BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

MILTON ROBINSON,
*Petitioner,*

vs.

CITY OF SILVERTON,
*Respondent,*

and

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

LUBA No. 2002-142

FINAL OPINION
AND ORDER

Appeal from City of Silverton.

Patrick E. Doyle, Silverton, filed the petition for review. With him on the brief was Donald M. Kelley and Kelley and Kelley. Donald M. Kelley argued on behalf of petitioner.

No appearance by City of Silverton.

E. Michael Connors, Portland, filed the response brief and argued on behalf of intervenor-respondent. With him on the brief was Davis Wright Tremaine, LLP.

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

REMANDED 04/04/2003

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

Opinion by Briggs.

## NATURE OF THE DECISION

Petitioner challenges city approval of a lot line adjustment.

## BACKGROUND

### A. Facts

This matter is before us for the second time. In *Mountain West Investment Corp. v. Silverton*, 39 Or LUBA 507, 508-509 (2001) (*Mountain West I*), we described the relevant facts as follows:

> "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.
>
> "[Petitioner], an adjacent property owner, appealed the planning director's decision to the planning commission. At the appeal hearing, petitioner[] argued that the lot line adjustment application failed to comply with relevant portions of the city's development ordinance. [Petitioner] 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 [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. * * *"

On appeal to LUBA, petitioner asserted that the city erred by failing to consider the proposed use in approving the lot line adjustment. Petitioner argued that under the lot line adjustment criteria set out in Silverton Zoning Ordinance (SZO) Section 12, the city must consider the proposed use of the property in order to determine that the applicable criteria

have been met.[1] Intervenor argued that the impact of the proposed use was considered during a design review process conducted in 2000 and that petitioner's argument was an impermissible collateral attack on the city's prior determination in that process that the proposed use was appropriate for the site. We agreed with petitioner that the planning commission's interpretation of the city's ordinance to preclude consideration of the proposed use in making a decision regarding the lot line adjustment was not consistent with the text and context of the SZO 12.04. We then remanded the decision to the city.

Intervenor appealed our decision to the Court of Appeals. The court affirmed our decision in part, reversed it in part and remanded the decision to us to clarify our disposition of some of the assignments of error. *Mountain West Investment v. City of Silverton*, 175 Or App 556, 30 P3d 420 (2001) (*Mountain West II*). We did so, and then remanded the decision to the city for further review in light of the Court of Appeals' and our opinions. *Mountain West Investment Corp. v. City of Silverton*, __ Or LUBA __ (LUBA No. 2000-093, September 27, 2001).

After our remand, the city council held public hearings to address the decision, and considered testimony and arguments by the parties concerning findings proposed by

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[1] SZO Section 12.04 sets out the review criteria for partitions and lot line adjustments. It provides, in relevant part:

> "A. Each parcel shall meet the minimum lot and dimension standards of the applicable zone district. In no instance shall a parcel be created, or a lot line adjustment made which will be inconsistent with any lot requirement of the applicable zone district without a concurrent variance application being submitted and approved.
>
> "B. Adequate public facilities shall be available to serve the existing and the newly created parcels or shall be made part of the conditions of approval.
>
> "C. [The p]roposal [is] compatible with all applicable policies within the Silverton Comprehensive Plan, if any, and with the requirements of the [underlying] zoning district.
>
> "D. A 'redevelopment plan' shall be required for any application which leaves a portion of the subject property capable of being replatted.
>
> "E. [E]ach parcel shall have direct access onto a public street. * * *"

intervenor that supported approval of the lot line adjustment.[2] The city council then adopted a decision approving the line line adjustment, and adopted the findings proposed by intervenor to support its decision. This appeal followed.

**B. The Appellate Decisions**

In remanding the challenged decision to the city in the first appeal, we said:

> "* * * The planning commission's decision could be read to prohibit consideration of the proposed use in *all* circumstances. If that is the case, we do not believe that the text and context of SZO Section 12 supports such an interpretation as reasonable and correct. *McCoy v. Linn County*, 90 Or App 271, 275-76, 752 P2d 323 (1988). SZO 12.04 clearly requires consideration of the proposed use, at least to the extent necessary to find compliance with SZO 12.04(B). We also do not agree with intervenor's contention that the city's design review procedure is the process that the city uses to evaluate proposed uses of property. We note that SZO Section 18, which contains the city's design review standards, includes standards regarding the proposed site layout and the use of certain building materials, but does not address the impacts from proposed uses or the adequacy of the city's infrastructure. *Remand is appropriate to allow the city to determine the extent to which the criteria in SZO 12.04 require consideration of the proposed use*." *Mountain West I*, 39 Or LUBA at 512-513 (emphasis in first sentence in original; other emphasis added).

