

**FINDINGS OF FACT
PLANNING COMMISSION
AMENDMENT A-BDC-23-001**

REQUEST: To amend Chapter 3.4 Public Facilities Standards Section 3.4.000 Purpose and Applicability Item B Applicability of the Boardman Development Code (BDC) to allow the city to defer construction of certain improvements until such time as the adjacent property develops.

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

- I. **GENERAL INFORMATION:** The proposed amendment is the result of a series of appeals related to work the City took on to complete improvements to Yates Lane and develop Devin Loop south of the Port of Morrow (POM) Interchange in conformance with the POM Interchange Area Management Plan (IAMP). The proposed change in language to Section 3.4.000.B is the simplest change to allow the City to close the file on both the appeals as well as the project that resulted in improvements to east Yates Lane and the development of Devin Loop.
- II. **PROCEDURE:** An amendment to the City development code is processed using the Type IV procedures. The Type IV process requires a hearing before the Planning Commission with a recommendation to the City Council. The final hearing will occur before the City Council.
- III. **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 are Goal 1, Citizen Involvement; Goal 2, Coordination; Goal 9, Economic Needs; Goal 11, Public Facilities; and Goal 12, Transportation.

Goal 1 requires the City to “develop a citizen involvement program that insures the opportunity for citizens to be involved in all phases of the planning process.” Because the proposed legislative amendment will be heard by both the Planning Commission and the City Council, there will be at least two opportunities for public comment to the proposed change. This is consistent with the City’s acknowledged citizen involvement program. (Goal 1, Policy 4: The Planning Commission is officially designated as the Citizen Involvement Committee.)

Goal 2 requires the City to adopt a comprehensive plan and implement the plan through its development code. The proposed amendment is consistent with the comprehensive plan as described in these findings. (Goal 2, Policy 3: The City has adopted the City of Boardman

Development Coded, 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.)

Goal 9 requires the City to provide adequate opportunities for a variety of economic activities vital to the health, welfare, and prosperity of its citizens. The proposed amendment is consistent with this Goal as it would allow the City to develop infrastructure in support of employment lands at a cost that is affordable and assigns associated amenities to occur at the time of development with associated costs accruing to the development. Goal 11, Policy 4: Promote cooperation among the city, the Port of Morrow, and other interested parties to facilitate the most effective uses of public facilities serving the planning area.)

Goal 11 requires the City to plan and develop a timely, orderly and efficient arrangement of public facilities and services to serve as a framework for urban development. While the Comprehensive Plan Public Facilities chapter does not discuss transportation at length, it does discuss transportation as part of the overall infrastructure that needs to be planned for and developed for the City to grow and prosper. The proposed amendment facilitates the development of public transportation infrastructure, which provides the public easements and rights-of-way necessary for sanitary sewer, storm sewer and municipal water facilities. (Goal 11, Policy 6: The City shall prioritize development of land serviced by utilities and require the extension of water, sewer and storm drainage facilities for all urban level development within the UGB. Goal 11, Policy 15: The City shall maintain an eight (8) year supply of commercial and industrial land that is serviceable by water, sewer, storm drainage and transportation infrastructure.)

Goal 12 requires the City to plan for transportation facilities and is implemented through the City's Transportation System Plan, including the POM IAMP. The proposed amendment implements the POM IAMP by facilitating the improvements to Yates Lane and the development of Devin Loop. The amendment allows the City to develop road infrastructure, as required by the POM IAMP, but defer the installation of certain amenities adjacent to that infrastructure until such time as the adjoining parcel(s) develop. (Goal 12, TSP Policy: Dedication of right-of-way, authorization of construction and the construction of facilities and improvements for improvements designated in the Transportation System Plan, the classification of the roadway and approved road standards shall be allowed without land use review.)

For these reasons, the criterion is met.

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

The Boardman Comprehensive Plan (BCP) has a variety of policies that support the proposed amendment and the process used to achieve it. Goal 1 policies support citizen involvement and the public hearing process. Goal 1, Policy 4, designates the Planning Commission as the City's official Citizen Involvement Committee. Therefore, review by the Planning Commission ensures compliance with the comprehensive plan.

Goal 2, Policy 8, requires the City to coordinate with the Port of Morrow on the development of industrial areas within the UGB. The proposed amendment implements the POM IAMP and will facilitate the development of industrial lands in the interchange area by providing for the development of public transportation infrastructure.

