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Via Email to:
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Boardman City Council
c/o Carla McLane
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 Mayor Keefer and Members of the City Council:

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. This is an appeal of the Planning Commission's February 24, 2022 decision to deny the Tallmans' appeal of LU 22-001 and approve ZP 21-066, allowing the construction of UEC's transmission line on the Tallmans' property. Please include this letter in the record of this proceeding.

As UEC points out in its pre-hearing submittal, this is the second time the approval of its 230kV transmission line has come before the City Council. In its initial application, UEC applied for zoning approval for the transmission line on multiple tax lots in the City, including the Tallmans' lots. During that proceeding, the Tallmans objected to various aspects of UEC's proposal, including an objection to UEC's application on their property because the City's code allows only "record owners" of property to file a land use application, and UEC is not the record owner of the Tallmans' property. Consequently, UEC withdrew the Tallmans' property from its application and the City proceeded to approve it only on the remaining tax lots.

The only circumstance that has changed since that prior proceeding is that UEC has filed an eminent domain action in the circuit court to condemn the Tallmans' property for its transmission line. That action seeks only an easement over the Tallmans' property; it does not seek fee title. The circuit court has granted UEC "advance occupancy" of the easement it seeks over the Tallmans' property, but that ruling does not make UEC the "record owner" of the Tallmans' property under the express terms of the City's code, which defines "record owner" as "person(s) whose name is on the most recently recorded deed". BDC 4.1.700(D)(1)(a)(4).

The Planning Commission erred in deciding that the *Schrock Farms* case applies here to require the City to allow a non-record owner like UEC to submit a land use application even though the clear terms of the code prohibit it. That case involved a similar, but broader county code provision that allowed "owners" of property to submit land use applications and defined "ownership" to mean "the existence of legal or equitable title to land." The county interpreted that provision to mean that ODOT, the condemner who was seeking fee title and had been granted immediate possession of the property, had sufficient "equitable interest" to be considered the "owner" under the code's definition, and was therefore allowed to submit an application. The court held that because petitioners had not established why the court was not required to defer to the county's interpretation of "owner" under ORS 197.829(1), the county's interpretation could not be reversed.

Here, the City's code is much stricter than the county's code in *Schrock Farms* regarding who can submit an application – it unambiguously allows only a "record owner" to do so and defines such an owner as one "whose name is on the most recently recorded deed". Unlike the county's code in *Schrock Farms*, the City's code does not leave room for those claiming "equitable interest" in a property to submit an application. It is undisputed that UEC's name is not on the subject property's most recently recorded deed; 1st John 2:17, LLC's is. Unlike the county's interpretation of "owner" in *Schrock Farms*, an interpretation of "record owner" by the City here to allow UEC to file an application would not be upheld under ORS 197.829(1) or *Siporen v. City of Medford*, 349 Or 247 (2010), because it is contrary to the express language of the City's code and is not plausible.

The Planning Commission relied on the court's dicta in *Schrock Farms* to decide that even if the term "record owner" could be interpreted to prevent UEC from submitting an application, that interpretation would nevertheless be prohibited because it would effectively "nullify" ORS 35.275 and a local ordinance "should not be read to repeal a state law." Interpreting "record owner" to prevent UEC from submitting a City land use application at this juncture does not "nullify" or "repeal" any state law. ORS 35.275 and the court's order can be plausibly read to allow UEC to enter onto the easement area and conduct any preliminary work for the transmission line that can be done without land use approval. Nothing in the statute or the court's order requires the City to allow UEC to apply for land use approval.

To the extent that UEC urges you not to consider the remaining issues appellants raise in their notice of appeal because they may be similar to those raised and decided in the prior proceeding concerning UEC's application for its transmission line on other tax lots in the City, issue preclusion cannot apply here and the City is well within its bounds to and should fix the earlier interpretations of its code that were wrongly decided. UEC does not 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)). Moreover, the City has the authority to correct earlier interpretations of its land use regulations that it now believes to be wrong. *Holland v. City of Cannon Beach*, 142 Or App 5, *rev den* 324 Or 229

(1996). Nothing prohibits the City from hearing the Tallmans' remaining arguments in this appeal. To that end, the City Council should refer to the arguments set forth in the appellants' notice of appeal.

Thank you for your consideration.

Very truly yours,

Sarah C. Mitchell

SCM:scm
CC: Clients