

**FINAL FINDINGS OF FACT
PLANNING COMMISSION
AMENDMENT A-BDC22-002
AMENDED OCTOBER 12, 2022**

REQUEST: To amend Chapter 4.1 Types of Applications and Review Procedures to initiate an update to the Boardman Development Code (BDC) that would address inconsistencies with practice, conform to Oregon Revised Statute (ORS) and Oregon Administrative Rule (OAR), and implement recent interpretation of the BDC concerning the definition of owner.

APPLICANT: City of Boardman
Planning Official
Post Office Box 229
200 City Center Circle
Boardman, Oregon 97818

- I. **GENERAL INFORMATION:** The BDC has not seen a comprehensive review for a number of years with recent updates or changes having a narrow scope. While the impetus for this action is partially based upon the recent City Council interpretation of the term owner for an approved Zoning Permit for the development of a transmission line there are other factors that are driving the beginning of a broader review and update of the BDC. Chapter 4.1 Types of Applications and Review Procedures has a number of provisions that are out of date with some provisions needing updated and others removed in their entirety. Planning staff are also recommending that the reference to City Manager throughout the BDC be updated to place responsibility on the Planning Official (or individual serving in that capacity).
- II. **APPROVAL CRITERIA:** The request has been filed under the BDC Chapter 4.1 Types of Applications and Review Procedures, more specifically 4.1.600 Type VI Procedures (Legislative). The criteria are identified below in **bold** type with responses in regular type.

G. Decision-Making Considerations. The recommendation by the Planning Commission and the decision by the City Council shall be based on consideration of the following factors:

1. Approval of the request is consistent with the Statewide Planning Goals;

The Statewide Planning Goals applicable to this request would be Goal 1: Citizen Involvement and Goal 2: Land Use Planning as these two goals deal with how communities engage with their citizens (Goal 1) and how they implement the planning program (Goal 2).

Goal 1 asks communities to “develop a citizen involvement program that insures the opportunity for citizens to be involved in all phases of the planning process.” Boardman seeks to achieve this through the BDC and specifically this Chapter that is being evaluated. It is the Chapter that defines how citizens can engage with the land use process when they are seeking an approval or when they may be affected by an approval. The changes that are proposed will not affect involvement but will clarify process, removing requirements not being utilized (applicant requirement to provide notice list and envelopes) and addressing changing the number of days to submit an appeal from 14 to 12 to assure that Boardman can meet the 120-day requirements.

Goal 2 asks communities “to establish a land use planning process and policy framework as a basis for all decision and actions related to use of land and to assure an adequate factual base for such decisions and actions.” Chapter 4.1 Types of Applications and Review Procedures provides at least a portion of the framework as it outlines how decisions are made related to notice, public hearings, and decisions.

One of the changes has to do with who can be considered an owner related to persons making application for a land use decision. The City Council recently determined that a utility was an owner with evidence in support of the determination being the utilities rights through condemnation. While Boardman would always want to see landowners and utilities work collaboratively, when that does not occur case law is clear that utilities and others with similar authority need to have assurance that they can complete their projects and improvements. Based on this recent decision suggested language has been included for consideration. *There is an attachment to this Findings of Fact that provides other examples for consideration.*

2. Approval of the request is consistent with the Comprehensive Plan; and

The Boardman Comprehensive Plan (BCP) has five Goal 1: Citizen Involvement Policies which support citizen engagement. The proposed changes can be found to be consistent with these policies.

The BCP has eight Goal 2: Land Use Planning Policies with Policy 3 being applicable. The Policy states, “The City has adopted the City of Boardman Development Code, a unified zoning and subdivision land use code to facilitate the development process and implement the land use goals of the City as outlined in the Comprehensive Plan.” The proposed changes can be found to be consistent with Policy 3. The other policies are more specific to actions that may be taken relative to housing, commercial development, and industrial development.

3. The property and affected area is presently provided with adequate public facilities, services and transportation networks to support the use, or such facilities, services and transportation networks are planned to be provided concurrently with the development of the property.

No specific property is affected by these proposed changes. The intent is to amend certain procedures and requirements within Chapter 4.1 Types of Applications and Review Procedures to remove outdated and unused provisions, contemplate replacing ‘City Manager’ with ‘Planning Official’ throughout the document to better identify the responsible party relative to implementation of the BDC, and address the term ‘owner’ related to who can make application.

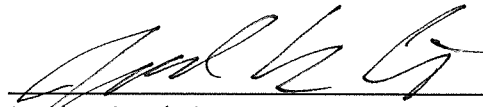
- III. **LEGAL NOTICE PUBLISHED:** September 6, 2022
East Oregonian
- IV. **DLCD 35-DAY NOTICE:** August 23, 2022
- V. **AGENCIES NOTIFIED:** Department of Land Conservation and Development; Morrow County Planning Department.

VI. HEARING DATES:

Planning Commission
September 28, 2022
October 19, 2022
Council Chambers
Boardman City Hall
200 City Center Circle
Boardman, Oregon 97818

City Council
November 8, 2022
Council Chambers
Boardman City Hall
200 City Center Circle
Boardman, Oregon 97818

VII. PLANNING OFFICIAL RECOMMENDATION: The Planning Official recommends forwarding the request to the City Council with a 'do adopt' recommendation.

 10-25-22
Jacob Cain, Chair Date
Planning Commission

ATTACHMENTS:

- Examples of ownership options
- Redline Version of Chapter 4.1 Types of Applications and Review Procedures
- Letter dated September 28, 2022, from Sarah Mitchell, Kellington Law Group, representing Jonathan Tallman, et al
- LUBA Final Opinion and Order No. 2022-029

City Examples:

Pendleton:

Public agencies that own the property or have passed a resolution declaring that they intend to exercise their statutory authority to condemn the property

Wilsonville:

Except for a Specific Area Plan (SAP), applications involving specific sites may be filed only by the owner of the subject property, by a unit of government that is in the process of acquiring the property, or by an agent who has been authorized by the owner, in writing, to apply.

Bend:

The following applications are not subject to the ownership requirement set forth in subsection (B)(1) of this section:

1. Applications submitted by or on behalf of a public entity or public utility having the power of eminent domain with respect to the property subject to the application; or

Beaverton:

Public agencies that own the property or have passed a resolution declaring that they intend to exercise their statutory authority to condemn the property.

Medford: No ownership requirement

County Examples:

Jefferson County:

Applications shall be submitted by the property owner, a purchaser under a recorded land sale contract, or by a condemner who has been granted immediate possession by a court of competent jurisdiction

Washington County:

Type I, II and III development actions may be initiated only byE. Public agencies or private entities that have statutory rights of eminent domain for projects they have the authority to construct.

Deschutes County:

The following applications are not subject to the ownership requirement set forth in DCC

22.08.010(B)(1):

Applications submitted by or on behalf of a public entity or public utility having the power of eminent domain with respect to the property subject to the application.

Douglas County:

Applications for development approval may be initiated by...A public utility or transportation agency, when dealing with land involving the location of facilities necessary for public service.

Chapter 4.1 - Types of Applications and Review Procedures

Sections:

- 4.1.100 - Purpose
- 4.1.200 - Description of Permit Procedures
- 4.1.300 - Type I Procedure
- 4.1.400 - Type II Procedure
- 4.1.500 - Type III Procedure
- 4.1.600 - Type IV Procedure
- 4.1.700 - General Provisions
- 4.1.800 - Special Procedures

4.1.100 Purpose

The purpose of this chapter is to establish standard decision-making procedures that will enable the City, the applicant, and the public to reasonably review applications and participate in the local decision-making process in a timely and effective way.

4.1.200 Description of Permit/Decision-Making Procedures

All land use and development permit applications, except building permits, shall be decided by using the procedures contained in this Chapter. General provisions for all permits are contained in Section 4.1.700. Specific procedures for certain types of permits are contained in Section 4.1.200 through 4.1.600. The procedure “type” assigned to each permit governs the decision-making process for that permit. There are four types of permit/decision-making procedures: Type I, II, III, and IV. These procedures are described in subsections A-D below. In addition, Table 4.1.200 lists all of the City’s land use and development applications and their required permit procedure(s).

- A. **Type I Procedure (Ministerial).** Type I decisions are made by the City Manager or ~~his/her~~ designee without public notice and without a public hearing. The Type I procedure is used when there are clear and objective approval criteria, and applies city standards and criteria that require no use of discretion~~;~~.
- B. **Type II Procedure (Administrative).** Type II decisions are made by the City Manager or ~~his/her~~ designee with public notice, and an opportunity for a public hearing if appealed. The appeal of a Type II decision is heard by the Planning Commission~~;~~.
- C. **Type III Procedure (Quasi-Judicial).** Type III decisions are made by the Planning Commission after a public hearing, with appeals heard by the City Council. Type III decisions generally use discretionary approval criteria~~;~~.

4.1.200 Description of Permit/Decision-making Procedures (continued)

- D. Type IV Procedure (Legislative).** Type IV procedures apply to legislative matters. Legislative matters involve the creation, revision, or large-scale implementation of public policy (e.g., adoption of land use regulations, zone changes, and comprehensive plan amendments which apply to entire districts). Type IV matters are considered initially by the Planning Commission forwarding a recommendation, with final decisions made by the City Council.

Table 4.1.200 Summary of Development Decisions/Permit by Type of Decision-making Procedure		
Action	Decision Type	Applicable Regulations
Access Permit (public street)	Type I	Chapters 3.1, 4.2, 4.3
Annexation	Type III/IV	Comprehensive Plan and city/county intergovernmental agreement(s), as applicable.
Building Permit	N/A	Building Code
Code Interpretation	Type II	Chapter 4.8
Code Amendment	Type IV	Chapter 4.7
Comprehensive Plan Amendment	Type IV	Comprehensive Plan
Conditional Use Permit	Type III	Chapter 4.4
Master Planned Development	Type III	Chapter 4.5
Modification to Approval	Type II/III	Chapter 4.6
Land Use District Map Change		
Quasi-Judicial (no plan amendment required)	Type III	Chapter 4.7
Legislative (plan amendment required)	Type IV	Chapter 4.7
Lot Line Adjustment	Type I	Chapter 4.3
Non-Conforming Use or Development Confirmation	Type I	Chapter 5.2
Partition	Type II	Chapter 4.3
Sensitive Lands Permit	Type III	Chapter 3.7
Sign Permit	Type I/II	Chapter 3.6
Development Review	Type I	Chapter 4.2, Building Code
Site Design Review		
Type II	Type II	Chapter 4.2
Type III	Type III	Chapter 4.2
Subdivision	Type II/III	Chapter 4.3
Temporary Use Permit	Type II/III	Chapter 4.9
Transportation Facilities and Improvements	Type II/III	Chapter 4.4
Traffic Impact Study	Type I	Chapter 4.10
Tree Removal	Type I/II	Chapter 3.2 (may require Sensitive Land development permit first)
Variance		
Class A	Type I	Chapter 5.1
Class B	Type II	Chapter 5.1
Class C	Type III	Chapter 5.1

*The City shall send ODOT notice of all Type II, III and IV land use applications and Traffic Impact Study

City of Boardman

October, 2002

| applications in Interchange Management Areas.

