



MEMORANDUM

To: Clackamas County Planning Commission

From: Jennifer Hughes, Planning Director (503-742-4518 or jenniferh@clackamas.us)

Date: February 20, 2024

RE: File ZDO-288, *Utility Facility ZDO Amendments*

The purpose of the February 26th study session is to:

- Update the Planning Commission on ZDO-288, which will include proposed amendments to the Zoning and Development Ordinance (ZDO) related to utility facilities; and
- Give the Planning Commission an opportunity to discuss issues and ask staff questions about proposed amendments that will be included in ZDO-288, in order to help prepare for an upcoming public hearing on this matter

BACKGROUND

Last fall, in response to a question from a land use attorney, Planning staff and County Counsel did a close review of the ZDO as it relates to utility facilities. As a result, it was determined that a conditional use permit likely is required for utility lines, even those that are underground and even in public road rights-of-way.

Although staff has previously understood that utility facilities outside rights-of-way potentially require land use review and has advised utility providers accordingly, utility facilities inside rights-of-way typically have proceeded through the utility permit process without review and analysis by Planning and Zoning. Given the new awareness of the scope of the needed land use review and the number of annual utility permits in rights-of-way (nearly 2,000 in 2022), a significant practical difficulty exists in administering the ZDO in its current form. From a policy perspective, many of these permits likely do not

warrant review through a land use application. The challenge before us is to identify which ones may.

The Board of County Commissioners (Board) held a policy session last November to consider the land use regulations applicable to utility facilities. After a staff presentation and related discussion, the Board voted to initiate amendments to the ZDO that, if adopted, would do the following:

1. Adopt a more comprehensive definition of “utility facility”
2. Limit the requirement for underground utilities to utility facilities that have a need for other utilities' services, rather than utility facilities that provide service to others
3. Allow the following outright: utility facilities inside the right-of-way and utility lines outside the right-of-way

In the context of the Board’s discussion, it was clear that the scope of the proposal could be narrowed during public hearing review, but beginning with the most expansive potential proposal would allow for the most accurate public notice of what the county may consider for adoption.

1. Definition

The ZDO definition of “public utility”, adopted substantially in its current form in 1982, presents practical difficulties in administration.

PUBLIC UTILITY: A utility regulated by the Public Utility Commission under ORS 757 or any other utility that provides electrical energy directly to consumers within the State of Oregon, including, but not limited to, municipalities, cooperatives and people's utility districts.

Based on staff’s initial review of ORS 757, this definition appears to exclude, for example, telecommunications, sanitary sewer and surface water management, as well as municipal water facilities. The ZDO has a separate “government uses” category that provides a pathway for *some* of these utilities. The ZDO also provides for “similar use” determinations in many zones through an additional layer of land use review.

Staff recommends that a more comprehensive definition of “utility facility” be adopted to include the full range of what is typically considered to be a utility. This will provide clarity for users of the ZDO, including Planning staff charged with administering the code.

2. Underground utilities

Section 1006 of the ZDO, which applies to development, including institutional uses such as utility facilities, includes the following standard:

All development that has a need for electricity, natural gas, and communications services shall install them pursuant to the requirements of the utility district or company serving the development. Except where otherwise prohibited by the utility district or company, all such facilities shall be installed underground.

Arguably, the requirement applies only to utility facilities that have a need for other utilities' services (e.g., a sewer pump station that requires electrical service), not utility facilities that provide service to others (e.g., an electric transmission line). Alternatively, a utility provider that proposes to establish an aboveground utility facility may be able to "prohibit" itself from an underground installation. However, it could also be argued that the requirement applies to all utility facilities and that "prohibited" requires something more substantial than a simple choice on the utility's part. Applying this standard to major utility lines, rather than just on-site service lines, potentially could result in substantially increased costs for utilities and ultimately ratepayers. Regardless of the policy choice that is ultimately made about the scope of the underground requirement, clarifying this provision will be helpful in staff's review of future applications for utility facilities.

3. Primary or conditional use

In most zones, public utility facilities are a conditional use except where they are accessory to the main use on a lot (e.g., service lines for a dwelling or commercial building). In several zones, utilities are listed only as an accessory use. The term "facilities" is a broad one and seems to encompass not just structures such as electrical substations and water reservoirs but also transmission, distribution and service lines and associated poles. In the Exclusive Farm Use, Timber and Ag/Forest zones, state law applies and establishes several different utility use categories, some of which are outright allowed and some of which require land use review.

Of note, road rights-of-way are zoned in the same manner as other land, with the zoning adjacent to the right-of-way most often extending to the centerline; hence, even utilities in rights-of-way are regulated by the ZDO. Utilities are commonly placed underground and overhead in rights-of-way; state law seemingly recognizes this by establishing the following as outright allowed in EFU, TBR and AG/F zones:

Reconstruction or modification of public roads and highways, including the placement of utility facilities overhead and in the subsurface of public roads and

highways along the public right of way, but not including the addition of travel lanes, where no removal or displacement of buildings would occur, or no new land parcels result.

In other zones, the ZDO makes no such distinction. As a result, utility facilities in rights-of-way (unless they qualify as an accessory use) seemingly require conditional use permits in all other zones where utilities are permitted, and there are several zones where such facilities may be prohibited altogether.

The code amendment that has been initiated would allow outright all utility facilities in road rights-of-way and all utility lines outside rights-of-way, both above- and belowground. What would remain as a conditional use in most zones are non-linear utility facilities outside rights-of-way, such as sewer pump stations, electrical substations and water reservoirs.

The amendments would not apply in EFU, TBR or AG/F zones where the ZDO already implements state law. In addition, even if utility facilities are identified as a primary use, review requirements associated with environmental or hazard areas (e.g., streams, wetlands, floodplains) would continue to apply.

4. Technical refinements

In developing the code amendments, there are technical issues to consider:

- Should the standards be the same in a public utility easement (PUE) adjacent to a road right-of-way (ROW) as they are within the ROW? It is relatively common for a PUE to exist adjacent to the ROW.
- For a linear facility, even underground, there may be ancillary equipment that is aboveground. Currently the ZDO has provisions for “utility carrier cabinets” as a primary use. We will need to consider whether this is sufficient to accommodate all aspects of a utility facility when determining what is allowed outright and what requires a conditional use permit.

UTILITY CARRIER CABINETS: A small enclosure used to house utility equipment intended for off-site service, such as electrical transformer boxes, telephone cable boxes, cable television boxes, fire alarm boxes, police call boxes, traffic signal control boxes, and other similar apparatus.

ZDO Section 830 establishes standards for these cabinets.

- A. Maximum Volume: *Unless approved pursuant to Section 1203, Conditional Uses, the maximum combined volume of all utility carrier cabinets located on a single lot shall be:*

1. *Forty cubic feet in a residential or OSM zoning district inside the Portland Metropolitan Urban Growth Boundary (UGB);*
2. *Two hundred cubic feet in a commercial or industrial zoning district inside the UGB; and*
3. *Two hundred fifty cubic feet outside the UGB.*

B. