

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3  
4 TERRY CASTER,  
5 *Petitioner,*

6  
7 vs.

8  
9 CITY OF SILVERTON,  
10 *Respondent.*

11  
12 LUBA No. 2007-211

13  
14 FINAL OPINION  
15 AND ORDER

16  
17 Appeal from City of Silverton.

18  
19 Donald M. Kelley, Silverton, filed the petition for review and argued on behalf of  
20 petitioner. With him on the brief was Kelley and Kelley.

21  
22 Richard D. Rodeman, Corvallis, filed the response brief and argued on behalf of  
23 respondent. With him on the brief was Rich Rodeman Law Office.

24  
25 RYAN, Board Member; HOLSTUN, Board Chair; BASSHAM, Board Member,  
26 participated in the decision.

27  
28 REMANDED

02/29/2008

29  
30 You are entitled to judicial review of this Order. Judicial review is governed by the  
31 provisions of ORS 197.850.

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**NATURE OF THE DECISION**

Petitioner appeals the city’s decision approving a conditional use application and imposing conditions of approval.

**FACTS**

The present appeal is an appeal of the city’s decision following our remand in *Caster v. Silverton*, 54 Or LUBA 441 (2007) (*Caster I*).<sup>1</sup> After our decision in *Caster I*, petitioner (applicant) submitted a revised application to place cellular antennae on a water tower and support facilities beneath the water tower. Record 168-73. The city held a public hearing on the revised application and voted to approve the application with conditions. This appeal followed.

**FIRST THROUGH FOURTH ASSIGNMENTS OF ERROR**

**A. Introduction**

Petitioner’s first through fourth assignments of error challenge the city’s imposition of Condition 3, specifically, language that limits the size of an accessory equipment support building to an area of 10 by 15 feet. Condition 3 provides:

“This Conditional Use Approval allows Cricket LCW to place six cellular antenna at three azimuths around the top of the water tank (as shown in the submitted graphics) below the cap of the water tank and related support equipment (not to exceed an area of 10’ x 15’ and placed in accordance with established setbacks), site improvements including a 12’ wide driveway with

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<sup>1</sup> We explained the facts in *Caster I*:

“An unused water tower is located on petitioner’s property. That water tower is 130 feet tall and the tower legs that support the tower occupy a footprint of 28 feet by 28 feet. At one time the water tower was part of the city’s municipal water system. However, before petitioner acquired the tower and property in 1992, it ceased to be used as part of the city’s water system. The tower has not been used for any purpose for many years and apparently remains in place because it would cost approximately \$180,000 to remove the tower. The property is zoned Residential Single Family (R-1). Petitioner sought city approval to site six cellular communication antennae on the tower, co-locate additional antennae at a later time, and construct an equipment shelter within the water tower footprint. \* \* \*” 54 Or LUBA 441, 444-45.

1 parking space located at least 20' feet from the property line, landscaping and  
2 other site improvements as noted on Exhibit 1. Two other providers may also  
3 co-locate antennas for a total of 18 antennas for all providers on the site  
4 following Conditional Use Review as stipulated by the Silverton Municipal  
5 Code.” Record 17.

6 After our remand in *Caster I*, petitioner submitted an application for conditional use  
7 review that included a drawing labeled as a “landscaping plan,” and an “applicant’s  
8 statement.” Record 149, 170-73. At oral argument, petitioner clarified that the landscaping  
9 plan also served as the site plan that was required to be submitted. That site plan showed a  
10 proposed 10 foot by 15 foot accessory structure located beneath the northwest corner of the  
11 water tower. Record 149. However, the applicant’s narrative explained that “the attached  
12 drawings show a typical installation on this site. The placement of the ground based facility  
13 will remain within the area identified by the four legs of the tower, but may be adjusted  
14 within that space.” Record 170. We understand the applicant’s narrative to take the position  
15 that the proposed 10 foot by 15 foot accessory structure might actually occupy a larger area  
16 within the 28 foot by 28 foot footprint of the water tower. The narrative also explained that  
17 it was requesting “future co-locations.”

18 The city recognized a discrepancy between the applicant’s narrative statement, which  
19 sought approval for an accessory structure that could potentially encompass the entire area  
20 underneath the water tower, and the site plan, which showed a 10 foot by 15 foot accessory  
21 structure. The city sent petitioner a letter stating that the city would treat the submitted site  
22 plan as the proposal, and inviting petitioner to submit a different site plan that showed  
23 multiple structures or a larger structure located beneath the tower, if petitioner wanted  
24 approval of multiple structures or a larger structure. Record 166. Petitioner responded that  
25 he was seeking approval for multiple facilities, but did not submit an amended site plan  
26 depicting multiple facilities. Record 140. Thereafter, the city sent a notice of that public  
27 hearing that described the application in part as proposing “\* \* \* one 10’ x 10’ x 8’

1 equipment cage located within the area encompassed by the legs of the water tower \* \* \*,”  
2 and scheduled a public hearing on the application.<sup>2</sup> Record 161.

3 In a memorandum in response to the initial staff report that recommended denial of  
4 the application, petitioner explained that he was seeking approval to site up to a maximum of  
5 four “co-locaters,” and that “[b]ecause the ultimate number is uncertain, applicant has not  
6 represented the ultimate size of the equipment shed, but feels that nonetheless it has  
7 submitted adequate information to satisfy the threshold requirements for a conditional use  
8 application.”<sup>3</sup> Record 120. The memorandum then explained that the accessory structure  
9 may be up to 600 square feet in area and that “whatever its ultimate size, [the accessory  
10 structure] would remain within the footprint of the existing water tower.” *Id.* Petitioner then  
11 proposed a condition of approval that limited the size of the accessory structure to not more  
12 than 750 square feet and located within the footprint of the legs of the tower. *Id.* Prior to the  
13 city council hearing, petitioner also proposed a condition of approval limiting co-location to  
14 a total of four co-located provider facilities. Record 70. It is undisputed that no revised site  
15 plan was submitted depicting a structure larger than the 150 square foot structure as shown  
16 on the original site plan.

17 As explained above, in its final decision approving petitioner’s conditional use  
18 application, the city imposed condition 3, limiting the size of the accessory structure to the  
19 10 x 15 foot structure shown on the submitted site plan.

20 **B. First Through Fourth Assignments of Error**

21 SMC 18.03.060.070 provides in relevant part:

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<sup>2</sup> The city’s notice appears to contain an error in describing the accessory structure as a “10 x 10 x 8” structure, when the site plan shows a 10 x 15 structure, although no party assigns legal significance to that error.

<sup>3</sup> Although petitioner does not explain what he means by additional “co-locaters,” we understand petitioner’s reference to mean that additional wireless service antennae may be sited on the tower and those additional antennae will require additional ground-based support facilities.

1           “The review body may attach conditions to a conditional use approval to  
2           *ensure that the proposal will conform to the applicable review criteria.* Some  
3           of the most frequently imposed conditions relate to the following but are not  
4           limited to: uses; special yards, and spaces; fences and walls; installation of  
5           sidewalks, right-of-way dedication, street improvements or petitions (or  
6           bonds); ingress and egress; signs; building textures, colors, architectural  
7           features and height; landscaping, screening and buffering; noise, vibration,  
8           odors or other similar nuisances; hours for certain activities; time period  
9           within which the proposed use shall be developed; duration of use; and  
10          preservation of natural vegetative growth and open space.” (Emphasis added.)

11          The central dispute between the parties is whether the city had authority under SMC  
12          18.03.060.070 to impose condition 3 to limit the size of the storage structure, where the  
13          applicant’s written statements in the application materials requested approval of a structure  
14          up to 750 square feet in size, but the only site plan submitted by petitioner showed a structure  
15          that was 150 square feet.

16                 Petitioner argues that condition 3 is based on an improper construction of applicable  
17          law, namely SMC 18.03.060.060(1) (Criterion 1).<sup>4</sup> Petitioner’s chief complaint regarding  
18          the city’s imposition of condition 3 is that the majority of the city findings explaining its  
19          reasons for imposing condition 3 are found in its discussion of Criterion 1. Petitioner argues  
20          that the city misconstrued Criterion 1 to be an “applicable review criteri[on],” and therefore  
21          the city erred in relying on Criterion 1 in order to justify condition 3. Petition for Review 5-9.

22                 The city responds by attempting to explain the city’s findings regarding Criterion 1.<sup>5</sup>

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<sup>4</sup> The city found in part that the application did not meet the requirements of SMC 18.03.060.060(1), which requires a determination that:

“1.         The proposal satisfies the threshold requirements for the Conditional Use application.”

<sup>5</sup> The city adopted detailed findings under Criterion 1 to justify imposition of Condition 3. For the reasons explained below, we need provide only a brief summary of those findings. The city’s findings explain that because the submitted site plan showed facilities for only one cellular provider, but the applicant’s narrative statement and statements submitted during the proceedings below appeared to seek approval for multiple providers, the application did not meet the “threshold requirements” for a new conditional use. However, the city found that the “threshold requirements” referred to in Criterion 1 could be met with conditions of approval, including Condition 3. Record 6-7.

