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January 26, 2022

*Via Email to:*  
[beyelerb@cityofboardman.com](mailto:beyelerb@cityofboardman.com)

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:

This firm represents 1st John 2:17, LLC and Jonathan Tallman (collectively, “the Tallmans”), the owners of property within the City of Boardman (Tax Lots 3205 and 3302 of Map 4N 25E S10) upon which Umatilla Electric Cooperative (“UEC”) applied for zoning approval to construct its 230kV electrical transmission line. City staff approved UEC’s application on December 22, 2021 (“Decision”) and that is the decision challenged in this appeal. Please include this letter in the record of the above captioned proceeding.

- 1. The Decision must be denied because UEC is neither a record owner nor a contract purchaser of Tax Lots 3205 and 3302, and processing UEC’s application and making a decision on the merits is prohibited as a matter of law.**

The City’s code is clear on its face that, without exception, land use applications like UEC’s application for a Zoning Permit, which the City describes as a “Type II” application, may only 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.**” BDC 4.1.700(D)(1)(a) (Boldface added).

These limitations on who may file a land use application make sense. When drafting its code, the City made an intentional decision only to accept land use applications from certain persons or City entities. By only allowing the record owner of property or contract purchaser with written permission from the record owner to file applications, the City sought to avoid having to make determinations of who the legal “owner” of property is, which is outside of its purview to decide.

There is no ambiguity in who or what constitutes a “record owner.” UEC is not the “record owner” of Tax Lots 3205 and 3302; 1st John 2:17, LLC is. *See* Exhibit 1 which is the most recently recorded deed for Tax Lots 3205 and 3302. In fact, UEC does not even claim to be a record owner. Accordingly, the Decision errs in finding that UEC is a “record owner” of the subject properties, because BDC 4.1.700(D)(1)(a)(4) expressly defines “record owner” as the “person(s) whose name is on the most recently recorded deed” and UEC’s name is simply not on the subject properties’ most recently recorded deed. UEC does not and cannot claim otherwise.

UEC is also not a “contract purchaser”. There is no contract for UEC to purchase any portions of Tax Lots 3205 or 3302.

The circuit court order UEC provided to the City gives UEC permission to occupy the property but does not purport to make, or in fact make, UEC a “record owner” of Tax Lots 3205 and 3302. The Oregon Supreme Court has explained that such orders granting advanced *occupancy* do not determine the plaintiff’s right to *ownership*. *City of Portland v. Anderson*, 248 Or 201, 202, 432 P2d 1020 (1967). Rather, under the condemnation statute, title of property in a condemnation action passes to the condemner only upon entry of a judgment of condemnation and payment into court by the condemner, of the compensation assessed by the jury. ORS 35.325. There has been no judgment of condemnation on Tax Lots 3205 or 3302. The court order UEC relies upon simply does not transfer title of the subject properties to UEC.

The City’s code at BDC 4.1.700(D)(3)(a) (boldface added) is also explicit that where the applicant is not the “record owner” of record, staff “shall” reject the application:

“When an application is received by the City, the City Manager shall immediately determine whether the following essential items are present.  
**If the following items are not present, the application shall not be accepted and shall be immediately returned to the applicant: \*\*\***”

Staff should have rejected UEC’s application because it was not provided by the record owner of the subject properties, as required by BDC 4.1.700(D)(3)(a). The City exceeded its jurisdiction in processing and making a decision on the merits of the application without the Tallmans’ signatures in violation of the City’s code.

In *Baker v. Washington County*, 46 Or LUBA 591 (2004), LUBA reversed a county decision that approved a land use application submitted by an easement holder without the required signatures of the underlying property owners under a similar Washington County Code

provision, because the county accepting the application without the required signatures was prohibited as a matter of law. The outcome here will be the same as in *Baker* if the City approves UEC's application without the Tallmans' signature.

