

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

3
4 PORTLAND GENERAL ELECTRIC COMPANY,
5 *Petitioner,*

6
7 vs.

8
9 CLACKAMAS COUNTY,
10 *Respondent,*

11
12 and

13
14 SAVE STAFFORD ROAD,
15 *Intervenor-Respondent.*

16
17 LUBA No. 2024-069

18
19 FINAL OPINION
20 AND ORDER

21
22 Appeal from Clackamas County.

23
24 William L. Rasmussen filed the petition for review and reply brief and
25 argued on behalf of petitioner. Also on the briefs were Steven G. Liday,
26 Souvanny Miller, and Miller Nash LLP.

27
28 Caleb Huegel filed the respondent's brief and argued on behalf of
29 respondent. Also on the brief was Jane E. Vetto.

30
31 Gregory S. Hathaway represented intervenor-respondent.

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33 ZAMUDIO, Board Chair; RYAN, Board Member, participated in the
34 decision.

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36 RUDD, Board Member, did not participate in the decision.

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38 RYAN, Board Member, concurring.

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REMANDED

01/23/2025

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

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NATURE OF THE DECISION

Petitioner appeals a planning director decision voiding petitioner’s application for alteration of a nonconforming use.

MOTION TO INTERVENE

Save Stafford Road moves to intervene on the side of respondent. The motion is unopposed and is allowed.

BACKGROUND

In May 2023, petitioner, a public utility electric company, sought county approval to replace existing power lines and 137 power poles in a 7.4-mile corridor along SW Stafford Road. 124 poles would be located entirely within the public right-of-way and seven poles would be located on a tax lot petitioner owns. Six poles would be located on private property. Power line or vegetation maintenance easements are needed on 25 properties. The proposed improvements are part of a greater regional expansion and upgrading of petitioner’s infrastructure in the south Portland metropolitan area. Record 201. The planned upgrades to the SW Stafford Road transmission lines will increase carrying capacity and create a link between the Rosemont and Wilsonville substations, allowing petitioner to reroute power between the stations to avoid power outages during extreme weather events. *Id.*

Forty-two of the poles would be located on land that is zoned Exclusive Farm Use (EFU) and 95 of the poles would be located on land zoned Rural

1 Residential Farm and Forest 5-acre (RRFF-5). In the EFU zone, utility lines are
2 an outright permitted use. ZDO 401.04(A)(1); Table 401-1 at 401-7. Petitioner
3 first applied only for a right-of-way permit. In April 2024, county planning staff
4 informed petitioner that utility lines in nonagricultural zones are a conditional
5 use, and thus, petitioner’s project would require land use review. Petitioner
6 disagreed but elected to proceed with an application for alteration of a
7 nonconforming use because the project consists of upgrades to existing
8 transmission and distribution lines. Record 250.

9 On June 6, 2024, petitioner submitted its application. On July 5, 2024, the
10 county issued an incompleteness notice to petitioner listing three items of missing
11 information, including written authorization of the property owner for those
12 segments of transmission lines outside the public right-of-way or existing public
13 utility easement. Record 165-66. Clackamas County Zoning and Development
14 Ordinance (ZDO) 1307.07(A) provides:

15 “A. Initiation of Applications: Type I, II, II-E, and III land use
16 permit applications may be initiated by:

17 “1. The owner of the subject property;

18 “2. The contract purchaser of the subject property, if the
19 application is accompanied by proof of the purchaser’s status
20 as such;

21 “3. The agent of the owner or contract purchaser of the subject
22 property, if the application is duly authorized in writing by
23 the owner or the contract purchaser, and accompanied by
24 proof of the agent’s authority; or

1 “4. If the application is for Comprehensive Plan designation or
2 zoning of a Historic District or Historic Corridor, the owners
3 or contract purchasers of at least 60 percent of the property
4 within the area to be so designated or zoned.”

5 ZDO 202 defines “owner” as “[p]erson or persons holding fee title to a parcel,
6 lot or tract of land, except in those instances when the land is being sold on
7 contract, the contract purchaser shall be deemed the owner.”