Goal 9 requires the City to provide adequate opportunities for a variety of economic activities vital to the health, welfare, and prosperity of its citizens. The proposed amendment is consistent with the Comprehensive Plan as it would allow the City to develop infrastructure in support of employment lands at a cost that is affordable and assigns associated amenities to occur at the time of development with associated costs accruing to the development. (Goal 11, Policy 4: Promote cooperation among the city, the Port of Morrow, and other interested parties to facilitate the most effective uses of public facilities serving the planning area.)

Goal 11 supports public facilities planning including assuring that urban services, which includes streets, are available to lands available for development. Goal 11, Policy 1, requires the City ensure that urban services, including water, sewer and storm drainage services and transportation infrastructure, are available to serve industrial lands within the City. The proposed amendment allows for the cost-efficient installation of public infrastructure that provides for these urban services, while deferring the installation of related amenities until the adjacent property develops. To that end, the improvement of Yates Lane and the installation of Devin Loop provide an opportunity for development south of the POM Interchange.

Further, Goal 11, Policy 3 provides that the City will support development that is compatible with the City's ability to provide adequate public facilities and services. By allowing the City to defer the cost of certain frontage amenities until the adjacent property develops while allowing the transportation and subsurface public facilities to be installed, the amendment ensures that the related development is "compatible" with the City's financial ability to provide public facilities.

Finally, Goal 12, Policy 1, designates the Transportation System Plan (TSP) as part of the comprehensive plan, and the POM IAMP is part of the TSP. Thus, because the amendment advances the POM IAMP, it is consistent with Goal 12, Policy 1. In addition, Goal 12 requires the City plan and develop a network of streets to provide circulation within the community, which was achieved by the improvement and installation of Yates Lane and Devin Loop.

For these reasons, the criterion is met.

- 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 the proposed amendment. The intent is to amend this one provision that would allow the City to defer installation of certain amenities only for a public improvement project when the City finds that the standard(s) are not necessary or are likely to

be provided by adjacent private development. As such, the amendment applies to development projects generally in the City, without regard to location. However, by allowing the planned transportation network to be constructed but deferring the installation of certain amenities until the adjacent property develops, the amendment is consistent with ensuring all transportation facilities, including the amenities, will be provided concurrent with development of the property.

For these reasons, the criterion is met.

- IV. LEGAL NOTICE PUBLISHED:** November 28, 2023
East Oregonian
- V. DLCD 35-DAY NOTICE:** October 22, 2023
- VI. AGENCIES NOTIFIED:** Department of Land Conservation and Development; Morrow County Planning Department.
- VII. HEARING DATES:** Planning Commission
December 20, 2022
Council Chambers
Boardman City Hall
200 City Center Circle
Boardman, Oregon 97818
- City Council
January 2, 2024
Council Chambers
Boardman City Hall
200 City Center Circle
Boardman, Oregon 97818

- VIII. PLANNING OFFICIAL RECOMMENDATION:** The Planning Official recommends the Planning Commission forward the request to the City Council with a 'do adopt' recommendation.



Sam Irons, Vice-Chair
Planning Commission

12/26/23
Date

ATTACHMENTS:

- Redline Version of Chapter 3.4 Public Facilities Standards Section 3.4.000 Purpose and Applicability Item B. Applicability (as amended).
- Letter dated December 19, 2023, from Wendie Kellington, Kellington Law Group, PC representing Jonathan Tallman and 1st John 2:17 LLC

Draft Text Amendment – Development Code Section 3.4.000

The purpose of the amendment is to allow the City to defer construction of certain road improvements until such time as the adjacent property develops. For example, 3.4.100.J requires the installation of sidewalks, street lights and street trees that are unlikely to be necessary until the adjacent property develops, at which time at least some of these amenities are likely to be removed to accommodate the developer's site plan. This amendment therefore represents the responsible management of public resources.

BDC 3.4.000 Purpose and Applicability

* * *

B. Applicability. Unless otherwise provided, the standard specifications for construction, reconstruction or repair of transportation facilities, utilities and other public improvements within the City shall occur in accordance with the standards of this Chapter. No development may occur unless the public facilities related to development comply with the public facility requirements established in this Chapter; except that the City may waive-defer compliance with one or more of the development standards for a public improvement project constructed by the City or other public agency of the City finds that the standard(s) are not necessary or are likely to be provided by adjacent private development.

