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January 1, 2024

Via Electronic Mail
Boardman City Council
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 3.4.0

Dear Honorable Mayor and Members of the City Council:

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 January 2, 2024. 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 the City constructed to wholly substandard levels. The "Loop Road" is referred to in the staff report/findings as "Yates Lane" and "Devin Lane". We refer to it similarly in this letter as well as in the manner that LUBA referred to it as the "Loop Road."

The New Proposal

The proposal before you is different in name only from the proposal that the planning commission considered. Its legal import is no different than the previous version that the planning commission reviewed. The proposal now is the following:

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 ~~o~~if the City finds that the improvements required by the standard(s) are ~~not necessary or are~~ likely to be provided by ~~adjacent private~~ development of the adjacent property.

* * *

The Staff Report Characterizes the Proposal as a Response to LUBA's Decision that the Loop Road was Improperly Installed by the City. That May be but the Proposed Amendment Applies to Any Road Improvement, Anywhere in the City

The proposal purports to allow the City to "defer" required road improvements anywhere in the City, ostensibly forever; on the finding that at some undefined point in the future, it is "likely" that adjacent private development will provide the required improvements. Pause here for a moment. The City has installed a wholly substandard Loop Road. That road is no real benefit to anyone – it lacks neither the right of way nor "pavement" for any type of collector street – when the City TSP requires it be developed as a collector. It has no sidewalks, no streetlights, no bike lanes, no landscaping, in fact very little about it complies with any law. In fact, it dooms private development to stagnation because the City's code will require that any private development be denied unless the required infrastructure is in place – unless that requirement is waived under the "unconstitutional conditions" rule of *Dolan v. City of Tigard* and related City code provisions. Or under *Koontz v. St. Johns Water District* which holds that the City cannot deny development because the private owner invokes his constitutional right not to be required to install infrastructure that is not roughly proportional to the impacts of his development.

But the proposal purports to allow the City to "defer" all and any required access/transportation requirements – ostensibly even pavement and right of way -- on the idea that the City can make "findings" that those facilities will all be developed when "adjacent" private property develops. Yet no "adjacent" private party can condemn land to obtain the required right of way and pavement widths. No private development can be reasonably expected to build a collector road with all of the access and transportation features the City's TSP and code require. So, what you will have in truth under the proposal is a City pathway to sorely substandard streets in the City of Boardman, that are unsafe for people to walk on, unsafe to bike on, unsafe to serve as access for emergency services and passenger vehicles, unsafe for freight to access and wholly inadequate to move people and goods around, regardless of the mode or

movement reason. Far from being "responsible" the proposal is the most irresponsible piece of City legislation this author has seen in 40 plus years of doing this work.

Under the proposal, the City need not find that it is "likely" that any otherwise required transportation/access improvements will be provided in anyone's lifetime, when needed, as needed, or even over the planning horizon of the City's TSP. The proposal is tantamount to an indefinite waiver of the requirements in the City code, the City TSP and the two IAMP's that bind the City, requiring that road improvements be provided to particular standards (i.e to collector standards and that require "lateral improvements" like bike lanes, sidewalks, street trees and landscaping strips, etc.).

Among other requirements, 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. The proposal purports to give the City authority to "defer" those requirements on a finding that private development on "adjacent property" is "likely" to provide the required improvements. Yet there are no standards regarding what it would take for the City to find it "likely" that "private development will provide required improvements.

Moreover, there is no process provided or contemplated to assure that such deferral will be subject to notice and opportunity for public comment, to ensure that the City does not make such a "finding" without any substantial evidence to support it. Gallingly, not only is there no public notice and hearing process for the City to make the highly subjective and factually intensive determination regarding whether private development is "likely" to provide required improvements, the proposal ostensibly allows the City or any other public agency to make substandard road improvements and for the City to attempt to justify them later with the "likely" findings when the folly is discovered.