4.1.300 Type I Procedure (Ministerial)**A. Application Requirements.**

1. Application Forms. Type I applications shall be made on forms provided by the City Manager or ~~his/her~~ designee.
2. Application Requirements. Type I applications shall:
 - a. Include the information requested on the application form;
 - b. Address the criteria in sufficient detail for review and action; and
 - c. Be filed with the required fee.

B. Administrative Decision Requirements. The decision of the City Manager or ~~his/her~~ designee shall address all of the approval criteria. Based on the criteria and the facts contained within the record, the City Manager or ~~his/her~~ designee shall approve, approve with conditions, or deny the requested permit or action. A written record of the decision shall be provided to the applicant and kept on file at ~~city~~ City hall Hall.

~~C. Final Decision. The decision shall be final on the date it is mailed or otherwise provided to the applicant, whichever occurs first.~~

~~D. Effective Date. The decision is effective the day after it is final.~~

E.C. Notice of Decision.

1. Within five days after the City Manager or designee 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;
 - b. The applicant and all owners or contract purchasers of record of the site that is the subject of the application;
 - c. Any City-recognized neighborhood group or association whose boundaries include the site;
 - d. Any governmental agency that is ~~entities entitled~~ to notice under an intergovernmental agreement entered into with the City.
2. The City Manager or designee shall cause an affidavit of mailing and ~~sting-posting~~ of the notice to be prepared and made a part of the file. The affidavit shall show the date the ~~nee-notice~~ was mailed and posted and the names and addresses of the people to whom it was mailed.

4.1.300 Type I Procedure (Ministerial) (continued)

3. The Type I Notice of Decision shall contain:
 - a. A brief description of the applicant's proposal and the City's decision to approve or deny the proposal;
 - b. The address or other brief geographic description of the property proposed for development;
 - 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 the applicant and any persons who are adversely affected or aggrieved by the decision may appeal the decision; and
 - 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.

FD. Final Decision and Effective Date. A Type I ~~administrative-Ministerial d~~Decision is final for purposes of appeal, when it is mailed by the City. A Type I ~~administrative-Ministerial d~~Decision is effective on the day after the appeal period expires. If an appeal is filed, the decision is effective when the appeal is decided.

GE. Appeal. A Type I ~~administrative-Ministerial d~~Decision may be appealed to the Planning Commission as follows:

1. Who may appeal. The following people have legal standing to appeal a Type I ~~Administrative-Ministerial~~ Decision:
 - a. The applicant; and
 - b. Any persons who are adversely affected or aggrieved by the decision.
2. Appeal procedure.
 - a. *Notice of appeal.* Any person with standing to appeal, as provided in subsection 1, above, may appeal a Type I ~~Administrative-Ministerial~~ Decision by filing a Notice of Appeal according to the following procedures;
 - b. *Time for filing.* A Notice of Appeal shall be filed with the City Manager or designee within ~~44-12~~ days of the date the Notice of Decision was mailed;
 - c. *Content of notice of appeal.* The Notice of Appeal shall contain:
 - (1) An identification of the decision being appealed, including the date of the decision;

4.1.300 Type I Procedure (Ministerial) (continued)

- (2) A statement demonstrating the person filing the Notice of Appeal has standing to appeal;
 - (3) A statement explaining the specific issues raised on appeal;
 - (4) Filing fee.
3. Determination of Filing Fee. The amount of the filing fee shall be established by the City. The maximum fee for an initial hearing shall be the City's cost for preparing for and conducting the hearing, or the statutory maximum, whichever is less.
4. Scope of appeal. The appeal of a Type I Ministerial Decision by a person with standing shall be through a public hearing before the Planning Commission. The Planning Commission may allow evidence or testimony concerning any relevant issue.
5. Appeal procedures. Type III notice and hearing procedures shall be used for all Type I Ministerial Appeals, as provided in Section 4.1.500.C - E;
6. Final decision and effective date. The decision of the Planning Commission regarding an appeal of a Type I Ministerial Decision is the final decision of the City, unless appealed to City Council.
7. Appeal to City Council. The decision of the Planning Commission regarding an appeal of a Type I Ministerial Decision may be appealed to the City Council.
- a. Who may appeal. The following have legal standing to appeal a Type III Appeal Decision of a Type I ~~Administrative-Ministerial~~ Decision:
- (1) The applicant;
 - (2) Any person who was mailed written notice of the Type III appeal decision or Type I ~~Administrative-Ministerial~~ Decision;
 - (3) Any person who participated in the appeal proceeding through testimony or submission of evidence.
 - (4) Any person who is adversely affected or aggrieved by the decision.
- b. Appeal procedure.
- (1) The requirements for the Notice of Appeal, time for filing, content of Notice of Appeal, and determination of filing fee are the same as for the appeal of a Type II decision, as provided in Section 4.1.400G, sub-sections 2 and 3.

4.1.300 Type I Procedure (Ministerial) (continued)

- (2) Scope of appeal. The appeal of a Type III appeal decision on a Type I ~~Administrative Ministerial~~ Decision by a person with standing shall be a hearing *de novo* before the ~~Town-City~~ Council. The appeal shall not be limited to the specific issues raised and evidence and testimony presented in the appeal to the Planning Commission.
- (3) Appeal procedures. Type III notice, hearing and decision procedures shall be used for appeals of Planning Commission appeal decisions to the City Council, as provided in Section 4.1.500, sub-sections C-E.
- c. Final decision and effective date. The decision of the City Council on a Type III appeal of a Type I ~~application-Ministerial Decision~~ is final and effective on the date it is mailed by the City. The City Council's decision may be appealed to the State Land Use Board of Appeals pursuant to ORS 197.805 – 197.860.

4.1.400 Type II Procedure (Administrative)

- A. Pre-application conference. A pre-application conference may be required for Type II applications. Pre-application conference requirements and provisions are in Section 4.1.700(C-E).
- B. Application requirements.
 1. Application Forms. Type II applications shall be made on forms provided by the City Manager or ~~his/her~~ designee;
 2. Submittal Information. The application shall:
 - a. Include the information requested on the application form;
 - b. Be filed with ~~3 copies of~~ a narrative statement that explains how the application satisfies each and all of the relevant criteria and standards in sufficient detail for review and decision-making;
 - c. Be accompanied by the required fee.
 - d. ~~Include one set of pre-stamped and pre-addressed envelopes for all real property owners of record who will receive a notice of the application as required in Section 4.1.400.C. The records of the Morrow County Assessor's Office records are the official records for determining ownership. The applicant shall produce the notice list. At the applicant's request, and upon payment of a fee noted on the city's fee list, the city shall prepare the public notice mailing list. The city or the applicant shall use the most current County real property assessment records to produce the notice list;~~

4.1.400 Type II Procedure (Administrative) (continued)

- e. Include an impact study ~~for all land division applications~~. The impact study shall quantify and assess the effect of the development on public facilities and services. The study shall address, at a minimum, the transportation system, including pedestrian ways and bikeways, the drainage system, the parks system, the water system, the sewer system, and the noise impacts of the development. For each public facility system and type of impact, the study shall propose improvements necessary to meet City standards and to minimize the impact of the development on the public at large, public facilities systems, and affected private property users. In situations where this Code requires the dedication of real property to the City, the City shall either (1) include in the written decision evidence that shows that the required property dedication is roughly proportional to the projected impacts of the development on public facilities and services, or (2) delete the dedication as a condition of approval.

C. Notice of Application for Type II Administrative Decision

1. Before making a Type II Administrative Decision, the City Manager or designee shall mail notice to:
 - a. All owners of record of real property within 250-100 feet (measured from the property line) of the subject site;
 - b. All City-recognized neighborhood groups or associations whose boundaries include the site;
 - c. Any person who submits a written request to receive a notice; and
 - d. Any governmental agency which is entitled to notice under an intergovernmental agreement entered into with the City. The City may notify other affected agencies; ~~ODOT shall be notified when there is a land division abutting a State facility use action in an Interchange Management Area~~, for review of the application.
2. The purpose of the notice is to give nearby property owners and other interested people the opportunity to submit written comments about the application, before the Type II ~~Administrative d~~Decision is made. The goal of this notice is to invite people to participate early in the decision-making process.
3. Notice of a pending Type II Administrative Decision shall:
 - a. Provide a 14-day period for submitting written comments before a decision is made on the permit;
 - b. List the relevant approval criteria by name and number of code sections;
 - c. State the place, date and time the comments are due, and the person to whom the comments should be addressed;

4.1.400 Type II Procedure (Administrative) (continued)

- d. Include the name and telephone number of a contact person regarding the Administrative Decision;
- e. Identify the specific permits or approvals requested;
- f. Describe the street address or other easily understandable reference to the location of the site;
- g. State 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. Only comments on the relevant approval criteria are considered relevant evidence;
- h. State 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. Copies of this evidence can be obtained at a reasonable cost from the City;
- i. State that after the comment period closes, the City Manager or designee shall issue a Type II Administrative Decision. The decision shall be mailed to the applicant and to anyone else who submitted written comments or who is otherwise legally entitled to notice;
- j. Contain 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."

D. Administrative Decision Requirements. The City Manager or ~~his/her~~ designee shall make Type II ~~written Administrative d~~Decisions in writing addressing all of the relevant approval criteria and standards. Based upon the criteria and standards, and the facts contained within the record, the City Manager or ~~his/her~~ designee shall approve, approve with conditions, or deny the requested permit or action. The decision may include a requirement for non-remediation for future road improvements.

E. Notice of Decision

- 1. Within five days after the City Manager ~~or designee~~ signs the Administrative dDecision, 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;

4.1.400 Type II Procedure (Administrative) (continued)

- 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. The City Manager ~~or designee~~ shall cause an affidavit of mailing and posting of the notice to be prepared and made a part of the file. The affidavit shall show the date the notice was mailed and posted, and shall demonstrate that the notice was mailed to the people and within the time required by law.
3. 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.
- F. **Final decision and effective date.** A Type II ~~administrative-Administrative decision Decision~~ is final for purposes of appeal, when it is mailed by the City. A Type II ~~administrative-Administrative decision Decision~~ is effective on the day after the appeal period expires. If an appeal is filed, the decision is effective when the appeal is decided.
- G. **Appeal.** A Type II ~~administrative-Administrative decision Decision~~ may be appealed to the Planning Commission as follows:
 1. **Who may appeal.** The following people have legal standing to appeal a Type II Administrative Decision:
 - a. The applicant;

4.1.400 Type II Procedure (Administrative) (continued)

- b. Any person who was mailed written notice of the Type II ~~administrative~~ ~~Administrative decision~~ Decision;
- c. Any other person who participated in the proceeding by submitting written comments.

