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.

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.

Opinion by Ryan.

NATURE OF THE DECISION

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

MOTION TO INTERVENE

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

FACTS

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

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[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.

ORS 772.210 and ORS chapter 35 to acquire an easement on the subject property for the transmission line.[3] On October 28, 2021, the circuit court granted intervenor's motion for advance occupancy of the easement under ORS 35.275.[4] Intervenor had previously deposited funds with the court, and petitioners later withdrew those funds.[5] Record 6, 8, 106.

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[3] ORS 772.210 provides, in part:

> "(1) Any public utility, electrical cooperative association or transmission company may:
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> "* * * * *
>
> "(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. * * *
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> "* * * ** *
>
> "(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

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

FIRST ASSIGNMENT OF ERROR

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

> "Applications for approval under this chapter may be initiated by:
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> "(1) Order of City Council;
>
> "(2) Resolution of the Planning Commission;
>
> "(3) The City Manager;
>
> "(4) *A record owner of property (person(s) whose name is on the most recently recorded deed)*, or contract purchaser with written permission from the record owner." (Emphasis added.)

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

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

> "When an application is received by the City, the City Manager 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;
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> "* * * * *
>
> "(3) The signature of the applicant on the required form *and* signed written authorization of the property owner of record *if the applicant is not the owner*." (Emphases added.)

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

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

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

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

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

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

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

Petitioners argue that the parenthetical after the phrase "a record owner of property" in BDC 4.1.700(D)(1)(a)(4), which states, "person(s) whose name is on the most recently recorded deed," is the definition of "a record owner" for purposes of BDC 4.1.700(D)(1)(a)(4).[6] Because intervenor's name is not on the most recently recorded deed for the subject property, petitioners argue that the city council erred in concluding that intervenor qualifies as "a record owner" of the subject property.

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

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[6] BDC chapter 1.2 sets out definitions for the BDC. The phrase "record owner" is not defined in that chapter.

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

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

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

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

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

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

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

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

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

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

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

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

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

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

The city council found:

> "12. An electrical line like the transmission line is an outright permitted use in the SC Zone. BDC 2.2.200(B) states that 'the land uses listed in Table 2.2.200E are permitted in the [SC] Sub District, subject to the provisions of this Chapter.' Section 2.b of that table, in turn, lists the following as an outright permitted use: 'Private utilities (e.g. natural gas, electricity, telephone, cable and similar facilities).' Where a use listed in Table 2.2.200B is subject to any additional standards beyond those in BDC Chapter 2.2.200, the table notes which additional standards apply. For private utilities, no additional standards are listed.
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> "13. [Intervenor] is a private utility providing electricity. The record demonstrates [intervenor] is a private cooperative organized under ORS Chapter 62. [Intervenor] is registered as such with the Oregon Secretary of State.
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> "14. The Planning Commission received testimony making various arguments that [intervenor] is not a private utility for purposes of BCC 2.2.200, because it is not the type of 'private utility' contemplated by the Code. The Planning Commission found 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." Record 3-4.

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

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

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

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

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

We agree with respondents that the city council did not conclude that the proposed transmission line is a "private utility" allowed in the C-SC zone simply because intervenor is a private electric cooperative under ORS chapter 62. Respondents first argue that, to the extent the findings suggest that that is what the city council concluded, petitioners invited that error by virtue of arguments that they made below. Specifically, respondents point out that petitioners argued that the community development director erred in approving the application because, "[i]n the first place, [intervenor] is not a 'private utility.'" Record 167. We agree with respondents that "[p]etitioners cannot urge the City to deny the Application on the basis that [intervenor] is not a private utility and then argue to LUBA that [intervenor's] status as a private utility is 'irrelevant.'"[7] Joint Respondent's and Intervenor-Respondent's Brief 19.

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

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[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.

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

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

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

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

The second assignment of error is denied.

THIRD ASSIGNMENT OF ERROR

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

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

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

does not contain criteria specific to zoning permits.[8] Respondents also respond that the city council *did* apply relevant site design review criteria, and petitioners do not challenge the city council's finding that those criteria are met. We agree. The city council found:

> "The materials submitted by [intervenor] 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." Record 5.

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

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[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.

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

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

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

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

The third assignment of error is denied.

The city's decision is affirmed.