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VIA EMAIL

Boardman City Council
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RE: File ZP 21-066– Olson Road Transmission Line
Applicant's Pre-Hearing Submittal

Dear City Council:

This firm represents Umatilla Electric Cooperative ("UEC" or "Applicant") in this matter. This letter and its attachment serve as the Applicant's Pre-Hearing Submittal in advance of the City Council hearing set for March 24, 2022, and they should be included in the record.

UEC's Application relates to a new electrical line (the "transmission line") UEC is constructing as part of an upgrade to the portion of its electrical system that serves the areas in and around the City of Boardman ("City") and the Port of Morrow. Only a small portion of that line will be located within the City's boundaries, with the remainder lying in unincorporated areas of Morrow County.

This is not the first time this matter has come before the City Council. The transmission line is planned to cross multiple tax lots in the City. UEC has previously obtained zoning permits for all but two of those tax lots. Most recently, on March 1, 2022, the City Council voted (for a second time) to approve a zoning permit for five parcels in the City's Service Center ("SC") Zone. UEC's current Application relates only to the two remaining tax lots for which UEC still seeks a zoning permit. These last two tax lots are also within the SC zone.

With one exception, there are no issues in this current proceeding that the City Council did not already address in its prior decisions. The application involves the same type of decision (zoning permit) for the same transmission line in the same zoning designation. The exact same parties that filed this appeal – 1st John 2:17, LLC and Jonathan Tallman – filed the prior appeals. The City Staff and the Planning Commission approved the requested zoning permits, just like last time, rejecting all of the bases for appeal.

The most disappointing part of this appeal is that the Appellants spend no time explaining why the City Council should make a different decision than it did when faced with the exact same facts presented in the prior proceeding. Included in the record is the City Council's prior decision relating to zoning permits for UEC's transmission line in the SC Zone ("City's Prior Decision"). That decision has since been revised, a copy of which is attached as Exhibit A. There is no dispute that the City's Prior Decision directly addresses the following issues that are raised in the current appeal:

1 – UEC's transmission line is allowed in the SC Zone. Finding #9 in the City's Prior Decision unambiguously concludes "[t]he proposed electrical transmission line is an outright permitted use in the SC Zone."

2 – The City's Site Design Review criteria have been satisfied if they apply. Finding #19 in the City's Prior Decision concludes "that the criteria for Site Design Review have been satisfied" and that "[t]he 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."

3 – UEC's poles used for the transmission line are not "buildings" under Code provisions limiting buildings. Finding #14 of the City's Prior Decision states "[b]ecause utility poles do not include an enclosed floor area, they are not considered a building for purposes of BDC 2.2.150." Finding #15 similarly states that because "[u]tility line poles do not contain a flat roof, mansard roof, or hipped roof," there is no "building height" that can be measured and BDC 2.2.140(A) therefore does not apply to limit the pole height.

The City Staff's current approval of UEC's application on two more tax parcels conforms to the City's Prior Decision.

The only issue Appellants have raised in this appeal that was not already resolved in the City's Prior Decision relates to BDC 4.1.700(D)(1). That Code provision governs the initiation of "Applications for approval under this chapter." The phrase "this chapter," in turn, refers to BDC Chapter 4.

Appellants argue that, under BDC 4.1.700(D)(1) and a related provision in BDC 4.1.700(D)(3)(a), UEC is not entitled to even submit an application for a zoning permit, and that the City is not entitled to process the application, without the written consent of 1st John 2:17, LLC, which is the underlying property owner of the two tax parcels. Appellants presented the same argument to the Planning Commission, which rejected that argument because it is contrary to the language of the Code and contrary to state law.

Even if an application for a zoning permit were required for approval of a use under BDC Chapter 4 (which the Applicant maintains it is not), the requirements relating to who can initiate an application are not as clear as what the Appellants have asserted. UEC described in its Application the basis for initiating the Application and its right to do so. The very fact that UEC

has interpreted the Code in one way and the Appellant has interpreted the Code another way means, at best, these Code provisions are ambiguous.

