old Code. Ordinance 20224
11 “repealed” the Old Code in its entirety, including the SR Subdistrict standards in
12 Old Code 9.686 *et seq.* Record 136. The plain meaning of the term “repeal” is
13 “to rescind or revoke.” *Webster’s Third New Int’l Dictionary* 1924 (unabridged
14 ed 2002). The fact that the Whiteaker Plan requires the city to “apply site review
15 to all properties zoned MU-W Zone” does not change the fact that the city
16 repealed the MU-W Zone and the SR Subdistrict. While the city is correct that
17 Ordinance 20224 did not repeal Ordinance 19978 (the 1994 ordinance that
18 applied the MU-W Zone and the SR Subdistrict to the subject properties), so that
19 the SR Subdistrict may remain in place on the subject properties, that fact merely
20 leaves the subject properties with the SR Subdistrict designation. However, that
21 designation is without any consequence, because the SR Subdistrict *standards*
22 were explicitly and unambiguously repealed in Ordinance 20224.

1 **2. The New Code Did Not Apply the SR Overlay to**
2 **Petitioners' Properties**

3 Petitioners next argue that the planning commission improperly construed
4 the New Code to the extent it concluded that the New Code merely renamed the
5 SR District and automatically applied the SR Overlay to properties previously
6 encumbered by the SR Subdistrict. According to petitioners, nothing in the plain
7 language of the New Code demonstrates that the New Code merely renamed the
8 SR Subdistrict as the SR Overlay. Also, according to petitioners, no action taken
9 by the city after the New Code took effect encumbered petitioners' properties
10 with the SR Overlay.

11 First, petitioners point out that the New Code adopted new base zones and
12 concurrently and expressly applied the new base zones to properties that were
13 previously subject to zoning districts in the Old Code, through Table 9.1045.¹
14 Record 178-79. As relevant here, the New Code reclassified the MU-W Zone to
15 the S-W Zone. *Id.*

16 The New Code also expressly adopted new overlay zones, listed in Table
17 9.1040. However, unlike Table 9.1045, which expressly reclassified the base
18 zones from the Old Code to base zones in the New Code, Table 9.1040 does not
19 reclassify any subdistricts created by the Old Code into any newly created overlay
20 zones. Petitioners argue that the difference in the two tables demonstrates that the

¹ Table 9.1045 is titled "Reclassification of Prior Zones" and includes a table reclassifying every zone in the Old Code to a new zone created by the New Code.

1 city could have, and chose not to, contemporaneously reclassify repealed
2 subdistricts into newly created overlay zones, and such a choice not to do so
3 reflects a legislative intent that repealed subdistricts were not automatically
4 converted to newly created overlay zones.

5 Petitioners next note that the New Code includes New Code 9.1050, which
6 provides:

7 “Establishment of Zone Boundaries and Overlay Zone Boundaries
8 by Map. Zone boundaries shall be depicted on an official map titled,
9 ‘Eugene Zoning Map.’ *Overlay zone boundaries shall be indicated*
10 *on the ‘Eugene Zoning Map,’ or on an official map titled, ‘Eugene*
11 *Overlay Zone Map.’* The text of this land use code may include a
12 boundary description or list of uses subject to overlay zone
13 regulations. The ‘Eugene Zoning Map’ and ‘Eugene Overlay Zone
14 Map’ may be divided into geographic units for convenience of use
15 and to more readily identify locations on the map. Where the text
16 of a zone change decision or the text of this land use code
17 specifically define boundaries (such as the TD or CAS overlay
18 zones), conflicts between that text and map boundaries shall be
19 resolved in favor of the text.” (Emphasis added.)

20 Petitioners point out that concurrent with its adoption, the New Code applied six
21 of the 10 newly created overlay zones to specific properties by incorporating
22 “official maps” into the New Code. Record 288, 294, 296, 299, 305-06, 520-21.
23 However, petitioners argue, the New Code did not specifically apply the SR
24 Overlay Zone to any specific properties or incorporate an official SR Overlay
25 Zone map into the New Code. Petitioners argue that the SR Overlay zone has
26 never been applied to the subject properties, either through the text of the New

1 Code, an official overlay zone map incorporated into the New Code, or a
2 subsequent decision apply the SR Overlay to petitioners' properties.

3 Next, petitioners point out that New Code Table 9.3910 specifies some
4 uses in the S-W Zone that are permitted with "site review," indicating that the
5 city intended some uses in the S-W Zone to be subject to site review. As
6 petitioners argue, if all land previously encumbered by the SR Subdistrict is
7 subject to the SR Overlay, then Table 9.3910's requirement for site review for
8 specified uses is redundant.