8 Petitioner did not provide the county with owner authorization for the six
9 poles on private land or for the properties over which a utility easement is needed.
10 Instead, petitioner explained that it has authority under state law to construct
11 transmission lines along public roads and over private land pursuant to its
12 condemnation authority in ORS 758.010 and ORS 772.210. Record 210-11.

13 The incompleteness notice stated that petitioner must provide the missing
14 information within 180 days of the notice or the application would be deemed
15 void, pursuant to ZDO 1307.07(E). Record 165. ZDO 1307.07(E) provides, in
16 part:

17 “3. Determination of completeness shall be based upon the
18 submittal requirements of Subsection 1307.07(C)(1) and shall not
19 be based on opinions as to quality or accuracy. A determination that
20 an application is complete indicates only that the application is ready
21 for review on its merits, not that the County will make a favorable
22 decision on the application.

23 “* * * * *

24 “5. If an application is determined to be incomplete, written
25 notice shall be provided to the applicant identifying the specific
26 information that is missing and allowing the applicant the
27 opportunity to submit the missing information. This written notice

1 shall be provided within 30 days of receipt of a Type II or Type III
2 application and within 21 days of receipt of a Type II-E application.
3 The application shall be deemed complete upon receipt by the
4 Planning Director of:

- 5 “a. All of the missing information;
- 6 “b. Some of the missing information and written notice from the
7 applicant that no other information will be provided; or
- 8 “c. Written notice from the applicant that none of the missing
9 information will be provided.

10 “6. If the application was complete when first submitted, or the
11 applicant submits additional information, as described in Subsection
12 1307.07(E)(5), within 180 days of the date the application was first
13 submitted, approval or denial of the application shall be based upon
14 the standards and criteria that were applicable at the time the
15 application was first submitted.

16 “7. On the 181st day after first being submitted, a Type II or III
17 application is void, if the applicant has been notified of the missing
18 information as required under Subsection 1307.07(E)(5) and has not
19 submitted the missing information or otherwise responded, as
20 provided in Subsection 1307.07(E)(5).”

21 ZDO 1307.07(E) implements ORS 215.427.¹

¹ ORS 215.427(2) provides:

“If an application for a permit, limited land use decision or zone change is incomplete, the governing body or its designee shall notify the applicant in writing of exactly what information is missing within 30 days of receipt of the application and allow the applicant to submit the missing information. The application shall be deemed complete for the purpose of subsection (1) of this section and ORS 197A.470 upon receipt by the governing body or its designee of:

- “(a) All of the missing information;

1 On August 8, 2024, after the application was filed, the county adopted
2 ZDO amendments making transmission lines along the right-of-way in the
3 RRFF-5 and other nonagricultural zones a conditional use. Petition for Review
4 Appendix 1-323. On August 19, 2024, petitioner submitted some additional
5 information and written notice that no other missing information would be
6 provided, including that petitioner would not provide the requested written owner
7 authorizations. Record 114; 125-30. On September 13, 2024, the planning
8 director informed petitioner that the county had voided the application because
9 petitioner was not eligible to initiate the application due to the owner-
10 authorization code provision. Record 8-14. This appeal followed.

11 Petitioner raises three assignments of error and requests that we reverse or
12 remand the county’s decision voiding the application so that the county must
13 make a decision on the merits of petitioner’s nonconforming use application
14 based upon the standards and criteria that were applicable at the time the
15 application was first submitted. First, petitioner argues that the planning director
16 misconstrued the ZDO 1307.07(A) application initiation provision because that
17 provision does not apply to petitioner, a public utility with condemnation
18 authority. Second, petitioner argues that even if ZDO 1307.07(A) is facially

“(b) Some of the missing information and written notice from the applicant that no other information will be provided; or

“(c) Written notice from the applicant that none of the missing information will be provided.”