Whether or not the Code is ambiguous, however, as a matter of law the City cannot apply the Code in the manner Appellants suggest. The Court of Appeals addressed this very issue in *Schrock Farms, Inc. v. Linn County*, 142 Or.App. 1 (1996). In that case, the Oregon Department of Transportation ("ODOT") submitted a land use action after obtaining immediate possession of property but prior to completing the condemnation process that would transfer ownership of the property right to ODOT. Linn County had a provision similar to the City and land use applications required the signature of the property owner. The property owner in that case, similar to Appellants here, asserted that ODOT could not submit the land use application because the property owner had not consented to it. After reviewing that county's code, the Court of Appeals concluded:

> even if the local provisions by their terms could be read to prevent ODOT from making the applications as petitioners assert, the effect would be that ODOT could not gain the necessary approvals to put the property to a public use until it had already acquired the property through a judgment in the condemnation proceeding. ODOT argues that the resulting Catch-22 situation would effectively nullify significant aspects of the state condemnation statutes, e.g., ORS 35.265, and a "county ordinance should not be read to repeal a state law." We agree.

The factual situation here is uncannily similar to *Schrock Farms, Inc. v. Linn County*. UEC, like ODOT, has a statutory right to possess and use Appellants' property. That right is not only in statue, it has been confirmed by a court order (included in the Application) that also states neither the Appellant nor anyone else can interfere with that use. If Appellants' reading of the Code were allowed to prevail, UEC could not gain the necessary approvals to put the property to a public use, resulting Catch-22 situation that would effectively nullify significant aspects of the state condemnation statutes. Because a local ordinance cannot be read to repeal a state law, the Code simply cannot be read in this manner.

Appellants provide very little argument other than what they presented to the Planning Commission. As an initial matter, they say UEC cannot apply for an application because it is not "a record owner of the property." The Planning Commission, however, addressed this argument directly and made findings that UEC is a record owner for purposes of the Code. Appellants simply repeat their own interpretation of the Code and make no attempt to explain why the Planning Commission's interpretation was in error. In the context of an appeal, it is not enough for Appellants to just restate the conclusion they want the City Council to come to; they must explain what was wrong about the Planning Commission's decision.

Appellants also attempt to distinguish *Schrock Farms, Inc. v. Linn County* from the present case by noting ODOT was attempting to acquire a fee interest in that case, whereas UEC is attempting to acquire an easement. While that may be a factual distinction, it is one without a difference in terms of how the Court of Appeals applied the law. The ultimate holding for the Court was that a local land use provision cannot be read to repeal a state law. Here, the state law,

as confirmed by a court order, is that UEC has a statutory right to possess and use the property for the transmission line. The City's Code therefore cannot be interpreted in a manner that would interfere with that use. UEC is not arguing that the City must issue the zoning permit no matter what, but the City must at least allow UEC the opportunity to submit an application to show that the approval criteria have been met.

Independent of the interpretation issues above, the City Council can find, based on this record, that Appellants have consented to UEC's use of their property for the transmission line. This is demonstrated by the fact that Appellants have already been compensated for UEC's use of the easement on their property. As part of the court proceeding that resulted in the order granting UEC possession and use, UEC was required to deposit funds with the court that would serve as compensation for the easement. 1st John 2:17 requested to withdraw those funds, and the court approved that request. It is untenable that Appellants would take payment for an easement and then attempt to use the City's zoning permit as a process to thwart UEC's use of the easement it paid for.

Conclusion

UEC's transmission line is an outright permitted use that complies with all development standards, and UEC had a statutory right, backed by a court order, to apply for a zoning permit. The Planning Commission was right to issue the zoning permit and the City Council can therefore deny the appeal and approve the zoning permits as requested, just as it did with UEC's prior application for the same transmission line on nearby properties.

Sincerely,

Tommy A. Brooks