* * *



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December 19, 2023

Via Electronic Mail
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C/O Carla McLane
City Planner
200 City Center Circle
P.O. Box 229
Boardman, Oregon 97818

RE: Proposed Boardman Development Code Text Amendments to BDC 3.4.00

Dear Chair and Members of the Planning Commission:

This firm represents 1st John 2:17, LLC and Jonathan Tallman (Tallman). Please include this letter in the record of the proposed text amendments being considered on December 20, 2023. We urge you to deny the proposed amendments. Jonathan Tallman is the managing member of 1st John 2:17, LLC. 1st John 2:17, LLC owns property west of and abutting Laurel Lane (tax lots 3302, 3207 and 3205) and directly across Laurel Lane from the Loop Road improvements which is what the proposed amendments are all about, as the staff report/findings admit. The "Loop Road" is referred to in the staff report/findings as "Yates Lane" and "Devin Lane".

Please include the record for LUBA No. 2022-062 in the record of this proceeding. Mr. Tallman will bring a thumb drive of that record to the hearing tomorrow night as well.

The Proposed Amendment will not Change the Fact that LUBA has Held that Yates Lane and Devin Lane (ie the Lopp Road) Fails to Comply with the City's Road Standards the BDC and the City's TSP/IAMP.

The staff report is mistaken regarding the import of LUBA's decision. The staff report suggests that the proposal implements LUBA's decision in some way as the "simplest change to allow the City to close the file on both appeals ****"). That is gravely mistaken. The reality is the converse: LUBA agreed with Tallmans that the City's substandard and partial improvements to Yates Lane (and Devin Lane) failed to remotely comply with the City's code – which are parts of the City's code that are not being amended under the proposal and with which the City must comply.

LUBA agreed with Tallmans that the "Loop Road" was a collector and that the City failed to prove up on its claim it was a "neighborhood" collector rather than a "minor collector". By remanding, LUBA gave the City a chance to try to justify characterizing the Loop Road as a

neighborhood collector instead of what both Tallmans and LUBA thought it was – a “minor collector”. However, the City made **no effort to do so in the 180-days that state law allows**, and therefore the Loop Road is a minor collector as Petitioner explained to LUBA and as LUBA agreed in the absence of a plausible City interpretation otherwise.

On this point, it is important to understand that state law gave the City 180 days to respond to LUBA’s remand and try to prove up on the point the City argued in its LUBA brief that the “Loop Road” was a “neighborhood Collector. ORS 227.181(2)(a). However, the City failed to make any effort at all to respond to LUBA’s remand in that 180-day period. That means as a matter of law it is now established that the Loop Road is a “minor collector” and must meet minor collector standards. There is no dispute it does not meet minor collector standards. The proposed amendment does not change the fact that as a matter of law, the Loop Road (both parts of it) must meet minor collector standards.

The proposal only solidifies that the improvements to Yates Lane and Devin Lane are woefully incomplete and inadequate and violate City transportation standards. Solidifying those errors in a new ordinance **does not** make those errors go away and does not create conforming City streets. Recall, that in the LUBA case, the City attempted to interpret its code to allow the City to waive the clear requirements to install transportation infrastructure in the same manner that the proposed code amendment purports to waive transportation infrastructure requirements. LUBA held that was unlawful. And the constructed substandard City streets are still unlawful under the proposal.

LUBA not only agreed with Tallmans that the Loop Road was a minor collector in the absence of a plausible City interpretation otherwise in the required 180-day period (which never happened), but LUBA also agreed with Tallman explaining that it was unlawful for the City to have constructed City streets without constructing the required infrastructure to go in them as the City code requires: “if adjoining property is never developed, then, under the city council’s interpretation, no lateral improvements will be constructed, contrary to the express requirements of the code. The city council’s interpretation also provides no mechanism or process to require lateral improvements for already-developed properties that are adjacent to the new roadways.” LUBA further explained that the “clear purpose” of the City’s unamended rules “is to require lateral improvements to be constructed along city roadways.” LUBA held that not providing required improvements concurrently with the development of Yates Lane “is certainly inconsistent with the purpose of” the City’s unamended code. Required improvements include adequate width required by the City Code (*i.e.* 75’ is required instead of 60’ of right-of-way; sidewalks, streetlights, bike lanes and landscaping strips, compliant water, sewer and storm facilities). Thus, what the City proposes here, has already been held to be unlawful.