The Planning Commission should find that UEC is not authorized to file the application on Tax Lots 3205 and 3302 and that City staff erred as a matter of law in accepting it, deeming it complete, and making a decision on the merits. The Planning Commission should deny UEC's application for these reasons alone.

**2. The Decision must be denied because UEC's proposal is not allowed in the Commercial Service Center Subdistrict.**

The Decision errs in approving UEC's proposed 230kV transmission lines and 100' tall towers as a "private utility". The Service Center Subdistrict permits "Private utilities (e.g., natural gas, electricity, telephone, cable and similar facilities)". BDC Table 2.2.200.B. However, this does not authorize major high-voltage transmission line and tower facilities. To interpret it as if it does and that ALL private utilities, regardless of size, are allowed, not only condemns your City to being criss-crossed with endless high-voltage wires contrary to the City's "Underground Wiring Control District" (BMC 13.12) and the command in the City's comprehensive plan (Chapter XI – "The City requires underground installation of all utilities within new developments, as well as many main utility feeder lines."), but also condemns the City to being overrun by other massive private utility developments like the highly controversial Jordan Cove natural gas facility and pipeline on the Oregon Coast.

Make no mistake, "private utilities" are allowed in nearly every district in the City, including its Residential District, Commercial Districts, including the City Center Subdistrict and Tourist Commercial Subdistrict, and Industrial Districts. Continuing to set the precedent here that "private utilities" includes all types of utilities, regardless of size, is not in the City's interest and it is not consistent with the text, context, purpose or policy of the City's code. The types of allowed "private utilities" can only mean utilities that serve a specific customer and cannot be interpreted to include UEC's major 230kV transmission lines and 100' towers. Such interpretation is consistent with the City comprehensive plan that provides the same policy:

Energy and Communication

The City is served by a variety of local utility companies, including electricity, gas, telephone, and TV cable. The City requires underground installation of all utilities within new developments, as well as many main utility feeder lines.

Where there are interpretive questions, your code provides that "**Most restrictive regulations apply.** Where this Code imposes greater restrictions than those imposed or required by other rules or regulations, the most restrictive or that imposing the higher standard shall govern." BDC 1.1.200(C). Accordingly, the City's code requires its interpretations to err on the side of being more restrictive. That means it is simply an erroneous interpretation of the City code to interpret 230kV lines and 100' tall electrical transmission towers as "private utilities"

that escape the undergrounding requirement. The staff Decision interpretation eviscerates the City code standard and is contrary to the purpose of the requirement – plainly, the City standard is not to have large above-ground utility facilities allowed as permitted outright uses in most City zoning districts. There is no difference between a UEC 230kV line and 100’ tower facility and a BPA one.

The Planning Commission should deny UEC’s application because its proposal is not allowed in the Service Center Subdistrict.

**3. The Decision must be denied because it errs in approving UEC’s proposal without undertaking Site Design Review or applying Site Design Review standards.**

Development Review or Site Design Review is required for “all new developments” in the City. BDC 4.2.200. Site Design Review applies to “all developments” in the City, except those specifically listed as subject to Development Review. BDC 4.2.200(A). The City code defines “development” as:

**“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.”** BDC 1.2 (Boldface added).

There can be no doubt that UEC’s proposal is for “development” – it seeks to improve Tax Lots 3205 and 3302 with its 230kV transmission lines and towers. UEC’s development is not listed as subject to Development Review under BDC 4.2.200(B), which generally lists residential developments and developments subject to a conditional use permit, so UEC’s proposed development is subject to Site Design Review. The Decision approved UEC’s proposal without undertaking Site Design Review or applying any Site Design Review standards. For one, UEC’s application does not contain all of the information required for an application. It did not include a site analysis map with topographic contour lines (BDC 4.2.500(B)(1)(b)) or names and addresses of all persons listed as owners on the most recently recorded deed (BDC 4.2.500(B)(1)(i)). The application narrative does not document compliance with the applicable approval criteria contained in BDC 4.2.600, as required by BDC 4.2.500(B)(8). Specifically, the narrative does not document compliance with Chapter 3.1 – Access and Circulation, Chapter 3.2 – Landscaping, Significant Vegetation, Street Trees, Fences and Walls, Chapter 3.3 – Vehicle and Bicycle Parking, Chapter 3.4 – Public Facilities and Standards, Chapter 3.5 – Stormwater Management, or Chapter 3.6 – Other Standards, as required by BDC 4.2.600(4). BDC 3.4.100(A) provides that “[n]o development shall occur unless the development has frontage or approved access to a public street, in conformance with the provisions of Chapter 3.1 – Access and Circulation, and the following standards are met: [standards follow].” Presumably, a new vehicle access from Laurel Lane, a public street, is required for development and maintenance of the transmission line and towers. No such access to the easement exists, either from Laurel Lane or from the Tallmans’ property. Access to a public street, like Laurel Lane, requires an access permit in accordance with the procedures in BDC 3.1.200(C). However, neither the application

nor the decision explains how access will be achieved or how the standards for access in BDC Chapter 3.1 are met. The Planning Commission should deny UEC's application for these reasons.

**4. The Decision must be denied because it errs in finding that UEC's proposed transmission towers are not buildings subject to the Commercial Service Center Subdistrict's maximum building height and design standards.**

The proposed transmission towers are "buildings" (a term undefined in the City's code) and exceed the 35-foot height limit for buildings in the Service Center Sub District under BDC 2.2.140(A). Thus, the transmission towers, which are 100 feet in height, cannot be approved without a variance. No variance has been approved and so the Decision errs in approving the towers which exceed the allowed maximum height for the zone.

The proposed transmission towers are also "public and institutional buildings", which must demonstrate compliance with "Design Standards" under BDC 2.2.150. BDC 2.2.150(A)(2). At a minimum, the transmission towers are "public" because they will provide a "public service", and they are buildings. The transmission towers are also "development" (as is a road, if such is approved in the challenged Decision). Both buildings *and* development must demonstrate compliance with the "Design of Buildings and Developments" under BDC 2.2.150(B)(1) ("The standards in the following section **shall apply to buildings *and* developments listed in Section 2.2.150.** Buildings shall be compatible with balance of the Commercial District and Sub Districts."). The proposed transmission towers are either "buildings" or "development". They cannot be neither. That means the Decision errs in failing to require the proposal to demonstrate compliance with these standards.

The proposed transmission lines are incompatible with the "balance" of the Commercial District and Sub Districts because they are far from aesthetically appealing (they are 100-foot tall 230kV transmission lines) and are vastly out of scale with existing and allowed development in the zone. Instead of attracting economic development to this part of the City, the challenged Decision will disincentivize it by making this part of the City undesirable as well as difficult to develop with uses that are allowed in the applicable zone. The Decision errs by approving the proposal that has not shown compliance with the "Design of Buildings and Developments" under BDC 2.2.150(B)(1).

Again, the City's code states that where there are interpretive questions, the most restrictive regulations apply. BDC 1.1.200(C). Accordingly, the City's interpretation of its code is required to err on the side of being more restrictive, i.e., to apply the City's design standards and maximum building height restriction to UEC's proposal.

The Planning Commission should deny UEC's proposal for these reasons.