In *Mountain West II*, the Court of Appeals interpreted the provisions of SZO Section 12, as follows:

> "[T]he lot line adjustment review criteria in SZO 12.04 do not specifically state that the city should examine whether the planned use for the newly configured property is appropriate under the city's comprehensive plan and zoning controls. Nevertheless, when construed as a linguistic and pragmatic whole, SZO chapter 12 requires such consideration. Without that use-specific inquiry, the city cannot meaningfully determine whether there are adequate public facilities available to serve the newly created parcels, *see* SZO 12.04(B), or whether the proposal will be compatible with the applicable policies of the city's comprehensive plan and the requirements of the underlying zoning district, *see* SZO 12.04(C). SZO chapter 12 requires the city to consider more than the placement of lot lines on a property map." 175 Or App at 564-565.

[2] It is not clear from the record whether the city council allowed the parties to present evidence to support their respective positions during the remand proceedings.

The above language in the Court of Appeals' decision can be read to affirm our conclusion in the above-quoted portion of our prior decision that, while the SZO 12.04(B) adequate public facilities standard is literally directed at "parcels," the nature of the public facilities standard itself requires consideration of the proposed use. The Court of Appeals' decision also appears to extend that reading of SZO 12.04 to the comprehensive plan and zoning district compatibility standard at SZO 12.04(C), which is directed at the "proposal," to require that the proposed use be found to be consistent with the comprehensive plan and zoning district.

Intervenor expresses a narrower view of the holdings in our decision and the Court of Appeals' decision. That more narrow view finds some support in the emphasized concluding part of our decision quoted above and in the following language in the Court of Appeals' decision, which follows the part of the court's decision quoted above:

> "Finally, we are not unmindful of the frustration an applicant might experience if, after having obtained final design approval, the project nonetheless runs afoul of the lot line adjustment process, particularly if the resolution of a lot line adjustment is based on consideration of a proposed use that passed muster in the design review context. However sympathetic that frustration, we emphasize again that the design review and lot line processes are separate under the city's code. *Consequently, as the SZO is configured, applicants must anticipate that, in some instances, a use otherwise permissible on a particular lot may be rendered unsuitable on a newly configured lot following a lot line adjustment. The city's code does not lend itself to automatic approval of a newly configured lot if the lot change would put the otherwise acceptable use in conflict with the site or with the city's comprehensive plan and zoning controls*." 175 Or App at 566 (emphasis added).

The language in our decision that states that the remand is "to allow the city to determine the extent to which the criteria in SZO 12.04 require consideration of the proposed use" can be read to say that the precise manner in which the proposed assisted living facility must be considered under SZO 12.04 remained to be decided by the city. The language in the court's decision quoted and emphasized above can be read to suggest that the city could satisfy its obligation to consider the proposed use under the SZO 12.04 criteria by asking

whether there is anything about the property line adjustment itself that makes the already-approved assisted living facility "conflict with the city's comprehensive plan and zoning controls." As we explain below, the city interpreted SZO 12.04 to permit this limited consideration of the proposed assisted living facility in applying the SZO 12.04 criteria.

**FIRST, SECOND AND FIFTH ASSIGNMENTS OF ERROR**

The city's interpretation of SZO 12.04 and the parties' arguments about that interpretation are not always easy to understand. As we understand intervenor, it believes that the *manner* in which the proposed use (*i.e.*, the proposed assisted living facility) must be considered under SZO 12.04 remained unsettled under LUBA's and the Court of Appeals' decisions. Stated differently, intervenor believes those decisions simply held that the proposed assisted living facility could not be ignored when applying SZO 12.04, and that determining the precise manner in which the proposed assisted living facility must be considered under SZO 12.04 remained subject to the city's interpretive discretion.

Petitioner rejects that narrow reading of LUBA's and the Court of Appeals' decision. Petitioner argues that when applying the SZO 12.04(B) public facilities standard and the SZO 12.04(C) comprehensive plan and zoning district compatibility standard, LUBA's and the Court of Appeals' decisions have already determined that the city must demonstrate that there are adequate public facilities to serve the proposed assisted living facility and that the assisted living facility is consistent with comprehensive plan and zoning district policies. With this general understanding of the decision and the parties' positions, we turn to the parties' arguments under these assignments of error.

In its decision on remand, the city interpreted SZO 12.04 to allow consideration of the proposed assisted living facility in the context of a lot line adjustment in only an extremely limited sense:

> "The City Council concludes that when a lot line adjustment is proposed in conjunction with a specific proposed development that has already been approved pursuant to the required development approval process, SZO 12.04

> requires that the proposed development only be considered to determine the extent that the proposed lot line adjustment changes or alters the lot configuration at the time the development was approved. For instance, the City is required to determine under SZO 12.04(B) to what extent the proposed lot line adjustment alters or affects the proposed development's access to the public facilities (public streets, sewer, water, etc.) relied upon in the prior approval of the proposed development. Additionally, the City is required to determine under SZO 12.04(C) to what extent the proposed lot line adjustment alters or affects the proposed development's compatibility with the City's Comprehensive Plan and Zoning Ordinance, such as compliance with the setback, building height and lot coverage requirements, relied upon in the prior approval of the proposed development." Record 10-11.

The city concluded that two events resulted in "approval" of the assisted living facility. First, the city determined that, by placing the RL zoning designation on the property, the city effectively concluded that all permitted uses, including senior care facilities, complied with relevant comprehensive plan policies and met minimum service requirements.[3] The city reasoned that it would not have allowed senior care facilities as a permitted use in the zone if it had not determined that services would be adequate and that such housing was consistent with comprehensive plan policies that address housing needs within the city.

Second, the city concluded that the design review decision in 2000 resolved a number of issues regarding the proposed assisted living facility. As a result, the city considered the proposed assisted living facility in the review of the lot line adjustment only to the extent that the newly configured parcel might result in violation of setbacks, building heights and lot coverages that were approved during design review. Record 11. Because the design review decision was conditioned on approval of the challenged lot line adjustment, the city concluded that the lot line adjustment did not change any of the factors that were considered during design review and, therefore, the proposed assisted living facility need not be

[3] "Senior care facilities" are permitted in the RL zone. Assisted living facilities are not expressly listed as a use that is allowed within the city. However, the city's decision treats the proposed assisted living facility as a type of "senior care facility."

considered further. According to the city, it is not required to reevaluate the proposed use in the context of this lot line adjustment because the lot line adjustment merely implements one aspect of the design review decision that determined the appropriateness of the use in the first instance.

Petitioner challenges the city's interpretation of SZO 12.04, arguing that the city's interpretation is inconsistent with the Court of Appeals' interpretation of SZO 12.04 in *Mountain West II*. According to petitioner, the Court of Appeals decision explicitly found that the lot line adjustment criteria require that the city consider the proposed use for the lot notwithstanding the fact that the proposed use may have been evaluated to some extent during design review. Petitioner argues that the city council erred in interpreting SZO 12.04 not to require consideration of the proposed use, when the court in *Mountain West II* had already interpreted SZO 12.04 to require such consideration.

Petitioner further argues that the city's interpretation is based on what the city characterizes as a "reevaluation" or "reapproval" of the proposed use. Petitioner contends that that characterization is wrong. According to petitioner, the city has yet to consider whether an assisted living facility at the proposed density is appropriate for the subject property.

Intervenor responds that the city did consider the proposed use of the property in approving the lot line adjustment, but appropriately limited the extent to which it considered that use to whether the use might be affected by the movement of the property line. According to intervenor, both LUBA's and the Court of Appeals' decisions allow the city to adopt its own interpretation of the extent to which SZO 12.04 requires consideration of proposed use. The city council did so, and intervenor argues that the city's interpretation of its ordinance requirements should be accorded deference.

Petitioner argues that SZO 12.04, as interpreted by the Court of Appeals, requires consideration of the use independent of the property line adjustment. We understand

petitioner to argue that the required lot line adjustment allows parties to argue, and requires the city to consider, whether the subject property is a suitable location for the proposed use at all. We do not believe that *Mountain West II* goes that far. *Mountain West II* recognizes that the provisions of SZO 12.04, particularly 12.04(B) and (C), require consideration of the proposed use in order to determine whether adequate public services are available to support the proposed use at the proposed location on the property, and whether that use on that reconfigured lot is compatible with whatever comprehensive plan policies or zoning requirements that may apply. *See* n 1.

That said, we agree with petitioner that the city's decision is not consistent with *Mountain West II*. The city interpreted SZO 12.04 to require consideration of the proposed use *only* if, as a result of the lot line adjustment, the proposed use on the reconfigured property will conflict with applicable setback, building height or lot coverage requirements in ways that were not considered in the design review decision. As the Court of Appeals decision explains, the fact that the design review decision may have considered the proposed use to some extent in applying the city's design review criteria does not mean that the use must not *also* be considered in applying its lot line adjustment criteria. The two procedures under the SZO are functionally and qualitatively different.[4] Therefore, we agree with petitioner that the city erred in interpreting SZO 12.04 as narrowly as it did. Consideration of the proposed assisted living facility is necessary to find that the lot line adjustment complies with SZO 12.04(B) and (C). The city must consider whether there are adequate public facilities to serve the proposed assisted living facility and whether that assisted living facility

[4] It may be that there are design review criteria that were applied to the proposed facility that are the functional equivalent of SZO 12.04. If so, it may be that the evidence that was considered in the design review decision and the decision itself may be sufficient to establish that SZO 12.04 criteria are also satisfied. However, bare reference to the design review decision is not sufficient to show that the SZO 12.04 criteria are met.

complies with comprehensive plan and zoning district policies, regardless of whether the proposed assisted living facility was also considered in some manner during design review.

We reject the city's and intervenor's position that the adequacy of public facilities to serve the proposed assisted living facility and the compatibility of that facility with relevant comprehensive plan and zoning district policies can be assumed simply because the proposed assisted living facility is a permitted use in the RL zoning district. Although the city may be free to amend SZO 12.04 to relieve applicants from carrying the burden to establish such adequacy and compatibility in partition and property line adjustment proceedings that involve permitted uses, it is not free to interpret that obligation out of SZO 12.04 when both LUBA and the Court of Appeals have already decided that SZO 12.04 requires that intervenor carry that burden. *Johns v. City of Lincoln City*, 161 Or App 224, 229, 984 P2d 864 (1999). Although our opinion and the Court of Appeals' decision could have been clearer about how much interpretive discretion the city retained on remand, we agree with petitioner that the city's narrow interpretation of SZO 12.04 is inconsistent with LUBA's and the Court of Appeals' decisions in this proceeding.

The first, second and fifth assignments of error are sustained in part.

**THIRD AND FOURTH ASSIGNMENTS OF ERROR**

The city's findings with respect to SZO 12.04(B) state, in relevant part:

> "SZO 12.04(B) requires a finding that adequate public facilities * * * be available to serve the existing and newly created parcel(s) * * *. As previously noted, [intervenor] already obtained approval for the [assisted living facility] pursuant to the Design Review Decision. Therefore, the City Council's inquiry under [SZO] 12.04(B) is limited to determining if the Lot Line Adjustment will impact or impair the City's ability to provide public services to the [assisted living facility] that the City relied upon in the previous approval[.] The City Council concludes that the Lot Line Adjustment will not impact the City's ability to provide public services because the Lot Line Adjustment will combine the two parcels into a single parcel, and therefore the newly created single parcel will have the same public facilities available to it that the two parcels had. Both City water and sanitary sewer services served both the previous residence and care facility. There is sufficient capacity in the City's water treatment system to continue to serve

> the property after the Lot Line Adjustment. The City is not constrained by its ability to provide water because the capacity of the City's water is for a planned population of 10,000 and the current population of the City is slightly more then 7,414, and therefore the Lot Line Adjustment will not impact the capacity of the City to provide water.
>
> "With the recent upgrade in the City's wastewater treatment facility, there is sufficient capacity to accommodate a population of slightly more then 10,000. The Lot Line Adjustment will not impact the City's ability to treat the project effluent. South Water Street is classified as an arterial street in the City's Transportation System Plan. The Lot Line Adjustment will not adversely impact the function or classification of this street. Police and Fire services will continue to be provided by the Silverton Police Department and the Silverton Fire District, respectively. Any building will be required to be constructed consistent with all building and fire codes. Therefore, the Lot Line Adjustment complies with SZO 12.04(B)." Record 14-15.

Petitioner argues the county's findings with respect to SZO 12.04(B) are inadequate because the findings address only the impact of the property line adjustment, and do not address the proposed assisted living facility that will be constructed as a result of the property line adjustment. Petitioner contends that the city's findings erroneously rely on the prior design review approval to assume that there are adequate public facilities to serve the assisted living facility. Petitioner also argues that the findings focus on the city's ability to provide public services generally rather than the particular public services that might be necessary to serve an assisted living facility located on the subject property. According to petitioner, the proposed assisted living facility will have a building footprint three times larger than the structures that are currently on the property. Petitioner argues that the findings do not explain how, or whether, public facilities and services are adequate at the proposed location to serve the proposed assisted living facility at the scale that is proposed.

In addition, petitioner argues that the city failed to evaluate all appropriate public facilities that will be required to be available to serve the site. According to petitioner, the findings fail to establish whether the city's stormwater facilities are adequate. Petitioner concedes that the decision considers the potential impact of stormwater runoff, but argues that the city's finding that the "stormwater drainage will be assessed during the building

permit process" is inadequate to establish that SZO 12.04(B) is met with respect to stormwater. Petitioner contends that it is impossible to know from the city's decision if it is feasible to connect to the city's stormwater system, or whether on-site measures will be necessary to provide adequate stormwater drainage.

Finally, petitioner argues that other public facilities such as ambulance services, and alternative transportation facilities such as sidewalks and bicycle paths are not addressed in the city's decision. Petitioner argues that the finding the city does make with respect to transportation in general is inadequate because it fails to explain why the city's classification of South Water Street as an arterial in the city's transportation plan has any bearing on the street's capacity to carry the additional trips that will be generated by the assisted living facility.

Intervenor responds that petitioner waived these issues by not raising them below. We disagree. Throughout the proceedings before the city, petitioner argued that intervenor had not demonstrated that the proposed lot line adjustment complies with SZO 12.04(B) in light of the fact that the proposed use may generate greater service demands than currently exist on the property or could be allowed absent the adjustment. *See* Record 104, 111 (stormwater discharge); 144 (ambulance services); 145 (sidewalks); 145 (traffic). While petitioner did not mention sewer and water service specifically, there is no dispute that the parties understood that those public facilities must be available and adequate to serve the reconfigured parcel. *See Boldt v. Clackamas County*, 21 Or LUBA 40, 46, *aff'd* 107 Or App 619, 813 P2d 1078 (1991) (the purpose of the "raise or waive it" provision of ORS 197.763 is to "prevent unfair surprise").

The city's findings can be read to conclude that adequate sewer and water facilities are available to serve the assisted living facility. However, that conclusion appears to be based on (1) prior less intensive use of the two parcels; and (2) available capacity of the city's sewer and water facilities. Neither consideration addresses whether adequate sewer and

water facilities are available to serve the more intensive proposed use at the site. With respect to transportation, we agree with petitioner that a finding that the subject parcel has access to a city arterial is not the same as a finding that existing transportation facilities are adequate to serve the traffic that will be generated by the proposed use. We also agree with petitioner that the findings are not adequate to address issues petitioner raised with respect to stormwater drainage, ambulance services, and sidewalk access.

We have already concluded that the city erred in interpreting SZO 12.04(B) so narrowly as to foreclose consideration of the extent to which the proposed use of the property will require different public facilities or facilities that have a greater capacity than currently serve the property. On remand, the city must address whether adequate public facilities are available to serve the proposed use. Those findings must also address the particular public facilities such as ambulance services, sidewalks and transportation facilities that petitioner has identified.

The third assignment of error is sustained. Because we agree with petitioner that the findings are inadequate, we do not address the evidentiary challenge petitioner makes to the city's findings with respect to SZO 12.04(B) in the fourth assignment of error.

**SIXTH AND SEVENTH ASSIGNMENTS OF ERROR**

The challenged decision adopts five pages of findings addressing the compatibility of the proposed lot line adjustment with plan policies pertaining to: urbanization; agricultural lands; open space, natural and cultural resources; air, water and land resource quality; natural hazards; housing; economy; transportation; energy; public facilities and services; and citizen involvement. The city concluded, based on those findings, that the proposed lot line adjustment, and the assisted living facility that will be sited on the property, are compatible with those policies. Petitioner challenges findings of compatibility with nine of those plan elements arguing that, like the city's consideration of SZO 12.04(B), the city's review of the proposed development's compatibility is limited to the extent to which the lot line

adjustment affected the already approved proposal. In addition, petitioner argues that the city's findings are conclusory and do not identify the particular policies within the general categories that the city considered. Petitioner further argues the findings are inadequate because they do not identify why the city believes certain policies are not applicable. Finally, petitioner argues that the city adopted the contradictory positions that (1) the design review decision addressed applicable comprehensive plan policies and therefore they need not be considered in the context of a lot line adjustment; and (2) adopted alternative findings that specifically consider whether the assisted living facility complies with applicable comprehensive plan policies.

Unlike the portion of the city's decision that addresses SZO 12.04(B), most of the city's findings regarding its comprehensive plan policies do consider the proposed assisted living facility and conclude that the assisted living facility is compatible with those policies. Therefore, to the extent the city erred in applying a limited scope of consideration under SZO 12.04(C) contrary to the Court of Appeals' interpretation, that error is harmless if the city's alternative findings addressing the proposed use are adequate. With that in mind, we address petitioner's arguments with respect to SZO 12.04(C).

**A. Urbanization**

According to petitioner, an applicable residential development policy provides that "[s]maller lots sizes will be encouraged on flat lands, larger lot sizes on hilly lands." SCP 2-15. According to petitioner, there is no dispute that the subject parcel is flat. Therefore, petitioner argues, the city should have explained why the proposed 2.2-acre parcel is consistent with a policy that "encourages" smaller lot sizes on flat lands. Petitioner also argues that the city failed to address the overall urbanization goal of providing "adequate land to meet anticipated future demands for urban development in a logical and orderly manner." SCP 2-1.

With respect to petitioner's first argument, we do not agree that the policy is a mandatory approval criterion. Even if it was, the proposed development of the property, at a density level that petitioner otherwise argues is greater than is allowed in the RL zone, appears to implement the apparent intent of the policy, which is to promote greater development density on the flat lands.

With respect to the city's overarching goal of providing adequate land to meet anticipated future demands, the SCP concludes that there is enough land zoned for residential and multi-family use to meet residential demands for a variety of housing over the relevant planning period. SCP 2-8. Petitioner does not explain why the siting of an assisted living facility on property zoned for multi-family housing is incompatible with this general goal, and we do not see that it is.

**B. Agricultural Lands**

Petitioner argues that the city's finding that its agricultural lands policies do not apply to the proposal because the property is already developed and is zoned for multi-family development is conclusory and not supported by the record, because there is no evidence as to whether the property contains agricultural soils or otherwise could be redeveloped for agricultural uses.

There is no dispute that the subject property is zoned for medium-density residential use, and has been developed for that use. The city did not err in concluding that the agricultural lands policies are not applicable.

