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VIA EMAIL

Boardman Planning Commission
c/o Barry Beyeler
Community Development Director
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**RE: File ZP21 – 031 – Olson Road Transmission Line
Applicant’s Final Legal Argument**

Dear Planning Commissioners:

Introduction

This firm represents Umatilla Electric Cooperative (“UEC” or “Applicant”) in this matter. This letter and its attachment serve as Applicant’s Final Legal Argument and should be included in the record.

Argument

Before addressing any provisions in the Boardman Development Code (“BDC” or “Code”), it is imperative to understand the specific application that has been presented to the Planning Commission.

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 (“Port”). 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. Of the nine tax lots in the City where the line will be located, the specific Application relates to only five tax lots, all of which are located in the City’s Service Center (“SC”) Zone. Two of the nine tax lots have already received a Zoning Permit, and the other two, owned by the Tallmans through 1st John 2:17, LLC, are no longer included in UEC’s request.

Under ORS 227.160, a Zoning Permit is not a “permit” in the traditional sense of the word, because the proposed use here is an outright permitted use that does not require additional permitting. Instead, the purpose of the Zoning Permit is to determine the appropriate zoning classification for the proposed use so that other City agencies have a basis on which to confirm that the use is allowed. Indeed, the Code does not contain any criteria specific to issuing a “Zoning Permit.”

This context is important because it informs how the Planning Commission is required to apply the provisions of the Code. For example, the Tallmans have argued that the Planning Commission should not authorize this use in the SC Zone. However, that is not a decision for the Planning Commission to make. The City Council, by enacting the Code, has already determined what uses are allowed by right in each zone. If the Planning Commission were to agree with the Tallman’s arguments, it would be unilaterally re-writing the Code, which it is not authorized to do. Instead, the Planning Commission’s role in this appeal is to determine if the City’s Planning Staff (“Staff”) correctly determined that the transmission line as proposed by UEC is allowed in the SC Zone. As explained below and in the proposed findings attached to this letter, Staff’s determination that the transmission line is allowed by the Code was correct.

1. The transmission line is allowed in the SC Zone.

There is no dispute in this proceeding that the only zoning designation relevant to the Planning Commission’s decision is the SC Zone. The Planning Commission did receive testimony questioning why UEC had not addressed the General Industrial Zone. As noted in the Application, however, UEC has already received a Zoning Permit for the only parcel in that zone. Any provisions of the General Industrial Zone are therefore irrelevant to the Application.

In order to determine if the transmission line is an allowed use in the SC Zone, the Planning Commission need look no further than the express language of the Code. 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.” Section 2.b of that table, in turn, 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. It should be noted that most uses allowed by right in the SC Zone are allowed without the imposition of additional standards. This is in line with the purpose of the Zone, as set forth in BDC 2.2.200(A), which states that “The Service Center Sub District is designed to accommodate heavy commercial uses and light industrial uses along portions of the I-84 corridor.”

Opponents to the transmission line have argued that UEC is not a “private utility” and, therefore, its transmission line does not qualify as an outright permitted use. This is an argument the Planning Commission can easily dismiss. The only evidence in the record relating to UEC’s corporate structure demonstrates that UEC is a private cooperative organized under ORS Chapter 62. This fact alone should end the inquiry. Nevertheless, opposing comments assert that UEC is a “public utility” defined by statute. However, as UEC already explained, the statutory phrase “public utility” does not apply to electric cooperatives. In their rebuttal, the Tallmans appear to

give up on this argument, noting that it does not matter if UEC is public or private and that, instead, the term “private utilities” should not refer to large utilities like transmission lines and “should only be interpreted to authorize only smaller scale utilities that serve a specific customer (e.g., natural gas, electricity, telephone, cable and similar facilities that serve residences or businesses).” The major flaw in this argument is that the Code makes no such distinction based on the size of a utility. The Code expressly allows all private utilities, including those for electricity, in the SC Zone. Further, the Tallman’s reading of the Code makes no practical sense, because it would allow small service lines in the SC Zone but not the larger facilities those lines rely on. For example, under their reading, a natural gas company could construct small service lines to a property, but could not also have a gas main connected to those lines, thereby making the service lines useless.

The bottom line is that UEC’s position in this case is grounded in the actual text of the Code, whereas the opponents’ position is not. Opponents’ “slippery slope” argument that this decision will somehow result in endless large transmission lines throughout the entire City is simply a scare tactic. As reflected in the decision by the Oregon Public Utility Commission (“PUC”), the ability to site a transmission line in this area is actually quite limited and UEC has pursued one of the only viable routes that are available. In doing so, UEC has sited the line in an area the City has expressly designated as being appropriate for heavy commercial and light industrial uses.

