City of Boardman Land Use Application

Office Use Only:
File No. LU21-003
Date Received 8-10-21
Decision Type _____

~~Owner:~~ Appellants: 1st John 2:17 LLC; Jonathan Tallman Phone: (208) 570-7589

Address: 706 Mount Hood Ave. City: Boardman State: OR Zip: 97818

~~Applicant or~~ Agent: Wendie Kellington, Kellington Law Group PC Phone: (503) 636-0069

Address: P.O. Box 159 City: Lake Oswego State: OR Zip: 97034

Appeal under BDC 4.1.400(G) of a Type II decision by the Community Development Director approving ZP21-031: Umatilla Electric Cooperative Olson Rd. Transmission Project on tax lots 402, 403 and 405 of Morrow County tax map 4N 25E 11 and tax lot 3201 of map 4N 25E 10, dated July 26, 2021.

Estimated Construction Cost Evaluation: $_____ Total Square Footage: _____

Requested Action: (Please circle one)

Zone Change Variance Conditional Use Permit Property Line Adjustment

Partition Subdivision Preliminary Plat Other: Land Use Appeal

The following material and supplemental information must be submitted with this application as a requirement for submittal to the Planning Commission:

Plans and specifications, drawn to scale, showing the actual shape, setbacks and dimensions of the property to be used, together with a plot plan and vicinity map of the subject property.
The size and location of the property, buildings, other structures; and use of buildings or structures, existing and proposed.
Plot plan indicating all on/off-site improvements, including streets, fire hydrants, water and sewer facilities, etc.

I acknowledge that I am familiar with the standards and limitations set forth by the City of Boardman Zoning Ordinance, and that additional information and materials may be required. I fully intend to comply with plans and specifications submitted with this application. I do hereby certify that the above information is correct and understand that issuance of a permit based on this application will not excuse me from complying with the effective Ordinances and Resolutions of the City of Boardman and Statutes of Oregon, despite any errors on the party of the issuing authority in checking this application.

Signed: Jonathan Talla
~~(Applicant)~~ (Appellant)

Printed: Jonathan Tallman
(Applicant) (Appellant)

Signed: Jonathan Talla
(Legal Owner)

Printed: Jonathan Tallman
(Legal Owner)

If this application is not signed by the property owner, a letter authorizing signature by the applicant must be attached.

Staff Comments:

Recommended Action: _____

Decision: Approved Not Approved

Date: _____ Signature: _____ Title: _____

Notice of Appeal Under BDC 4.1.400(G) of a Type II Decision by the Community Development Director Approving ZP21-031: Umatilla Electric Cooperative Olson Rd. Transmission Project

Decision Being Appealed:	File: ZP21-031 Applicant: Umatilla Electric Cooperation Project: Olson Rd. 230kV Transmission Line Location: Tax Lots 402, 403 and 405 of Morrow County Tax Map 4N 25E 11 and Tax Lot 3201 of Map 4N 25E 10 Date of Decision: July 26, 2021
Appeal Date:	August 9, 2021
Filing Fee:	$300
Appellants:	1st John 2:17, LLC Jonathan Tallman 706 Mount Hood Ave. Boardman, OR 97818 (208) 570-7589 jonathan@tallman.cx
Appellants' Representative:	Wendie Kellington Kellington Law Group, PC P.O. Box 159 Lake Oswego, OR 97034 (503) 636-0069 wk@klgpc.com

I. Introduction

Appellants 1st John 2:17 LLC and Jonathan Tallman (Tallman) appeal the Decision made without a hearing of the City of Boardman Community Development Director in File ZP21-031, dated July 26, 2021, approving an application by Umatilla Electric Cooperation (UEC) for zoning approval for a 230kV transmission line that affects tax lots 402, 403 and 405 of Morrow County tax map 4N 25E 11 and tax lot 3201 of map 4N 25E 10, under BDC 4.1.400(G). A copy of the Decision is attached as "Appeal Exhibit 1".

II. Timely Filing of Appeal

Under BDC 4.1.400(G)(2), a Notice of Appeal of a Type II decision must be filed with the City Manager within 21 days of the date the Notice of Decision was mailed. This Notice of Appeal is filed within that period.

We note that BDC 4.1.400(E)(1) requires the notice of a Type II decision to be sent by mail within five days after the Decision is signed by the City Manager to "[a]ny person who * * *

provides comments during the application review period[.]" 1st John 2:17, LLC provided comments during the application review period. Mr. Tallman is the managing member of 1st John 2:17, LLC. Neither 1st John 2:17, LLC nor Mr. Tallman received mailed Notice of the Decision as is required by BDC 4.1.400(E)(1). Rather, Notice of the Decision was posted on the City's website with a date of July 26, 2021. While the 21 days to file a Notice of Appeal does not start running until the Notice of Decision is mailed, to ensure that the filing deadline is met, Appellants file this appeal within 21 days of July 26, 2021, the date of the Notice of Decision posted on the City's website. This Notice of Appeal is timely filed.

