

CITY of BOARDMAN

Community Development

LAND USE

NOTICE OF DECISION

DATE: October 11, 2021

TO: Boardman Planning Commission and Interested Parties

FROM: Barry C. Beyeler, Community Development Director

SUBJECT: Type III Appeal hearing of Appeal of ZP21-031

File: ZP21-031

Applicant: Umatilla Electric

Project: Olson Rd. 230 kV Transmission Line

On October 6, 2021, the Boardman Planning Commission deliberated based on the evidence submitted in the appeal of ZP21-031 by 1st John 2:17 LLC, represented by Kellington Law Group. At hearing held on September 15, 2021, the Planning Commission agreed to hold the record open for seven days for general evidence and comments, an additional seven days for responsive evidence and comments, and a final seven days for Applicant to submit its final written arguments. After the applicant filed its final written argument, the record was closed on September 29, 2021.

At the October 6, 2021, hearing, Boardman Planning Commission, deliberated based on the evidence, testimony and arguments in the record. Following deliberation, a motion was made to adopt the Findings below, deny the Appeal by 1st John 2:17, LLC, and approve the application. The Planning Commission then voted 5-0 to approve the motion. **The Appeal is DENIED.**

ZP21-031 - Findings

Background

1. Applicant: Umatilla Electric Cooperative.
2. Application Date: The application in File ZP21-031 was submitted on May 26, 2021.
3. Completeness: The application was deemed complete on May, 28 2021.
4. Subject Property: The subject property includes Tax Lots 3000, 3200, 3201, 402 and 403.
5. Zoning: Commercial/Service Center Subdistrict.
6. Proposed use: The application proposes to install two segments of a 230kV electrical transmission line.

7. Applicable Criteria: Boardman Development Code (“BDC”) 2.2, 3.4 and 4.1.400.

Findings

1. This matter came before the Planning Commission as an appeal from a Type II staff decision in File ZP21-031. In that decision, staff approved Umatilla Electric Cooperative’s (“UEC”) application to develop a 230kV electric utility line (“transmission line”) that will be constructed, in part, on multiple parcels within the City of Boardman (“City” or “Boardman”).
2. As described in the application, the proposed project is needed to reliably accommodate 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.
3. The transmission line is proposed to eventually cross nine tax lots in the City. The Applicant previously obtained a Zoning Permit for two of those tax lots. The Applicant originally requested Zoning Permit approval for the other seven tax lots. The Applicant later withdrew its request for two of those tax lots and the Application was processed for the remaining five tax lots: 402, 403, 3201, 3206, and 3000.
4. The subject property is located in the Commercial District/Service Center Subdistrict (“SC Zone”). As such, it is subject to the standards in BDC 2.2.200. Table 2.2.200.B lists “private utilities” as a permitted use in the zone.
5. On July 26, 2021, the City’s Community Development Director issued a Notice of Decision approving the Zoning Permits.
6. On August 10, 2021, 1st John 2:17 LLC and Jonathan Tallman (“Appellants”) appealed the decision to the Planning Commission.
7. On September 8, 2021, the Planning Commission held a *de novo* hearing to consider the appeal. The Planning Commission left the written record open: (1) until September 15th for all participants (“Open Record Period”); (2) until September 22nd to receive evidence and argument only for rebuttal purposes in response to evidence submitted during the Open Record Period; and (3) until September 29th for the Applicant to provide a final legal argument. The Planning Commission received no testimony or evidence objecting to the hearing process or the manner in which the record was left open.

8. Each of the subject tax lots are commercially zoned and are in the SC Zone, a subdistrict of the Commercial District.
9. The proposed electrical transmission line is an outright permitted use in the 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.
10. The Planning Commission finds that UEC is a private utility that provides electrical service. The record demonstrates UEC is a private cooperative organized under ORS Chapter 62 and is registered as such with the Oregon Secretary of State.
11. The Planning Commission received testimony that UEC is not a private utility for purposes of BCC 2.2.200, either because it is a "public utility" as defined by ORS 757.005, or because it is not the type of "private utility" contemplated by the Code. The Planning Commission finds that the statutory definition of "public utility" in ORS 757.005 does not include cooperatives like UEC because they are expressly excluded from the definition under ORS 757.006. The Planning Commission also finds that the Code does not distinguish between "types" of private utilities and that all "Private utilities (e.g. natural gas, electricity, telephone, cable and similar facilities)" are allowed by right in the SC Zone.
12. Based on the figures and other information in the record provided by the Applicant, the transmission line satisfies applicable development standards for an electric utility in the SC Zone. Under BDC 2.2.200(B), a land use that is listed in Table 2.2.200.B, including public utility facilities, are subject to the standards in Chapter 2.2. Further, 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."
13. The Planning Commission finds that most of the standards in BDC Chapter 2.2 and the base standards of the Commercial District by their terms do not apply to the proposed transmission lines. To the extent the standards apply, the standards are met as described below.
14. Appellants argue that the standards in BDC 2.2.150(B)(1) ("Design of Buildings and Developments") are not satisfied. However, BDC 2.2.150(A) lists the types of developments to which BDC 2.2.150(B)(1) applies. Those developments include only "commercial buildings", "public and institutional buildings", and "mixed use buildings." No portion of the transmission line in the City includes a commercial, public or institutional building. Although the Code does

not define “building”, BDC 2.2.150(B) describes a “building” as measured by “enclosed floor area.” The only structures that are part of the transmission line are the utility poles. Because utility poles do not include an enclosed floor area, they are not considered a “building for purposes of BDC 2.2.150. Therefore, BDC 2.2.150(B)(1) does not apply.

