

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

3  
4 MOUNTAIN WEST INVESTMENT CORP.,  
5 *Petitioner,*

6  
7 and

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9 MILTON ROBINSON,  
10 *Intervenor-Petitioner,*

11  
12 vs.

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14 CITY OF SILVERTON,  
15 *Respondent,*

16  
17 and

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19 NORTH WATER STREET, LLC,  
20 *Intervenor-Respondent.*

21  
22 LUBA No. 2000-093

23  
24 FINAL OPINION  
25 AND ORDER

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27 Appeal from City of Silverton.

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29 Mark D. Shipman, Salem, and Donald M. Kelley, Silverton, filed a combined brief on  
30 behalf of petitioner and intervenor-petitioner. With them on the brief were Saalfeld Griggs  
31 Gorsuch Alexander and Emerick, P.C., and Kelley and Kelley. Donald M. Kelley argued on  
32 behalf of intervenor-petitioner.

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34 No appearance by City of Silverton.

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36 Christopher P. Koback, Portland, E. Michael Connors, Portland, and Michelle Bellia,  
37 Portland, filed the response brief. With them on the brief was Davis Wright Tremaine. E.  
38 Michael Connors argued on behalf of intervenor-respondent.

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40 BRIGGS, Board Chair; BASSHAM, Board Member; HOLSTUN, Board Member,  
41 participated in the decision.

42  
43 REMANDED

03/09/2001

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45 You are entitled to judicial review of this Order. Judicial review is governed by the

1 provisions of ORS 197.850.  
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**NATURE OF THE DECISION**

Petitioners appeal the city’s decision to approve a lot line adjustment.<sup>1</sup>

**FACTS**

The subject property is a 105,000 square-foot parcel containing two lots. The property is designated Multiple Family Residential in the city’s comprehensive plan and is zoned Multi-Family Residential, Low Density (RL). On February 4, 2000, North Water Street, LLC (intervenor) applied for a lot line adjustment to eliminate the common boundary between the two lots to accommodate the siting of a 62-unit residential care facility on the property. The city planning director approved the lot line adjustment in an administrative decision that was made without a hearing on March 13, 2000.

Intervenor-petitioner Robinson, an adjacent property owner, appealed the planning director’s decision to the planning commission. At the appeal hearing, petitioners argued that the lot line adjustment application failed to comply with relevant portions of the city’s development ordinance. They also argued that the siting of the assisted living facility on the combined lots would not comply with the city’s comprehensive plan and implementing regulations.

The city planning commission denied intervenor-petitioner’s appeal and affirmed the planning director’s decision. The planning commission’s decision only considered the lot line adjustment, and did not consider the proposed use of the property for an assisted living facility. This appeal followed.

**FIRST, THIRD AND SIXTH ASSIGNMENTS OF ERROR**

Silverton Zoning Ordinance (SZO) Section 12 provides a procedure and criteria for reviewing and approving major and minor partitions and lot line adjustments. SZO 12.01

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<sup>1</sup>Petitioner and intervenor-petitioner filed a joint petition for review. Therefore, we refer to them together as “petitioners.”

1 establishes the intent of the section.<sup>2</sup> SZO 12.02 sets out the application requirements.<sup>3</sup> SZO

2 12.04 provides, in relevant part:

3 “**Review Criteria** – Approval of a \* \* \* lot line adjustment shall require that  
4 findings of fact substantiate compliance with the following:

5 “A. Each parcel shall meet the minimum lot and dimension standards of  
6 the applicable zone district. In no instance shall a parcel be created, or  
7 a lot line adjustment made which will be inconsistent with any lot  
8 requirement of the applicable zone district without a concurrent  
9 variance application being submitted and approved.

10 “B. Adequate public facilities shall be available to serve the existing and  
11 the newly created parcels or shall be made part of the conditions of  
12 approval.

13 “C. Proposal[s] shall be compatible with all applicable policies within the  
14 Silverton Comprehensive Plan, if any, and with the requirements of  
15 the [underlying] zoning district.

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<sup>2</sup>SZO 12.01 provides, in relevant part:

“**Intent** – The purpose of a partition or a lot line adjustment is to allow for one or more parcel sizes to be adjusted from their original size. \* \* \* A lot line adjustment adjusts a common property line between two or more properties so that while property sizes are adjusted, no new \* \* \* parcels are created.”