1 applicable, it is preempted by state law. Third, petitioner argues that even if ZDO
2 1307.07(A) is facially applicable and not preempted, ORS 215.427 requires the
3 county to proceed to a decision on the merits of the application after it has
4 accepted the application, and the county may not “void” the application. For the
5 reasons explained below, we agree with petitioner that the planning director
6 misconstrued the local code and sustain the first assignment of error. We do not
7 reach or resolve the second and third assignments of error.

8 **FIRST ASSIGNMENT OF ERROR**

9 As explained above, the planning director determined that petitioner’s
10 application was void because it was not authorized by the owners of all the
11 affected properties and, thus, failed to satisfy the initiation requirement in ZDO
12 1307.07(A). Petitioner argues that the planning director misconstrued ZDO
13 1307.07(A). Petitioner argues that the application initiation provision is not
14 prescriptive or exclusive. Rather, ZDO 1307.07(A) includes a permissive list of
15 whom may initiate a land use application, but does not prohibit petitioner, as a
16 public utility with condemnation power, from initiating a land use application.

17 The county responds that ZDO 1307.07(A) is exclusive and only those
18 listed individuals may initiate a land use application. The county argues that to
19 construe ZDO 1307.07(A) as nonexclusive would render that provision
20 meaningless.

21 In interpreting local code, LUBA and courts will consider the text, context,
22 and legislative history to determine the intent of the enacting body. *State v.*

1 *Gaines*, 346 Or 160, 171-72, 206 P3d 1042 (2009); *PGE v. Bureau of Labor and*
2 *Industries*, 317 Or 606, 610-12, 859 P2d 1143 (1993). LUBA owes no deference
3 to the planning director’s interpretation of the ZDO. Rather, we review the
4 interpretation to determine whether it is correct. *McCoy v. Linn County*, 90 Or
5 App 271, 275, 752 P2d 323 (1988).

6 **A. Text**

7 Petitioner argues that ZDO 1307.07(A) is nonexclusive because it includes
8 the phrase “may be initiated by.” Petitioner argues that “[t]he open-ended nature
9 of this code provision means that a nonowner entity can initiate an application
10 for a land use permit if the proposed development is authorized elsewhere in the
11 local code or state law, regardless of owner approval. In such cases, like the
12 Application here, the authorization of owner-initiated applications in ZDO
13 1307.07(A) is inapplicable and irrelevant.” Petition for Review 15. Petitioner
14 argues that ZDO 1307.07(A) is an authorization for land use application initiation
15 and is not a restriction or prohibition on petitioner’s application. Petitioner argues
16 that the planning director’s interpretation impermissibly inserts the term “only”
17 into ZDO 1307.07(A), in violation of the rule of construction that an interpreting
18 entity not “insert what has been omitted.” ORS 174.010.

19 Petitioner points out that, under the director’s interpretation, public utilities
20 could not seek county approval for transmission lines because they are, by and
21 large, built on the public-right-of-way or on easements over private land.
22 Petitioner explains that public utilities typically do not own and are not contract

1 purchasers of the right-of-way, and thus, under the director’s view, could not
2 initiate an application for the land use approval of transmission lines. Petitioner
3 argues that interpretation is “unworkable” and creates an avoidable conflict
4 between ZDO 1307.07(A) and ORS 758.010, which authorizes public utilities to
5 construct transmission lines along public roads and over private land outside of
6 cities.²

7 The county responds that the only way the initiation authorization in ZDO
8 1307.07(A) has any meaning is if it authorizes what is otherwise prohibited. The
9 county argues that the enumeration of entities in ZDO 1307.07(A) means that all
10 others are excluded from initiating a land use application, invoking the canon of
11 construction *expressio unius est exclusio alterius*, which means that the
12 expression of one is the exclusion of others. *Expressio unius* may be helpful
13 guidance when there is support in the text or context that a list of enumerated
14 terms was intended to be exhaustive. *Colby v. Gunson*, 224 Or App 666, 671-72,

² ORS 758.010(1) provides:

“Except within cities, any person has a right and privilege to construct, maintain and operate its water, gas, electric or communication service lines, fixtures and other facilities along the public roads in this state, as defined in ORS 368.001 or across rivers or over any lands belonging to state government, as defined in ORS 174.111, free of charge, and over lands of private individuals, as provided in ORS 772.210. Such lines, fixtures and facilities shall not be constructed so as to obstruct any public road or navigable stream.”