**C. Open Space, Natural and Cultural Resources**

Petitioner argues that the proposed assisted living facility is not compatible with the SCP goal of conserving "open spaces and preserv[ing] natural and cultural resources" because, as a result of the lot line adjustment, the property will be more intensively developed, resulting in a loss of open space and creating additional impervious surfaces that

will cause runoff into Silver Creek. Petitioner argues that this intensive development will "place greater stress" on Silver Creek. Petition for Review 22.

The Open Space, Natural and Cultural Resources section of the SCP implements the city's Statewide Planning Goal 5 (Natural Resources, Scenic and Historic Areas, and Open Space) program. The only inventoried Goal 5 resource that may be affected by the proposed development is Silver Creek, which borders the subject property. The challenged decision concludes that the proposed lot line will allow the property to be developed in a way that minimizes the impact on Silver Creek, and that the design review decision adopts specific standards regarding tree preservation and planting, setbacks and stormwater detention facilities that will further ensure that the proposed development will not have an impact on the creek. Record 17.

Because the design review decision is not in the record of this appeal, we do not know whether the conditions of approval for that decision are adequate to establish that Silver Creek will be protected within the meaning of the Comprehensive Plan. Therefore, we agree with petitioner that the city's findings that Silver Creek will be preserved within the meaning of the plan goal and the policies and programs that implement that goal are not supported by substantial evidence.

**D. Air, Water and Land Resource Quality**

The city's findings describe the SCP Air, Water and Land Resource Quality element goal and objectives as follows:

> "to maintain and improve the quality of the area's air, water and land resources. The goal is to limit discharges from development to meet applicable state and federal environmental quality statutes, rules and standards. One of the ways the City's Comprehensive Plan addresses that problem is to encourage development to be connected to the public sewage system. * * *" Record 17-18.

The city found that the proposed lot line adjustment will not affect air, water or land resources. It also found that the proposed assisted living facility will not affect air, water and

land resource quality because it will be connected to the city's public sewer system, and the city concluded that the proposed assisted living facility would not overwhelm the sewer system, because it has excess capacity. Record 18.

Petitioner argues that there is no evidence in the record to show that the city's sewer system is adequate to accommodate the proposed assisted living facility, because there is no evidence in the record regarding the quantity of sewage that will be discharged from the facility.

While there is no specific evidence with respect to the quantity of sewage that will be discharged by the assisted living facility, we believe the city could conclude, based on testimony by the city engineer and planning director, that a system that was built to accommodate a population of 10,000 persons, where the current city population is approximately 7,500 persons, is adequate to accommodate the quantity of sewage that will be discharged by the assisted living facility and therefore, the proposed assisted living facility is consistent with SCP policies pertaining to air, water and land.[5] *Herman v. City of Lincoln City*, 36 Or LUBA 521, 536 (1999) (evidence that the supply of needed multi-family housing is much greater than the anticipated need is adequate to show that a proposed rezoning to a lower residential density will not impact the city's needed housing supply, even if the exact number of excess multi-family dwelling units is not known).

**E. Natural Hazards**

The goal of the Natural Hazards element of the SCP is to "[p]rotect life and property from natural disasters and hazards." SCP 6-1. The city's decision identifies five natural

[5] On the surface, our resolution of this subassignment of error may not seem be consistent with our resolution of petitioner's argument in his third assignment of error that the city's findings with respect to SZO 12.04(B) are inadequate. However, the air, land and water policies at issue in this subassignment of error are more generally focused on the city as a whole, and not on whether public facilities are adequate to serve the subject property, as is the case with SZO 12.04(B). In addition, the focus of petitioner's argument under his third assignment of error is different, in that there petitioner raises issues regarding the adequacy of facilities at the site to serve the proposed use, and not whether the sewer system as a whole has adequate capacity to serve the assisted living facility.

hazards that may affect development on property located within the city: steep slopes, landslides, soil limitations, drain fields and flood plains. The city concludes that the only natural hazard that may be present on the subject property is a susceptibility to flooding. The decision concludes the proposal is compatible with this goal because, as a result of the lot line adjustment, the assisted living facility will be able to be sited in a way as to avoid flood prone areas. Record 18.

Petitioner challenges that finding and its evidentiary support, arguing that there is no evidence in the record to show that the property does not have soils with limitations that would prevent a facility the size of the proposed assisted living facility from being sited on the property. Petitioner argues that at the very least, the city should have some evidence of the soils on the property, and whether those soils would limit development.

The SCP Natural Hazards element identifies soil limitation as a factor that must be considered in determining development potential. SCP 6-2. The city's findings do not address the issue petitioner raised with respect to the soils on the property. On remand, the city must adopt findings to address whether soils on the property might limit the scope of development on the property in ways that are inconsistent with the proposal to develop an assisted living facility on the property.

**F. Housing**

The goal of the city's Housing element is to "[m]eet the projected [housing] needs of citizens in the Silverton area." SCP 7-1. Housing Policy 1 requires the city to "protect residential areas from encroachment [by] incompatible uses." SCP 7-10. The city found that

> "The development of the [assisted living facility] will help the City meet projected housing needs." Record 19.