2. The City’s undergrounding requirements do not apply.

Opponents to the transmission line make several arguments asserting that the transmission line must be placed underground. With these arguments, the opponents again ignore the actual language of the City’s Code.

The primary argument opponents make is based on Boardman Municipal Code (“BMC”) chapter 13.12, which is referred to as the Underground Wiring Control District. Under that chapter, many electrical wires must be placed underground. There are several exceptions to that requirement, however, and UEC’s transmission line is not required to be placed underground.

First, 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. . . .” In other words, opponents are attempting to apply this language, which regulates only utility lines in streets, as a means of controlling development on private property away from streets. The Planning Commission should be suspicious of any argument that relies on the BMC instead of the land use regulations contained in the Boardman Development Code that usually come before it.

Second, even if the Underground Wiring Control District were relevant to the Application - which it is not – there is an express exemption that allows UEC’s transmission line to be constructed above ground. Specifically, BMC 13.12.130(E) states that these requirements do not apply to “feeder lines” which are defined as a line “that serves the system but not a

specific customer.” Despite the fact that UEC raised this exemption during the hearing, the Tallmans and others continue to ignore this language in the BMC. In their rebuttal, the Tallmans make the odd assertion that the transmission line is not a feeder line because “it consists of two disparate segments that have no transmitting capability as proposed.” (Emphasis added). To the contrary, UEC’s project is proposed as an entire line connecting two substations. UEC will, of course, need to demonstrate compliance with the City’s land use regulations on all properties the line crosses in the City. The fact that UEC has not yet sought a Zoning Permit on two tax parcels owned by the Tallmans does not somehow convert the proposed line to multiple segments, and the Tallmans have not identified any Code provision that requires the City to issue Zoning Permits only if all Zoning Permits are applied for at the same time.

3. The transmission line complies with all applicable development standards.

Although the Tallmans’ rebuttal appears to abandon many of the arguments they made in earlier stages of the proceeding, the Planning Commission did receive testimony from the Tallmans arguing that UEC’s transmission line does not meet all of the City’s development standards. The Planning Commission can reject those arguments.

As noted above, BDC 2.2.200(B) allows the transmission line subject only “to the provisions of this Chapter.” BDC 2.2.200(A), in turn, states that “The base standards of the Commercial District apply, except as modified by the standards of this Sub District.” BDC Chapter 2.2 and the base standards of the Commercial District contain very few development standards that apply to transmission lines.

One development standard the Tallmans claim is not met is the height standard set forth in BDC 2.2.140. The problem with this argument, of course, is that the height standard applies to buildings, and UEC is not proposing any buildings as part of the transmission line in the City. The Tallmans acknowledge this reality but nevertheless assert that the transmission line poles constitute “buildings.” The Planning Commission should reject that interpretation of the Code. Although the Code does not define “building”, the Code’s requirement for how to measure building height clearly indicates that a pole for an electric line is not a building. Specifically, BDC 2.2.140 states “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.

The Tallmans also claim the transmission line does not comply with BDC 2.2.150(B)(1). But the only standard in that Code provision is that “Buildings shall be appealing and compatible with balance of the Commercial District and Sub Districts.” BDC 2.2.150(A), however, limits the scope of BDC 2.2.150(B)(1) to certain “building” types. This argument fails for the same reason that no buildings are included in UEC’s proposal. This is reinforced by other language in this Code section, which refers to the “enclosed floor area” of a building, a quality that does not describe a utility pole.

The only other development standards that are potentially applicable to the transmission line are those found in BDC Chapter 3.4. Under that Code chapter, there is a specific subsection applicable to utilities – BDC 3.4.500 – the only requirement of which is that some utilities must be located underground. That Code section, however, applies only to subdivisions, which is not part of UEC's proposal. Further, that Code section expressly exempts any electric lines that operate at 50 kV or greater. UEC's transmission line, which will operate at 230 kV, qualifies for that exemption whether or not a subdivision is involved.

4. Any procedural errors in the Staff's original decision have now been cured.

The Planning Commission received testimony asserting that the Staff's original decision made several procedural errors. To the extent that the Staff made any errors – which UEC believes Staff did not – there is no longer any basis to deny the Zoning Permit based on any procedural errors or particular review process. Opponents to the transmission line, by appealing this matter to the Planning Commission, have had a full and fair opportunity to present their case. There has now been an evidentiary hearing, and the Planning Commission left the record open for all participants for an extended period. There has therefore been no impact to any party's substantial rights regarding the review and approval of the Application.

Conclusion

UEC's transmission line is an outright permitted use that complies with all development standards. The Planning Commission can therefore deny the appeal and approve the Zoning Permits as requested. For the convenience of the Planning Commission, we have included as Exhibit A proposed findings that address the criteria in the Code and the arguments that have been set forth by all participants. The Applicant respectfully requests that the Planning Commission adopt those findings in support of its decision.