Therefore, far from being a “simple” “response” to LUBA, the proposal adds more needless complexity and costs. The proposal seeks to codify what LUBA already has held to be unlawful which will guarantee more litigation and, perhaps worse, perpetuates substandard City streets until LUBA’s order that the City must install the expressly required street improvements in City streets (Yates and Devin), is eventually enforced by a court.

The Time for the City to Respond to LUBA's Remand Has Passed. Now LUBA's Order is Law of the Case that Must be Complied With.

As noted above, state law gave the City 180 days after LUBA's final decision to respond to LUBA's remand. ORS 227.181(2)(a). The City did **exactly nothing** in response to LUBA's remand order in that 180-day period, which expired months ago. When the City failed to respond to LUBA's remand within the required 180-days, the City's application was ("shall" be) deemed "terminated." ORS 227.181(2)(a). That means that now, the City is bound by LUBA's holdings – including that the Loop Road must have the City code required improvements and must be constructed to the width and other features required for a minor collector. Fixing the Loop Road to install the required width and infrastructure is **the only lawful response** available to the City at this point.

Regardless, the City Loop Road is Bound to be Constructed to the Standards and Criteria in Effect when it was First Applied for which does not Include the Proposed Amendment.

A prospective City code amendment would not have helped the City regardless, even had the City had successfully amended its code as proposed within the 180-day period of ORS 227.181(2)(a). That is because the City is obligated by ORS 227.178(3) (no change in the goalposts rule) to apply the same "standards and criteria" that were applicable at the time the application for the roads were submitted to all subsequent applications. *Gagnier v. City of Gladstone*, 38 Or LUBA 858 (2000). The amendment proposed here was not in effect what the application for the Loop Road was first submitted. The constructed Loop Road improvements have not only not received land use approval that LUBA held was unlawful, but now there can be no dispute that both parts of the Loop Road violate the BDC.

**Proposed Amendment is Inconsistent With Boardman Development Code (BDC)
1.1.700(A)**

BDC 1.1.700(A) requires that all City officials, employees and contractors who have authority to "issue permits, or grant approvals shall adhere to and require conformance with this Code" and requires they "shall issue no permit or grant approval for any development or use which violates or fails to comply with **** standards imposed to carry out this Code." Both Yates Lane and Devin Lane fails to comply with BDC 3.4.100. BDC 3.4.100.A.2 requires that the "Development of new streets, and additional street width or improvements planned as a portion of an existing street shall be improved in accordance with this Section." "This Section" is BDC 3.4.100.A-Y. BDC 3.4.100(A)-(Y) contain the standards that "new streets" and "existing street" improvements are required to meet. For example, BDC 3.4.100.J requires "Sidewalks, planter strips and bicycle lanes *shall* be installed in conformance with the standards in Table 3.4.100 * * *"; BDC 3.4.100.X that requires that "Streetlights shall be installed" at "intervals of 300 feet". Yet both Devin Lane and Yates Lane fail to comply with these standards. BDC 1.1.200(A) also states that "no building permit shall be issued without compliance with the provisions of this Code" and BDC 1.1.600(A) reinforces that point by stating that no building permit shall be issued until a development permit in accordance with the provisions of BDC Chapter 5 has been issued. To the extent any part of the required improvements to the Loop

Road require building permits, they cannot lawfully be issued under the above code provision. The proposed amendment does not change that at all. Again, both Devin Lane and Yates Lane (the Loop Road), were constructed without complying with these required standards. The City is prohibited from amending its code to purport to allow permits and approvals to be issued in violation of the clear requirements of BDC 3.4.100 and nothing in the BDC allows for retroactive approvals for land uses LUBA has said do not comply with the BDC.

In fact, LUBA has already held that the City is foreclosed from interpreting its code to allow the City to waive these mandatory standards. The proposed amendment is just as unlawful.