9 Petitioners also argue that the site review standards in Old Code 9.686 *et*
10 *seq* and New Code 9.8440 contain significant differences that demonstrate that
11 the New Code was not simply a renaming and renumbering of Old Code 9.686.
12 Record 1887, 2222. Petitioners additionally argue that petitioners' interpretation
13 of the text of the New Code is consistent with context provided by Whiteaker
14 Plan Policy 2, which provides in relevant part that "the * * * Planning
15 Commission shall consider initiating actions to remove site review requirements,
16 where appropriate, when city-wide design standards have been adopted by the
17 city council." According to petitioners, the New Code adopted city-wide design
18 standards, and the logical outcome of the city's adoption of those design
19 standards is that the city did not intend for the SR Overlay to automatically apply
20 to all properties within the old SR Subdistrict.

21 Before turning to the city's response, we note that neither the hearings
22 officer's or the planning commission's decisions include any textual analysis of

1 Ordinance 20224 or any provisions of the New Code that support their conclusion
2 that “site review requirements” apply to the subject properties. The city’s textual
3 analysis of provisions of the New Code that the city argues supports the planning
4 commission’s decision is not included in the planning commission’s decision,
5 but is presented for the first time in the city’s brief.

6 The city responds by pointing to text of the New Code that the city
7 maintains supports the planning commission’s interpretation that the New Code
8 automatically applied the SR Overlay to properties that were included in the SR
9 Subdistrict. The city first notes that the purpose of the SR Subdistrict in Old Code
10 9.686 and the purpose of the SR Overlay in New Code 9.4400 are very similar.
11 The city argues that the purpose statement in New Code 9.4400 makes clear that
12 the SR Overlay was intended to serve the same purpose as the SR Subdistrict.
13 Second, the city cites New Code 9.1010, which provides in relevant part that the
14 New Code is intended to implement applicable refinement plans, which the city
15 points out includes the Whiteaker Plan Policy 2. As the argument goes, the city
16 intended the New Code to implement the requirement in Whiteaker Plan Policy
17 2 that requires site review for properties zoned MU-W.

18 The city also points to a March 2000 statement by the city’s planning staff
19 to the planning commission at one of the meetings before the planning
20 commission leading to the adoption of the New Code in May 2001. Record 15.
21 The city’s planning staff “confirmed that generally the overlay zones were
22 reformatted and numbered for clarity, but where they applied had not changed.”

1 *Id.* The city argues that the statement is evidence that supports the inference that
2 the intent of the city council in adopting the New Code was to merely rename
3 and renumber the SR Subdistrict as the SR Overlay.

4 We think petitioners' interpretation of the provisions of the New Code is
5 correct and the city's interpretation set forth in the response brief is incorrect.
6 *McCoy*, 90 Or App at 275. First, as we conclude above, the SR Subdistrict
7 standards were repealed when the New Code was adopted. That means that the
8 SR Subdistrict site review standards no longer apply to any properties, and the
9 city's decision to repeal those standards is a strong indication that the city did not
10 intend for the SR Subdistrict standards to have any continuing application or
11 validity after repeal. The planning commission's decision to the contrary is
12 contradicted by the plain meaning of the word "repeal."

13 Second, in the New Code, the city created and contemporaneously
14 reclassified every base zone from the Old Code to the New Code in New Code
15 Table 9.1045, and also created and contemporaneously applied six of the 10
16 newly created overlay zones by adopting official overlay zone maps concurrently
17 with the adoption of the New Code. That action and the absence of any language
18 in the New Code either reclassifying the former subdistricts or specifically
19 defining the overlay zone boundaries strongly suggests that the city intended that
20 the remaining four newly created overlay zones would be applied at a later time,
21 through text amendments or the adoption of an official overlay zone map. As
22 petitioners note, one of those overlay zones was mapped two years after the New

1 Code was adopted, in 2003. Record 1255-58. The substantive differences
2 between the SR Subdistrict standards and the SR Overlay standards also support
3 a conclusion that the city’s creation of the SR Overlay was not merely a renaming
4 and renumbering of the Old Code SR Subdistrict.

5 Third, New Code 9.1050 specifies that overlay zone boundaries will be
6 depicted on (1) an “official” overlay zone map or (2) in the text of the New Code.²
7 As we explain above, the New Code does not include any text that describes the
8 SR Overlay zone boundaries and did not contemporaneously adopt an overlay
9 zone map depicting the boundaries. That supports a conclusion that the New
10 Code did not apply the SR Overlay to any properties.³

² “Official” is not defined in the *EC. Webster’s Third New Int’l Dictionary* 1567 (unabridged ed 2002) defines the word, when used as an adjective as in new Code 9.1050, as “**4 a**: derived from the proper office or authority : made or communicated by virtue or authority : AUTHORIZED[.]”

³ In response to petitioners’ argument regarding New Code 9.1050, the city puts forth an argument that we simply do not fully understand. The city argues that the Overlay Map at Record RE-E depicts the SR Subdistrict boundaries that were first applied to the subject properties in 1994 in Ordinance 19978. Response Brief 17-18. The city cites the last sentence of New Code 9.1050, which provides that “[w]here the text of a zone change decision or the text of this land use code specifically define boundaries (such as the TD or CAS overlay zones), conflicts between that text and map boundaries shall be resolved in favor of the text.”