The city also found that

> "Removing the common boundary line between the Properties will not impact the City's ability to meet housing needs. As combined, the two parcels will still be limited to residential development. * * * [T]he lot line adjustment is in compliance with the policy of protecting residential areas from incompatible

uses. Accordingly, the Lot Line Adjustment is compatible with the Housing element of the [SCP]." *Id.*

Petitioner argues that those findings are conclusory assumptions and are not supported by substantial evidence. According to petitioner, the city presumes that it has made a projection of a need for assisted living facilities and that the proposed assisted living facility will help meet that need. Petitioner argues no such housing study has been done and, in addition, there is no evidence in the record to support a finding that the proposed assisted living facility is compatible with the neighborhood, which is comprised of primarily single-family dwellings.

The subject property is designated Multi-Family Residential in the SCP, and the SCP indicates that if vacant property that is designated for multi-family use is developed for multi-family housing, there is enough land available to meet multi-family housing needs within the planning period. SCP 2-8. Petitioner does not explain why the Housing element requires a more particularized analysis of need for a certain type of multi-family housing, *i.e.*, assisted living facilities. With respect to neighborhood compatibility, both the existing uses and the proposed use of the property are residential. The city found that the proposed residential use is compatible with existing residential uses. Petitioner does not explain why Housing element Policy 1 requires an analysis of compatibility between different types of residential uses, and we do not see that it does.

**G. Transportation**

The goal of the city's Transportation element is to "[p]rovide and encourage a safe, convenient, aesthetic and economical transportation system." SCP 9-1. The text of the plan indicates that the current transportation system is adequate. SCP 9-7. The city found that based on that conclusion in the comprehensive plan, and the fact that South Water Street is an arterial road within that circulation system, that "[c]ombining the properties will not impact the City's ability to provide [transportation services] to its residents." Record 20.

Petitioner challenges these findings, arguing that until the city considers the traffic that will be generated by the proposed assisted living facility, the city cannot establish that the proposed lot line adjustment is consistent with the city's transportation goals.

As we have already concluded, the city must consider the impact of the assisted living facility in addressing the comprehensive plan policies, not just the impact of the lot line adjustment. The city has not done so with respect to transportation. Accordingly, we agree with petitioner that the city's findings are not adequate to establish that the proposal is consistent with the transportation element of the SCP.

**H. Energy**

The goal of the Energy element of the SCP is to "[c]onserve energy resources and encourage use of reusable energy resources." SCP 10-1. The city found that this element "is clearly not applicable to the Lot Line Adjustment." Record 20.

Petitioner argues that it is *not* clear that the policies that address the city's energy goal are inapplicable to the siting of the assisted living facility. Petitioner contends that one of the applicable energy policies requires that "new construction * * * meet * * * State standards for weatherization and energy conservation." SCP 10-10. According to petitioner, the city erred in failing to address this policy.

We agree with the city that the city's Energy element and the weatherization policy contained within the element do not apply to a land use decision to move a lot line to allow the siting of an assisted living facility. Weatherization and energy conservation measures would logically be addressed during the building permit phase, and petitioner offers no suggestion concerning how those measures could or should be addressed as part of this proceeding. We do not see how that policy has any bearing on the land use decision before the city, and petitioner has not established that it does.

**I. Public Facilities and Services**

The goal of the city's Public Facilities and Services element is to "[p]rovide orderly and efficient public facilities and services to adequately meet the needs of Silverton residents." SCP 11-1. Public Facilities and Services Policy 2 provides that the city is responsible for providing certain public services, including a sanitary sewer system, a municipal water supply and storm drainage. SCP 11-21. The city found that the current sewer system has the capacity to serve an additional 2,586 residents, and concluded that the proposed lot line adjustment is compatible with the city's public facilities and services element. Record 20.

Petitioner reiterates his argument that the city failed to consider whether there are adequate sewer and water facilities to service the site at the proposed development density. According to petitioner, the city's capacity to treat wastewater or drinking water at its central facilities does not answer that question.

We have already agreed with petitioner that the city must consider the use of the property as an assisted living facility in its assessment of whether public services to the property are adequate in addressing SZO 12.04(B). The city must also adopt findings that consider the use of the property in deciding whether the SCP public facilities and services policies are met.

The sixth and seventh assignments of error are sustained, in part.

