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February 9, 2022

Via Email to:
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City of Boardman Planning Commission
c/o Barry Beyeler
Community Development Director
200 City Center Circle
P.O. Box 229
Boardman, OR 97818

RE: LU 22-001: Appeal to Planning Commission of ZP 21-066: Umatilla Electric
Cooperative Olson Road 230kV Transmission Line Project

Dear Members of the Planning Commission:

As you know, this firm represents 1st John 2:17, LLC and Jonathan Tallman (“Tallmans” or “Appellants”) in the above matter. On February 2, 2022, the Planning Commission held a hearing on this matter and voted to leave the record open until February 9, 2022 for the submission of additional evidence, argument and testimony. This letter serves as the Appellants’ first open record submittal. Please include it in the record of the above matter.

UEC argues that the issues raised in this appeal are the same as the issues that were resolved in a prior City decision approving UEC’s transmission lines on different tax lots, and so the outcome of the current application should be no different than the outcome of that prior City decision. However, nothing prohibits the City from hearing Appellants’ arguments in this matter, regardless of how similar they are to those raised and resolved in a different, previous City decision, and reinterpreting the meaning of applicable code criteria. Prohibiting the City from doing so would be contrary to *Holland v. City of Cannon Beach*, 142 Or App 5, *rev den* 324 Or 229 (1996), which says that local governments may correct earlier interpretations of applicable land use regulations that they now believe to be wrong.

Moreover, UEC does not contend, and cannot contend, that issue preclusion applies here because issue preclusion does not generally apply to land use proceedings. *Lawrence v. Clackamas County*, 40 Or LUBA, 507, 520 (2001), *aff’d* 180 Or App 495 (2002) (the system of local government land use adjudications “is incompatible with giving preclusive effect to issues previously determined by a local government tribunal in another proceeding”, quoting *Nelson v. Clackamas County*, 19 Or LUBA 131, 140 (1990)). The City is well within its authority to and should hear Appellants’ arguments in this matter that UEC’s proposed high-voltage 230kV powerlines and 100’ transmission towers are not allowed in the SC zone and are subject to

additional Site Design Review criteria, notwithstanding the City’s prior decision, and deny UEC’s current application.

UEC argues that its application is not an “application for approval” or is simply a nondiscretionary “zoning permit” for a use permitted outright and so the requirement of BDC 4.1.700(D)(1)(a) that an application for approval be submitted by the record owner of property does not apply. UEC is wrong that it is seeking merely a “zoning permit”, whatever that is, or is not seeking any “approval” from the City and so it is not subject to BDC Chapter 4. For one, UEC’s claim that its application is not one for “approval” or is a nondiscretionary “zoning permit” is belied by its own representation at the Planning Commission’s February 2, 2022 hearing on this matter that the 120-day rule for a city to take final action on an application for a permit set out at ORS 227.178(1), applies here. That rule applies only to applications for “permit[s], limited land use decision[s] or zone change[s]”. A “permit” is “discretionary approval of a proposed development of land”. ORS 227.160(2). And a “limited land use decision” is “a final decision or determination made by a local government pertaining to a site within an urban growth boundary that concerns: * * * (B) The approval or denial of an application based on discretionary standards designed to regulate the physical characteristics of a use permitted outright, including but not limited to site review and design review.” ORS 197.015(12)(a)(B). By stating that the 120-day rule applies here, UEC is representing that its application is one for a statutory “permit” and/or a “limited land use decision”, both of which involve discretionary decisionmaking.

Further, UEC’s proposal is to construct high-voltage 230kV transmission lines and 100’ towers in the SC zone and is subject to Site Design Review which applies to **“all developments”** in the City, except those specifically listed under Development Review (UEC’s proposed development is not listed under Development Review):

4.2.200 Applicability

Development Review or Site Design Review shall be required for all new developments and modifications of existing developments described below. Regular maintenance, repair and replacement of materials (e.g., roof, siding, awnings, etc.), parking resurfacing, and similar maintenance and repair shall be exempt.