III. Statement of Standing to Appeal – BDC 4.1.400(G)(2)(c)(2)

Appellant 1st John 2:17, LLC participated in the proceeding by submitting written comments on the application and so has standing to appeal the Decision under BDC 4.1.400(G)(1)(c). 1st John 2:17, LLC also has standing to appeal the Decision under BDC 4.1.400(G)(1)(b). Under BDC 4.1.400(E)(1), 1st John 2:17, LLC should have been mailed written notice of the July 26, 2021 Type II administrative Decision by the City because it provided written comments on the application during the review period. However, 1st John 2:17, LLC never received such notice and it does not appear that the City gave the required notice. Despite the City failing to follow its own code, 1st John 2:17, LLC has standing to appeal under BDC 4.1.400(G)(1)(c).

Appellant Jonathan Tallman also has standing to appeal as he is the managing member of 1st John 2:17, LLC; 1st John 2:17, LLC is a closely held family company and he cares deeply about land use actions in the vicinity that may adversely affect the family property.

IV. Specific Issues Raised on Appeal – BDC 4.1.400(G)(2)(c)(3)

The challenged Decision approves (1) disconnected segments of an electrical power transmission line, and (2) possibly also attempts to approve "the alternate access road meeting the Port of Morrow Interchange Access Management Plan." Finding 21.

- To the extent that the Decision purports to approve an "alternate access road", that is beyond the City's authority for the reason there is no application for such road, no application for such road signed by the property owners, no standards have been identified or complied with for such road, and there is no location or design of such access road in the record.
- The Decision fails to address the City's standards for Public Service Facilities in Chapter 3.4. The City's code defines "Public Facilities" as "Public *and private* transportation facilities and *utilities*. See Chapter 3.4." BDC Chapter 1.2 (Emphasis added). BDC Chapter 3.4 explains that its purpose is to provide planning and design standards for public and private utilities and that those standards are applicable to the construction of utilities, such as the transmission lines proposed here. *See* BDC 3.4.000(A) and (B). The Decision errs in approving the transmission lines without showing compliance with these standards.

- 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]." The Decision errs by not applying these transportation standards for the approved "development", whatever exactly that is.

- The transmission towers are "development" (as is a road) which 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.").

  First off, the proposed transmission lines are incapable of providing any utility service because they are disconnected – they have a large gap due to the withdrawal of the proposal on tax lots 3302 and 3305. Second, 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 add to the proliferation of numerous and unsightly utility lines criss-crossing the City. 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).

- The transmission towers appear to be "buildings" (a term undefined in the City's code) and exceed BDC 2.2.140(A)'s 35-foot height limit for buildings in the Service Center Sub District. Thus, the transmission towers (which cannot provide any utility service because they are disconnected) cannot be approved without a variance. No variance has been approved and so the Decision errs in approving the towers which are 100 feet in height.

- The proposal is subject to Site Design Review under BDC 4.2.200(A), which applies to "all developments" except those specifically listed under BDC 4.2.200(B). The transmission towers are clearly "development", which the City code defines as "*[a]ll 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 Chapter 1.2 (Emphasis added). The proposal is not a type of development exempt from Site Design Review that is specifically listed under BDC 4.2.200(B). The Decision errs in approving the proposal without undertaking Site Design Review.

- The proposal is subject to design review under the Commercial District design standards under BDC 2.2.150(A) which applies to "[p]ublic and institutional buildings". The Commercial District design standards are applicable to buildings in the Service Center Sub District by operation of BDC 2.2.200 ("The base standards of the Commercial District apply, except as modified by the standards of this Sub District."). The Decision errs in approving the proposal without applying the Commercial District design standards to the towers because it appears that they are "buildings."

- Appellants note that where there are interpretive questions, BDC 1.1.200(C) states: "**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." Accordingly, the City's code require its interpretations to err on the side of being more restrictive.

- To the extent that the Decision purports to approve an "alternate access road", to do so is beyond the authority of the City. There is no application for an "alternate access road", no notice was given for such and the Decision makes no attempt to demonstrate that an "alternative access road" meets applicable standards or much less, even identify what those standards are.

- Procedural Issues: There were several procedural errors in the City's processing of the application and in the City's issuance of the Decision. The City's notice of the application stated that it seeks a "Type II" decision and never disclosed a proposal for a road. BDC 4.1.400(C)(3) requires that notices of pending Type II decisions "[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'", among other requirements.