2. Appeal procedure.

- a. *Notice of appeal.* Any person with standing to appeal, as provided in subsection 1, above, may appeal a Type II Administrative Decision by filing a Notice of Appeal according to the following procedures;
- b. *Time for filing.* A Notice of Appeal shall be filed with the City Manager within ~~14~~ 12 days of the date the Notice of Decision was mailed;
- c. *Content of notice of appeal.* The Notice of Appeal shall contain:
 - (1) An identification of the decision being appealed, including the date of the decision;
 - (2) A statement demonstrating the person filing the Notice of Appeal has standing to appeal;
 - (3) A statement explaining the specific issues raised on appeal;
 - (4) If the appellant is not the applicant, a statement demonstrating that the appeal issues were raised during the comment period;
 - (5) Filing fee.

- 3. **Determination of Filing Fee.** The amount of the filing fee shall be established by the City. The maximum fee for an initial hearing shall be the City's cost for preparing and for conducting the hearing, or the statutory maximum, whichever is less.
- 4. **Scope of appeal.** The appeal of a Type II Administrative Decision by a person with standing shall be limited to the specific issues raised during the written comment period, as provided under Section 4.1.400.C, unless the Planning Commission allows additional evidence or testimony concerning any other relevant issue. The Planning Commission may allow such additional evidence if they determine that such evidence is necessary to resolve the case. The purpose of this requirement is to limit the scope of Type II Administrative Appeals by encouraging persons with standing to submit their specific concerns in writing during the comment period. The written comments received during the comment period will usually limit the scope of issues on appeal. Only in extraordinary circumstances should new issues be considered by the hearings body on appeal of a Type II Administrative Decision;

4.1.400 Type II Procedure (Administrative) (continued)

5. Appeal procedures. Type III notice and hearing procedures shall be used for all Type II Administrative Appeals, as provided in Sections 4.1.500.C - E;
6. Appeal to City Council. The decision of the Planning Commission regarding an appeal of a Type II Administrative Decision is the final decision of the City unless appealed to City Council. An appeal to City Council shall follow the same notification and hearing procedures as for the Planning Commission hearing.

4.1.500 Type III Procedure (Quasi-Judicial)

A. Pre-application conference. A pre-application conference may be required for Type III applications. The requirements and provisions for a pre-application conference are described in Section 4.1.700.C.

B. Application requirements.

1. Application forms. Type III applications shall be made on forms provided by the City Manager or designee;
2. Content. Type III applications shall:
 - a. Include the information requested on the application form;
 - b. Be filed with ~~copies of~~ a narrative statement that explains how the application satisfies each and all of the relevant criteria in sufficient detail for review and action;
 - c. Be accompanied by the required fee;
 - d. ~~Include one set of pre-stamped and pre-addressed envelopes for all real property owners of record who will receive a notice of the application as required in Section 4.1.400.C. The records of the Morrow County Assessor's Office records are the official records for determining ownership. The applicant shall produce the notice list. At the applicant's request, and upon payment of a fee noted on the city's fee list, the city shall prepare the public notice mailing list. The city or the applicant shall use the most current County real property assessment records to produce the notice list;~~

4.1.500 Type III Procedure (Quasi-Judicial) (continued)

~~ed.~~ Include an impact study ~~for all land division applications~~. The impact study shall quantify and assess the effect of the development on public facilities and services. The study shall address, at a minimum, the transportation system, including pedestrian ways and bikeways, the drainage system, the parks system, the water system, the sewer system, and the noise impacts of the development. For each public facility system and type of impact, the study shall propose improvements necessary to meet City standards and to minimize the impact of the development on the public at large, public facilities systems, and affected private property users. In situations where this Code requires the dedication of real property to the City, the City shall either (1) include in the written decision evidence that shows that the required property dedication is roughly proportional to the projected impacts of the development on public facilities and services, or (2) delete the dedication as a condition of approval.

C. Notice of Hearing.

1. ~~Mailed notice~~—Notice of a Type III ~~application-Quasi-Judicial Decision~~ hearing or Type II appeal hearing shall be given by the City Manager ~~or designee~~ in the following manner:
 - a. ~~Mailed Notice~~. At least ~~14-20~~ days before the hearing date, notice shall be mailed to:
 - (1) The applicant and all owners or contract purchasers of record of the property which is the subject of the application;
 - (2) All property owners of record within ~~250-100~~ feet of the property line of the site;
 - (3) Owners of airports shall be notified of a proposed zone change in accordance with ORS 227.175;
 - (4) Any neighborhood or community organization recognized by the City Council and whose boundaries include the property proposed for development;
 - (5) Any person who submits a written request to receive notice;
 - (6) For appeals, the appellant and all persons who provided testimony; and
 - (7) For a land use district change affecting a manufactured home or mobile home park, all mailing addresses within the park, in accordance with ORS 227.175.
 - b. The City Manager ~~or designee~~ shall have an affidavit of notice be prepared and made a part of the file. The affidavit shall state the date that the notice was ~~posted-on-the property-and~~ mailed to the persons who must receive notice;
 - c. ~~Published Notice~~. At least 14 ~~business~~ days before the hearing, notice of the hearing shall be printed in a newspaper of general circulation in the City. The newspaper's affidavit of publication of the notice shall be made part of the administrative record;

4.1.500 Type III Procedure (Quasi-Judicial) (continued)

- d. Posted Notice. At least 14 ~~business~~ days before the hearing, the applicant shall allow the City to post notice of the hearing on the property per Subsection 2 below. The ~~applicant-City~~ shall prepare ~~and submit~~ an affidavit of posting of the notice which shall be made part of the administrative record.
2. Content of Notice. Notice of appeal of a Type II Administrative ~~decision-Decision~~ or a Type III Quasi-Judicial hearing to be mailed, posted and published per Subsection 1 above shall contain the following information:
 - a. The nature of the application and the proposed land use or uses which could be authorized for the property;
 - b. The applicable criteria and standards from the development code(s) that apply to the application;
 - c. The street address or other easily understood geographical reference to the subject property;
 - d. The date, time, and location of the public hearing;
 - e. A statement that the failure to raise an issue in person, or by letter at the hearing, or failure to provide statements or evidence sufficient to afford the decision-maker an opportunity to respond to the issue, means that an appeal based on that issue cannot be filed with the State Land Use Board of Appeals;
 - f. The name of a City representative to contact and the telephone number where additional information on the application may be obtained;
 - g. A statement that a copy of the application, all documents and evidence submitted by or for the applicant, and the applicable criteria and standards can be reviewed at Boardman City Hall at no cost and that copies shall be provided at a reasonable cost;
 - h. A statement that a copy of the City's staff report and recommendation to the hearings body shall be available for review at no cost at least seven days before the hearing, and that a copy shall be provided on request at a reasonable cost;
 - i. A general explanation of the requirements to submit testimony, and the procedure for conducting public hearings.
 - j. 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."

D. Conduct of the Public Hearing.

1. At the commencement of the hearing, the hearings body shall state the following to those in attendance:

4.1.500 Type III Procedure (Quasi-Judicial) (continued)

- a. The applicable approval criteria and standards that apply to the application or appeal;
 - b. A statement that testimony and evidence shall concern the approval criteria described in the staff report, or other criteria in the comprehensive plan or land use regulations which the person testifying believes to apply to the decision;
 - c. A statement that failure to raise an issue with sufficient detail to give the hearings body and the parties an opportunity to respond to the issue, means that no appeal may be made to the State Land Use Board of Appeals on that issue;
 - d. Before the conclusion of the initial evidentiary hearing, any participant may ask the Planning Commission for an opportunity to present additional relevant evidence or testimony that is within the scope of the hearing. The hearings body shall grant the request by scheduling a date to finish the hearing (a "continuance") per paragraph 2 of this subsection, or by leaving the record open for additional written evidence or testimony per paragraph 3 of this subsection.
2. If the Planning Commission grants a continuance, the completion of the hearing shall be continued to a date, time, and place at least seven days after the date of the first evidentiary hearing. An opportunity shall be provided at the second hearing for persons to present and respond to new written evidence and oral testimony. If new written evidence is submitted at the second hearing, any person may request, before the conclusion of the second hearing, that the record be left open for at least seven days, so that they can submit additional written evidence or testimony in response to the new written evidence;
 3. If the Planning Commission leaves the record open for additional written evidence or testimony, the record shall be left open for at least seven days after the hearing. Any participant may ask the City in writing for an opportunity to respond to new evidence submitted during the period the record was left open. If such a request is filed, the Planning Commission shall reopen the record per subsection E of this section;
 - a. When the Planning Commission re-opens the record to admit new evidence or testimony, any person may raise new issues which relates to that new evidence or testimony;
 - b. An extension of the hearing or record granted pursuant to Section D is subject to the limitations of ORS 227.178 ("120-day rule"), unless the continuance or extension is requested or agreed to by the applicant;
 - c. If requested by the applicant, the City shall allow the applicant at least seven days after the record is closed to all other persons to submit final written arguments in support of the application, unless the applicant expressly waives this right. The applicant's final submittal shall be part of the record but shall not include any new evidence.
 - d. The record shall contain all testimony and evidence that is submitted to the City and

the hearings body and not rejected;

4.1.500 Type III Procedure (Quasi-Judicial) (continued)

- e. The hearings body may take official notice of judicially cognizable facts under the applicable law. If the review authority takes official notice, it must announce its intention and allow persons participating in the hearing to present evidence concerning the noticed facts;
 - f. The review authority shall retain custody of the record until the City issues a final decision.
4. Participants in the appeal of a Type II Administrative ~~decision~~-Decision or a Type III Quasi-Judicial hearing are entitled to an impartial review authority as free from potential conflicts of interest and pre-hearing ex parte contacts (see Section 6 below) as reasonably possible. However, the public has a countervailing right of free access to public officials. Therefore:
- a. At the beginning of the public hearing, hearings body members shall disclose the substance of any pre-hearing ex parte contacts (as defined in Section 6 below) concerning the application or appeal. He or she shall state whether the contact has impaired their impartiality or their ability to vote on the matter and shall participate or abstain accordingly;
 - b. A member of the hearings body shall not participate in any proceeding in which they, or any of the following, has a direct or substantial financial interest: Their spouse, brother, sister, child, parent, father-in-law, mother-in-law, partner, any business in which they are then serving or have served within the previous two years, or any business with which they are negotiating for or have an arrangement or understanding concerning prospective partnership or employment. Any actual or potential interest shall be disclosed at the hearing where the action is being taken;
 - c. Disqualification of a member of the hearings body due to contacts or conflict may be ordered by a majority of the members present and voting. The person who is the subject of the motion may not vote on the motion to disqualify;
 - d. If all members abstain or are disqualified, those members present who declare their reasons for abstention or disqualification shall be re-qualified to make a decision;
 - e. If a member of the hearings body abstains or is disqualified, the City shall provide a substitute in a timely manner subject to the impartiality rules in Section 6;
 - f. Any member of the public may raise conflict of interest issues prior to or during the hearing, to which the member of the hearings body shall reply in accordance with this section.
5. Ex parte communications.
- a. Members of the hearings body shall not:

4.1.500 Type III Procedure (Quasi-Judicial) (continued)

- (1) Communicate, directly or indirectly, with any applicant, appellant, other party to the proceedings, or representative of a party about any issue involved in a hearing, except upon giving notice, per Section 5 above;
 - (2) Take official notice of any communication, report, or other materials outside the record prepared by the proponents or opponents in connection with the particular case, unless all participants are given the opportunity to respond to the noticed materials.
 - b. No decision or action of the hearings body shall be invalid due to ex parte contacts or bias resulting from ex parte contacts, if the person receiving contact:
 - (1) Places in the record the substance of any written or oral ex parte communications concerning the decision or action; and
 - (2) Makes a public announcement of the content of the communication and of all participants' right to dispute the substance of the communication made. This announcement shall be made at the first hearing following the communication during which action shall be considered or taken on the subject of the communication.
 - c. A communication between City staff and the hearings body is not considered an ex parte contact.
6. Presenting and receiving evidence.
- a. The hearings body may set reasonable time limits for oral presentations and may limit or exclude cumulative, repetitious, irrelevant or personally derogatory testimony or evidence;
 - b. No oral testimony shall be accepted after the close of the public hearing. Written testimony may be received after the close of the public hearing, only as provided in Section D;
 - c. Members of the hearings body may visit the property and the surrounding area, and may use information obtained during the site visit to support their decision, if the information relied upon is disclosed at the hearing and an opportunity is provided to dispute the evidence. In the alternative, a member of the hearings body may visit the property to familiarize him or herself with the site and surrounding area, but not to independently gather evidence. In the second situation, at the beginning of the hearing, he or she shall disclose the circumstances of the site visit and shall allow all participants to ask about the site visit.