1 199 P3d 350 (2008). The county points to no textual or contextual support that
2 the county intended ZDO 1307.07(A) to prohibit public utilities from initiating
3 land use applications.

4 We agree with petitioner that the planning director’s conclusion that ZDO
5 1307.07(A) is exclusive and a prohibition is not supported by the text. However,
6 that conclusion does not mean that *any* person may initiate a land use application.
7 Instead, we need only conclude in this case that ZDO 1307.07(A) does not
8 prohibit a public utility with condemnation authority from initiating a land use
9 application.

10 **B. Conflict with State Law**

11 The county asserts that “[w]hether the Planning Director correctly
12 interpreted ZDO 1307.07(A) and whether ZDO 1307.07(A), as correctly
13 interpreted, is preempted or unconstitutional are different issues.” Respondent’s
14 Brief 9. We agree with petitioner that conflict with state law is relevant to whether
15 the planning director correctly interpreted ZDO 1307.07(A).

16 The parties acknowledge the canons of construction that statutes should be
17 interpreted to avoid even potential constitutional violations and conflicts with
18 other statutes—known as the avoidance canon of construction. *State v. Bordeaux*,
19 220 Or App 165, 175, 185 P3d 524 (2008). The avoidance canon is an exercise
20 of the prudential principle that courts should avoid conflicts with the legislative
21 branch. The county argues that petitioner has not identified a canon of
22 construction that requires that local code provisions be interpreted to avoid

1 conflicts with state statutes or rules. Respondent’s Brief 9. Petitioner cites two
2 cases in which the Court of Appeals and LUBA have affirmed a local
3 government’s interpretation of local code, in part, because the interpretation
4 avoided any conflict with state condemnation statutes.

5 In *Schrock Farms, Inc. v. Linn County*, we affirmed the county’s Goal 3
6 exception and comprehensive plan amendment, which allowed respondent
7 Oregon Department of Transportation (ODOT) to construct a highway
8 realignment on the petitioners’ property in an EFU zone that was the subject of
9 an ODOT condemnation action. 31 Or LUBA 57, *aff’d*, 142 Or App 1, 919 P2d
10 519 (1996). The petitioners argued that, because the condemnation action had not
11 yet resulted in a judgment, and notwithstanding the fact that ODOT had taken
12 possession of the property pursuant to ORS 35.265, ODOT did not have the
13 interest in the property necessary to allow it to seek land use approvals from the
14 county because the local code required owner authorization. In that case, ODOT
15 had not completed condemnation proceedings. In fact, the trial court had
16 dismissed ODOT’s condemnation action, and the Court of Appeals had affirmed
17 that dismissal, because ODOT had not demonstrated that the proposed
18 development was a permitted land use. We concluded, and the Court of Appeals
19 agreed, that ODOT had sufficient interest in the property to seek county land use
20 approval. The court reasoned that “even if the local provisions by their terms
21 could be read to prevent ODOT from making the applications as petitioners
22 assert, the effect would be that ODOT could not gain the necessary approvals to

1 put the property to a public use until it had already acquired the property through
2 a judgment in the condemnation proceeding.” 142 Or App at 4. The court agreed
3 with ODOT that reasoning would create a “Catch-22 situation [that] would
4 effectively nullify significant aspects of the state condemnation statutes[.]” *Id.*
5 That is, if ODOT could not condemn the property without first establishing that
6 the use is a permitted land use and ODOT could not initiate a land use application
7 until after condemning the property, then there would be no avenue by which to
8 advance the public works project.