1 Response Brief 5-9. While we tend to agree with petitioner that the city misunderstood how  
2 Criterion 1 is meant to function as an applicable review criterion, it would serve no purpose  
3 to address in detail in this opinion the parties' various arguments regarding Criterion 1,  
4 because we think the city's misapplication or misunderstanding of how Criterion 1 functions  
5 is at most harmless error. Further, to the extent petitioner argues that the only applicable  
6 review criterion that the city relied on to impose condition 3 was Criterion 1, we disagree  
7 with petitioner.

8 In its response brief, the city explains that it imposed condition 3 based on the  
9 authority found in SMC 18.03.060.070. The city explains that because of the inconsistency  
10 between the submitted site plan and the applicant's written and oral statements about the  
11 proposed size of the storage structure, the city imposed condition 3 to place limits on the  
12 extent of use that can occur on the site, so that the use will be compatible with the existing  
13 uses in the area. The city notes that condition 3 includes limits on the number of antennae,  
14 required screening, special yards and spaces, landscaping, site improvements, and ingress  
15 and egress, all of which are specifically referenced in that code provision as "frequently  
16 imposed conditions of approval" that are related to conditional use approval criteria. As the  
17 city explains:

18 " \* \* \* Silverton's conditional use requires a specific site plan of the proposal,  
19 so that there can be a review of the proposed use for relationship with the  
20 neighborhood, site orientation, setbacks, landscaping, etc. \* \* \* [G]eneralized  
21 statements of 'one or more buildings' do not meet the requirement for a  
22 conditional use. The trouble with this is that staff reviewed the application  
23 that was submitted as the application only to discover \* \* \* that the  
24 applicant's intended proposal is not what was submitted. \* \* \* Neither the  
25 City nor the petitioner can get away with reviewing a conditional use with one  
26 detailed site plan, providing notice to the public, and then allowing petitioner  
27 to materially change or substitute a more intensive site plan after the decision  
28 has been made. Condition 3 is consistent with the application that was  
29 submitted, and it was determined by the [city] to be consistent with the size  
30 limits in the [SMC], and compatible with the neighborhood characteristics."  
31 Response Brief 14-15.

1 We understand the city to argue that SMC 18.03.060.070 authorizes the city to  
2 impose a condition to limit its approval of an application for a conditional use so that the  
3 conditional use that is approved is the same conditional use that is shown in a submitted site  
4 plan. That allows the city to ensure that its evaluation to determine whether the conditional  
5 use that is shown on that site plan will be compatible with the existing uses is actually an  
6 evaluation of the conditional use that is ultimately approved.<sup>6</sup> In our view, SMC  
7 18.03.060.070 gives the city the authority to impose exactly the kind of condition that is  
8 imposed by condition 3, particularly in circumstances where an applicant submits a site plan  
9 that the applicant freely admits is not visually representative of the actual proposed  
10 development.

11 Accordingly, the first through fourth assignments of error are denied.<sup>7</sup> Consequently,  
12 if petitioner continues to seek approval of an accessory structure that is larger than 150  
13 square feet, petitioner will need to file an appropriate application, supported by a site plan  
14 that accurately reflects the facilities for which petitioner seeks city approval. However, as  
15 explained below, we remand the city's decision under the fifth, sixth and seventh  
16 assignments of error, which challenge a different condition of approval. As an alternative to  
17 a new application to modify Condition 3, on remand the city may permit petitioner to submit  
18 a revised site plan and consider petitioner's request to approve that revised site plan as part  
19 of the proceedings on remand.

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<sup>6</sup> SMC 18.03.060.060(3) provides in relevant part:

“The proposed use will be compatible with existing or anticipated uses in terms of size, building scale and style, intensity, setbacks, and landscaping or the proposal calls for mitigation of difference in appearance or scale through such means as setbacks, screening, landscaping or other design features.”

<sup>7</sup> Because we do not sustain the first through fourth assignments of error, we need not address the city's argument that petitioner failed to raise the issues raised in those assignments of error below and that he cannot raise the issues for the first time on appeal to LUBA.