4.1.500 Type III Procedure (Quasi-Judicial) (continued)**E. The Decision Process**

1. Basis for decision. Approval or denial of an appeal of a Type II Administrative ~~decision~~ **Decision** or a Type III ~~application-Quasi-Judicial Decision~~ shall be based on standards and criteria in the development code. The standards and criteria shall relate approval or denial of a discretionary development permit application to the development regulations and, when appropriate, to the comprehensive plan for the area in which the development would occur and to the development regulations and comprehensive plan for the City as a whole;
2. Findings and conclusions. Approval or denial shall be based upon the criteria and standards considered relevant to the decision. The written decision shall explain the relevant criteria and standards, state the facts relied upon in rendering the decision, and justify the decision according to the criteria, standards, and facts;
3. Form of decision. The Planning Commission shall issue a final written order containing the findings and conclusions stated in subsection 2, which either approves, denies, or approves with specific conditions. The Planning Commission may also issue appropriate intermediate rulings when more than one permit or decision is required;
4. Decision-making time limits. A final order for any Type II Administrative Appeal or Type III ~~action-Quasi-Judicial Decision~~ shall be filed with the City Manager ~~or designee~~ within ten business days after the close of the deliberation.
5. Notice of Decision. Written notice of a Type II Administrative Appeal decision or a Type III ~~Quasi-Judicial d~~**Decision** shall be mailed to the applicant and to all participants of record within five business days after the hearings body decision. Failure of any person to receive mailed notice shall not invalidate the decision, provided that a good faith attempt was made to mail the notice. The decision may include a requirement for non-remonstration for future road improvements.
6. Final Decision and Effective Date. The decision of the hearings body on any Type II appeal or any Type III **Quasi-Judicial** application is final for purposes of appeal on the date it is mailed by the City. The decision is effective on the day after the appeal period expires. If an appeal is filed, the decision becomes effective on the day after the appeal is decided by the City Council. The notification and hearings procedures for Type III **Quasi-Judicial** applications on appeal to the City Council shall be the same as for the initial hearing.

4.1.600 Type IV Procedure (Legislative)

- A. **Pre-Application conference.** A pre-application conference is required for all Type IV **Legislative** applications. The requirements and provisions for a pre-application conference are described in Section 4.1.700.C.

- B. **Timing of Requests.** The City Manager or designee shall review proposed Type IV Legislative actions no more than twice yearly when requested. Requests are appropriate from the City Council, Planning Commission, Planning Official, City Manager, property owner, or other interested parties., based upon the City's approved schedule for such actions.

4.1.600 Type IV Procedure (Legislative) (continued)**C. Application requirements.**

1. Application forms. Type IV Legislative applications shall be made on forms provided by the City Manager or designee;
2. Submittal Information. The application shall contain:
 - a. The information requested on the application form;
 - b. A map and/or plan addressing the appropriate criteria and standards in sufficient detail for review and decision (as applicable);
 - c. The required fee; and
 - d. ~~10 copies of a letter or~~ A narrative statement that explains how the application satisfies each and all of the relevant approval criteria and standards.

D. Notice of Hearing.

1. Required hearings. A minimum of two hearings, one before the Planning Commission and one before the City Council, are required for all Type IV Legislative applications, except annexations where only a hearing by the City Council is required.
2. Notification requirements. Notice of public hearings for the request shall be given by the City Manager or designee in the following manner:
 - a. At least 20 days, but not more than 40 days, before the date of the first hearing on an ordinance that proposes to amend the comprehensive plan or any element thereof, or to adopt an ordinance that proposes to rezone property, a notice shall be prepared in conformance with ORS 227.175 and mailed to:
 - (1) Each owner whose property would be rezoned in order to implement the ordinance (i.e., owners of property subject to a comprehensive plan amendment shall be notified if a zone change would be required to implement the proposed comprehensive plan amendment);
 - (2) Any affected governmental agency.
 - (3) Recognized neighborhood groups or associations affected by the ordinance;
 - (4) Any person who requests notice in writing;
 - (5) For a zone change affecting a manufactured home or mobile home park, all mailing addresses within the park, in accordance with ORS 227.175.

4.1.600 Type IV Procedure (Legislative) (continued)

- (6) Owners of airports shall be notified of a proposed zone change in accordance with ORS 227.175;
 - b. At least 14 days before the scheduled Planning Commission public hearing date, and 10 days before the City Council hearing date, notice shall be published in a newspaper of general circulation in the City.
 - c. The City Manager or designee shall:
 - (1) For each mailing of notice, file an affidavit of mailing in the record as provided by Subsection a; and
 - (2) For each published notice, file in the record the affidavit of publication in a newspaper that is required in subsection b.
 - d. The Department of Land Conservation and Development (DLCD) shall be notified in writing of proposed comprehensive plan and development code amendments at least 45-35 days before the first public hearing at which public testimony or new evidence will be received.
 - e. Notifications for annexation shall follow the provisions of this Chapter.
3. Content of notices. The mailed and published notices shall include the following information:
- a. The number and title of the file containing the application, and the address and telephone number of the City Manager or designee's office where additional information about the application can be obtained;
 - b. A description of the location of the proposal reasonably calculated to give notice of the location of the geographic area;
 - c. A description of the proposal in enough detail for people to determine that a change is proposed, and the place where all relevant materials and information may be obtained or reviewed;
 - d. The time(s), place(s), and date(s) of the public hearing(s); a statement that public oral or written testimony is invited; and a statement that the hearing will be held under this title and rules of procedure adopted by the Council and available at City Hall (See subsection E below); and
 - e. Each mailed notice required by section D shall contain the following statement:
"Notice to mortgagee, lienholder, vendor, or seller: The Boardman Development Code requires that if you receive this notice it shall be promptly forwarded to the purchaser."

4.1.600 Type IV Procedure (Legislative) (continued)

4. Failure to receive notice. The failure of any person to receive notice shall not invalidate the action, providing:
 - a. Personal notice is deemed given where the notice is deposited with the United States Postal Service;
 - b. Published notice is deemed given on the date it is published.

E. Hearing Process and Procedure.

1. Unless otherwise provided in the rules of procedure adopted by the City Council:
 - a. The presiding officer of the Planning Commission and of the City Council shall have the authority to:
 - (1) Regulate the course, sequence, and decorum of the hearing;
 - (2) Direct procedural requirements or similar matters; and
 - (3) Impose reasonable time limits for oral presentations.
 - b. No person shall address the Commission or the Council without:
 - (1) Receiving recognition from the presiding officer; and
 - (2) Stating their full name and address.
 - c. Disruptive conduct such as applause, cheering, or display of signs shall be cause for expulsion of a person or persons from the hearing, termination or continuation of the hearing, or other appropriate action determined by the presiding officer.
2. Unless otherwise provided in the rules of procedures adopted by the Council, the presiding officer of the Commission and of the Council, shall conduct the hearing as follows:
 - a. The presiding officer shall begin the hearing with a statement of the nature of the matter before the body, a general summary of the procedures, a summary of the standards for decision-making, and whether the decision which will be made is a recommendation to the City Council or the final decision of the Council;
 - b. The City Manager or designee's report and other applicable staff reports shall be presented;
 - c. The public shall be invited to testify;
 - d. The public hearing may be continued to allow additional testimony or it may be closed; and

4.1.600 Type IV Procedure (Legislative) (continued)

- e. The body's deliberation may include questions to the staff, comments from the staff, and inquiries directed to any person present.

F. Continuation of the Public Hearing. The Planning Commission or the City Council may continue any hearing, and no additional notice of hearing shall be required if the matter is continued to a specified place, date, and time.

G. Decision-Making Considerations. The recommendation by the Planning Commission and the decision by the City Council shall be based on consideration of the following factors:

1. Approval of the request is consistent with the Statewide Planning Goals and the applicable provisions of the Boardman Comprehensive Plan;
2. ~~Approval of the request is consistent with the Comprehensive Plan~~ Evidence is present showing coordination with appropriate State agencies regarding the Statewide Planning Goals; and
2. ~~3.~~ The property and affected area is presently provided with adequate public facilities, services and transportation networks to support the use, or such facilities, services and transportation networks are planned to be provided concurrently with the development of the property; and
3. Amendments to the Development Code or Zoning Map which significantly affect a transportation facility shall assure that land uses are consistent with the function, capacity, and level of service of the facility identified in the Transportation System Plan. This is accomplished by one of the following:
 - a) Limiting allowed land uses to be consistent with the planned function of the transportation facility or roadway;
 - b) Amending the Transportation System Plan to ensure that existing, improved, or new transportation facilities are adequate to support the proposed land uses consistent with the requirement of the Transportation Planning Rule; or
 - c) Altering land use designations, densities, or design requirements to reduce demand for automobile travel to meet needs through other modes;
4. A plan or land use regulation amendment significantly affects a transportation facility if it:
 - a) Changes the functional classification of an existing or planned transportation facility;
 - b) Changes standards implementing a functional classification;
 - c) Allows types or levels of land use that would result in levels of travel or access that are inconsistent with the functional classification of a transportation facility; or
 - d) Would reduce the level of service of the facility below the minimal acceptable level identified in the Transportation System Plan.

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H. Approval Process and Authority.

