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**VIA EMAIL**

Boardman Planning Commission  
c/o Barry Beyeler  
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**RE: LU 22-01; File ZP 21-066– Olson Road Transmission Line  
Applicant’s Pre-Hearing Submittal**

Dear Planning Commissioners:

This firm represents Umatilla Electric Cooperative (“UEC” or “Applicant”) in this matter. This letter and its attachment serve as the Applicant’s Pre-Hearing Submittal in advance of the hearing set for February 2, 2022, and they should be included in the record.

UEC’s Application relates to a new electrical line (the “transmission line”) UEC is constructing as part of an upgrade to the portion of its electrical system that serves the areas in and around the City of Boardman (“City”) and the Port of Morrow. Only a small portion of that line will be located within the City’s boundaries, with the remainder lying in unincorporated areas of Morrow County. Of the nine tax lots in the City where the line will be located, UEC’s current Application relates to only two tax lots, both of which are located in the City’s Service Center (“SC”) Zone.

City Staff reviewed UEC’s Application and determined it met all of the criteria for a Zoning Permit. The Application comes to the Planning Commission as an appeal of the Staff’s decision issuing the Zoning Permit.

If the Application and the issues raised on appeal seem familiar to the Planning Commission, that is because the exact same parties that filed this appeal – 1<sup>st</sup> John 2:17, LLC and Jonathan Tallman – filed a similar appeal at the end of last year. As noted above, the transmission line crosses nine tax parcels in the City. As part of a previous application (File ZP 21-031), UEC sought and obtained zoning permits across five of those parcels. As with the current Application, City Staff approved the zoning permit requests for those other five

properties. 1<sup>st</sup> John 2:17, LLC appealed that decision to the Planning Commission, which rejected all of the bases for appeal, including the vast majority of the issues that are once again before the Planning Commission in this appeal. The Boardman City Council also considered these issues on appeal and agreed with the Planning Commission's decision, upholding Staff's initial approval.

Attached as Exhibit A is the City Council's prior decision relating to zoning permits for UEC's transmission line in the SC Zone ("City's Prior Decision") for the other five properties. As you will see, that decision directly addresses the following issues that are raised in the current appeal:

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

2 – The City's Site Design Review criteria have been satisfied if they apply. Finding #19 in the City's Prior Decision concludes "that the criteria for Site Design Review have been satisfied" and that "[t]he materials submitted by the Applicant were sufficient to conduct Site Design Review, and the applicable criteria in BDC 4.2.600 are satisfied because, as explained in other findings, the transmission line satisfies all applicable development standards in BDC Chapter 2 relating to the SC Zone and BDC Chapter 3 relating to utilities."

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

Of note, not only were the above findings part of the City's Prior Decision, they were the basis of the Planning Commission's original approval that the City Council reviewed when it made its decision.

The City Staff's current approval of UEC's application on two more tax parcels conforms to the City's Prior Decision. The Appellants here have presented no argument to the Planning Commission to explain why the outcome for the current Application should be any different than the outcome when the Planning Commission previously reviewed these matters.

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

Appellants argue that, under BDC 4.1.700(D)(1) and a related provision in BDC 4.1.700(D)(3)(a), UEC is not entitled to even submit an application for a Zoning Permit, and that the City is not entitled to process the application, without the written consent of 1<sup>st</sup> John 2:17,

LLC, which is the underlying property owner of the two tax parcels. That argument, however, is contrary to the language of the Code and contrary to state law.

First, it should be noted that a Zoning Permit is not a “permit” in the traditional sense of the word. The purpose of the Zoning Permit is to determine the appropriate zoning classification for the proposed use so that other City agencies have a basis on which to confirm that the use is allowed. Here, because the proposed use is an outright permitted use that does not require additional permitting, it is a use that has already been approved, and the Zoning Permit simply documents that fact.

This context is important because it informs how the Planning Commission is required to apply the provisions of the Code. The City Council, by enacting the Code, has already determined what uses are allowed by right in each zone, including the transmission line in the SC Zone. UEC, by seeking a Zoning Permit, has not asked the City to “approve” anything. Rather, UEC has documented that the transmission line is a use that has already been approved. As such, the application for a Zoning Permit is not an “application for approval under” BDC Chapter 4 and any requirement to obtain property owner consent is not applicable. Further, nowhere in Chapter 4, or anywhere in the Code, is there even a reference to a “Zoning Permit.” The Appellants have not even attempted to explain how the property owner consent requirement applies to this particular Application.

Second, even if an application for a Zoning Permit were required for approval of a use under BDC Chapter 4 (which it is not), the requirements relating to who can initiate an application are not as clear as what the Appellants have asserted. UEC described in its Application the basis for initiating the Application and its right to do so. The very fact that UEC has interpreted the Code in one way and the Appellant has interpreted the Code another way means, at best, these Code provisions are ambiguous.

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

even if the local provisions by their terms could be read to prevent ODOT from making the applications as petitioners assert, the effect would be that ODOT could not gain the necessary approvals to put the property to a public use until it had already acquired the property through a judgment in the condemnation proceeding. ODOT argues that the resulting Catch-22 situation would effectively nullify significant aspects of the state

condemnation statutes, e.g., ORS 35.265, and a “county ordinance should not be read to repeal a state law.” We agree.

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

As a final point, it should be noted that Appellants have already been compensated for UEC’s use of the easement on their property. As part of the court proceeding that resulted in the order granting UEC possession and use, UEC was required to deposit funds with the court that would serve as compensation for the easement. 1<sup>st</sup> John 2:17 requested to withdraw those funds, and the court approved that request. It is untenable that Appellants would take payment for an easement and then attempt to use the City’s Zoning Permit process to thwart UEC’s use of the easement it paid for.

### **Conclusion**

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

Sincerely,



Tommy A. Brooks