  The City's public notice of the application did none of these things. By failing to conform to the City's notice requirements, the application notice offended the City's own purpose of its notice procedure which is "to give nearby property owners and other interested people the opportunity to submit written comments about the application, before the Type II decision is made" and "to invite people to participate early in the decision-making process." BDC 4.1.400(C)(2). These failures have prejudiced Appellants' substantial rights by leaving them in the dark about what the City believed were the criteria applicable to the application and denying them a full and fair opportunity to present his case. Without knowing what criteria the City believed were applicable to the application, or what the application was for, Appellants were prevented from meaningfully providing comment about how the application did or did not comply with the relevant criteria.

  Likewise, the Decision errs in several procedural respects. BDC 4.1.400(D) requires the City Manager or his/her designee to make Type II written decisions addressing ***all*** of the relevant approval criteria and standards and to base his/her decision upon those criteria and standards and the facts in the record. As explained above, the Decision fails to address all relevant approval criteria and standards and the Decision is not based upon the relevant criteria and standards. BDC 4.1.400(E)(1) requires that within five days after the City Manager signs the decision, the Notice of Decision be posted on the property and

sent by mail to persons and entities listed in (a) through (e).[1] As far as the Appellants know, no notice of the Decision was ever mailed to any of the persons and entities required to be mailed written notice under BDC 4.1.400(E)(1). There is no affidavit of mailing and posting of the notice of Decision showing the date the notice was mailed and posted and demonstrating that the notice was mailed to the people and within the time required by law, under BDC 4.1.400(E)(2). The Decision fails to contain all of the elements required by BDC 4.1.400(E)(3).[2] The Decision does not include a map of the subject property in relation to the surrounding area; there is no statement of where the City's Decision may be obtained; no date the Decision becomes final, unless appealed; no statement of who may appeal or how an appeal may be filed, the deadline for filing an appeal, or where further information can be obtained concerning the appeal process.

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[1] BDC 4.1.400(E)(1) provides:

> "1. Within five (5) days after the City Manager signs the decision, a Notice of Decision shall be posted on the property and sent by mail to:
>
> > "a. Any person who submits a written request to receive notice, or provides comments during the application review period;
> >
> > "b. The applicant and all owners or contract purchasers of record of the site which is the subject of the application;
> >
> > "c. Any person who submits a written request to receive notice, or provides comments during the application review period;
> >
> > "d. Any City-recognized neighborhood group or association whose boundaries include the site;
> >
> > "e. Any governmental agency which is entitled to notice under an intergovernmental agreement entered into with the City, and other agencies which were notified or provided comments during the application review period."

[2] BDC 4.1.400(E)(3) provides:

> "The Type II Notice of Decision shall contain:
>
> > "a. A description of the applicant's proposal and the City's decision on the proposal (i.e., may be a summary);
> >
> > "b. The address or other geographic description of the property proposed for development, including a map of the property in relation to the surrounding area, where applicable;
> >
> > "c. A statement of where the City's decision can be obtained;
> >
> > "d. The date the decision shall become final, unless appealed;
> >
> > "e. A statement that all persons entitled to notice or who are otherwise adversely affected or aggrieved by the decision may appeal the decision;
> >
> > "f. A statement briefly explaining how an appeal can be filed, the deadline for filing an appeal, and where further information can be obtained concerning the appeal process; and
> >
> > "g. A statement that unless appellant (the person who files the appeal) is the applicant, the hearing on the appeal shall be limited to the specific issues identified in the written comments submitted during the comment period. Additional evidence related to the Notice of Appeal (See subsection G.2.a, below) may be submitted by any person during the appeal hearing, subject to any rules of procedure adopted by the Planning Commission."

There is also no statement that unless the appellant is the applicant, the hearing on appeal shall be limited to the specific issues identified in the written comments submitted during the comment period. The Appellants point out that the this limitation on the scope of the appeal is inconsistent with state law and is unenforceable. As explained in Section V of this notice, ORS 227.175(10)(a) requires the City to provide, on appeal from a decision made without a hearing, as here, at least one hearing at which any issue may be raised.

V. Appeal Issues Raised During the Comment Period – BDC 4.1.400(G)(2)(c)(4)

To the extent BDC 4.1.400(G)(4) limits the scope of an appeal of a Type II decision made without a hearing to specific issues raised during the written comment period, that is inconsistent with state law and is unenforceable. ORS 227.175(10)(a), attached to this notice as part of "Appeal Exhibit 2", requires the City to provide, on appeal from a decision made without a hearing, as here, at least one hearing at which any issue may be raised. ORS 227.175(10)(a)(E) requires the appeal hearing to be the initial evidentiary hearing required under ORS 197.763 as the basis for an appeal to LUBA, and that presentation of testimony, arguments and evidence shall not be limited to issues raised in a notice of appeal. Accordingly, the City must hold at least one de novo appeal hearing, the scope of which may not be limited to specific issues raised during the written comment period or even the issues raised in this notice of appeal, as a matter of state law.

Nevertheless, Appellants raised the issues in written comments submitting during the written comment period that the City's notice of its intent to make a decision on the proposal were inadequate for failing to contain several of the required elements of such notices under BDC 4.1.400(C)(3), and that those failures prejudiced Appellants' substantial rights by leaving them in the dark about what the City believes are the criteria applicable to the proposal and by denying Appellants a full and fair opportunity to present their case. Appellants raised that without knowing what criteria the City believes are applicable to the proposal, Appellants were unable to meaningfully provide comment about how the proposal did or did not comply with the relevant criteria. Appellants also raised that whatever standards and criteria are applicable to the proposal, the proposal fails to meet them.

VI. Appeal Hearing Procedures

Because this Decision was made without a hearing, the appeal hearing shall be the first evidentiary hearing on this matter and the requirements under ORS 197.763 for such hearings apply. ORS 227.175(10)(a). In addition, the applicable parts of ORS 227.173 and 227.175 also apply to the process.[3]

[3] ORS 197.763, 227.173 and 227.175 are attached to this notice as "Appeal Exhibit 2".

CITY of BOARDMAN
Community Development
NOTICE OF DECISION

DATE: July 26, 2021

TO: Boardman Planning Commission and Interested Parties

FROM: Barry C. Beyeler, Community Development Director

SUBJECT: ZP21-031 Umatilla Electric Cooperative Olson Rd. Transmission Project

On May 19, 2021, Umatilla Electric Cooperative (UEC) submitted an application for zoning approval for the Olson Rd Transmission Project, a 230kv electrical transmission line in the Service Center Subdistrict. This project affects Tax lots #402, #403, #405 of Tax Lot Map 4N 25E 11, and tax lot #3201. Tax lots #3202 and #3205, of Morrow County Tax Map 4N 25E 10 were withdrawn by UEC for this project.

Approval of an outright allowable use is processed using a Type II - Administrative decision in accordance with Boardman Development Code (BDC) Chapter 4.1- Types of Applications and Review. The Type II decision process requires public notice to be sent to all properties within 250' of the parent property and posting notice on local reader boards and on the property. Public notice was mailed and the proper posting was accomplished on October 1, 2020, meeting the 20-day notification requirements.

File: ZP21 – 031
Applicant: Umatilla Electric Cooperation
Project: Olson Rd. 230kv Transmission Line

FINDINGS OF FACT

1) In 2018, Umatilla Electric Co-op approached the city about construction of a 230kv transmission line from a substation which was to be built at the I-84/US 730 junction to south Boardman. This transmission line is to provide increasing service pressure with existing and projected residential growth.

2) The city informed UEC where the line would go through many lots in the Service Center Sub-district, some evidence of property owner support would be needed.

3) UEC held numerous meeting with city and county staff members, and potentially affected property owners about the project.

4) UEC had obtained tentative agreements from most of the property owners for easements for the line. The Tallman family had not reached an agreement with UEC.

5) At this point UEC petitioned the Oregon Public Utilities Commission (PUC) for a Certificate of Public Convenience and Necessity (CPCN).

6) The PUC began their review of the petition as PCN4.

7) On March 5, 2021, The PUC, by Order 21-074, rendered their decision to Grant UEC a CPCN for this 230kv transmission line.

8) On April 15, 2021, Umatilla Electric Co-op submitted a Conditional Use Permit application for the Construction of 230kv electrical transmission line.

9) After review of the application, it was determined a conditional use permit was not necessary as the application for the transmission line was an outright allowable under the provisions of §Table 2.2.200B(2)(b) Boardman Development Code (BDC).

10) On May 19, 2021, the city received another application for Zoning approval, which is a Type II – Administrative decision process.

11) With the June 2021, Planning Commission Docket full, requiring staff time, UEC was informed the decision would be in July.

12) The proposed Transmission line will be required to meet the standards, specifications, and provisions of the National Electrical Safety Code (NESC), which is the applicable code for this type of project.

13) As staff reviewed the application, the language of §Table2.2.200B(2)(b) brought the question is Electrical Co-op, which is user owned, a "private" utility. City attorney David Blanc received this and UEC is a corporation incorporated ORS Chapter 62 qualifying UEC as a private utility.

14) One comment repeatedly heard from 1st John 2:17 L.L.C., is this violates the city's underground wiring control district, Boardman Municipal Code Chapter 13.12. There are 2 key provisions which negate this comment. Chapter 13.12 §13.12.130(E) Feeder Lines, state a line that serves the system but no specific customer, "...placed underground by council order shall be put underground at the expense of the city by crediting franchise fees in the amount of the actual cost differential between overhead and underground installation." This cost differential for a 230kv transmission line are 10 to 15 times the cost and UEC's total Franchise fees could not pay the difference in cost over the lifetime of the underground installation. The other key provision is in the variances allowed by code in §13.12.140(B)(2) "It is economically not feasible;"

15) On July 14, 2021, the city received a letter from Sarah Mitchell, of Kellington Law Group, representing, 1st John 2:17, L.L.C., Stating the city should nor accepted the application because the Tallman's have full ownership of tax lots 3302 and 3305 of Morrow County tax map 4N 25E 10, and the is no signed agreement with UEC.