Proposed Amendments Are Inconsistent With the City Comprehensive Plan and Transportation System Plan (TSP)

The proposal amends the City's Land Development Code (Boardman Development Code or "BDC"). It is settled that the City may not amend its BDC in a manner that is inconsistent with the City TSP or Comprehensive Plan. The proposal is inconsistent with the City Comprehensive Plan and TSP and is therefore unlawful. The TSP itself required an amendment to the City Comprehensive Plan in which the City's Plan would expressly state that "all development proposals, plan amendments or zone changes shall conform with the adopted [TSP]." The proposal neither complies with the City plan nor the City TSP.

The comprehensive plan at Chapter XII (Transportation), p 3 provides that "[b]ikeways shall be included on all new arterials and collectors within the Urban Growth Boundary except on limited access freeways." Nothing about that wording is conditional or ambiguous. No bikeways are included on Devin Loop, which is a "new collector" that is within the City's UGB and is not a limited access freeway. Likewise, there are also no bikeways on Yates Lane, which is a "new" collector.

The plan at Chapter XII, p 3 also provides that "[s]idewalks shall be included on all new streets within the Urban Growth Boundary except on limited access freeways." No sidewalks are included on Devin Loop, which is a "new street" and is not a limited access freeway. There are also no sidewalks on Yates Lane and it is also a "new street". The Loop Road is inconsistent with the comprehensive plan.

The City's TSP, Table 7 "Street Design Standards" provides standards for two types of "collectors" – "Collector – City Developed Alternative" and "Downtown Collector".¹ Table 7 provides that City Developed Alternative Collectors shall have 75-foot rights-of-way, turn lanes at intersections, 12-foot travel lanes, 8-foot bikeways, 5-foot sidewalks, and 7 feet for on-street parking. *Id.* The Loop Road has a 60-foot right-of-way, no turn lanes at its intersections with Laurel Lane, and no bikeways, sidewalks, or on-street parking. The Loop Road is inconsistent with TSP, Table 7.

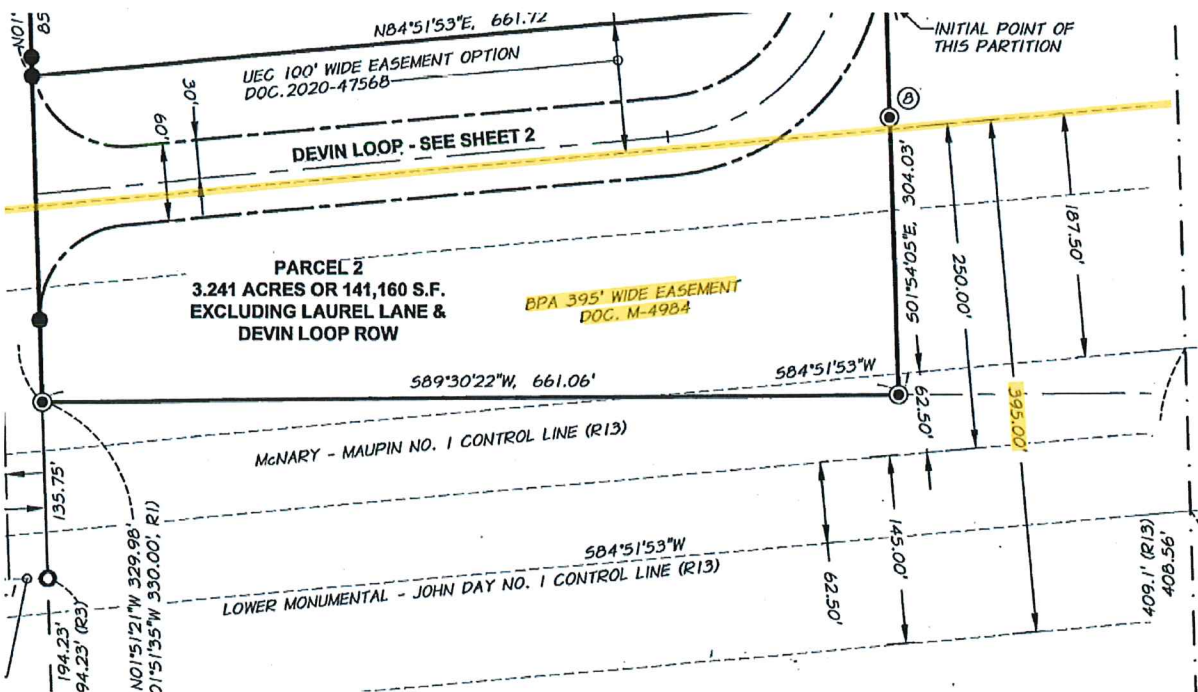
¹ The Loop Road is not a "Downtown Collector" because it is not located "downtown."