1 **FIFTH THROUGH EIGHTH ASSIGNMENTS OF ERROR**

2 Petitioner’s fifth through eighth assignments of error challenge the imposition of  
3 condition 25, which provides:

4 “The applicant agreed during the hearing to condition the approval of his  
5 conditional use upon the complete removal of the water tower at the end of 30  
6 years. Estimates are that the costs of removal in present terms are in excess of  
7 \$180,000. To guarantee the performance of this condition, applicant shall  
8 deposit monthly the sum of \$1,000.00 with a financial institution approved by  
9 the City, such sum to be placed in a segregated escrow interest bearing  
10 account in the name of the applicant and the City, where withdrawals may  
11 only be made with the approval of the City. The applicant shall develop a  
12 tentative removal plan for the review and approval of the City Manager prior  
13 to issuance of building permits. The removal plan must demonstrate the safe  
14 removal of the site structures and restoration of the site *when the use ceases*.  
15 *When the conditional use ceases, the water tower must be removed within 30*  
16 *days*. The City and the applicant shall use the escrowed sums to restore the  
17 site. After \$180,000 has been deposited, the applicant may update the  
18 removal plan, with then prevalent cost estimates, and revise the amount of the  
19 deposit to match the estimated removal costs, plus an ENR adjusted inflation  
20 factor.” Record 21 (emphasis added).

21 The minutes of the August 6, 2007 city council hearing indicate that during the  
22 applicant’s rebuttal period, the city attorney proposed a condition of approval requiring  
23 removal of the water tank at the end of 30 years, and that petitioner agreed to remove the  
24 water tower at the end of 30 years. Record 111. After that agreement by the applicant, a  
25 majority of the councilors tentatively approved the application, subject to the condition of  
26 approval regarding removal of the water tank. After that tentative approval, the city  
27 proposed draft findings and conditions of approval, including condition 25. Petitioner  
28 objected to condition 25 as proposed, and sent a letter to the city in which petitioner agreed  
29 to remove the water tower at the end of 30 years if the city requested such a removal. Record  
30 70-71.<sup>8</sup>

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<sup>8</sup> The September 20, 2007 letter states:

“2. Securing the Tower’s Removal



1 In his fifth, sixth, seventh and eighth assignments of error, petitioner argue that the  
2 city erred in imposing condition 25. Petitioner argues that condition 25 is unlawful because  
3 it was not imposed to ensure compliance with any applicable approval criteria, as required by  
4 SMC 18.03.060.070. The city found in relevant part:

5 “15.14 The council expressed concern that there is no plan for removal of the  
6 water tank and tower noting that it has remained unused for decades  
7 and this situation negatively impacts the livability of the area. The  
8 council wanted to insure that after use of the structure as a base for  
9 cellular antennas or in 30 years, the water tank and tower would be  
10 removed. The applicant agreed during the August 6, 2007 hearing to  
11 condition the approval on the complete removal of the structure at the  
12 end of 30 years. The applicant also provided documentation that the  
13 cost for removal was at least \$180,000 in present day terms. The  
14 Council imposed a condition that would set aside adequate financial  
15 resources based on the applicant’s cost estimate to ensure the removal  
16 of the water tank and tower structure when it was no longer needed for  
17 the cellular antennas or in 30 years (Condition 25).”

18 “ \* \* \* \* \*

19 “17.3 Another concern is for public welfare and ensuring that the water  
20 tower structure, antenna and related equipment are removed promptly  
21 when they are no longer needed or in use. One way to ensure this is to  
22 require the applicant to develop a removal plan for the review and  
23 approval by the City Manager. The removal plan must include  
24 financial security in an amount sufficient to ensure the safe removal of  
25 the structures and restoration of the site (Condition 25).” Record 16-  
26 17.

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“The property on which the tower stands is worth almost two-thirds (2/3) of the presently estimated removal cost. The applicant proposes an agreement by which the owner of the property personally guarantees the removal at the end of thirty (30) years if requested by the city. In the event of a failure to remove the tank, the city will have the right to hire the removal of the tank and have a lien against the real property for the cost of the removal. The current value of the property is equal to what would be paid into the city proposed escrow in the first nine years. After ten years, the owner of the property will be required to secure a new estimate for removal of the tank and the applicant will be required to secure the difference between the value of the property and the removal estimate by means of a bond, letter of credit, personal guarantee, or starting periodic deposits of money into an interest bearing escrow account at that time in an amount which at the end of thirty (30) years would be sufficient to pay the estimated removal cost.” Record 70-71.