The proposal simply sets up an inappropriate backroom process for the City to make a private decision that public agencies can avoid compliance with mandatory access and transportation standards, and allow those substandard improvements to be constructed, so long as there is an eventual "finding" that it is "likely" that the required public infrastructure can be foisted on private development to provide at some point in the future. That scheme has never been held to be lawful and it is not. *See Meadow Neigh. Assoc. v. Washington County*, 55 Or LUBA 472 (2007) (even where deferral is allowed (and it is not here), deferral can only be authorized if there is a second stage that ensures there is a meaningful opportunity for public notice and hearing before the deferred "findings" are made.); *Township 13 Homeowners Assoc. v. City of Waldport*, 53 Or LUBA 250 (2007) (deferral of compliance with mandatory standards is error where no provision for notice and opportunity for a public hearing); *McKay Cr. Valley Assoc v. Washington County*, 24 Or LUBA 187 (same).

The proposal is tantamount to an indefinite waiver of mandatory access and transportation standards - there is no requirement or assurance that any requirements will ever be

met. LUBA has already this scheme to be unlawful. There is nothing to suggest that the proposal will fare any better.

The Word Changes to the Proposed Amendment do not Change the Undeniable Fact that the Proposal is Unlawful

Recognizing that the proposal fails to comply with law, City staff have suggested a half-hearted amendment, moving a few words around. Respectfully, that proposed amendment suffers from the same serious legal defects that they hope to get around. We identified many of these serious legal defects in our December 2023 letter to the planning commission. The problems identified in that letter persist under the proposal. For brevity, we do not repeat our December 20203 letter to the planning commission but rather incorporate it here by this reference. Here, we simply highlight key deficits.

Illustrative Key Deficits of the Proposal

The idea that the City may work in concert with adjoining concurrent private development to co-develop road improvements, might make sense is some situations where there is specific development proposed on adjoining property at the time that the City is also making improvements, and there is a reasonable basis (supported by substantial evidence) to conclude that the totality of the required access and transportation improvements will be timely installed. But the proposed amendment requires no such thing. Rather, the proposal is pitched a late response to LUBA's decision that the Loop Road constructed by the City fails to comply with mandatory requirements. As with the City decision that LUBA held to be unlawful, here nothing supports a conclusion that required access/transportation infrastructure in the Loop Road or anywhere else will ever be constructed once "deferred" and there is no mechanism to ensure that required infrastructure will ever be constructed either. Your planning commission was concerned about this and you should be too.

As LUBA explained: "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." LUBA decided that the "waiver" or "deferral" idea advanced previously and now in the proposed amendment, is unlawful because it "provides no mechanism or process to require lateral improvements for already-developed properties that are adjacent to the new roadways." LUBA explained that the "clear purpose" of the City's rules that the proposal then before it and now "is to require lateral improvements[1] to be constructed along city roadways." LUBA held that not providing required improvements concurrently with the development of the Loop Road "is certainly inconsistent with the purpose of" the City's code. Those holdings apply equally to the proposal.

LUBA agreed with Tallman's that the City's TSP required the "Loop Rd." to be developed as a minor collector and that City standards require that the infrastructure the City

[1] By "lateral improvements" LUBA said it was referring to the City's mandatory requirements for sidewalks, bike lines, landscape strips, streetlights and so forth.

neglected to install, be installed. LUBA observed that the City erred in failing to acquire the required right of way for the Loop Road and failed to install the required amount of pavement even for a neighborhood collector. LUBA pointed out that even if the Loop Road were only required to meet neighborhood collector standards, that the City failed to acquire the required amount of right of way to enable the Loop Road to serve as either a minor ***or*** a neighborhood collector. LUBA observed that the "pavement" that the City installed is wholly inadequate to meet even neighborhood collector standards. Private developers cannot acquire required right of way- they have no condemnation authority. Moreover, some of the adjacent property is owned by public agencies including ODOT and UEC and no private property owner can condemn public property. Under the proposal, there will never be any assurance that the Loop Road or any other will ever be constructed to required standards.