1. The Planning Commission shall:

- a. After notice and a public hearing, vote on and prepare a recommendation to the City Council to approve, approve with modifications, approve with conditions, deny the proposed change, or adopt an alternative; and
 - b. Within 10 business days of determining a recommendation, the presiding officer shall sign the written recommendation, and it shall be filed with the City Manager or designee.
2. Any member of the Planning Commission who votes in opposition to the Planning Commission's majority recommendation may file a written statement of opposition with the City Manager or designee before the Council public hearing on the proposal. The City Manager or designee shall send a copy to each Council member and place a copy in the record;
3. If the Planning Commission fails to adopt a recommendation to approve, approve with modifications, approve with conditions, deny the proposed change, or adopt an alternative proposal, within 60 days of its first public hearing on the proposed change, the City Manager or designee shall:
 - a. Report the failure together with the proposed change to the City Council; and
 - b. Provide notice and put the matter on the City Council's agenda, a public hearing to be held, and a decision to be made by the Council. No further action shall be taken by the Commission.

4.1.600 Type IV Procedure (Legislative) (continued)

4. The City Council shall:
 - a. Approve, approve with modifications, approve with conditions, deny, or adopt an alternative to an application for legislative change, or remand the application to the Planning Commission for rehearing and reconsideration on all or part of the application;
 - b. Consider the recommendation of the Planning Commission; however, it is not bound by the Commission's recommendation; and
 - c. Act by ordinance, which shall be signed by the Mayor after the Council's adoption of the ordinance.

I. Vote Required for a Legislative Change.

1. A vote by a majority of the qualified voting members of the Planning Commission present is required for a recommendation for approval, approval with modifications, approval with conditions, denial or adoption of an alternative.
2. A vote by a majority of the qualified members of the City Council present is required to decide any motion made on the proposal.

J. Notice of Decision. Notice of a Type IV ~~Legislative decision~~ **Decision** shall be mailed to the applicant, all participants of record, and the Department of Land Conservation and Development, within five business days after the City Council decision is filed with the City Manager ~~or designee~~. The City shall also provide notice to all persons as required by other applicable laws.

K. Final Decision and Effective Date. A Type IV ~~Legislative~~ decision, if approved, shall take effect and shall become final as specified in the enacting ordinance, or if not approved, upon mailing of the notice of decision to the applicant.

L. Record of the Public Hearing.

1. A ~~verbatim~~ record of the proceeding shall be made by ~~stenographic, mechanical, or~~ electronic means. It is not necessary to transcribe an electronic record. The minutes and other evidence presented as a part of the hearing shall be part of the record~~s~~.
2. All exhibits received and displayed shall be marked to provide identification and shall be part of the record~~s~~.
3. The official record shall include:
 - a. All materials considered by the hearings body;
 - b. All materials submitted by the City Manager ~~or designee~~ to the hearings body regarding the application;

4.1.600 Type IV Procedure (Legislative) (continued)

- c. The ~~verbatim~~ record made by ~~the stenographic, mechanical, or~~ electronic means; the minutes of the hearing; and other documents considered;
- d. The final ordinance;
- e. All correspondence; and
- f. A copy of the notices which were given as required by this Chapter.

4.1.700 General Provisions

- A. **120-day Rule.** The City shall take final action on permit applications which are subject to this Chapter, including resolution of all appeals, within 120 days from the date the application is deemed as complete. Any exceptions to this rule shall conform to the provisions of ORS 227.178. (The 120-day rule does not apply to Type IV ~~legislative~~ Legislative decisions Decisions - plan and code amendments - under ORS 227.178.)
- B. **Time Computation.** In computing any period of time prescribed or allowed by this chapter, the day of the act or event from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday or legal holiday, including Sunday, in which event, the period runs until the end of the next day which is not a Saturday or legal holiday.
- C. **Pre-application Conferences.**
 - 1. **Participants.** When a preapplication conference is required, the applicant shall meet with the City Manager or ~~his/her~~ designee(s);
 - 2. **Information provided.** At such conference, the City Manager or ~~his/her~~ designee shall:
 - a. Cite the comprehensive plan policies and map designations applicable to the proposal;
 - b. Cite the ordinance provisions, including substantive and procedural requirements applicable to the proposal;
 - c. Provide available technical data and assistance which will aid the applicant;
 - d. Identify other governmental policies and regulations that relate to the application; and
 - e. Reasonably identify other opportunities or constraints concerning the application.
 - 3. **Disclaimer.** Failure of the City Manager or ~~his/her~~ designee to provide any of the information required by this Section C shall not constitute a waiver of any of the standards, criteria or requirements for the application;

4.1.700 General Provisions (continued)

4. Changes in the law. Due to possible changes in federal, state, regional, and local law, the applicant is responsible for ensuring that the application complies with all applicable laws on the day the application is deemed complete.

D. Applications.

1. Initiation of applications:
 - a. Applications for approval under this chapter may be initiated by:
 - (1) Order of City Council;
 - (2) Resolution of the Planning Commission;
 - (3) The City Manager or designee;
 - (4) A record owner of property (~~for example, a~~ person(s) whose name is on the most recently recorded deed), ~~or~~;
(5) eContract purchaser with written permission from the record owner; owner; or
(56) An entity that has the power of eminent domain relating to the property Public agencies or private entities that have statutory rights of eminent domain for projects they have the authority to construct and have been granted immediate possession by a court of competent jurisdiction.
 - b. Any person authorized to submit an application for approval may be represented by an agent authorized in writing to make the application on their behalf.
2. Consolidation of proceedings. When an applicant applies for more than one type of land use or development permit (e.g., Type II and III) for the same one or more parcels of land, the proceedings shall be consolidated for review and decision.
 - a. If more than one approval authority would be required to decide on the applications if submitted separately, then the decision shall be made by the approval authority having original jurisdiction over one of the applications in the following order of preference: the Council, the Commission, or the City Manager or designee.
 - b. When proceedings are consolidated:
 - (1) The notice shall identify each application to be decided;
 - (2) The decision on a plan map amendment shall precede the decision on a proposed land use district change and other decisions on a proposed development. Similarly, the decision on a zone map amendment shall precede the decision on a proposed development and other actions; and

(3) Separate findings and decisions shall be made on each application.

3. Check for acceptance and completeness. In reviewing an application for completeness, the following procedure shall be used:

4.1.700 General Provisions *(continued)*

- a. Acceptance. When an application is received by the City, the City Manager or designee shall immediately determine whether the following essential items are present. If the following items are not present, the application shall not be accepted and shall be immediately returned to the applicant:

- (1) The required form;
- (2) The required fee; and
- (3) The signature of the applicant on the required form. If the applicant is the agent of a person or entity authorized by Section 4.1.700.D.1 to initiate an application, the applicant must provide evidence of and signed written authorization of by the property owner of record if the applicant is not the owner applicable person or entity.

- b. Completeness.

- (1) Review and notification. After the application is accepted, the City Manager or designee shall review the application for completeness. If the application is incomplete, the City Manager or designee shall notify the applicant in writing of exactly what information is missing within 30 days of receipt of the application and allow the applicant 180 days to submit the missing information;
- (2) When application deemed complete for review. In accordance with the application submittal requirements of this chapter, the application shall be deemed complete upon the receipt by the City Manager or designee of all required information. The applicant shall have the option of withdrawing the application, or refusing to submit information requested by the City Manager or designee in (1), above. For the refusal to be valid, the refusal shall be made in writing and received by the City Manager or designee no later than 14 days after the date on the City Manager or designee's letter of incompleteness. If the applicant refuses in writing to submit the missing information, the application shall be deemed complete on 31st day after the City Manager or designee first accepted the application.
- (3) Standards and criteria that apply to the application. Approval or denial of the application shall be based upon the standards and criteria that were applicable at the time the application was first accepted.
- (4) Coordinated Review. The City shall also submit the application for review and comment to the City Engineer, ODOT, and other applicable County, State and federal review agencies.

4. Changes or additions to the application during the review period. Once an application is deemed complete:

4.1.700 General Provisions *(continued)*

- a. All documents and other evidence relied upon by the applicant shall be submitted to the City Manager or designee at least seven days before the notice of action or hearing is mailed, if possible. Documents or other evidence submitted after that date shall be received by City Manager or designee, and transmitted to the hearings body, but may be too late to include with the staff report and evaluation;
- b. When documents or other evidence are submitted by the applicant during the review period, but after the application is deemed complete, the assigned review person or body shall determine whether or not the new documents or other evidence submitted by the applicant significantly change the application;
- c. If the assigned reviewer determines that the new documents or other evidence significantly change the application, the reviewer shall include a written determination that a significant change in the application has occurred as part of the decision. In the alternate, the reviewer may inform the applicant either in writing, or orally at a public hearing, that such changes may constitute a significant change (see "d", below), and allow the applicant to withdraw the new materials submitted, in order to avoid a determination of significant change;
- d. If the applicant's new materials are determined to constitute a significant change in an application that was previously deemed complete, the City shall take one of the following actions, at the choice of the applicant:
 - (1) Continue to process the existing application and allow the applicant to submit a new second application with the proposed significant changes. Both the old and the new applications will proceed, but each will be deemed complete on different dates and may therefore be subject to different criteria and standards and different decision dates;
 - (2) Suspend the existing application and allow the applicant to submit a new application with the proposed significant changes. Before the existing application can be suspended, the applicant must consent in writing to waive the 120-day rule (Section A., above) on the existing application. If the applicant does not consent, the City shall not select this option;
 - (3) Reject the new documents or other evidence that has been determined to constitute a significant change, and continue to process the existing application without considering the materials that would constitute a significant change. The City will complete its decision-making process without considering the new evidence;
- e. If a new application is submitted by the applicant, that application shall be subject to a separate check for acceptance and completeness and will be subject to the standards and criteria in effect at the time the new application is accepted.

4.1.700 General Provisions *(continued)***E. City Manager or Designee's Duties.** The City Manager or designee shall:

1. Prepare application forms based on the criteria and standards in applicable state law, the City's comprehensive plan, and implementing ordinance provisions;
2. Accept all development applications which comply with Section 4.1.700;
3. Prepare a staff report that summarizes the application(s) and applicable decision criteria, and provides findings of conformance and/or non-conformance with the criteria. The staff report should also provide a recommended decision of: approval; denial; or approval with specific conditions that ensure conformance with the approval criteria;
4. Prepare a notice of the proposal decision:
 - a. In the case of an application subject to a Type I or II review process, the City Manager or designee shall make the staff report and all case-file materials available at the time that the notice of the decision is issued;
 - b. In the case of an application subject to a hearing (Type III or IV process), the City Manager or designee shall make the staff report available to the public at least seven days prior to the scheduled hearing date, and make the case-file materials available when notice of the hearing is mailed, as provided by Sections 4.1.400.C (Type II), 4.1.500.C (Type III), or 4.1.600.D (Type IV);
5. Administer the hearings process;
6. File notice of the final decision in the City's records and mail a copy of the notice of the final decision to the applicant; all persons who provided comments or testimony; persons who requested copies of the notice; and any other persons entitled to notice by law;
7. Maintain and preserve the file for each application for the time period required by law. The file shall include, as applicable, a list of persons required to be given notice and a copy of the notice given; the affidavits of notice; the application and all supporting information; the staff report; the final decision including the findings, conclusions and conditions, if any; all correspondence; minutes of any meeting at which the application was considered; and any other exhibit, information or documentation which was considered by the decision-maker(s) on the application; and
8. Administer the appeals and review process.