9 In *1st John 2:17, LLC v. City of Boardman*, the petitioners appealed a city
10 council decision approving Umatilla Electric Cooperative’s (the intervenor’s)
11 installation of a 230-kilovolt transmission line. LUBA No 2022-029 (Oct 13,
12 2022). In that case, the circuit court had granted the intervenor’s motion for
13 advance occupancy of an easement under ORS 35.275. Relying on *Schrock*
14 *Farms*, we rejected the petitioners’ narrow interpretation of the city code owner
15 authorization provision because, under the petitioners’ proposed construction, the
16 code would have prevented the exercise of the intervenor’s condemnation
17 authority.

18 Neither *Schrock Farms* nor *1st John* relied on a conclusion that the local
19 code owner authorization provision was preempted by state condemnation
20 statutes. Instead, the reasoning in those cases is aligned with a principle that, if
21 possible, local code provisions should be interpreted to avoid conflicts with the

1 operation of state statutes. We see no reason why, in this case, the avoidance
2 canon should not be applied in that manner.

3 The county argues, and we agree, that the avoidance canon is not a textual
4 rule of construction. That is, the avoidance canon should not be used to override
5 text. We explain above why we agree with petitioner that the text of ZDO
6 1307.07(A) is not correctly read as exclusive and a prohibition on petitioner
7 initiating the application and we reject the county’s argument that ZDO
8 1307.07(A) is clear in light of the *expressio unius* principle. Therefore, our
9 reasoning based on the avoidance canon merely supports our textual conclusion.

10 The avoidance canon and the parties’ preemption arguments are directed
11 at the same issue—that is, whether the planning director’s interpretation of ZDO
12 1307.07(A) conflicts with petitioner’s exercise of their statutory condemnation
13 authority.³ The county argues that there is no conflict between the planning
14 director’s interpretation of ZDO 1307.07(A) and the applicable condemnation
15 statutes. The county reasons that ORS 758.010 authorizes persons, outside cities,
16 to construct transmission lines along public roads and over private property as
17 provided in ORS 772.210, which authorizes public utilities to condemn certain
18 lands. There is no dispute that the necessary property interests have not yet been
19 condemned. The county posits that it is possible that the necessary property

³ Petitioner emphasizes that their statutory condemnation authority exists for the public benefit so that petitioner may effectively provide safe and reliable power to their customer base, which includes property in cities and counties.

1 interests may never be condemned. The county argues that there is no conflict
2 with requiring petitioner to obtain the necessary property interest *prior to*
3 initiating a land use application. The county argues that petitioner may initiate a
4 land use application only after it has condemned the necessary private property
5 rights for public use. We agree with petitioner that such an interpretation of ZDO
6 1307.07(A) conflicts with the state condemnation statutes and could result in
7 needless waste of public resources.

8 Under the county's interpretation, a public utility would be required to
9 condemn (and pay compensation for) private property prior to determining
10 whether it can obtain necessary land use approval to develop the use on that
11 property. In addition, as petitioner points out, the county's interpretation
12 essentially allows individuals or entities who oppose plans for public utility
13 development on or over property they own in the county to effectively obstruct
14 or delay a county determination of whether the development satisfies county land
15 use standards. Whether we call it avoidance, preemption, or pragmatism, the
16 order of operations and division of authority that the county advocates for and
17 hangs entirely on ZDO 1307.07(A) is contrary to the statutory scheme that
18 permits petitioner to advance its public project planning and permitting processes
19 with due process within the condemnation process for property owners who
20 oppose the development. We agree with petitioner that ZDO 1307.07(A) cannot
21 be used to vindicate private property interests where the applicant has
22 condemnation authority and seeks to obtain land use approval prior to completion

1 of condemnation proceedings. Instead, we agree that petitioner has initiated the
2 application and has complied with the statutory procedure in ORS 215.427
3 regarding notification to the county to proceed. Accordingly, the county must
4 reach a decision on the merits. We agree with petitioner that the director
5 misconstrued ZDO 1307.07(A).