Further, the IAMP (a part of the City TSP) makes clear that the Loop Road is supposed to support economic development of this region of the city, stating the required improvements for the "Loop Road" are necessary

> To support long-term commercial growth on the south side of the interchange,

Moreover, the IAMP is replete with similar findings.

LUBA pointed out that the affected area is zoned commercial and is supposed to deliver economic uses to the City. LUBA explained that some of the property in this area is already developed. As LUBA posited, how can the City expect that developed properties will provide the required infrastructure? The reality is that they will not do so, and nothing requires that they do so. The remaining underdeveloped or undeveloped properties cannot reasonably be expected to provide required infrastructure when the City fails to require itself or any other agency to install required infrastructure, as required. Developed properties have no obligation to do anything and both the City code and constitutional law establish that the City may only require underdeveloped or undeveloped property to install roads, dedicate right of way or lateral road infrastructure or impose other "conditions" if doing so is roughly proportional to the impacts of that development both in nature and extent. The City theoretically could take the position that it can expect private development to install the access/transportation work it was unwilling to do, but nothing suggests that the City has the authority to shift those burdens to private development (in whole or part), and a court or LUBA is likely and capable of reversing such a determination. When that happens, there is no mechanism to ensure the required improvements are actually built. Ever.

The proposal fails to demonstrate that the City can maintain its Goal 9 (Economic Development) compliance when required access/transportation improvement standards that are acknowledged to provide the necessary transportation infrastructure to ensure safe and adequate operations occur for "commercial development" in the City, may never be installed. For example, the Loop Road is supposed to be a collector road. It can never serve that role if adjacent property for whatever reason either cannot be required or is not required by the City to provide required improvements and the City does not require itself to provide required improvements. The City did not bother or establish the required right of way or pavement for either a minor collector or a neighborhood collector to ever be installed. Similarly, the City's

Goal 12 compliance hinged on the City's compliance with the IAMPs and the City TSP and the implementing access regulations to include those in BDC Chapter 3 that the City under the proposal hopes to give itself authority to "defer" forever. If the proposal is adopted, the City will no longer comply with OAR 660-012-0020(2)(a); 045(3)(b)(B); 610; 620; 810; 820; 905, among others.

Similarly, if the City were to defer required road improvements for housing, the City would have a Goal 10 (housing) problem caused by the proposal. The City's Goal findings are utterly deficient.

In addition to presenting direct Goal compliance problems, the proposal has impermissible secondary effects on the City's continued Goal compliance that are completely ignored by the proposed findings. It is settled that review for compliance with state planning goals is not limited to provisions that the proposed amendments directly affect. *1000 Friends of Oregon v. Jackson County*, 79 Or App 93 (1986) (*Jackson County*). Rather, as the Court of Appeals explained in *Jackson County*, amendments can affect provisions of the City code and here the City TSP that are not directly changed by the proposal because the application of the proposed amended provisions can create problems that did not exist at a the time of acknowledgement. Here, at the time of acknowledgement, the City's Goal 9 and 12 compliance was inexorably tied to compliance with the very standards that the City now purports to give itself authority to defer. Similarly, City goal compliance was tied to the City's downtown interchange IAMP. The proposal errs on this basis as well.

The proposal authorizes the City to indefinitely "defer" required transportation infrastructure requirements for its own road projects or those improvement required for the development of its own property but also for that of any "public agency" – presumably including ODOT or UEC or Morrow County, or the school district, or any other public agency that one can think of. Thus, when UEC or ODOT or the school district develop- their properties, say if ODOT develops a rest area or UEC an office, or the district a new school, and would be otherwise required to install access/transportation infrastructure, they can be excused from performing required infrastructure improvements on the false claim (in City findings) that "adjacent" private property owners are "likely" to install it for those public agencies. Nothing will ever assure that such a fantasy will become reality and so required road improvements will never happen.