F. Amended Decision Process.

1. The purpose of an amended decision process is to allow the City Manager or designee to correct typographical errors, rectify inadvertent omissions and/or make other minor changes which do not materially alter the decision.

4.1.700 General Provisions (continued)

2. The City Manager or designee may issue an amended decision after the notice of final decision has been issued but before the appeal period has expired. If such a decision is amended, the decision shall be issued within 10 business days after the original decision would have become final, but in no event beyond the 120-day period required by state law. A new 10-day appeal period shall begin on the day the amended decision is issued.
3. Notice of an amended decision shall be given using the same mailing and distribution list as for the original decision notice.
4. Modifications to approved plans or conditions of approval requested by the applicant shall follow the procedures contained in Section 4.6. All other requested changes to decisions that do not qualify as minor or major modifications shall follow the appeal process.

G. **Re-submittal of Application Following Denial.** An application which has been denied, or an application which was denied and which on appeal or review has not been reversed by a higher authority, including the Land Use Board of Appeals, the Land Conservation and Development Commission or the courts, may not be resubmitted as the same or a substantially similar proposal for the same land for a period of at least 12 months from the date the final City action is made denying the application, unless there is substantial change in the facts or a change in City policy which would change the outcome, as determined by the City Manager or designee.

4.1.800 Special Procedures

- A. **Expedited Land Divisions.** An Expedited Land Division ("ELD") shall be defined and may be used as in ORS 197.360, which is expressly adopted and incorporated by reference here.
1. **Selection.** An applicant who wishes to use an ELD procedure for a partition, subdivision or planned development instead of the regular procedure type assigned to it, must request the use of the ELD in writing at the time the application is filed, or forfeit his/her right to use it;
 2. **Review procedure.** An ELD shall be reviewed in accordance with the procedures in ORS 197.365;
 3. **Appeal procedure.** An appeal of an ELD shall be in accordance with the procedures in ORS 197.375.

4.1.900 Neighborhood Meetings

- A. **Procedure.** Applicants are encouraged to meet with adjacent property owners and neighborhood representatives prior to submitting their application in order to solicit input and exchange information about the proposed development. In some cases, the City Manager or designee may require the applicant to meet with a City-recognized neighborhood association or group prior to accepting an application as complete.
- B. **Community Impact.** A Neighborhood Meeting may be required for development applications that are likely to have neighborhood or community-wide impacts (e.g. traffic, parking, noise or similar impacts), as determined by the City Manager or designee.



Sarah C. Mitchell
P.O. Box 2209
Lake Oswego, OR 97035

Phone: (503) 636-0069
Fax: (503) 636-0102
Email: sm@klgpc.com

September 28, 2022

Via Email
mclanec@cityofboardman.com

City of Boardman Planning Commission
c/o Carla McLane, Planning Official
200 City Center Circle
P.O. Box 229
Boardman, OR 97818

RE: A-BDC22-002 – Proposed Boardman Development Code Amendments

Dear Members of the Planning Commission:

This firm represents 1st John 2:17, LLC and Jonathan Tallman (Tallmans). The purpose of this letter is to provide comments on the proposed text amendments to the Boardman Development Code (BDC) for which you are being asked to make a recommendation to the City Council to approve or deny. We urge you to recommend denial of the proposed amendments for the reasons explained in this letter. Please include it in the record of these proceedings.

These proposed amendments are a direct response to the Tallmans' appeal to the Land Use Board of Appeals (LUBA) of the City's approval of Umatilla Electric Cooperative's (UEC) transmission line on the Tallman property. As you know, the Tallmans are the owners of property within the City of Boardman on which Umatilla Electric Cooperative (UEC) seeks to establish a transmission line. After negotiations with the Tallmans to obtain an easement on which to site the transmission line failed, UEC filed a complaint in the Morrow County circuit court in eminent domain to acquire an easement on the Tallmans' property for the transmission line. In July 2021, UEC filed a motion for advance occupancy of the easement under a statute that allows a private condemner like UEC to ask the court for an interim order to occupy the property to be condemned *before* the action in eminent domain is decided and a final judgment is rendered, the amount of just compensation assessed by a jury is paid, and the property to be condemned is actually conveyed. In October 2021, the circuit court granted UEC's motion, but a jury trial to decide the final amount of just compensation to be paid has not occurred and the court has not rendered a final judgment in the matter conveying the easement to UEC.

Shortly after the court issued the interim order, UEC applied for and obtained, over the Tallmans' objections, City approval to establish the transmission line. During the local proceedings, the Tallmans objected that UEC did not have the authority to file a land use application for the transmission line because UEC was not the "record owner" of the Tallmans' property or any part of it and that the court's order did not constitute the Tallmans' authorization

required by the City's code. Nevertheless, the City approved UEC's application. The Tallmans appealed the City's decision to LUBA where they raised these same issues, completed briefing, and held oral argument. The parties are now awaiting LUBA's final opinion and order.

The amendments are intended to reduce or avoid these types of disputes in the future, but as proposed, they only muddy the waters even more. For one, the proposed amendment to the record owner provision (BDC 4.1.700.D.1.a) says:

- “(4) A record owner of property (**for example, a** person(s) whose name is on the most recently recorded deed), or contract purchaser with written permission from the record owner.”

Instead of clarifying who a “record owner” is (although it was clear before that a record owner is the person(s) whose name is on the most recently recorded deed for the property), the amendment dilutes its meaning by adding “for example”. By refusing to express about who a record owner is, the added language is bound to result in more disputes and is wholly unnecessary given that the amendments also propose a new category of who may initiate land use applications:

- “(5) An entity that has the power of eminent domain relating to the property.”

This amendment, when read in conjunction with the proposed amendment to the City acceptance of applications provision (BDC 4.1.700.D.3.a) is even more troubling. That amendment says that an application may only be accepted if it contains:

- “(3) The signature of the applicant on the required form. **If the applicant is the agent of a person or entity authorized by Section 4.1.700.D.1 to initiate an application, the applicant must provide evidence of and signed-written authorization of by the property owner of record if the applicant is not the owner applicable person or entity.**”

The current language requires that applications include the signed, written authorization of the property owner of record, if the applicant is not the owner. This makes sense, because the landowner should have control over what is or isn't developed on their property. The proposed amendment completely eliminates the requirement for landowner consent/authorization if the applicant is not the owner.

Although the findings say that the city always wants to see landowners and utilities work collaboratively, the amendments unfairly tip the scales of power in favor of utilities (and other entities with the power of eminent domain) by granting unilateral authority to those entities to file land use applications involving any property. Under these amendments, a utility with the power of eminent domain would not have to seek or obtain permission from the property owner in order to file and get approval of a land use application; they could bypass collaboration or cooperative resolution entirely. The amendments eliminate a critical safeguard that is meant to ensure that a property owner has a say in what can or cannot happen on their land.

In this respect, the proposed amendments are inconsistent with Policy 2 of Chapter 2 of the City's Comprehensive Plan, which is to "encourage[] the development of infill and redevelopment of existing land in order to balance the need to expand the [UGB]" to meet the City's commercial and housing needs. The City would not "encourage" commercial and housing development by approving the proposed amendments. The amendments would have the exact opposite effect of giving commercial and housing developers cold feet by granting utilities carte blanche to establish their facilities all over town without the property owner's consent.

The proposed amendments are also inconsistent with the goals of Chapter 1 of the Comprehensive Plan, which include that the City "shall strive to provide for widespread citizen involvement, especially in its land use process", "to assure effective two-way communication with its citizens", and "to provide the opportunity for citizens to be involved in all phases of the planning process". By eliminating the landowner's consent/authorization requirement, the City would undermine landowner involvement in the land use process.

The proposed amendments also violate ORS 227.175(1), which provides that only an owner of land may apply for a permit:

"(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. * * *"

This statute furthers a state policy not to allow persons or entities to apply for land use approvals on property they do not own without the landowner's consent. The existing code complies with ORS 227.175(1) by requiring non-owners who wish to file an application for a permit, to obtain authorization of the owner.

For these reasons, the Planning Commission should recommend denial of the proposed amendments.

Sincerely,



Sarah C. Mitchell

SCM:scm
CC: Client

BEFORE THE LAND USE BOARD OF APPEALS
OF THE STATE OF OREGON

1ST JOHN 2:17, LLC and JONATHAN TALLMAN,
Petitioners,

and

KELLY DOHERTY,
Intervenor-Petitioner,

vs.

CITY OF BOARDMAN,
Respondent,

and

UMATILLA ELECTRIC COOPERATIVE,
Intervenor-Respondent.

LUBA No. 2022-029

FINAL OPINION
AND ORDER

Appeal from City of Boardman.

Sarah C. Mitchell filed the joint petition for review and joint reply brief and argued on behalf of petitioners.

Kelly Doherty filed the joint petition for review and joint reply brief on behalf of themselves.

Christopher D. Crean filed the joint response brief on behalf of respondent.

Tommy A. Brooks filed the joint response brief and argued on behalf of intervenor-respondent.

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RYAN, Board Chair, participated in the decision.

RUDD, Board Member; ZAMUDIO, Board Member, did not participate in the decision.

AFFIRMED 10/13/2022

You are entitled to judicial review of this Order. Judicial review is governed by the provisions of ORS 197.850.

1 Opinion by Ryan.

2 **NATURE OF THE DECISION**

3 Petitioners appeal a city council decision approving the installation of a
4 230-kilovolt transmission line in the Commercial (C) district and the Service
5 Center (SC) subdistrict.

6 **MOTION TO INTERVENE**

7 Kelly Doherty moves to intervene on the side of petitioners. There is no
8 opposition to the motion, and it is allowed.

9 **FACTS**

10 On March 5, 2021, the Oregon Public Utility Commission granted
11 intervenor-respondent Umatilla Electric Cooperative (intervenor) a certificate of
12 public convenience and necessity under ORS 758.015 for a proposed 230-
13 kilovolt transmission line.¹ The transmission line is proposed to cross the subject
14 property, which is owned by petitioner 1st John 2:17, LLC (1st John).² On July
15 13, 2021, intervenor commenced a condemnation action in circuit court under

¹ ORS 758.015(1) provides, in part:

“When any person, as defined in ORS 758.400, providing electric utility service, as defined in ORS 758.400, or any transmission company, proposes to construct an overhead transmission line which will necessitate a condemnation of land or an interest therein, it shall petition the Public Utility Commission for a certificate of public convenience and necessity * * *.”

² Petitioner Jonathan Tallman is the managing member of 1st John.

1 ORS 772.210 and ORS chapter 35 to acquire an easement on the subject property
2 for the transmission line.³ On October 28, 2021, the circuit court granted
3 intervenor’s motion for advance occupancy of the easement under ORS 35.275.⁴
4 Intervenor had previously deposited funds with the court, and petitioners later
5 withdrew those funds.⁵ Record 6, 8, 106.