16) On July 20, 2021, an email was received from Tommy Brooks, of Cable Huston L.L.P., representing UEC, informing the city of UEC's withdrawal of tax lots 3302 and 3305 of Morrow County tax map 4N 25E 10, from the application.

17) On July 21, 2021, a letter from Fred Wilson, of Kellington Law Group, representing 1st John 2:17, L.L.C., reiterating the Tallman's ownership of the tax lots and the fact no agreement between the Tallman's and UEC have been concluded.

18) On July 21, 2021, a letter from Fred Wilson, of Kellington Law Group, representing 1st John 2:17, L.L.C., stating UEC did not have the authority to initiate an application to the City of Boardman because they do not have an agreement with the Tallman's.

19) On July 21, 2021, a letter from Kelly Doherty in opposition to ZP21-031 siting it was not in accordance with the underground wiring Municipal Code 13.12. Additionally, citizens have the right to a public hearing on this decision.

20) Upon the withdrawal of tax lot 3302 and 3305 owned by the Tallman's the city has five other property owners affected by this decision, of which, all five have signed agreements with UEC for this project. Those five are the Port of Morrow, Double T Farming, F.E. and Frances Glenn, Randal and Catherine Yates Living Trust, and Walo, L.L.C.

21) The city is currently working to complete the alternate access road meeting the Port of Morrow Interchange Access Management Plan.

In staff review of the application all required items appear to be met, for the properties involved, after tax lots 3302 and 3305 of Morrow County tax map 4N 25E 10 were withdrawn from the application. This Zoning Permit request is **APPROVED** as submitted.

Comprehensive Land Use Planning

ORS 197.763
Conduct of local quasi-judicial land use hearings

- **notice requirements**
- **hearing procedures**

The following procedures shall govern the conduct of quasi-judicial land use hearings conducted before a local governing body, planning commission, hearings body or hearings officer on application for a land use decision and shall be incorporated into the comprehensive plan and land use regulations:

(1) An issue which may be the basis for an appeal to the Land Use Board of Appeals shall be raised not later than the close of the record at or following the final evidentiary hearing on the proposal before the local government. Such issues shall be raised and accompanied by statements or evidence sufficient to afford the governing body, planning commission, hearings body or hearings officer, and the parties an adequate opportunity to respond to each issue.

(2) (a) Notice of the hearings governed by this section shall be provided to the applicant and to owners of record of property on the most recent property tax assessment roll where such property is located:

(A) Within 100 feet of the property which is the subject of the notice where the subject property is wholly or in part within an urban growth boundary;

(B) Within 250 feet of the property which is the subject of the notice where the subject property is outside an urban growth boundary and not within a farm or forest zone; or

(C) Within 500 feet of the property which is the subject of the notice where the subject property is within a farm or forest zone.

(b) Notice shall also be provided to any neighborhood or community organization recognized by the governing body and whose boundaries include the site.

(c) At the discretion of the applicant, the local government also shall provide notice to the Department of Land Conservation and Development.

(3) The notice provided by the jurisdiction shall:

(a) Explain the nature of the application and the proposed use or uses which could be authorized;

(b) List the applicable criteria from the ordinance and the plan that apply to the application at issue;

(c) Set forth the street address or other easily understood geographical reference to the subject property;

(d) State the date, time and location of the hearing;

(e) State that failure of an issue to be raised in a hearing, in person or by letter, or failure to provide statements or evidence sufficient to afford the decision maker an opportunity to respond to the issue precludes appeal to the board based on that issue;

(f) Be mailed at least:

(A) Twenty days before the evidentiary hearing; or

(B) If two or more evidentiary hearings are allowed, 10 days before the first evidentiary hearing;

(g) Include the name of a local government representative to contact and the telephone number where additional information may be obtained;

(h) State that a copy of the application, all documents and evidence submitted by or on behalf of the applicant and applicable criteria are available for inspection at no cost and will be provided at reasonable cost;

(i) State that a copy of the staff report will be available for inspection at no cost at least seven days prior to the hearing and will be provided at reasonable cost; and

(j) Include a general explanation of the requirements for submission of testimony and the procedure for conduct of hearings.

(4) (a) All documents or evidence relied upon by the applicant shall be submitted to the local government and be made available to the public.

(b) Any staff report used at the hearing shall be available at least seven days prior to the hearing. If additional documents or evidence are provided by any party, the local government may allow a continuance or leave the record open to allow the parties a reasonable opportunity to respond. Any continuance or extension of the record requested by an applicant shall result in a corresponding extension of the time limitations of ORS 215.427 (Final action on permit or zone change application) or 227.178 (Final action on certain applications required within 120 days) and ORS 215.429 (Mandamus proceeding when county fails to take final action on land use application within specified time) or 227.179 (Petition for writ of mandamus authorized when city fails to take final action on land use application within 120 days).