1           Petitioner argues that in those findings the city impermissibly changed the subject of  
2 the conditional use review from the communications facility to the water tower itself. In  
3 *Caster I*, we remanded the city’s denial of petitioner’s conditional use application because  
4 the city impermissibly applied the approval criteria to the existing water tower, rather than to  
5 the proposed communications facilities. We held:

6           “On remand, the city must remain focused on the antennae and related  
7 facilities that are the proper subject of conditional use review, and must not  
8 allow the fact that those antennae will be attached to the water tower to  
9 convert its review of the antennae and related facilities under Criteria 2 and 3  
10 into a review of the existing water tower.” 54 Or LUBA at 462.

11          Contrary to our decision in *Caster I*, the city appears to have impermissibly focused once  
12 again on the water tower.

13          The city responds that condition 25 was imposed to ensure compliance with  
14 applicable approval criteria, including SMC 18.03.060.060(6) and (8).<sup>9</sup> The city also  
15 responds that petitioner agreed to the condition of approval and cannot now challenge its  
16 imposition.

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<sup>9</sup> SMC 18.03.060.060(6) and (8) provide in relevant part:

“Requests for Conditional Uses will be approved if the review body finds that the applicant has shown that all of the following criteria have been met, either outright, or with conditions that bring the proposal into compliance:

“ \* \* \* \* \*

“6.       The proposal will not have significant adverse impacts on the livability of nearby residentially zoned lands due to:

“A.       Noise, glare, odor, litter, and hours of operation.

“B.       Privacy and safety issues.

“ \* \* \* \* \*

“8.       The proposed use, as conditioned, will not substantially limit, impair, or preclude the use of adjacent properties in the same zone or negatively affect the public health, safety or welfare.”

1           We disagree with the city that condition 25 is related to an applicable approval  
2 criterion. SMC 18.03.060.060(6) and (8) require that the *proposed conditional use*, the  
3 cellular communications facilities, will not have significant adverse impacts on the nearby  
4 residentially zoned lands and that *the proposed conditional use* will not impair the use of  
5 adjacent properties or negatively affect the public health, safety, and welfare. We note that  
6 the city imposed conditions to ensure that the water tower remains safe during the time that  
7 the tower is used for mounting of cellular antennae, and petitioner does not challenge the  
8 imposition of those conditions.<sup>10</sup> However, in contrast, Condition 25 is focused entirely on  
9 removing the water tower to bring the property back into conformance with the current  
10 zoning, and not on any identified safety considerations that are not already addressed by  
11 other conditions of approval. Condition 25 is not focused at all on the proposed  
12 communications facility. In imposing condition 25, the city impermissibly focused on the  
13 water tower after our decision in *Caster I* held that the city must limit its evaluation to  
14 whether the proposed conditional use, the communications facility, satisfies the applicable  
15 approval criteria.

16           We also disagree with the city that petitioner consented to condition 25. If the city's  
17 condition of approval was limited to what petitioner actually agreed to do, we likely would  
18 agree that petitioner cannot assign error to a conditional of approval that he agreed to, even if  
19 that condition of approval was not related to an applicable approval criterion. However,  
20 condition 25 is significantly different from the steps that petitioner agreed to take. Notably,  
21 condition 25 requires removal of the water tower at the earlier of 30 years *or when the*  
22 *conditional use ceases*. The city points to nothing in the record indicating that petitioner  
23 agreed to remove the tower "when the use ceases" and in fact, the August 6, 2007 hearing

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<sup>10</sup> Condition 4 requires an engineering study to evaluate the structural integrity of the water tower and its components before any construction activity can occur. Record 18. Condition 21 requires the applicant to install erosion control measures during construction. Record 20.

1 minutes and petitioner's proposal found at Record 70-71 indicate that petitioner explicitly  
2 agreed only to remove the tower at the end of 30 years. For the above reasons, we agree with  
3 petitioner that condition 25 is unlawful.

4 In his eighth assignment of error, petitioner argues that condition 25 amounts to an  
5 unconstitutional taking without just compensation in violation of the Fifth Amendment.  
6 Because we agree with petitioner that condition 25 was unlawfully imposed, we need not  
7 determine whether the imposition of condition 25 amounted to an unlawful taking of  
8 petitioner's property.

9 The fifth, sixth and seventh assignments of error are sustained. On remand, the city  
10 must modify condition 25 to limit that condition to exactly what petitioner agreed to do,  
11 withdraw condition 25, or explain why that condition is necessary so that the proposed  
12 conditional use approval *of the cellular communications facilities* conforms to applicable  
13 approval criteria, as required by SMC 18.03.060.070.

14 The city's decision is remanded.