**5. The public notices of the application and Decision failed to contain elements required by the City's code.**

The City's public notice of the Decision stated that the City intends to make a "Type II" decision. As with the public notices sent out by the City on UEC's prior transmission line application (ZP21-031), the notice here failed to contain any of the information required under BDC 4.1.400(C)(3) for notices of pending Type II decisions, including the requirements that it "[l]ist the relevant approval criteria by name and number of code sections"; "[s]tate the place, date and time the comments are due, and the person to whom the comments should be addressed"; "[s]tate that if any person fails to address the relevant approval criteria with enough detail, they may not be able to appeal to the Land Use Board of Appeals or Circuit Court on that issue"; "[s]tate that all evidence relied upon by the City Manager or his/her designee to make this decision is in the public record, available for public review"; "[s]tate that after the comment period closes, the City Manager or designee shall issue a Type II Administrative Decision"; and "[c]ontain the following notice: 'Notice to mortgagee, lienholder, vendor, or seller: The City of Boardman Development Code requires that if you receive this notice it shall be promptly forwarded to the purchaser.'" By ignoring these consistent failures in this proceeding and in the proceeding on UEC's previous application, the City has demonstrated that it has no interest in ensuring that its code's requirements concerning public notice of land use applications, which are intended to ensure that the public is made aware of the City's pending land use decisions and able to meaningfully participate in those decisions, are followed. At the very least, the City should direct its planning staff to correctly follow the City's requirements for public notices so it does not continue to violate those requirements at the expense of the rights of the public.

Thank you for your consideration.

Very truly yours,



Sarah C. Mitchell

SCM:scm

CC: Clients

Exhibit 1 – Deed for Tax Lots 3205 and 3302

*Filed for record at the request of/  
After recording, return to:*  
Todd Mitchell  
Buchalter  
1331 NW Lovejoy St., Suite 900  
Portland, OR 97209

**Grantors:**  
Terry K. Tallman and Cheryl Tallman  
706 SW Mt. Hood Avenue  
Boardman, OR 97818

**Grantee:**  
1st John 2:17, LLC  
706 SW Mt. Hood Avenue  
Boardman, OR 97818

*Until a change is requested, send tax statements to:*  
1st John 2:17, LLC  
706 SW Mt. Hood Avenue  
Boardman, OR 97818

MORROW COUNTY, OREGON		<b>2021-49037</b>
D-WD		
Cnt=1 Stn=23 TC	06/18/2021 01:03:06 PM	
\$20.00 \$11.00 \$10.00 \$60.00	<b>\$101.00</b>	
I, Bobbi Childers, County Clerk for Morrow County, Oregon, certify that the instrument identified herein was recorded in the Clerk records.		
Bobbi Childers - County Clerk		



APNs: R08224, R08081, R08080

*For Clerk's Use Only*

### STATUTORY WARRANTY DEED

Terry K. Tallman and Cheryl Tallman, husband and wife, GRANTORS, convey and warrant to 1st John 2:17, LLC, an Oregon limited liability company, GRANTEE, the following described real property located in the County of Morrow, State of Oregon, and more fully described on Exhibit A attached hereto and incorporated herein by this reference.

Subject to: covenants, conditions, restrictions and/or easements, if any, affecting title, which may appear in the public record, including those shown on any recorded plat or survey.

THE TRUE CONSIDERATION FOR THIS CONVEYANCE IS \$1,265,000.

Dated this 16th day of June, 2021.

BEFORE SIGNING OR ACCEPTING THIS INSTRUMENT, THE PERSON TRANSFERRING FEE TITLE SHOULD INQUIRE ABOUT THE PERSON'S RIGHTS, IF ANY, UNDER ORS 195.300, 195.301 AND 195.305 TO 195.336 AND SECTIONS 5 TO 11, CHAPTER 424, OREGON LAWS 2007, SECTIONS 2 TO 9 AND 17, CHAPTER 855, OREGON LAWS 2009, AND SECTIONS 2 TO 7, CHAPTER 8, OREGON LAWS 2010. THIS INSTRUMENT DOES NOT ALLOW USE OF THE PROPERTY DESCRIBED IN THIS INSTRUMENT IN VIOLATION OF APPLICABLE LAND USE LAWS AND REGULATIONS. BEFORE SIGNING OR ACCEPTING THIS INSTRUMENT, THE PERSON ACQUIRING FEE TITLE TO THE PROPERTY SHOULD CHECK WITH THE APPROPRIATE CITY OR COUNTY PLANNING DEPARTMENT TO VERIFY THAT THE UNIT OF LAND BEING TRANSFERRED IS A LAWFULLY ESTABLISHED LOT OR PARCEL, AS DEFINED IN ORS 92.010 OR 215.010, TO VERIFY THE APPROVED USES OF THE LOT OR PARCEL, TO DETERMINE ANY LIMITS ON LAWSUITS AGAINST FARMING OR FOREST PRACTICES, AS DEFINED IN ORS 30.930, AND TO INQUIRE ABOUT THE RIGHTS OF NEIGHBORING PROPERTY OWNERS, IF ANY, UNDER ORS 195.300, 195.301 AND 195.305 TO 195.336 AND SECTIONS 5 TO 11, CHAPTER 424, OREGON LAWS 2007, SECTIONS 2 TO 9 AND 17, CHAPTER 855, OREGON LAWS 2009, AND SECTIONS 2 TO 7, CHAPTER 8, OREGON LAWS 2010.