Sincerely,

A handwritten signature in blue ink, appearing to read 'T. Brooks', with a stylized flourish at the end.

Tommy A. Brooks

Exhibit A

Findings

1. This matter came before the Planning Commission as an appeal of File ZP21-031. In that file, the Applicant, Umatilla Electric Cooperative, sought and received a Zoning Permit related to the development of an 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. This line will be rated 230kV and integrated into the area grid. 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 transmission system additions. UEC has obtained a Certificate of Public Convenience and Necessity for the transmission line from the Oregon Public Utility Commission.
3. The Boardman Development Code (“BDC” or “Code”) does not contain any criteria specific to a Zoning Permit and the sole analysis required is to determine the appropriate zoning classification for the particular use by applying criteria or performance standards defining the uses permitted within the applicable zone.
4. 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 3300.
5. On July 26, 2021, the City’s Community Development Director issued a Notice of Decision approving the requested Zoning Permits (“Decision”).
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 objections to the hearing process or the manner in which the record was left open.
8. As described in these Findings, and based on the record in this matter, the Planning Commission approves the Application for the requested Zoning Permits and, therefore, denies the appeal.
9. Each of the subject tax lots are commercially zoned and are in the Service Center Subdistrict (“SC Zone”), a subdistrict of the Commercial District.
10. An electrical line like the 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.” Section 2.b of that table, in turn, 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.

11. UEC is a private utility providing electricity. The record demonstrates UEC is a private cooperative organized under ORS Chapter 62. UEC is registered as such with the Oregon Secretary of State.
12. The Planning Commission received testimony making various arguments that UEC is not a private utility for purposes of BCC 2.2.200, either because it is a “public utility” as defined by statute, 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” relied on in that testimony – ORS 757.005 – does not include cooperatives like UEC by virtue of ORS 757.006, which expressly excludes electric cooperatives from that definition. 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.
13. Based on the figures and other information provided by the Applicant, the transmission line satisfies applicable development standards for an electric utility in the SC Zone. BDC 2.2.200(B) allows the transmission line subject only “to the provisions of this Chapter.” BDC 2.2.200(A), in turn, states that “[t]he base standards of the Commercial District apply, except as modified by the standards of this Sub District.” BDC Chapter 2.2 and the base standards of the Commercial District contain very few development standards that apply to transmission lines. Those standards are met and only the specific development standards in dispute in this proceeding are addressed further below.
14. Appellants identified BDC 2.2.150(B)(1) as not being 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 building. Although the Code does not distinctly define “building”, as described in other portions of BDC 2.2.150(B) buildings are measured with respect to “enclosed floor area.” The only structures that are part of the transmission line are the utility poles. Utility poles do not include an enclosed floor area and, therefore, are not a building for purposes of this Code provision. BDC 2.2.150(B)(1) is therefore not applicable.
15. Appellants identified BDC 2.2.140(A) 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 distinctly define “building”, BDC 2.2.140 states “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) is therefore not applicable.
16. BDC Chapter 3.4 contains additional development standards, some of which apply to utilities. Based on the figures and other information provided by the Applicant, the transmission line satisfies applicable development standards in BDC Chapter 3.4. Only the specific development standards in dispute in this proceeding are addressed further below.

17. Appellants identified BDC 3.4.100(A) as not being satisfied. That Code provision imposes certain transportation standards. The only standard in that Code provision potentially applicable to the transmission line is that all development must have frontage or approved access to a public street. Applicant's development is a utility use that does not involve a transportation component. Without addressing whether this Code provision even applies, the Planning Commission finds that the Applicant's 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. This Code provision has therefore been satisfied.
18. The Appellants raise certain procedural issues with respect to the 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.
19. 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.
20. Appellants make several arguments based on their assertion that, because UEC still needs to obtain a Zoning Permit on two tax parcels owned by Appellants, the transmission line is not a line at all because it is incapable of transmitting electricity until the entire line is constructed. The Planning Commission rejects this argument because there is no Code provision that requires Zoning Permits to be obtained at all, much less to be obtained for all parcels at the same time where the use exists on multiple parcels. Instead, the Zoning Permit is used to determine that the use as proposed is allowed. As proposed, UEC would construct the transmission line on multiple parcels, each of which allow that use. The record indicates 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.
21. 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.
22. 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.

23. Even if the Underground Wiring Control District were 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 indicates that the transmission line is part of a system improvement and is not a line that serves only a specific customer. This exemption from the undergrounding requirement therefore applies to the transmission line and does not prevent approval of the Zoning Permits.
24. Based on the foregoing and the information in the record, the Zoning Permits for tax parcels 402, 403, 3201, 3206, and 3300 in the SC Zone are approved.