

CITY of BOARDMAN

Community Development

STAFF REPORT

DATE: February 17, 2022

TO: Boardman Planning Commission

FROM: Carla McLane, Planner

SUBJECT: UEC Application for Zoning Permit (ZP) 21-066

LU 22-001/ZP21-066 – Findings and Recommendation

Background

1. Applicant: Umatilla Electric Cooperative.
2. Application Date: The application in File ZP21-031 was submitted on November 2, 2021.
3. Completeness: The application was deemed complete on November 3, 2021.
4. Subject Property: The subject property includes Tax Lots 3205 and 3302 (map 4N 25E S10).
5. Zoning: Commercial/Service Center Subdistrict ("C-SC").
6. Proposed use: The application proposes to install two segments of a 230kV electrical transmission line.
7. Applicable Approval Criteria: Boardman Development Code ("BDC") 2.2, 3.4 and 4.1.400.
8. On December 22, 2021, the Community Development Director approved the application. The decision was appealed on January 4, 2022, by 1st John 2:17, LLC.

Findings

1. The application was submitted on November 2, 2021, and deemed complete the following day, November 3, 2021. The application seeks approval to construct a portion of a 230 kV electrical transmission line. The transmission line will be constructed within an easement owned by the applicant over Tax Lots 3205 and 3302 (map 4N 25E S10).

2. The site is zone Commercial/Service Center subject to BDC 2.2.200. Electrical facilities are listed as a permitted use in BDC Table 2.2.200.B.2. An application for a permitted use in the C-SC zone subject to the city's Type II review procedures.
3. Public Notice was posted on the tax lots #3205 and #3302 of tax map 4N 25E 10, and on-line at the city's webpage on December 2, 2021, and Published in the East Oregonian newspaper on December 3, 2021, for a Type II – Administrative Decision process. Additionally, public notice was mailed to all properties within 250 feet of the subject lots and to interested parties.
4. As described in the application, the proposed project is needed to reliably provide for electrical growth in the Boardman area. The line will be rated 230kV and integrated into UEC's area grid. As further described in the application, UEC's electrical load in the Boardman area has grown from 62 MW in 2009 to 260 MW in 2019 with forecasted growth to be above 535 MW by the end of 2029. This growth is driving the need for additional transmission facilities. UEC obtained a Certificate of Public Convenience and Necessity for the transmission line from the Oregon Public Utility Commission. A copy of PUC Order 21-074 is in the record.
5. The proposed electrical transmission line is a permitted use in the C-SC Zone. BDC 2.2.200(B) states that "the land uses listed in Table 2.2.200B are permitted in the Service Center Sub District, subject to the provisions of this Chapter." Table 2.2.200(B)2.b lists the following as an outright permitted use: "Private utilities (e.g. natural gas, electricity, telephone, cable and similar facilities)." Where a use listed in Table 2.2.200B is subject to any additional standards beyond those in BDC Chapter 2.2.200, the table notes which additional standards apply. For private utilities, no additional standards are listed.
6. UEC is a private cooperative organized under ORS Chapter 62 and is registered as such with the Oregon Secretary of State. As such, the transmission line is a "private" utility line that provides electrical service for purposes of Table 2.2.200.B.
7. For uses listed in Table 2.2.200.B, BDC 2.2.200(A) states that "[t]he base standards of the Commercial District apply, except as modified by the standards of this Sub District." Based on the figures and other information in the record provided by the Applicant, the transmission line satisfies applicable base standards of the Commercial District.
8. BDC 2.2.120. Setbacks.
 - C. Front yard setbacks. There is not a minimum or maximum front yard setback in the C-SC zone.

- D. Rear yard setbacks. The rear yard setback is zero (0) for street access lots. Tax lots 3302 and 3305 have street access. Therefore, the required setback is zero.
 - E. Side yard setbacks. There is not minimum side yard setback
- 9. BDC 2.2.130 Lot Coverage. There is no minimum or maximum lot coverage requirement.
 - 10. BDC 2.2.140. Building height. This section establishes a maximum “building” height. The proposed structures are not “buildings,” therefore this criterion does not apply.
 - 11. BDC 2.2.150 Design Standards. This section establishes design standards for “buildings.” The proposed structures are not “buildings,” therefore this criterion does not apply.
 - 12. BDC 2.2.160 Pedestrian amenities. This section applies to an application for a public or institutional building, three or more townhomes, duplex or triplex development, multi-family housing, or a commercial or mixed use building. Because the proposed transmission line and towers are not one of the listed development types, this section does not apply.
 - 13. The Community Development Director finds that there are no other standards in the base zone (BDC Chapter 2.2) that apply to the proposed transmission line. Accordingly, the proposed use complies with the base zone standards.
 - 14. BDC Chapter 3.4 establishes standards for specific public facilities. Section 3.4.500 applies to “utilities” and requires utility lines in a subdivision to be placed underground. The application does not propose a subdivision, therefore this section does not apply. Moreover, the section exempts “high capacity electric lines operating at 50,000 volts or above.” The proposed transmission line operates above 50,000 volts. Accordingly, this section does not apply.

Public Comments

- 1. The City received written comments from Kelly Doherty (email attachment dated February 9, 2022) and Sarah Mitchell on behalf of 1st John 2:17, LLC (letters dated January 26, 2022, and February 9, 2022). The City also received comments from Tommy Brooks on behalf of UEC. Mr. Brooks’ comments are generally consistent with the findings described above. The comments from Ms. Mitchell and Ms. Doherty raise the following additional issues:
 - A. BDC Sections 4.1.770.D requires the application to be submitted by “a record owner” of the property or, alternatively, the property owner of record. Both Doherty and Mitchell assert that 1st John 2:17, LLC, is the record owner and did not consent to the application. Therefore, they argue that the application must be denied. To support this claim, they rely on the LUBA decision in *Baker v. Washington County*, 46 Or LUBA 591 (2004).