15. Appellants identified BDC 2.2.140(A) (“Maximum Height”) as not being satisfied. That Code provision regulates building height. As noted in the previous finding, no portion of the transmission line in the City includes a building. Although the Code does not define “building”, BDC 2.2.140 states that “building height is measured as the vertical distance above a reference datum measured to the highest point of the coping of a flat roof or to the deck line of a mansard roof or to the average height of the highest gable of a pitched or hipped roof.” Utility line poles do not contain a flat roof, mansard roof, or hipped roof. There is therefore no “building height” that can be measured in this context and BDC 2.2.140(A) therefore does not apply.
16. The Planning Commission further finds that none of the development standards in BDC 2.2.120 (“Building Setbacks”), 2.2.130 (“Lot Coverage”), or 2.2.160 (“Pedestrian Amenities”) apply to the development of an electrical transmission line by their express terms.
17. BDC Chapter 3.4 contains additional development standards, some of which apply to utilities. Based on the figures and other information in the record provided by the Applicant, the Planning Commission finds that the development standards in BDC Chapter 3.4 either do not apply by their terms to an electrical transmission line or, where they do apply, they are met. Only the specific development standards in dispute in this proceeding are addressed further below.
18. Appellants identified BDC 3.4.100(A) (“Development Standards”) as not being satisfied. BDC 3.4.100(A) imposes certain transportation standards. The only standard in BDC 3.4.100(A) that potentially applies to the proposed transmission line is the requirement that all development must have frontage or approved access to a public street. Here, the proposed development is a linear electric utility line that does not involve a transportation component. Moreover, the Planning Commission finds that the proposed development has approved access to a street. The Applicant submitted easement documents demonstrating its right to access each easement area from the underlying parcel, each of which has access to a street. Further, the transmission line will result in a continuous corridor that can be accessed from multiple streets. Accordingly, BDC 3.4.100(A) is satisfied.
19. The Appellants raise certain procedural issues with respect to staff’s initial approval of the Zoning Permits, for example the adequacy of the notice of the decision and the review of the

Application using Site Design Review standards in BDC Chapter 4.2. The Applicant submitted materials showing the extent of the development on each tax lot. The Planning Commission also held a *de novo* hearing, with an extended record period, allowing participants to review and comment on the proposal. Without determining whether Site Design Review is even required in this instance, the Planning Commission finds that the criteria for Site Design Review have been satisfied. The materials submitted by the Applicant were sufficient to conduct Site Design Review, and the applicable criteria in BDC 4.2.600 are satisfied because, as explained in other findings, the transmission line satisfies all applicable development standards in BDC Chapter 2 relating to the SC Zone and BDC Chapter 3 relating to utilities.

20. The Appellants presented several arguments to the Planning Commission relating to the approval of a road as part of the Zoning Permit. UEC's application does not propose a road and the Zoning Permit determines only whether the transmission line is an allowed use. Therefore, these arguments have no bearing on the Planning Commission's decision.
21. Appellants make several arguments based on the assertion that, because UEC will need to obtain a Zoning Permit on two tax parcels owned by Appellants to complete the transmission line, that the transmission line is not a line at all because it is not capable of transmitting electricity until the entire line is constructed. The Planning Commission rejects this argument. There simply is no Code provision that requires all permits for a proposed linear facility to be obtained at the same time. Instead, the Zoning Permit is used to determine whether the proposed use is allowed, and under what conditions, on the subject property. As proposed, UEC would construct the transmission line on the tax lots that are the subject of this application, each of which allow a "private utility" as a permitted use. Further, there is evidence in the record that UEC is in the process of acquiring the remaining two parcels for the proposed use and the Code does not prohibit UEC from seeking a Zoning Permit for the parcels to which it has already acquired a right while it continues its efforts to acquire rights to the remaining parcels.
22. Finally, Appellants assert that the transmission line as proposed is not allowed because it is not underground. Appellants' argument is not based on the Boardman Development Code and, instead, is based on Boardman Municipal Code ("BMC") chapter 13.12, which is referred to as the Underground Wiring Control District. The Planning Commission finds that BMC 13.12 is not part of the City's land use regulations and therefore do not provide approval criteria for this land use application.
23. Moreover, even if BMC 13.12 applies to this application, the Planning Commission finds that the Underground Wiring Control District governs only those wires that are in public rights of way.

BMC 13.12.030, the provision that prohibits overhead wires, expressly states: "It is unlawful for any person to erect, construct or maintain on or over the surface of any of the streets in the underground wiring control district any wires . . . on, through, or by means of which electric current is transmitted or used. . . ." Because this language regulates only utility lines in streets, it does not apply to private property away from streets. In contrast, the BDC does contain a provision regulating utilities on private property and requires some utilities to be underground, but those provisions apply only to subdivisions and are not applicable here.

24. Finally, even if the Underground Wiring Control District is relevant to the application, there is an express exemption that allows UEC's transmission line to be constructed above ground. Specifically, BMC 13.12.130(E) states that the underground requirements do not apply to "feeder lines" which are defined as a line "that serves the system but not a specific customer." The record demonstrates that the proposed transmission line is part of a system improvement that is designed to serve the overall system and "not a specific customer." Accordingly, the provisions of BMC 13.12 do not apply.
25. Based on the information in the record and the findings set forth above, the appeal of the staff decision in ZP21-031 is denied and the Zoning Permits for tax lots 402, 403, 3201, 3206, and 3000 in the SC Zone are approved.