**EIGHTH, NINTH AND TENTH ASSIGNMENTS OF ERROR**

In these assignments of error, petitioner argues that the city erred in failing to consider whether the proposed use is consistent with the requirements of the underlying zoning district. The RL district has a density limitation of no more than 10 dwelling units per gross acre, and permits "senior care facilities," not "assisted living facilities." *See* n 3. The city's decision concludes that the design review decision conclusively establishes that the proposed assisted living facility is a type of "senior care facility." The decision also cites to

the design review decision as having conclusively decided that the density standards found in SZO 52.02 are not applicable to the proposed assisted living facility because it will not include cooking facilities in each individual living area and, therefore the proposed 62 units are not individual "dwelling units" for the purposes of computing density under SZO 52.02.[6]

According to petitioner, the proposed assisted living facility, if it is designed according to state standards for such facilities, as set out in OAR chapter 411, division 56, will have individual cooking facilities in each of its residential units, in addition to a main dining area. Because the SZO 2.1 defines "dwelling unit" as "[o]ne or more rooms designed for occupancy for one family for living purposes and having cooking facilities," petitioner argues that the city cannot approve the proposed 62-unit assisted living facility, because it would exceed the maximum density allowed in the zone. Petitioner also argues that to the extent the city's findings address these arguments, those findings are not supported by substantial evidence, because there is nothing in the record that demonstrates that the proposed assisted living facility will *not* have cooking facilities for each unit, and no conditions of approval to that effect have been adopted.

SZO 12.04(C) requires that the "proposal" be compatible with "the requirements of the [underlying] zoning district." The city found that the density requirements of SZO 52.02 are not violated by the proposed assisted living facility because the residential units do not have individual "cooking facilities" and therefore do not constitute separate dwelling units.[7]

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[6] SZO Section 52 addresses standards for development within the RL zone. SZO 52.02 provides:

> "**Density** – Maximum ten dwelling units per gross acre with a maximum density of [one-half] of the allowable density based on the size of the property."

[7] The county's findings state, in relevant part:

> "The City Council concludes that the Planning Director correctly determined that the [assisted living facility] is a senior care facility and is not subject to the density limitation set forth in SZO 52.02. As the City Council interprets its code, the density limitation applies to residential developments that have separate 'dwelling units' such as apartments. A 'dwelling unit' is defined as 'one or more rooms designed for occupancy for one family for living

Petitioner cites to OAR 411-056-0045(1), which requires that assisted living facilities have kitchenettes in each unit. The city's findings do not address that issue, or whether "kitchenette" facilities are "cooking facilities" within the meaning of the SZO definition of "dwelling unit." Given that we must remand this decision to the city to apply SZO 12.04 in a manner consistent with *Mountain West II* and this decision, it is appropriate to remand the this issue to the city to address in the first instance.

The eighth and ninth assignments of error are sustained. We do not decide the tenth assignment of error.

**ELEVENTH ASSIGNMENT OF ERROR**

Petitioner argues that the city erred in conducting its remand proceedings before the city council rather than the planning commission. According to petitioner, Silverton Ordinance 95-104, chapter 2, establishes that appeals of lot line adjustments are to the planning commission and then to LUBA. Petitioner argues that the ordinance does not provide for appeals to be considered by the city council and, in fact, both LUBA and the Court of Appeals remanded the city's decision to the planning commission, not the city council.

Intervenor responds that the city does not have any ordinance provisions that govern its proceedings following a remand from LUBA, and nothing prohibits the city council from deciding which local review body is the most appropriate to hear a remand proceeding. In this case, intervenor argues, it is appropriate for the city council to be the review body,

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> purposes and having cooking facilities.' * * * Senior care facilities and assisted living facilities, like the one proposed by [intervenor], are institutional facilities that do not contain separate dwelling units. The rooms in these facilities are not 'dwelling units' because they are not designed for family living purposes and they do not contain cooking facilities. Residents in the facility dine in a central dining area. The assisted living facility is designed and will be constructed in accordance with institutional building code provisions and not to residential standards. Furthermore, the City Council finds that to hold institutions such as assisted living facilities to the same density requirements as apartments and other residential developments would likely exclude them from all residential zones in the City; which is not the intent of the City Council in adopting its Development Code." Record 9-10.

because it has the responsibility to interpret the local ordinances in a manner that is consistent with the meaning and intent of the ordinance as a whole. In any event, intervenor argues that petitioner has not demonstrated that his substantial rights were prejudiced by the city's proceedings on remand.

As intervenor notes, the applicable ordinance, Silverton Ordinance 95-104, does not expressly apply to proceedings on remand from LUBA. Therefore, we agree with intervenor that the city has some discretion in choosing the most appropriate forum to address issues following remand. And, contrary to petitioner's view, neither we nor the Court of Appeals directed that a particular city body conduct the remand proceedings. *Mountain West I* at 513 ("[r]emand is appropriate to allow the *city* to determine the extent to which the criteria in SZO 12.04 require consideration of the proposed use") and at 514 ("[t]he *city's* decision is remanded"); *Mountain West II* at 568 (LUBA's remand for a determination of the extent to which SZO chapter 12 requires consideration of the proposed use "will require the *city* to reconsider its application of SZO 12.04 * * *"); and *Mountain West Investment Corp. v. City of Silverton*, __ Or LUBA __ (LUBA No. 2000-093, September 27, 2001) slip op 2 ("*city's* decision is remanded") (emphases added).

The city did not err by conducting remand proceedings before the city council. The eleventh assignment of error is denied.

The city's decision is remanded.