A. Site Design Review. Site Design Review is a discretionary review conducted by the City Manager or his/her designee without a public hearing. (See Chapter 4.1 for review procedure.) It applies to all developments in the City, except those specifically listed under “B” (Development Review). Site Design Review ensures compliance with the basic development standards of the land use district (e.g., building setbacks, lot coverage, maximum building height), as well as the more detailed design standards and public improvement requirements in Chapters 2 and 3.

BDC 1.2 defines “development” to include **“all improvements on a site”** including buildings and **“other structures”**:

Development - All improvements on a site, including buildings, other structures, parking and loading areas, landscaping, paved or graveled areas, grading, and areas devoted to exterior display, storage, or activities. Development includes improved open areas such as plazas and walkways, but does not include natural geologic forms or landscapes.

UEC's proposal is unquestionably one for "development" – it seeks to construct 230kV transmission lines and towers on the subject properties, which are "improvements" to the site or "structures", if not also "buildings" (a term that is undefined in the code).

Accordingly, Site Design Review absolutely applies to UEC's development, and it is a "discretionary" review that can result in denial of an application, even if the application is one for a use permitted outright. Please understand that the Tallmans do not concede that UEC's proposal is for a use permitted outright in the SC zone.

Site Design Review requires the submittal of either a Type II or Type III application, to be determined in accordance with BDC 4.2.400(B):

4.2.500 Site Design Review - Application Submission Requirements

All of the following information is required for Site Design Review application submittal:

- A. General Submission Requirements.** The applicant shall submit an application containing all of the general information required by Section 4.1.400 (Type II application) or Section 4.1.500 (Type III application), as applicable. The type of application shall be determined in accordance with subsection B of Section 4.2.400.

BDC 4.2.400(B) provides that Site Design Review applications that do not meet any of the listed criteria are Type II and those that meet one or more of the criteria are Type III:

4.2.400 Site Design Review – Application Review Procedure

- A. Site Design Review is subject to either a Type II or Type III procedure as determined by the criteria listed in “B,” and using the submittal requirements and approval criteria contained in Section 4.2.500 to 4.2.600.
- B. Site Design Review applications that do not meet any of the following criteria shall be conducted as a Type II procedure; those that meet one or more of the following criteria shall be conducted as a Type III procedure:
 1. Residential buildings with greater than 3 units;
 2. Commercial, industrial, public/semi-public, and institutional buildings with greater than 5,000 square feet of gross floor area;
 3. Developments with more than one building (e.g., two duplex buildings or an industrial building with accessory workshop);
 4. Developments with more than 4 off-street vehicle parking spaces;
 5. Developments involving the clearing and/or grading of ½ acre or greater area;
 6. Developments in designated sensitive land districts (see Chapter 3.7).

Although it is unclear from UEC’s application materials whether the development will involve the clearing and/or grading of ½ acre or more (presumably, some clearing and/or grading will be required to install the three proposed transmission towers), if you assume that UEC’s development does not meet any of the criteria in subsection B, then it “**shall**” be conducted as a **Type II** procedure. This requirement is repeated in BDC Table 4.1.200, which categorizes Site Design Review as requiring either a Type II or Type III procedure:

Table 4.1.200 Summary of Development Decisions/Permit by Type of Decision-making Procedure		
Action	Decision Type	Applicable Regulations
Site Design Review		
Type II	Type II	Chapter 4.2
Type III	Type III	Chapter 4.2

Moreover, City Staff described and processed UEC’s application as a Type II application, presumably because they understood the code to require it:

PUBLIC NOTICE
THE CITY of BOARDMAN WILL MAKE A TYPE II
ADMINISTRATIVE LAND USE DECISION
Wednesday, December 22, 2021

The purpose of this notice concerns: #ZP 21-066 Umatilla Electric Coop

Consideration of a Request for Zoning Approval for an easement for Umatilla Electric Co-op 230 kV transmission line in the Service Center Zone, Chapter 2.2 of the Development Code. Tax lots, #3205 and #3302, of Morrow County Tax Map 4N 25E 10, are the lots associated with this request to site the transmission line.