Moreover, the IAMP contemplates specific congestion at the I-84 interchange ramps to trigger particular Loop Road improvements; improvements the proposal can "waive off" on the claim that someday "adjacent" development will install them. For example, the IAMP states that Laurel Lane will be widened to include a center turn lane between Yates Lane and the 1-84 Westbound ramp terminal" to include "a 16' wide center turn lane will allow left-turning vehicles on Laurel Lane to wait for a gap in traffic to make their turn without impeding free flowing through or right-turning traffic; thereby improving operations and reducing the likelihood of vehicles stacking from one ramp terminal through another. The IAMP establishes the timing of these improvements. "This improvement would be constructed when one of the ramp terminal intersections along this section of Laurel Lane fails to meet its operational standard or when the

95th-percentile queue from one intersection stacks in front of another." The proposal allows the City to ignore this, and any other critical timing component established in the City IAMP's or TSP or code and merely "defer" required improvements, regardless of whether the required trigger for the improvement is met.

Compounding this problem is the fact that "adjacent" property may never be developed until long after the IAMP or other trigger necessitating them is met or those properties may be developed in a way that does not justify the City imposing conditions of approval requiring private property owners to construct the infrastructure the City erroneously failed to install in the first place. Even if the city makes the "findings" contemplated by the proposed amendment, as noted above, there is certainly the potential that such findings will be overturned by LUBA, a state court or a federal court, posing just another reason why the access and transportation improvements that the City code, TSP and IAMP require, will never be built if the proposed amendment is adopted.

Further, nothing in the TSP contemplates that the City will itself build or allow others to build or neglect to build any City street including "lateral improvements" in whole or part, including the Loop Road, below the standards required by the TSP and City code. For example, the POM IAMP (which is a part of the City's TSP) is express that the Loop Road will be built to collector standards. LUBA agreed and agreed that it appeared the standard was to build the Loop Road to the minor collector standard. That is now the final decision that binds the City because the City failed to respond to LUBA's remand in the required period for doing so. The City did not build the Loop Road to minor collector standards or even neighborhood collector standards for that matter, not having the paved width or lateral improvements required for either type of collector, and of course the City installed none of the required "lateral improvements." The City failed to obtain adequate right of way to ever establish the Loop Road to any collector standards.

Therefore, it is undeniable that the proposal:

1. Is an amendment to the City zoning ordinance that has a "significant effect" on City transportation facilities under the state Transportation Planning Rule (TPR) and the City has undertaken none of the required steps to address that fact. The proposal is designed at least in part to give the City authority to attempt to justify the City's construction of the Loop Road to less than required functional standards (lacking right of way and pavement that is required for a minor collector or for that matter a neighborhood collector). That at a minimum triggers the "significant effect" prong of OAR 660-012-0060(1)(a). It impermissibly proposes to allow the degradation of the performance standards established in the IAMP/TSP for any City transportation facility constructed in whole or part by any public agency (even for their own development), on the idea that adjacent private development is "likely" to someday fix that problem. That triggers OAR 660-012-0060(1)(c)(B). The proposal is simply a legal nonstarter.
2. Is contrary to the City's obligations in the POM IAMP; the Downtown Interchange IAMP, the City TSP and Comprehensive Plan;

3. Is contrary to Goal 12 and the TPR because the City justified its compliance with Goal 12 on the basis of transportation and access improvements being developed per the IAMP and not being deferred potentially forever. It is also contrary to Goal 9 and Goal 10 because required access and transportation improvements may never be built. The proposal has secondary effects on the City's continued compliance with all state planning goals.

The Proposal's Justification is an Obvious, Ineffectual Ruse

Staff purports to justify the proposal, claiming that it is a response to LUBA's opinion that held that the City violated the law when it constructed parts of the Loop Rd without complying with mandatory requirements of the City's code:

> 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.