6 The first assignment of error is sustained.

7 **SECOND ASSIGNMENT OF ERROR**

8 Petitioner argues that even if ZDO 1307.07(A) is facially applicable, it is
9 preempted by state law. Under the first assignment of error, we agree with
10 petitioner that the county misconstrued the local code, in part because the
11 planning director’s interpretation conflicts with petitioner’s exercise of its
12 statutory condemnation authority. We need not and do not decide the distinct
13 issue of whether ZDO 1307.07(A) is preempted by state law. We do not reach or
14 resolve the third assignment of error.

15 **THIRD ASSIGNMENT OF ERROR**

16 Petitioner argues that even if ZDO 1307.07(A) is facially applicable and
17 not preempted, ORS 215.427 requires the county to proceed to a decision on the
18 merits of the application after it has accepted the application, and not “void” the
19 application. We do not reach or resolve the third assignment of error.

20 **DISPOSITION**

21 The challenged decision is the director’s decision that petitioner’s
22 application is “void” because petitioner lacked authority to initiate the

1 application. We sustain the first assignment of error and conclude that decision
2 improperly construes the applicable law. On remand, the county must consider
3 and decide petitioner's application on the merits.

4 The county's decision is remanded.

5 RYAN, Board Member, concurring.

6 I agree with the resolution of the appeal. I write separately to explain that
7 if we reached it, I would sustain petitioner's third assignment of error. Under the
8 statutory requirements governing applications for permits, the only authorization
9 to void an application is where an applicant has failed to respond to an
10 incompleteness notice within 180 days. ORS 215.427(4), *as implemented in ZDO*
11 *1307.07(E)*. ZDO 1307.07 implements ORS 215.427 and must be interpreted and
12 applied consistently with the statute.

13 ORS 215.427 provides in relevant part:

14 “(2) If an application for a permit, limited land use decision or
15 zone change is incomplete, the governing body or its designee
16 shall notify the applicant in writing of exactly what
17 information is missing within 30 days of receipt of the
18 application and allow the applicant to submit the missing
19 information. *The application shall be deemed complete for*
20 *the purpose of subsection (1) of this section * * * upon receipt*
21 *by the governing body or its designee of:*

22 “(a) All of the missing information;

23 “(b) Some of the missing information and written notice
24 from the applicant that no other information will be
25 provided; or

1 “(c) Written notice from the applicant that none of the
2 missing information will be provided.

3 “* * * * *

4 “(4) On the 181st day after first being submitted, the application is
5 void if the applicant has been notified of the missing
6 information as required under subsection (2) of this section
7 and has not submitted:

8 “(a) All of the missing information;

9 “(b) Some of the missing information and written notice
10 that no other information will be provided; or

11 “(c) Written notice that none of the missing information
12 will be provided.” (Emphasis added.)

13 Here, on July 5, 2024, the county notified petitioner “of exactly what
14 information” was missing from the application (Incompleteness Determination).
15 ORS 215.427(2). On August 27, 2024, petitioner responded to the
16 Incompleteness Determination. Record 107; 111 (checking the box on the
17 county’s form that “I am submitting the required information (attached)[]”). By
18 operation of ORS 215.427(2), the application was “deemed complete” upon
19 receipt by the county of petitioner’s response. If an applicant responds in
20 accordance with ORS 215.427(2)(a) to (c), the statute provides that the
21 application “shall be deemed complete” upon receipt of the response. That
22 language does not give the county the discretion to determine whether the
23 application should be deemed complete, or give the county any other option other
24 than to proceed to evaluate the application against the approval criteria. The

1 county was then required to proceed to a decision on the merits, and petitioner
2 was entitled to protection of the goal post statute at ORS 215.427(3)(a):

3 “If the application was complete when first submitted *or the*
4 *applicant submits additional information, as described in*
5 *subsection (2) of this section, within 180 days of the date the*
6 *application was first submitted * * ** approval or denial of the
7 application shall be based upon the standards and criteria that were
8 applicable at the time the application was first submitted.”
9 (Emphasis added.)

10 Accordingly, I agree with petitioner that the county lacked authority to deem the
11 application void and terminate its review after it received petitioner’s response to
12 the Incompleteness Determination.