This decision will be consistent with 4.1.400 – Type II Procedure (Administrative) of the Boardman Development Code (BDC) Chapter 4.1. You are receiving this notice because you are a property owner within 250 feet of the properties involved or have expressed interest in the project.

The Staff Report for this decision will be available, end of day, on December 15, 2021. The citizens of Boardman are invited to make comment in writing, orally at city hall, or electronically to beyelerb@cityofboardman.com.

PUBLIC NOTICE
The City of Boardman Planning Commission will hold a
Type III Public Hearing of the Appeal of a Type II
Land Use Decision ZP21-066
Wednesday, February 2, 2022 at 7:00 PM

This meeting is available to the public using:
<https://zoom.us/j/2860039400>

The Boardman Planning Commission will meet on February 2, 2022, to consider an APPEAL of the December 22, 2021, Type II staff decision of ZP 21-066. The application was submitted by Umatilla Electric Co-op and seeks a zoning permit for a 230 kV transmission line in the Service Center Zone. The application is subject to the Boardman Development Code, Sections 2.2, 3.4 and 4.1. The subject site is tax lots #3205 and #3302 of Morrow County Tax Map 4N 25E 10. The application and related materials can be reviewed online or at Boardman City Hall. Copies are available at cost.

The code provides requirements for Type II decisions at BDC 4.1.200(D), including that such decisions address all relevant *approval* criteria and standards and that the City shall “approve, approve with conditions, or deny” the application:

D. Administrative Decision Requirements. The City Manager or his/her designee shall make Type II written decisions addressing all of the relevant approval criteria and standards. Based upon the criteria and standards, and the facts contained within the record, the City Manager or his/her designee shall approve, approve with conditions, or deny the requested permit or action. The decision may include a requirement for non-remonstrance for future road improvements.

Accordingly, UEC's application can **only** be a discretionary Type II application for "approval" subject to the procedures in BDC Chapter 4.1. And those procedures at BDC 4.1.700(D)(1) provide that Type II applications can only be submitted by certain entities and persons, none of which describe UEC:

D. Applications.

1. **Initiation of applications:**

a. Applications for approval under this chapter may be initiated by:

- (1) Order of City Council;
- (2) Resolution of the Planning Commission;
- (3) The City Manager;
- (4) A record owner of property (person(s) whose name is on the most recently recorded deed), or contract purchaser with written permission from the record owner.

The only person who can submit an application is the "record owner" and the City lacks the jurisdiction and authority to allow otherwise. The applicant cites *Schrock Farms, Inc. v. Linn County*, 142 Or App 1 (1996), but that case has no applicability here. The circumstances here are different than in *Schrock*. In that case, ODOT applied to Linn County to construct a highway across property that was subject to a pending condemnation action brought by ODOT in the circuit court for **fee title**. Here, of course, there is no issue of fee title; UEC seeks only an **easement**. In *Schrock*, the county's zoning ordinance had a looser definition of "owner" as one having "legal or equitable title" and the court held that ODOT had "equitable" interest in the property enough to be deemed the "owner". Here, the City's code is clear that applications may only be filed by a "record owner of property (person(s) whose name is on the most recently recorded deed)". UEC is seeking an **easement** over the Tallman property, **not fee title**. Perhaps if UEC had sought fee title of the Tallman property, *Schrock* would dictate a different outcome, but that is not the case here. Accordingly, UEC cannot be deemed to be the "record owner" of the Tallman property and so the City did not have the jurisdiction or authority to accept or make a decision on the application.

The Planning Commission should deny UEC's application.

Thank you for your consideration.

Very truly yours,

A handwritten signature in cursive script that reads "Sarah Mitchell". The signature is written in a dark ink and is positioned above the printed name.

Sarah C. Mitchell

SCM:scm

CC: Clients