And asserting that somehow not building required infrastructure is "responsible" municipal behavior and nothing could be further from the truth. The staff report states:

> This memorandum is provided to assist in your review and consideration of an amendment to the Boardman Development Code (BDC) that is intended to provide the City of Boardman flexibility in accomplishing public improvement projects prior to full development of adjoining lands. The need for the amendment was identified in a recent case at the Land Use Board of Appeals (LUBA) filed by Jonathan Tallman and 1st John 2:17 LLC. The amendment will provide the City additional flexibility citywide when future opportunities arise that allow the City to defer construction of ancillary or amenity improvements and allow the city to focus public investment on infrastructure (water, wastewater, and pavement).

The idea that transportation and access infrastructure "are likely to be removed to accommodate the developer's site plan" is silly and is not supported by ***any*** adequate factual basis or substantial evidence for that matter. When the City or any other public agency develops public transportation and access infrastructure to required standards, that helps, incentivizes, and enables adjacent properties to develop. There is nothing, and that is zero, evidence to suggest that any developer in their right mind is going to tear out streetlights, or sidewalks, or bike lanes, or access points, or property sized collector streets to put in a driveway. There may be modest adjustments, but there will not be wholesale removal of any infrastructure for "driveways" and the idea peddled by staff to this effect is wrong if not insulting.

The truth is exactly to the contrary. It is well understood that having "shovel ready" industrial property – with properly installed public infrastructure in place is critical and is the key feature that enables development to happen in a City in the first place. In this regard, the Oregon legislature in 2023 convened a task force about industrial development, specifically semiconductor development. That taskforce was very clear that one of the critical issues

Oregon's Metro area faces is that it lacks "shovel ready" industrial sites – which includes a lack of industrial sites with adequate access/transportation infrastructure. Here, the City was and is perfectly capable of installing the Loop Road to required standards but wholly neglected to do so. Snippets from the report of the task force is illuminating:

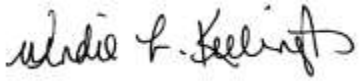
> Most troubling is the paucity of large sites that are "Tier 1" or "development ready", meaning they have infrastructure in place and development can begin within six months or less. The Metro region currently has only two development ready sites totaling 82 acres. There are only six sites in the Tier 2 category, meaning they require significant permitting and infrastructure improvements to be developed within three years. This subcommittee determined that only three of those six sites and 352 acres would meet the industry's site requirements (including those listed above and other factors like site grade).
>
> Notably, there are no development ready sites of the size needed to attract a major semiconductor investment, or to support larger size suppliers.

The Mayor of the City of Albany lamented that city had lost out on "at least five new companies highly interested in investing in Albany" because Albany lacked adequate transportation infrastructure and the cost to provide it was way beyond the capacity of even the semiconductor industry:

> lands. We have been overlooked in this last year alone by at least five large, new companies highly interested in investing in Albany. Ultimately, these companies did not invest in Albany because the cost and timeline for a shovel ready project far exceeded market driven timelines and costs. For perspective, our two largest industrial zoned sites (242 acres and 67 acres respectively) would support several hundred new, high paying jobs. But combined, both carry a shovel ready cost of nearly $43M for transportation access alone. Additionally, regulatory requirements for any required wetland remediation adds years to the site readiness timeline.
>
> It has been our sad experience that we have repeatably missed out on transformative investments because we lack the financial capacity to support the creation of shovel-ready lands on our own. Unfortunately, the state as a whole, has also missed out on the payroll tax generation those projects represent, further hampering efforts to address homelessness, affordable housing, education, and environmental projection.

The truth is that the only evidence that there is that the City's IAMPs and TSP and code require certain transportation infrastructure because it has been determined that transportation infrastructure is necessary for a safe and adequate transportation system. The type of required facilities (collector), the width of required right of way for those facilities, the required amount of pavement, the access points, the bike lanes, sidewalks, streetlights, landscaping, have all been legislatively determined to be necessary to a livable City and is how the City demonstrated its compliance with Goal 12, Goal 9 and other goals. The City's proposed wholesale abandonment of those requirements on the idea that it can foist improving intentionally inadequate public infrastructure on adjacent private development is a legal and policy nonstarter. The City should reject the proposal. Thank you for your consideration.

Very truly yours,



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