(5) At the commencement of a hearing under a comprehensive plan or land use regulation, a statement shall be made to those in attendance that:

(a) Lists the applicable substantive criteria;

(b) States that testimony, arguments and evidence must be directed toward the criteria described in paragraph (a) of this subsection or other criteria in the plan or land use regulation which the person believes to apply to the decision; and

(c) States that failure to raise an issue accompanied by statements or evidence sufficient to afford the decision maker and the parties an opportunity to respond to the issue precludes appeal to the board based on that issue.

(6) (a) Prior to the conclusion of the initial evidentiary hearing, any participant may request an opportunity to present additional evidence, arguments or testimony regarding the application. The local hearings authority shall grant such request by continuing the public hearing pursuant to paragraph (b) of this subsection or leaving the record open for additional written evidence, arguments or testimony pursuant to paragraph (c) of this subsection.

(b) If the hearings authority grants a continuance, the hearing shall be continued to a date, time and place certain at least seven days from the date of the initial evidentiary hearing. An opportunity shall be provided at the continued hearing for persons to present and rebut new evidence, arguments or testimony. If new written evidence is submitted at the continued hearing, any person may request, prior to the conclusion of the continued hearing, that the record be left open for at least seven days to submit additional written evidence, arguments or testimony for the purpose of responding to the new written evidence.

(c) If the hearings authority leaves the record open for additional written evidence, arguments or testimony, the record shall be left open for at least seven days. Any participant may file a written request with the local government for an opportunity to respond to new evidence submitted during the period the record was left open. If such a request is filed, the hearings authority shall reopen the record pursuant to subsection (7) of this section.

(d) A continuance or extension granted pursuant to this section shall be subject to the limitations of ORS 215.427 (Final action on permit or zone change application) or 227.178 (Final action on certain applications required within 120 days) and ORS 215.429 (Mandamus proceeding when county fails to take final action on land use application within specified time) or 227.179 (Petition for writ of mandamus authorized when city fails to take final action on land use application within 120 days), unless the continuance or extension is requested or agreed to by the applicant.

(e) Unless waived by the applicant, the local government shall allow the applicant at least seven days after the record is closed to all other parties to submit final written arguments in support of the application. The applicant's final submittal shall be considered part of the record, but shall not include any new evidence. This seven-day

period shall not be subject to the limitations of ORS 215.427 (Final action on permit or zone change application) or 227.178 (Final action on certain applications required within 120 days) and ORS 215.429 (Mandamus proceeding when county fails to take final action on land use application within specified time) or 227.179 (Petition for writ of mandamus authorized when city fails to take final action on land use application within 120 days).

(7) When a local governing body, planning commission, hearings body or hearings officer reopens a record to admit new evidence, arguments or testimony, any person may raise new issues which relate to the new evidence, arguments, testimony or criteria for decision-making which apply to the matter at issue.

(8) The failure of the property owner to receive notice as provided in this section shall not invalidate such proceedings if the local government can demonstrate by affidavit that such notice was given. The notice provisions of this section shall not restrict the giving of notice by other means, including posting, newspaper publication, radio and television.

(9) For purposes of this section:

(a) "Argument" means assertions and analysis regarding the satisfaction or violation of legal standards or policy believed relevant by the proponent to a decision. "Argument" does not include facts.

(b) "Evidence" means facts, documents, data or other information offered to demonstrate compliance or noncompliance with the standards believed by the proponent to be relevant to the decision. [1989 c.761 §10a (enacted in lieu of 197.762); 1991 c.817 §31; 1995 c.595 §2; 1997 c.763 §6; 1997 c.844 §2; 1999 c.533 §12]

Location: https://oregon.public.law/statutes/ors_162.185.

Original Source: § 162.185 — Supplying contraband, https://www.oregonlegislature.gov/bills_laws/ors/ors162.html (last accessed Jun. 26, 2021).

City Planning and Zoning

ORS 227.173
Basis for decision on permit application or expedited land division

- **statement of reasons for approval or denial**

(1) Approval or denial of a discretionary permit application shall be based on standards and criteria, which shall be set forth in the development ordinance and which shall relate approval or denial of a discretionary permit application to the development ordinance and to the comprehensive plan for the area in which the development would occur and to the development ordinance and comprehensive plan for the city as a whole.

(2) When an ordinance establishing approval standards is required under ORS 197.307 (Effect of need for certain housing in urban growth areas) to provide only clear and objective standards, the standards must be clear and objective on the face of the ordinance.

(3) Approval or denial of a permit application or expedited land division shall be based upon and accompanied by a brief statement that explains the criteria and standards considered relevant to the decision, states the facts relied upon in rendering the decision and explains the justification for the decision based on the criteria, standards and facts set forth.