The TSP provides that minor collectors will have “a right-of-way requirement of 70 feet”, “two 12-foot travel lanes” and “an optional center turn lane”, and that “[s]idewalks and bike lanes will not be required where a multi-use path is available[.]” The Loop Road has a right-of-way width of only 60 feet. It does not have bike lanes and sidewalks, which are required by the TSP because there is no “multi-use path”. The Loop Road is inconsistent with the TSP’s requirements for a “Minor Collector”.

Moreover, the TSP also anticipates as the BDC does, the installation of sidewalks on all collector streets: “Sidewalks should be included in any full reconstruction of arterials or collectors.” And states that “Provision of sidewalks along both sides of key collector and local roads not specifically identified in this plan is also encouraged.” TSP, p 22. And encourages the provision of street lighting to increase visibility on collector streets and at arterial/collector intersections. The Loop Road is not consistent with the TSP.

The proposal is inconsistent with all of the above plan provisions. Nothing authorizes the City to adopt a BDC amendment that exempts it from compliance with express comprehensive plan requirements.

Further, the POM IAMP, Figure 7-2, Table 7-1 and p 81-82 identify and describe the Loop Road improvements as being located “just north of” and outside the BPA Transmission Line Easement. However, as shown on the surveys for the right-of-way dedication for the Loop Road in the LUBA record, a portion of the Loop Road is *within* the BPA Transmission Line Easement, inconsistent with the POM IAMP:



Furthermore, the proposal significantly undermines the City's plan compliance with Goal 12's Transportation Planning Rule (TPR). The City's TSP expressly states that it is implemented by the BDC and even provided the terms of the BDC to be adopted to ensure street standards are complied with (Section 7, p 6-27). In other words, the BDC standards that the proposal authorizes the City to waive for whatever reason, are standards that implement the City's TSP. In fact, it is precisely the BDC requirements the proposal purports to authorize the City to wave, that the City's TSP *uses to justify* the City's compliance with the state Transportation Planning Rule in the TSP at Section 8 entitled "Transportation Planning Rule Compliance, which includes among other things the following compliance table:

Implementation of a Transportation System Plan

Plan Review and Coordination

- | | |
|--|---|
| <ul style="list-style-type: none"> • Consistent with ODOT and other applicable plans. | <p>See Section 7: Policies and Land Use Ordinance Modifications</p> |
|--|---|

Adoption

- | | |
|--|--------------------------|
| <ul style="list-style-type: none"> • Is it adopted? | <p><i>To follow.</i></p> |
|--|--------------------------|

Implementation

- | | |
|--|--|
| <ul style="list-style-type: none"> • Ordinances (facilities, services and improvements; land use or subdivision regulations). | <p>Included in Section 7: Policies and Land Use Ordinance Modifications.</p> |
|--|--|

Another basis the City used to justify compliance with the state Transportation Planning Rule was the promise to provide bicycle and pedestrian facilities when the City improves roadways:

- | | |
|---|--|
| <ul style="list-style-type: none"> • Bikeway needs. • Pedestrian needs. | <p>Future bicycle and pedestrian improvements are to be made in conjunction with roadway improvements to provide cyclists and pedestrians with full accessibility to City of Boardman's street system. Plans for these facilities are shown in Figure 14 of Section 5: Transportation System Plan.</p> |
|---|--|

Thus, the proposed BDC amendment that purports to give the City the authority to waive the BDC requirements that were adopted under the City's TSP under Section 7 to demonstrate the City's compliance with the state Transportation Planning Rule, violates the City TSP. See TSP Section 7, p 20-27 ("Bikeways shall be included on all new arterials and collectors within the Urban Growth Boundary except on limited access freeways." Sidewalks shall be included on all new streets within the Urban Growth Boundary except on limited access freeways." It is the policy of the City of Boardman to plan and develop a network of streets, accessways, and other

improvements, including bikeways, sidewalks, and safe street crossings to promote safe and convenient bicycle and pedestrian circulation within the community.”) TSP Table 1 provides:

Street Standards

Table 1
Recommended Street Standards

Classification	Travel Lane Width	Center Turn Lane/Median Width	Parking Width	Planter	Sidewalk Width	Right-of-Way Width
Arterial	12' (2)	12'	None	12'	10'	80'
Collector A	12' (2)	8' swale/pat h	8'	None	6'	52'
Collector B	12' (2)	None	8'	4'	6'	60'
Local Commercial/Resid.	12' (2)	None	8'	4'	6'	60'
Local Residential	14' (1)	--	7'	6'	6'	52'
Alley	15-20'	--	--	--	--	20'
Multi-use Path	10'	--	--	--	10'	10'

The TSP states that The City of Boardman shall protect the function of existing or planned roadways or roadway corridors through the application of appropriate land use regulations.” And states that “The City of Boardman shall protect the function of existing and planned roadways as identified in the Transportation System Plan.”

The Loop Road (Yates and Devin) was unlawfully developed by the City in a manner that is inconsistent with the City’s comprehensive plan, TSP and POM IAMP and LUBA has so held. The proposal that purports to authorize that inconsistency is just as inconsistent with the City’s Comprehensive Plan and TSP. And compounding that error, the proposal purports to waive requirements that the City used to justify the City’s compliance with the state Transportation Planning Rule and that means that if the proposal is adopted that the City would be out of compliance with the TPR. Further, since the state TPR implements statewide planning Goal 12 (Transportation), that means the proposal violates Goal 12.

The Proposal Violates Goal 2 by Making the BDC Superior to the Comprehensive Plan and TSP.

Goal 2 requires that the City’s land use implementing measures (the BDC) conform to the comprehensive plan. The proposal turns Goal 2 on its head, making the BDC superior to the comprehensive plan by allowing the City to ignore the comprehensive plan requirements that use the term “shall” (discussed above) at the whim of the City.

The City cannot adopt the proposal without first amending the comprehensive plan. The proposal is not consistent with Goal 2.

The Proposal Directly Violates the State Transportation Planning Rule (TPR).

The findings/staff report erroneously fail to address the TPR. The proposal amends a land use regulation. That means that OAR 660-012-0060 applies. OAR 660-012-0060 requires the City take certain actions for proposals that cause a “significant effect” on a transportation facility. Failing to do so means that the proposal is unlawful and may not be approved.

The proposal here causes a “significant effect on a transportation facility” as OAR 660-012-0060 defines that term but applies none of the requirements (“measures”) that OAR 660-012-0060 requires in that circumstance. The proposal causes a significant effect on a transportation facility because it authorizes the City to waive (for any facility in the City, including for the “Loop Road”), the “standards implementing a functional classification system.”

Those standards include the standards in BCD 3.4 as well as the standards in the TSP that pertain to minor collectors (including their width), that the proposal authorizes be waived for whatever reason.

A significant effect is also triggered here because the proposal ostensibly also allows the City to effectively “change the functional classification of an existing or planned facility” by failing to install any of the required infrastructure that would be needed for the particular classification to remain.

Finally, the proposal causes a significant effect on a transportation facility triggering the TPR because it allows the City to waive required transportation infrastructure standards and thereby authorize “Types or levels of travel or access that are inconsistent with the functional classification of an existing or planned transportation facility;” and/or “Degrade the performance of an existing or planned transportation facility such that it would not meet the performance standards identified in the TSP or comprehensive plan” and/or “Degrade the performance of an existing or planned transportation facility that is otherwise projected to not meet the performance standards identified in the TSP or comprehensive plan.”

Because the proposed amendment has a significant effect on the transportation system. The City is required to adopt one of the implementing measures set forth under OAR 660-012-0060(2).

Instead of addressing the TPR as required by Goal 12, the proposed findings seek to establish Goal 12 compliance by reference to the City’s TSP and to the POM IAMP. This is erroneous for at least two reasons. First, as outlined elsewhere, the proposal fails to comply with those provisions. Second, as the findings recognize, the proposed amendment must comply with the goals as well as those local provisions and fails to do so.. The finding’s failure to address Goal 12 and the TPR is fatal to the ordinance.

The Proposal Violates the Codification Rule of ORS 227.173(1).