[SIGNATURE PAGE FOLLOWS]



GRANTORS:

Terry K. Tallman  
Terry K. Tallman

Cheryl Tallman  
Cheryl Tallman

STATE OF OREGON                    )  
COUNTY OF MORROW            ) ss.



This instrument was acknowledged before me on the 16<sup>th</sup> day of June, 2021, by Terry K. Tallman and Cheryl Tallman, husband and wife, Grantors.

Lori Ann Moss  
Notary Public for Oregon  
My commission expires: December 17, 2022

**EXHIBIT A**

**Legal Description**

**PARCEL I:**

Beginning at the Northeast corner of the Southwest Quarter of the Southeast Quarter of Section 10, Township 4 North, Range 25, East of the Willamette Meridian, Morrow County, Oregon; thence South along the East boundary of said Southwest Quarter of the Southeast Quarter 463.1 feet to the true point of beginning; thence South 89 degrees 31' West 470.3 feet; thence South 1 degree 43' East 81.4 feet; thence South 89 degrees 31' West 800 feet to a point 50 feet East of the West boundary of the South Half of the Southeast Quarter of said Section 10; thence South and parallel with said West boundary 566.8 feet to a point 200 feet North of the South boundary of said Section 10; thence East and parallel with said South boundary 1,272.4 feet to the East boundary of said Southwest Quarter of the Southeast Quarter of Section 10; thence North along said East boundary 649.6 feet to the true point of beginning.

EXCEPTING THEREFROM that portion conveyed to Morrow County by Roadway Dedication Deed Recorded April 20, 1984 as Microfilm No. M-23150, Morrow County Microfilm Records.

**PARCEL II:**

Beginning at the Northeast corner of the Southwest Quarter of the Southeast Quarter of Section 10, Township 4 North, Range 25 East of the Willamette Meridian, Morrow County, Oregon; thence West along the North boundary of said Southwest Quarter of the Southeast Quarter 470.3 feet to the true point of beginning; thence South 1 degree 43' East 544.5 feet; thence South 89 degrees 31' West 800 feet to the West line of Southwest Quarter of the Southeast Quarter; thence North 1 degree 43' West 544.5 feet to the Northwest corner of Southwest Quarter of the Southeast Quarter, thence North 89 degrees 31' East 800 feet along the North line of Southwest Quarter of Southeast Quarter to the Point of beginning.

EXCEPTING THEREFROM the West 50 feet.

**PARCEL III:**

A tract of land located in Section 10, Township 4 North, Range 25 East of the Willamette Meridian, in the County of Morrow and State of Oregon, described as follows:

All of the Southeast Quarter of the Southeast Quarter of said Section 10 lying North and West of Laurel Lane; and the North 463.10 feet of the East 470.30 feet of the Southwest Quarter of the Southeast Quarter.

EXCEPTING THEREFROM that portion conveyed to Morrow County by Roadway Dedication Deed recorded April 20, 1984 as M-23150 Morrow County Microfilm Records.