(4) Written notice of the approval or denial shall be given to all parties to the proceeding. [1977 c.654 §5; 1979 c.772 §10b; 1991 c.817 §16; 1995 c.595 §29; 1997 c.844 §6; 1999 c.357 §3]

*Location:*https://oregon.public.law/statutes/ors_305.094.

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City Planning and Zoning

ORS 227.175
Application for permit or zone change

- **fees**
- **consolidated procedure**
- **hearing**
- **approval criteria**
- **decision without hearing**

(1) When required or authorized by a city, an owner of land may apply in writing to the hearings officer, or such other person as the city council designates, for a permit or zone change, upon such forms and in such a manner as the city council prescribes. The governing body shall establish fees charged for processing permits at an amount no more than the actual or average cost of providing that service.

(2) The governing body of the city shall establish a consolidated procedure by which an applicant may apply at one time for all permits or zone changes needed for a development project. The consolidated procedure shall be subject to the time limitations set out in ORS 227.178 (Final action on certain applications required within 120 days). The consolidated procedure shall be available for use at the option of the applicant no later than the time of the first periodic review of the comprehensive plan and land use regulations.

(3) Except as provided in subsection (10) of this section, the hearings officer shall hold at least one public hearing on the application.

(4) (a) A city may not approve an application unless the proposed development of land would be in compliance with the comprehensive plan for the city and other applicable land use regulation or ordinance provisions. The approval may include such conditions as are authorized by ORS 227.215 (Regulation of development) or any city legislation.

(b) (A) A city may not deny an application for a housing development located within the urban growth boundary if the development complies with clear and objective standards, including clear and objective design standards contained in the city comprehensive plan or land use regulations.

(B) This paragraph does not apply to:

(i) Applications or permits for residential development in areas described in ORS 197.307 (Effect of need for certain housing in urban growth areas) (5); or

(ii) Applications or permits reviewed under an alternative approval process adopted under ORS 197.307 (Effect of need for certain housing in urban growth areas) (6).

(c) A city may not condition an application for a housing development on a reduction in density if:

(A) The density applied for is at or below the authorized density level under the local land use regulations; and

(B) At least 75 percent of the floor area applied for is reserved for housing.

(d) A city may not condition an application for a housing development on a reduction in height if:

(A) The height applied for is at or below the authorized height level under the local land use regulations;

(B) At least 75 percent of the floor area applied for is reserved for housing; and

(C) Reducing the height has the effect of reducing the authorized density level under local land use regulations.

(e) Notwithstanding paragraphs (c) and (d) of this subsection, a city may condition an application for a housing development on a reduction in density or height only if the reduction is necessary to resolve a health, safety or habitability issue or to comply with a protective measure adopted pursuant to a statewide land use planning goal. Notwithstanding ORS 197.350 (Burden of persuasion or proof in appeal to board or commission), the city must adopt findings supported by substantial evidence demonstrating the necessity of the reduction.

(f) As used in this subsection:

(A) "Authorized density level" means the maximum number of lots or dwelling units or the maximum floor area ratio that is permitted under local land use regulations.

(B) "Authorized height level" means the maximum height of a structure that is permitted under local land use regulations.

(C) "Habitability" means being in compliance with the applicable provisions of the state building code under ORS chapter 455 and the rules adopted thereunder.

(5) Hearings under this section may be held only after notice to the applicant and other interested persons and shall otherwise be conducted in conformance with the provisions of ORS 197.763 (Conduct of local quasi-judicial land use hearings).

(6) Notice of a public hearing on a zone use application shall be provided to the owner of an airport, defined by the Oregon Department of Aviation as a "public use airport" if:

(a) The name and address of the airport owner has been provided by the Oregon Department of Aviation to the city planning authority; and

(b) The property subject to the zone use hearing is:

(A) Within 5,000 feet of the side or end of a runway of an airport determined by the Oregon Department of Aviation to be a "visual airport"; or

(B) Within 10,000 feet of the side or end of the runway of an airport determined by the Oregon Department of Aviation to be an "instrument airport."

(7) Notwithstanding the provisions of subsection (6) of this section, notice of a zone use hearing need only be provided as set forth in subsection (6) of this section if the permit or zone change would only allow a structure less than 35 feet in height and the property is located outside of the runway "approach surface" as defined by the Oregon Department of Aviation.

(8) If an application would change the zone of property that includes all or part of a mobile home or manufactured dwelling park as defined in ORS 446.003 (Definitions for ORS 446.003 to 446.200 and 446.225 to 446.285 and ORS chapters 195, 196, 197, 215 and 227), the governing body shall give written notice by first class mail to each existing mailing address for tenants of the mobile home or manufactured dwelling park at least 20 days but not more than 40 days before the date of the first hearing on the application. The governing body may require an applicant for such a zone change to pay the costs of such notice.