<sup>3</sup>SZO 12.02 provides, in relevant part:

“**Application and fee** – An application for \* \* \* a lot line adjustment shall be filed with the City and accompanied by the appropriate fee. At a minimum the application shall include:

“A. A complete application signed by the property owner [or authorized agent] \* \* \* ,

“B. A certified list of all current property owners, as identified by the Marion County Tax Assessor’s Office, within 100 feet of the subject property,

“C. A copy of the deed(s),

“D. A written applicant’s statement addressing the review criteria,

“E. *A site plan of the property showing the proposed use of the property.*

“F. In addition to providing the above, the Planning Director may determine that supplemental information may be required which will better address specific pertinent issues pertaining to the development of the property. This additional information may include: a detailed engineer’s drawing, a report from a wetlands biologist, a soils report, or traffic engineer’s report.” (Emphasis added.)

1           “D.    A ‘redevelopment plan’ shall be required for any application which  
2                    leaves a portion of the subject property capable of being replatted.

3           “E.    [E]ach parcel shall have direct access onto a public street. \* \* \*”

4           In the third and sixth assignments of error, petitioners argue that the city’s decision  
5 inadequately addresses SZO 12.04(B) and 12.04(C) because those criteria require the city to  
6 consider the use to which the property is to be put in order to determine whether they are  
7 satisfied.<sup>4</sup> Petitioners contend that it is impossible to decide whether the resulting parcel will  
8 be served by adequate public facilities or that the proposal is compatible with the  
9 comprehensive plan without considering the anticipated use of the property. In this case,  
10 petitioners argue, the application should be reviewed to determine whether the resulting lot  
11 has adequate public facilities to serve the assisted living facility, and whether the approval of  
12 a lot line adjustment to allow for the establishment of such a facility on the subject property  
13 is consistent with the city’s comprehensive plan. In the alternative, petitioners argue that if it  
14 is not appropriate to consider the anticipated use of the property, SZO 12.04(B) and (C)  
15 cannot be satisfied without considering *all* development permitted in the zone that could be  
16 approved on the property as a result of the lot line adjustment.

17           Petitioners point to portions of SZO Section 12 to support their argument that the  
18 ordinance contemplates that the use of the property will be considered during the approval of  
19 a lot line adjustment. In particular, petitioners cite to SZO 12.02(E), which requires that the  
20 application for a lot line adjustment include a site plan showing the proposed use of the  
21 property; and SZO 12.06 (Conditions), which allows the planning director to adopt  
22 conditions of approval to ensure compliance with the SZO 12.04 approval criteria, provided  
23 findings are adopted to show that “the conditions are reasonably related to the impacts  
24 caused by the specific development proposed on the subject property” and will serve to

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<sup>4</sup>Petitioners’ first assignment of error attacks the city’s decision as a whole for failing to consider the proposed use of the property for the assisted living facility.

1 mitigate “any adverse impacts which may be associated with the proposed use of the  
2 property.” SZO 12.06(A) and (B). Petitioners also point to SZO 12.07, which lists the types  
3 of conditions that may be imposed.<sup>5</sup>

4 Intervenor argues that the “proposal” referred to in SZO 12.04(C) pertains to the lot  
5 line adjustment and not to a proposed use. According to intervenor, the city adopted findings  
6 concluding that the proposed lot line adjustment is compatible with the RL zoning district  
7 and, therefore, that portion of SZO 12.04(C) is satisfied. Intervenor argues that the city made  
8 its decision to approve the siting of the assisted living facility when it approved a related  
9 design review application. Intervenor contends that the proper place to raise issues regarding  
10 the proposed use was during the design review process and, because petitioners’ attempts to  
11 challenge the design review decision have failed, they cannot collaterally attack that decision  
12 in an appeal of the lot line adjustment.

13 In addition, intervenor argues that nothing in SZO Section 12 *requires* consideration  
14 of the proposed use in the context of a lot line adjustment. According to intervenor, the city’s  
15 decision to approve the lot line adjustment does no more than eliminate the common

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<sup>5</sup>SZO 12.07 provides, in part:

**“Matters which may be conditioned include but are not limited to:**

“\* \* \* \* \*

“C. Provision for a storm drainage facility.

“\* \* \* \* \*

“E. Special building setbacks, orientation, landscaping, fencing, berming, and retention of natural vegetation.

“F. Special locations for loading, parking, access routes, or any outdoor activity that could impact adjacent property.

“\* \* \* \* \*

“I. Conditions may require that all, or part, of the proposed development or use be deferred until the happening of certain events such as the availability to the subject property of a certain level of service.”