We think the city is arguing that even if the Overlay Map did not show the subject properties as encumbered by the SR Overlay, the text of that 1994 zone change decision would control over a conflict with the Overlay Map. If that is the city’s argument, the city misreads New Code 9.1050. The last sentence of New Code 9.1050 addresses what happens when there is a conflict between text that

1 Finally, we do not find the city planning staff's March 2000 comment to
2 the planning commission during the proceedings that led to the final adoption of
3 the New Code by the city council particularly persuasive in ascertaining the intent
4 of the city council in adopting the New Code.

5 **3. The City Has Not Demonstrated that the Online Eugene**
6 **Overlay Zone Map is an Official Map**

7 Finally, the city argues that the Overlay Map at Record RE-E, which is a
8 map titled "Eugene Overlay Zone Map," depicts the subject properties as subject
9 to the SR Overlay. Response Brief 18. The city argues that despite New Code
10 9.1050's use of the word "official" to describe the map, "nothing in [the New
11 Code] requires adoption of a map [by the city council] *in order* for it to be deemed
12 'official.'" Response Brief 18 (emphasis in original). The city argues that the
13 Overlay Map merely depicts the SR Subdistrict boundaries that were first applied
14 to the subject properties in 1994 in Ordinance 19978, and the Overlay Map's
15 inclusion of the subject properties within the SR Overlay settles the question of
16 whether the subject properties are subject to the SR Overlay. *Id.* The city also
17 responds that petitioners are prohibited from challenging the "legitimacy" of the

defines an overlay zone boundary and a map that defines the same overlay zone boundary, and concludes that the text controls. Here, however, we have already concluded that the SR Overlay is not simply a renaming and renumbering of the SR Subdistrict from the Old Code, and therefore the text of the 1994 zone change decision that included the subject properties within the SR Subdistrict boundary is simply irrelevant.

1 Eugene Overlay Zone Map in the context of an application for a zone change.
2 Response Brief 19.

3 Petitioners argue that the city’s reliance on the map at Record RE-E is
4 misplaced, because nothing on the map or anything else proffered by the city
5 indicates that it is an “official” map within the meaning of New Code 9.1050.
6 Petitioners argue that the city has failed to produce any documentation or proof
7 of action by the city after the adoption of the New Code that placed petitioners’
8 properties on the Overlay Map or encumbered their properties with the SR
9 Overlay. During the proceedings before the hearings officer, petitioners pointed
10 out that the city had not identified any previous city council action that adopted
11 an SR Overlay map, and pointed to qualifying language on the online version of
12 the Overlay Map, from which the map at Record RE-E was produced, that states
13 “[t]o verify zoning contact the Eugene Permit and Information Center.” Record
14 RE-E, 1346.

15 We reject the city’s argument that the Overlay Map settles the question or
16 conclusively establishes that the subject properties are subject to the SR Overlay.
17 First, nothing in the record or otherwise identified by the city establishes that the
18 Overlay Map is an “official” map as that term is used in New Code 9.1050. The
19 city does not argue that the Overlay Map in the record and available online is an
20 “official” map. In addition, we have some trouble agreeing with the city’s
21 argument that something less than a public action by a city governing body could
22 establish an “official” map for purposes of New Code 9.1050, in part because of

1 notice and hearing requirements in ORS 227.186 that apply when a city changes
2 the zoning of a property.

3 In addition, we reject the city’s argument that the Overlay Map settles the
4 question. As explained above, the SR Subdistrict was repealed and no longer
5 exists. The Overlay Map was created after repeal of the SR Subdistrict and to the
6 extent it depicts properties that were previously included in the SR Subdistrict, it
7 is not a substitute for an official action to subject those properties to the newly
8 created SR Overlay. Again, the city has not identified any public, official action
9 that adopted the Overlay Map as an “official” map within the meaning of New
10 Code 9.1050.

11 For the reasons set forth above, we agree with petitioners that the planning
12 commission’s decision that the subject properties are subject to “site review
13 requirements” is not supported by anything in the text of the Old Code, Ordinance
14 20224, or the New Code.

15 Petitioners’ first assignment of error is sustained.

16 **SECOND ASSIGNMENT OF ERROR**

17 Petitioners’ second assignment of error argues that the planning
18 commission improperly construed EC 9.8865(2), which provides the standards
19 that apply to petitioners’ application to remove the SR Overlay from the subject
20 properties, when it determined that petitioners’ application was not consistent
21 with Whiteaker Plan Policy 2. Petitioners’ second assignment of error is styled
22 as a contingent assignment of error.

1 We conclude above that the planning commission improperly construed
2 the Old Code, Ordinance 20224, and the New Code when it concluded that the
3 subject properties are encumbered by the SR Overlay. The subject properties are
4 not subject to the SR Overlay, and therefore petitioners need not apply to remove
5 that overlay from the subject properties. Accordingly, we need not and do not
6 address petitioners' second assignment of error.

7 The city's decision is remanded.