(9) The failure of a tenant or an airport owner to receive a notice which was mailed shall not invalidate any zone change.

(10)(a)(A) The hearings officer or such other person as the governing body designates may approve or deny an application for a permit without a hearing if the hearings officer or other designated person gives notice of the decision and provides an opportunity for any person who is adversely affected or aggrieved, or who is entitled to notice under paragraph (c) of this subsection, to file an appeal.

(B) Written notice of the decision shall be mailed to those persons described in paragraph (c) of this subsection.

(C) Notice under this subsection shall comply with ORS 197.763 (Conduct of local quasi-judicial land use hearings) (3)(a), (c), (g) and (h) and shall describe the nature of the decision. In addition, the notice shall state that any person who is adversely affected or aggrieved or who is entitled to written notice under paragraph (c) of this subsection may appeal the decision by filing a written appeal in the manner and within the time period provided in the city's land use regulations. A city may not establish an appeal period that is less than 12 days from the date the written notice of decision required by this subsection was mailed. The notice shall state that the decision will not become final until the period for filing a local appeal has expired. The notice also shall state that a person who is mailed written notice of the decision cannot appeal the decision directly to the Land Use Board of Appeals under ORS 197.830 (Review procedures).

(D) An appeal from a hearings officer's decision made without hearing under this subsection shall be to the planning commission or governing body of the city. An appeal from such other person as the governing body designates shall be to a hearings officer, the planning commission or the governing body. In either case, the appeal shall be to a de novo hearing.

(E) The de novo hearing required by subparagraph (D) of this paragraph shall be the initial evidentiary hearing required under ORS 197.763 (Conduct of local quasi-judicial land use hearings) as the basis for an appeal to the Land Use Board of Appeals. At the de novo hearing:

(i) The applicant and other parties shall have the same opportunity to present testimony, arguments and evidence as they would have had in a hearing under subsection (3) of this section before the decision;

(ii) The presentation of testimony, arguments and evidence shall not be limited to issues raised in a notice of appeal; and

(iii) The decision maker shall consider all relevant testimony, arguments and evidence that are accepted at the hearing.

(b) If a local government provides only a notice of the opportunity to request a hearing, the local government may charge a fee for the initial hearing. The maximum fee for an initial hearing shall be the cost to the local government of preparing for and conducting the appeal, or $250, whichever is less. If an appellant prevails at the hearing or upon subsequent appeal, the fee for the initial hearing shall be refunded. The fee allowed in this paragraph shall not apply to appeals made by neighborhood or community organizations recognized by the governing body and whose boundaries include the site.

(c) (A) Notice of a decision under paragraph (a) of this subsection shall be provided to the applicant and to the owners of record of property on the most recent property tax assessment roll where such property is located:

(i) Within 100 feet of the property that is the subject of the notice when the subject property is wholly or in part within an urban growth boundary;

(ii) Within 250 feet of the property that is the subject of the notice when the subject property is outside an urban growth boundary and not within a farm or forest zone; or

(iii) Within 750 feet of the property that is the subject of the notice when the subject property is within a farm or forest zone.

(B) Notice shall also be provided to any neighborhood or community organization recognized by the governing body and whose boundaries include the site.

(C) At the discretion of the applicant, the local government also shall provide notice to the Department of Land Conservation and Development.

(11) A decision described in ORS 227.160 (Definitions for ORS 227.160 to 227.186) (2)(b) shall:

(a) Be entered in a registry available to the public setting forth:

(A) The street address or other easily understood geographic reference to the subject property;

(B) The date of the decision; and

(C) A description of the decision made.

(b) Be subject to the jurisdiction of the Land Use Board of Appeals in the same manner as a limited land use decision.

(c) Be subject to the appeal period described in ORS 197.830 (Review procedures) (5)(b).

(12) At the option of the applicant, the local government shall provide notice of the decision described in ORS 227.160 (Definitions for ORS 227.160 to 227.186) (2)(b) in the manner required by ORS 197.763 (Conduct of local quasi-judicial land use hearings) (2), in which case an appeal to the board shall be filed within 21 days of the decision. The notice shall include an explanation of appeal rights.

(13) Notwithstanding other requirements of this section, limited land use decisions shall be subject to the requirements set forth in ORS 197.195 (Limited land use decision) and 197.828 (Board review of limited land use decision). [1973 c.739 §§9,10; 1975 c.767 §8; 1983 c.827 §24; 1985 c.473 §15; 1987 c.106 §3; 1987 c.729 §18; 1989 c.648 §63; 1991 c.612 §21; 1991 c.817 §6; 1995 c.692 §2; 1997 c.844 §5; 1999 c.621 §2; 1999 c.935 §24; 2001 c.397 §2; 2017 c.745 §3; 2019 c.640 §18]

Location: https://oregon.public.law/statutes/ors_162.185.

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