Finding: The Baker case involved an application to construct a driveway within an access easement owned by Black over property owned by Baker. There, the county code required the application to be initiated by “all the owners of the subject property.” No one in the case contested that Black was an owner, but LUBA concluded that because Baker did not sign the application, it was not initiated by all owners and reversed the county’s decision to approve the driveway. In this case, the evidence in the record demonstrates that UEC is “a record owner” (singular) of an interest in the property for purposes of BDC 4.1.700.D. Moreover, the application includes an order from the Morrow County circuit court that gives UEC the right to immediately occupy the property for the purpose of constructing the electrical facilities that are the subject of this application. (“[UEC] shall be entitled to occupy and make use of the Easement . . . for all purposes and uses as described in the Easement.”) The order also expressly prohibits 1st John 2:17, LLC from interfering with UEC’s occupancy and use of the easement. (Neither Defendant nor its contractors, employees, invitees, licensees guests, agents or representatives, shall interfere with [UEC’s] occupancy and use of the Easement.”) Finally, because the court order expressly authorizes UEC to use the property for the transmission towers, UEC is authorized to submit the application as an owner for purposes of BDC 4.1.700.D.1.b because it owns an equitable interest in the property by virtue of the court ruling.

Finally, under the circumstances of this application, state law prohibits the City from interpreting the term “owner” in BDC 4.1.700.D. to exclude an entity that has eminent domain authority and has been granted immediate possession of the property by a court. In *Schrock Farms, LLC v. Linn County*, 142 Or App 1 (1996) ODOT filed a condemnation action in circuit court to obtain a right-of-way across Schrock Farm’s property. The court awarded ODOT immediate possession of the property, although the case was not complete and ODOT had not taken title when it applied to the county for a zoning permit. Like BDC 4.1.700.D.1, the Linn County code required a land use application to be filed by the “owner” of the property and Schrock Farms objected to the application because ODOT was not the “owner” of the property. The county approved the permit and Schrock Farms appealed, arguing that because ODOT was not the owner, the county could not approve the permit. The court of appeals rejected the argument:

[Schrock Farms] asserts that ODOT is not an “owner,” within the meaning of those [code] provisions, because it has not yet obtained title through a final judgment in the condemnation action.

[Schrock Farms’ argument] fails for two reasons. First, the county governing body considered the local provisions and concluded that ODOT had the requisite equitable interest under them to apply for the land use decisions in question. Petitioners do not cite ORS 197.829(1) or related case law, much less demonstrate that we are not required to defer to the governing body’s interpretation under that authority.

Second, even if the local provisions by their terms could be read to prevent ODOT from making the applications as petitioners assert, the effect would be that ODOT could not gain the necessary approvals to put the property to a public use until it had already acquired the property through a judgment in the condemnation proceeding. ODOT argues that the resulting Catch-22 situation would effectively nullify significant aspects of the state condemnation statutes, e.g., ORS 35.265, and a “county ordinance should not be read to repeal a state law.” We agree. In addition to being nonreversible under ORS 197.829, the county’s understanding of its ordinance is the only plausible one under the circumstances.

There are two things to note in the court’s discussion. First, the county interpreted the term “owner” in its code to include a condemning authority such as ODOT. Schrock Farms objected but the court deferred to the county board’s interpretation of its own code. (Under ORS 197.829 and *Siporen v. City of Medford*, 349 Or. 247 (2010), LUBA and the courts are required to defer to a local government’s interpretation of its own code provided it is “plausible.”) Second, the court concluded that interpreting the term “owner” to mean the only owner of fee title would undermine (“nullify”) the condemnation statutes. Again, if a condemning authority can’t get the land use permits, it can’t show there is a public purpose and would never be able to acquire the property through condemnation. Ultimately, “a county ordinance should not be read to repeal a state law” and the local code has to give way to the state statutes.

The same situation applies here. If UEC cannot obtain the zoning permit for the proposed electrical facilities, then it cannot show it has a “public purpose” and obtain the property through condemnation, which would effectively nullify the condemnation statutes. Mitchell asserts that because ODOT was seeking fee title whereas UEC is only seeking an easement, that *Schrock Farms* does not apply. However, the result is the same in either case – denying an entity that has condemnation authority like UEC the ability to obtain a necessary development permit would “nullify” the condemnation statutes and the City’s development

code cannot be interpreted in a way that would repeal state law. Accordingly, staff interprets the term “record owner” in BDC 4.1.700.D.1 to include an entity with condemnation authority such as UEC that can show it has an equitable interest in the property. Because the record includes a copy of the court order granting UEC immediate possession of the property, we conclude that it is a “record owner” for purposes of BDC 4.1.700.D.1.

For these reasons, the application complies with BDC 4.1.700.D.

- B. Doherty also references the “district wide underground utility district.” We believe this is a reference to the utility undergrounding requirements in BDC 3.4.500.

Finding: As described above the undergrounding requirement “applies only to proposed subdivisions.” Because this application does not propose a subdivision, BDC 3.4.500 does not apply. Further, the section expressly exempts utility facilities “operating at 50,000 volts or above.” The proposed facility will operate at 230kV. Accordingly, it is exempt from BDC 3.4.500.

Recommendation

Based on the evidence in the record, the applicable criteria and the findings set forth above, staff recommends the Planning Commission APPROVE UEC’s application in ZP-21-066.