1 boundary and consideration of the use is not needed in *this* case to determine whether the  
2 resulting parcel will conform with the minimum siting standards in the RL zone. Intervenor  
3 contends that the larger parcel provides for additional area for setbacks, ensures access to a  
4 public street and complies with the minimum parcel size in the zone.<sup>6</sup> Therefore, intervenor  
5 argues, it is not necessary to consider the proposed use of the property for an assisted living  
6 facility to determine that the relevant standards have been met.

7 As the parties' arguments illustrate, SZO 12.04 is ambiguous. The planning  
8 commission's decision could be read to prohibit consideration of the proposed use in *all*  
9 circumstances. If that is the case, we do not believe that the text and context of SZO Section  
10 12 supports such an interpretation as reasonable and correct. *McCoy v. Linn County*, 90  
11 Or App 271, 275-76, 752 P2d 323 (1988). SZO 12.04 clearly requires consideration of the  
12 proposed use, at least to the extent necessary to find compliance with SZO 12.04(B). We also  
13 do not agree with intervenor's contention that the city's design review procedure is the  
14 process that the city uses to evaluate proposed uses of property. We note that SZO Section  
15 18, which contains the city's design review standards, includes standards regarding the  
16 proposed site layout and the use of certain building materials, but does not address the  
17 impacts from proposed uses or the adequacy of the city's infrastructure. Remand is  
18 appropriate to allow the city to determine the extent to which the criteria in SZO 12.04  
19 require consideration of the proposed use.

20 The first, third, and sixth assignments of error are sustained.

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<sup>6</sup>Intervenor also argues that petitioners failed to raise the issue of whether the *lot line adjustment* complies with SZO 12.04(B) and (C) during the proceedings before the planning commission. According to intervenor, the only issues raised below dealt with whether the *proposed use* of the property complies with the relevant provisions of the ordinance. We believe that petitioners' arguments in their petition for review address the same issues they raised below. Therefore, petitioners are not precluded from assigning error to the city's omission of any reference to the proposed use in its decision.

1 **SECOND, FOURTH, SEVENTH, NINTH AND TENTH ASSIGNMENTS OF ERROR**

2           Petitioners argue that the city’s decision does not address the issues raised by  
3 petitioners regarding whether the proposed assisted living facility complies with SZO 12.04.  
4 Petitioners also contend that the city’s decision is not supported by adequate findings  
5 because it does not demonstrate that there are adequate facilities to support the use of the  
6 property for an assisted living facility as required by SZO 12.04(B), or that the siting of an  
7 assisted living facility on the site satisfies relevant policies of the Silverton Comprehensive  
8 Plan, as required by SZO 12.04(C). SZO 12.04(C) requires the city to determine whether the  
9 “proposal [is] compatible \* \* \* with the requirements of the [underlying] zoning district.”  
10 Petitioners argue that the city’s findings do not address whether the siting of an assisted  
11 living facility is compatible with the RL zone. According to petitioners, the maximum  
12 density allowed on the reconfigured parcel is 22 units. Intervenor proposed a 62-unit facility.  
13 Therefore, petitioners contend that the city could not approve the density contemplated by  
14 intervenor.

15           Intervenor argues that it was not necessary for the city to adopt findings  
16 demonstrating that the proposed use complies with the lot line adjustment criteria. Intervenor  
17 contends that the findings the city did adopt were adequate to show that the *proposed lot line*  
18 *adjustment* satisfied the relevant criteria, and that is enough.

19           Our disposition of the first, third and sixth assignments of error, above, requires  
20 remand to determine the extent to which the requirements of SZO 12.04 require  
21 consideration of the proposed use of the property. The city’s interpretation on remand is  
22 necessary to resolve petitioners’ arguments regarding the scope of the findings required  
23 under SZO 12.04. Therefore, we do not address the merits of those arguments here.

24           Petitioners’ second, fourth, seventh, ninth and tenth assignments of error are denied.

1 **FIFTH, EIGHTH AND ELEVENTH ASSIGNMENTS OF ERROR**

2 In these assignments of error, petitioners argue that the city's decision is not  
3 supported by substantial evidence because there is little or no evidence in the record  
4 regarding the proposed assisted living facility.

5 In view of our disposition of petitioners' assignments of error pertaining to the  
6 meaning of SZO 12.04, we do not consider petitioners' fifth, eighth and eleventh  
7 assignments of error.

8 The city's decision is remanded.