³ ORS 772.210 provides, in part:

“(1) Any public utility, electrical cooperative association or transmission company may:

“* * * * *

“(b) Condemn such lands not exceeding 100 feet in width for its lines (including poles, towers, wires, supports and necessary equipment therefor) and in addition thereto, other lands necessary and convenient for the purpose of construction of service facilities. * * *

“* * * * *

“(4) The proceedings for the condemnation of such lands shall be the same as that provided in ORS chapter 35 * * *.”

⁴ ORS 35.275(1) provides, “At any time after an action is commenced to acquire any property, a private condemner may apply to the court for an order to occupy the property to be condemned and to make use of the property for the purposes for which it is being appropriated.”

⁵ ORS 35.275(3)(a) provides, in part:

“If an order to occupy the property is granted, it may also require the private condemner to deposit with the court either such sum as the court finds reasonable on account of just compensation to be

1 On November 2, 2021, intervenor applied for a zoning permit for the
2 portion of the transmission line that is proposed to cross the subject property. The
3 community development director approved the application, and. petitioners
4 appealed the community development director's decision to the planning
5 commission. The planning commission held a public hearing on the appeal and
6 at the conclusion denied the appeal and approved the application. Petitioners then
7 appealed the planning commission's decision to the city council. On March 24,
8 2022, the city council held a public hearing on the appeal, denied the appeal, and
9 approved the application. This appeal followed.

10 **FIRST ASSIGNMENT OF ERROR**

11 Boardman Development Code (BDC) 4.1.700(D)(1)(a) identifies who can
12 initiate an application for land use approval and provides:

13 “Applications for approval under this chapter may be initiated by:

14 “(1) Order of City Council;

15 “(2) Resolution of the Planning Commission;

16 “(3) The City Manager;

17 “(4) *A record owner of property (person(s) whose name is on the*
18 *most recently recorded deed)*, or contract purchaser with
19 written permission from the record owner.” (Emphasis
20 added.)

awarded or to deposit a surety bond in an amount and with such
surety as the court may approve.”

1 BDC 4.1.700(D)(3)(a) sets out the procedure that the city manager follows in
2 reviewing an application for completeness and provides, in part:

3 “When an application is received by the City, the City Manager shall
4 immediately determine whether the following essential items are
5 present. If the following items are not present, the application shall
6 not be accepted and shall be immediately returned to the applicant;

7 “* * * * *

8 “(3) The signature of the applicant on the required form *and* signed
9 written authorization of the property owner of record *if the*
10 *applicant is not the owner.*” (Emphases added.)

11 The city council concluded that the application satisfied BDC
12 4.1.700(D)(1)(a)(4). The city council interpreted BDC 4.1.700(D)(1)(a)(4) to
13 mean that “an application can be submitted by the owner of a property interest
14 that is subject to the land use application as long as that ownership interest is a
15 matter of record.” Record 6, 8. Because the record before the city council showed
16 that the circuit court had granted intervenor advance occupancy of the easement,
17 the city council concluded that intervenor was “a record owner” within the
18 meaning of BDC 4.1.700(D)(1)(a)(4), “the owner” within the meaning of BDC
19 4.1.700(D)(3)(a)(3), and, thus, authorized to initiate the application without
20 petitioners’ signed written authorization.

21 In the alternative, the city council concluded that petitioners had provided
22 the requisite “written authorization” under BDC 4.1.700(D)(3)(a)(3) by virtue of
23 the fact that they had accepted payment of “estimated just compensation” after
24 the circuit court granted intervenor advance occupancy. Record 6; ORS

1 35.275(3)(a). The city council concluded that petitioners had thereby “consented”
2 to the application. Record 8.

3 In the first assignment of error, petitioners challenge the city council’s
4 alternative conclusion that petitioners had provided the requisite “written
5 authorization” under BDC 4.1.700(D)(3)(a)(3) by virtue of the fact that they had
6 accepted payment under ORS 35.275(3)(a). Record 6, 8. Petitioners argue that
7 “the payment of provisional ‘just compensation’ is irrelevant to the express BDC
8 limits on filing land use applications.” Joint Petition for Review 11. We agree
9 with petitioners. Petitioners’ acceptance of the provisional just compensation
10 deposited pursuant to ORS 35.275(3)(a) does not serve as “written authorization
11 of the property owner of record if the applicant is not the owner.”

12 Petitioners also challenge the city council’s conclusion that intervenor is
13 “a record owner” within the meaning of BDC 4.1.700(D)(1)(a)(4) and “the
14 owner” within the meaning of BDC 4.1.700(D)(3)(a)(3). For the reasons
15 explained below, we conclude that the city council’s interpretation of the phrase
16 “a record owner” as including an owner of a property interest, as long as that
17 ownership interest is a matter of record, is not inconsistent with the express
18 language of BDC 4.1.700(D)(1)(a)(4). Accordingly, we agree with the city and
19 intervenor (respondents) that petitioners’ written authorization was not required
20 under BDC 4.1.700(D)(3)(a)(3).

21 We review the city council’s interpretation of the BDC under the highly
22 deferential standard of review in ORS 197.829(1). *Mark Latham Excavation, Inc.*

1 *v. Deschutes County*, 250 Or App 543, 555, 281 P3d 644 (2012). Under ORS
2 197.829(1), LUBA must affirm a governing body’s interpretation of its own land
3 use regulation if the interpretation is not inconsistent with the regulation’s
4 express language, purpose, or underlying policy. The test under ORS 197.829(1)
5 is not whether the interpretation is correct, or the best or superior interpretation,
6 but whether the governing body’s interpretation is “plausible,” given its text and
7 context. *Siporen v. City of Medford*, 349 Or 247, 243 P3d 776 (2010). The
8 “existence of a stronger or more logical interpretation does not render a weaker
9 or less logical interpretation ‘implausible.’” *Mark Latham*, 250 Or App at 555
10 (citing *Siegert v. Crook County*, 246 Or App 500, 509, 266 P3d 170 (2011)).

11 Petitioners argue that the parenthetical after the phrase “a record owner of
12 property” in BDC 4.1.700(D)(1)(a)(4), which states, “person(s) whose name is
13 on the most recently recorded deed,” is the definition of “a record owner” for
14 purposes of BDC 4.1.700(D)(1)(a)(4).⁶ Because intervenor’s name is not on the
15 most recently recorded deed for the subject property, petitioners argue that the
16 city council erred in concluding that intervenor qualifies as “a record owner” of
17 the subject property.

18 Respondents respond, and we agree, that the parenthetical is ambiguous
19 and that it is not clear whether it is intended to define the phrase “a record owner”

⁶ BDC chapter 1.2 sets out definitions for the BDC. The phrase “record owner” is not defined in that chapter.

1 or whether it is intended to be an example of “a record owner.” The city council
2 interpreted the parenthetical as providing an example of “a record owner,” as
3 opposed to providing a definition of that phrase. The city council’s interpretation
4 is consistent with the use of the article “a” before “record owner,” which indicates
5 that there can be multiple “record owner[s]” of property subject to an application.
6 Petitioners have not established that the city council’s interpretation of the
7 parenthetical as providing an example of one of potentially multiple record
8 owners, rather than a definition, is inconsistent with the express language,
9 purpose, or underlying policy of BDC 4.1.700(D)(1)(a)(4). Petitioners’
10 interpretation is essentially that only the holder of fee title to the property may
11 initiate an application.

12 We also understand petitioners to argue that, even if the parenthetical is
13 only one example of “a record owner,” the phrase “a record owner,” by itself,
14 refers to an owner that is shown in the county’s *real property* records. In support
15 of that argument, petitioners cite BDC 4.1.400(B)(2)(d), which provides that
16 certain applicants must submit pre-stamped and pre-addressed envelopes for all
17 “real property owners of record” who will receive notice of the application and
18 that “[t]he records of the Morrow County Assessor’s Office records are the
19 official records for determining ownership.” Petitioners argue that that provision
20 supports the interpretation of the phrase “a record owner” in BDC
21 4.1.700(D)(1)(a)(4) as referring to an owner that is shown in the county’s real
22 property records. Because intervenor’s advance occupancy is not shown in the

1 county's *real property* records, petitioners argue that the city council erred in
2 concluding that intervenor is "a record owner" of the subject property.

3 We reject petitioners' argument. If petitioners were correct that the phrase
4 "a record owner" refers only to an owner that is shown in the county's real
5 property records, then the clarifying reference to "the Morrow County Assessor's
6 Office records" in BDC 4.1.400(B)(2)(d) would be meaningless surplusage,
7 something we must assume that the enacting body did not intend. *State v.*
8 *Stamper*, 197 Or App 413, 418, 106 P3d 172, *rev den*, 339 Or 230 (2005). We
9 also observe that the phrase "record owner" is a legal term of art defined in
10 *Black's Law Dictionary* as "[a] property owner in whose name the title appears
11 in the public records." *Black's Law Dictionary* 1215 (9th ed 2009) (emphasis
12 added). In turn, "public record" is defined as "[a] record that a governmental unit
13 is required by law to keep, *such as* land deeds kept at a county courthouse." *Id.*
14 at 1387 (emphasis added). In other words, the phrase "a record owner," by itself,
15 does not necessarily refer to the owner that is shown in the county's *real property*
16 records.

17 Further, as respondents explain, because intervenor sought to acquire only
18 an easement on the subject property, even when the condemnation action has
19 concluded, intervenor's name will not be on the most recently recorded *deed*.
20 Accordingly, if the city may only accept an application from a "person[] whose
21 name is on the most recently recorded deed," then the city will only be able to
22 accept an application from intervenor with petitioners' signed written

1 authorization. In turn, petitioners could prevent intervenor from proceeding with
2 the installation of the transmission line consistent with a court-ordered easement
3 in a condemnation action by withholding that authorization.

4 Finally, we conclude that the city council's interpretation is consistent with
5 the court's holding in *Schrock Farms, LLC v. Linn County*, 142 Or App 1, 919
6 P2d 519 (1996). In *Schrock Farms*, the Oregon Department of Transportation
7 (ODOT) commenced a condemnation action in circuit court to acquire fee title to
8 property for the construction of a highway realignment. A circuit court granted
9 ODOT's motion for immediate possession of the property under ORS 35.348,
10 and ODOT subsequently applied with the county for the necessary approvals.
11 The local code authorized "owners" to file such applications and defined
12 "ownership" to include "equitable title." The question was whether ODOT held
13 equitable title to the subject property after the circuit court granted ODOT
14 immediate possession.

15 The court concluded that the county was prohibited from interpreting its
16 code to prevent ODOT from submitting the application because that
17 interpretation would effectively "nullify" ORS 35.348 and because a local
18 ordinance "should not be read to repeal a state law." *Schrock Farms*, 142 Or App
19 at 4. While the local code provision at issue in *Schrock Farms* defined
20 "ownership" to include "equitable title" and did not require the applicant to be "a
21 record owner," the court's salient reasoning in that case—that interpretations of
22 local code provisions that effectively "nullify" state condemnation statutes are

1 prohibited—is applicable here. If the city council interpreted the BDC in the
2 manner proposed by petitioners, that interpretation would come exceedingly
3 close to “nullify[ing]” ORS 35.275.