In *Waveseer of Or., LLC v. Deschutes County*, 308 Or App 494, 501 (2021), the Court of Appeals explained that the county equivalent of ORS 227.173 (ORS 215.416(8)(a)), does not permit local governments to develop land use approval standards and criteria through quasi-adjudicative decision-making. Rather, the standards must be “reasonably discernible from provisions of the code itself.” Thus, under ORS 227.173, the City must approve or deny streets based upon standards and criteria that are set forth in the BDC. Nothing in the proposed new waiver provisions reasonably informs an applicant of how and when the City road standards will apply because the waiver standards are instead to be worked out through the process of adjudication. How does the City know what standards apply? How does an “other public agency know” what standards apply? How does a “private developer” know what standards apply? When are standards “not necessary”? When are standards “likely to be provided by adjacent private development?” No one knows, it is apparently to be determined on an “ad hoc” basis and that violates the codification requirement.

The latter regarding “private development” is particularly problematic because the City is only allowed under the “unconstitutional conditions doctrine of *Dolan v. City of Tigard*, 512 US 374 (1994), to impose conditions requiring “private development” to install road infrastructure that is roughly proportional to the impacts of the development. Where the City undertakes road improvements, it has no way to know when or what development will occur in the future and can only speculate about what is “likely to be provided by private development.” There is simply no lawful basis for the City to “waive” mandatory requirements of the City’s code, plan and TSP, including street standards.

City is not at Liberty to Collaterally Attack its Own Regulations as “Not Necessary.”

We have already seen that the City determined that the BDC implementing requirements of the City TSP are necessary for the City to comply with the state Transportation Planning Rule. Further, the City adopted the Street requirements it purports to give itself authority to “waive” under the proposed amendment, on the basis that those requirements were necessary for the City to have a livable City, comply with the City Plan and TSP as well as the TPR. The proposal undermines the very fabric of the entire City planning program. It is unlawful and poor policy.

The Proposed Findings are Wholly Inadequate.

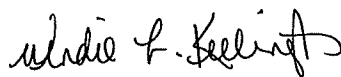
The findings purport to demonstrate compliance with the statewide planning goals and the City’s comprehensive plan. The findings fail. To be adequate, the findings must: (1) identify the relevant standards and criteria; (2) set out the facts relied upon; and (3) explain how the facts lead to the conclusion that the standards and criteria are satisfied. *Jacobsen v. City of Winston*, 51 Or. LUBA at 620–31 (2010). The findings for Goal 2 do not explain how the proposal complies with the TSP, IAMP or comprehensive plan and it does not. *Del Rio Vineyards v. Jackson County*, 70 Or LUBA 368 (2014).

The findings for Goal 9 and implementing City plan provisions are wholly inadequate to demonstrate the proposal complies with that goal and the City plan. The findings assert that the proposal is consistent with Goal 9 and implementing City plan requirements because "it would allow the City to develop infrastructure in support of employment lands at a cost that is affordable". That finding is a legal nonstarter. There are no facts to base that determination upon and none are cited. The proposed amendment does not support that conclusion; rather the proposed amendment will only serve to discourage economic development and drive up costs to develop Goal 9 land. That is because the required infrastructure will not be there and if such Goal; 9 land is to develop at all, the proposal unlawfully purports to put the onus on private economic development to do everything. Similarly, the proposed findings for Goal 11 are inadequate. While they purport to recite Goal 11 and implementing plan requirements, they do nothing to demonstrate how it could possibly be that allowing the City to wholly waive public facilities requirements for public roads complies with Goal 11 and the cited (and other) City implementing plans and regulations that require in all cases that water, sewer and storm and other public facilities be installed in public streets. The proposal does not comply with Goal 11 and the County plan policies as required and that is probably why the findings do not demonstrate otherwise. As noted above, the Goal 12 findings are completely inadequate, wrong, and demonstrate nothing that would support the proposal.

Further, we note that the proposed amendment applies throughout the City. Therefore, the City is required to demonstrate compliance with Goal 10 (Housing) and City plan provisions implementing that goal and fails to do so. This is obviously necessary because the City going around and waiving public infrastructure requirements for public streets it decides for whatever reason that it does not want to pay for, merely discourages needed and other housing in the City and drives up its cost because the City has unlawfully punted the requirement to construct required infrastructure to private developers.

The proposal must be rejected. It is unwise and unlawful. Thank you for your consideration.

Very truly yours,



Wendie L. Kellington

WLK:wlk

CC: Clients