4 Because the record before the city council revealed that the circuit court
5 had granted intervenor advance occupancy of the easement, the city council
6 concluded that intervenor was “a record owner” authorized to initiate the
7 application without petitioners’ signed written authorization. Petitioners have not
8 established that that interpretation is inconsistent with the express language,
9 purpose, or underlying policy of BDC 4.1.700(D)(1)(a)(4). Accordingly, we
10 affirm it.

11 Because we affirm the city council’s interpretation of BDC
12 4.1.700(D)(1)(a)(4), we need not address respondents’ alternative responses that
13 BDC 4.1.700(D)(1)(a)(4) and BDC 4.1.700(D)(3)(a)(3) are merely application
14 requirements and that petitioners have not shown that the alleged failure to
15 comply with those requirements has resulted in noncompliance with any approval
16 standards.

17 The first assignment of error is denied.

18 **SECOND ASSIGNMENT OF ERROR**

19 The subject property is zoned C-SC. BDC Table 2.2.200(B)(2)(b) provides
20 that “[p]rivate utilities (e.g. natural gas, electricity, telephone, cable and similar
21 facilities)” are authorized in the C-SC zone. The city council concluded that the
22 transmission line qualifies as a “private utility” and is therefore authorized in the

1 C-SC zone. Record 4. In the second assignment of error, petitioners argue that
2 the city council improperly construed BDC Table 2.2.200(B)(2)(b) in concluding
3 that the transmission line qualifies as a “private utility.”

4 The city council found:

5 “12. An electrical line like the transmission line is an outright
6 permitted use in the SC Zone. BDC 2.2.200(B) states that ‘the
7 land uses listed in Table 2.2.200E are permitted in the [SC]
8 Sub District, subject to the provisions of this Chapter.’
9 Section 2.b of that table, in turn, lists the following as an
10 outright permitted use: ‘Private utilities (e.g. natural gas,
11 electricity, telephone, cable and similar facilities).’ Where a
12 use listed in Table 2.2.200B is subject to any additional
13 standards beyond those in BDC Chapter 2.2.200, the table
14 notes which additional standards apply. For private utilities,
15 no additional standards are listed.

16 “13. [Intervenor] is a private utility providing electricity. The
17 record demonstrates [intervenor] is a private cooperative
18 organized under ORS Chapter 62. [Intervenor] is registered
19 as such with the Oregon Secretary of State.

20 “14. The Planning Commission received testimony making
21 various arguments that [intervenor] is not a private utility for
22 purposes of BCC 2.2.200, because it is not the type of ‘private
23 utility’ contemplated by the Code. The Planning Commission
24 found that the Code does not distinguish between ‘types’ of
25 private utilities and that all ‘Private utilities (e.g. natural gas,
26 electricity, telephone, cable and similar facilities)’ are
27 allowed by right in the SC Zone.” Record 3-4.

28 Petitioners argue that the city council erred in concluding that the proposed
29 transmission line is a “private utility” allowed in the C-SC zone simply because
30 intervenor is a private electric cooperative under ORS chapter 62. Petitioners

1 argue that intervenor's organizational status is irrelevant to whether the
2 transmission line for which it seeks approval is allowed in the C-SC zone.
3 Petitioners also argue that the proposed transmission line itself does not qualify
4 as a "private utility." Petitioners cite dictionary definitions of the terms "private"
5 and "public" and argue that the proposed transmission line is not a "private
6 utility" because the electricity it will transmit is intended to serve not certain
7 persons or groups, such as individual homes or businesses, but the public in
8 general.

9 As context for their interpretation, petitioners point to Boardman
10 Municipal Code (BMC) chapter 13.12, which designates the entire city as an
11 underground wiring district and which provides that underground wiring is
12 "highly desirable to beautify the city and to promote its orderly development."
13 BMC 13.12.010; BMC 13.12.020. Petitioners argue that the proposed
14 transmission line, which includes overhead lines, is contrary to that policy.

15 Petitioners also point out that BDC 2.2.210(F)(12) allows in the C district's
16 BPA Transmission Easement (BPA) subdistrict "[u]tility infrastructure including
17 water lines, sewer lines, stormwater management, *electrical service lines*, gas
18 lines, television cable, telephone lines, communications lines, transportation
19 routes, and other necessary infrastructure to service the sub district." (Emphases
20 added.) Petitioners point out that BDC 2.2.210(G) provides safety standards for
21 such uses. Petitioners argue that, because "utility infrastructure," including
22 "electrical service lines," are expressly allowed in the C-BPA zone but not in the

1 C-SC zone, the city council erred in concluding that the proposed transmission
2 line is allowed in the C-SC zone.

3 We agree with respondents that the city council did not conclude that the
4 proposed transmission line is a “private utility” allowed in the C-SC zone simply
5 because intervenor is a private electric cooperative under ORS chapter 62.
6 Respondents first argue that, to the extent the findings suggest that that is what
7 the city council concluded, petitioners invited that error by virtue of arguments
8 that they made below. Specifically, respondents point out that petitioners argued
9 that the community development director erred in approving the application
10 because, “[i]n the first place, [intervenor] is not a ‘private utility.’” Record 167.

11 We agree with respondents that “[p]etitioners cannot urge the City to deny the
12 Application on the basis that [intervenor] is not a private utility and then argue to
13 LUBA that [intervenor’s] status as a private utility is ‘irrelevant.’”⁷ Joint
14 Respondent’s and Intervenor-Respondent’s Brief 19.

15 The city council expressly concluded that the proposed transmission line
16 itself qualifies as a “private utility.” Quoting the “private utility” language at

⁷ Respondents also argue that the city council’s finding at Record 4 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” was made in response to arguments by petitioners that the proposed transmission line itself does not qualify as a “private utility” given its voltage levels, its height, and the number of end-users it is intended to serve.

1 BDC Table 2.2.200(B)(2)(b), the city council expressly found that “[a]n electrical
2 line like the transmission line is an outright permitted use in the SC Zone.”
3 Record 3. Accordingly, petitioners’ challenge to the findings concerning
4 intervenor’s organizational status provides no basis for reversal or remand.

5 We also agree with respondents that the city council’s interpretation of
6 “private utility” is not inconsistent with the express language, purpose, or
7 underlying policy of BDC Table 2.2.200(B)(2)(b). ORS 197.829(1). Respondents
8 cite other dictionary definitions of the term “private” and argue that the proposed
9 transmission line is a “private utility” because it is owned by intervenor, a private
10 entity, as opposed to a governmental, public entity.

11 With respect to BMC chapter 13.12, respondents argue that those
12 provisions regulate uses in public rights-of-way, not on private property like the
13 proposed transmission line. Respondents also argue that those provisions
14 distinguish between “feeder lines,” which are defined as lines “that serve[] the
15 system but not a specific customer,” and other types of lines. BMC 13.12.130(E).
16 Respondents argue that those provisions demonstrate that the city knows how to
17 distinguish between different types of utility lines. Because BDC Table
18 2.2.200(B)(2)(b) contains no such distinction, respondents argue that the city
19 council did not err in concluding that the proposed transmission line qualifies as
20 a “private utility” despite the fact that the electricity it will transmit is intended
21 to serve the public in general rather than certain persons or groups, such as
22 individual homes or businesses.

1 Finally, with respect to the C-BPA zone's allowance of "utility
2 infrastructure," including "electrical service lines," we agree with respondents
3 that the fact that the C-BPA zone expressly allows those specific uses does not
4 mean that the broader phrase "private utility" may not include them as well.
5 Petitioners have not established that the city council's interpretation of "private
6 utility" is inconsistent with the express language, purpose, or underlying policy
7 of BDC Table 2.2.200(B)(2)(b). Accordingly, we affirm it.

8 The second assignment of error is denied.

9 **THIRD ASSIGNMENT OF ERROR**

10 Petitioners' third assignment of error includes multiple arguments.
11 Petitioners first argue that the city council erred in failing to apply the application
12 requirements in BDC chapter 4.1 to the application. We understand that argument
13 to be the same as the argument we rejected in our resolution of the first
14 assignment of error.

15 Petitioners next argue that the site design review criteria in BDC chapter
16 4.2, which require compliance with design standards in BDC chapters 3.1 to 3.6,
17 apply to the application because the proposed transmission line qualifies as
18 "development." Petitioners argue that the city council erred in failing to apply
19 those provisions to the application.

20 Respondents respond that petitioners do not identify any criteria that are
21 specifically applicable to zoning permits, and they argue that the city council
22 therefore did not improperly construe the applicable law in finding that the BDC

1 does not contain criteria specific to zoning permits.⁸ Respondents also respond
2 that the city council *did* apply relevant site design review criteria, and petitioners
3 do not challenge the city council’s finding that those criteria are met. We agree.

4 The city council found:

5 “The materials submitted by [intervenor] were sufficient to conduct
6 Site Design Review, and the applicable criteria in BDC 4.2.600 are
7 satisfied because, as explained in other findings, the transmission
8 line satisfies all applicable development standards in BDC Chapter
9 2 relating to the SC Zone and BDC Chapter 3 relating to utilities.”
10 Record 5.

11 Next, petitioners argue that the city council erred in failing to apply BDC
12 3.2.200(B), which requires a landscaping plan. Respondents respond that
13 petitioners did not raise the issue of compliance with BDC 3.2.200(B) below and
14 are therefore prohibited from raising that issue for the first time at LUBA. ORS
15 197.797(1); ORS 197.835(3). Petitioners do not respond to respondents’
16 argument that petitioners failed to raise the issue that BDC 3.2.200(B) applies to
17 the application prior to the close of the final evidentiary hearing. Accordingly,
18 we agree with respondents that that portion of the third assignment of error is
19 waived.

⁸ The city found that “[t]he [BDC] 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.” Record 3.

1 Finally, petitioners argue that there is no evidence in the record that BDC
2 3.4.100(A) is met. BDC 3.4.100(A) provides, in part, “No development shall
3 occur unless the development has *frontage or* approved access to a public
4 street[.]” (Emphasis added.) The city council found that that criterion was met:

5 “[Intervenor’s] development has approved access to a street.
6 [Intervenor] submitted easement documents demonstrating its right
7 to access each easement area from the underlying parcel, which have
8 access to a street. Further, the transmission line will result in a
9 continuous corridor that can be accessed from multiple streets. This
10 Code provision has therefore been satisfied.” Record 5.

11 Petitioners argue that that finding is unsupported by substantial evidence because,
12 according to petitioners, the record lacks evidence that the subject property has
13 “approved access” to a public street.

14 Respondents respond that that provision requires “*frontage or* approved
15 access to a public street” and that “[t]he record contains multiple figures and
16 depictions of the Transmission Line corridor, illustrating that the Transmission
17 Line has frontage on multiple streets.” Joint Respondent’s and Intervenor-
18 Respondent’s Brief 25. We agree with respondents that substantial evidence in
19 the record supports a determination that there is “frontage” on a public street and
20 that the city council’s conclusion that BDC 3.4.100(A) is met is supported by
21 substantial evidence in the record.

22 The third assignment of error is denied.

23 The city’s decision is affirmed.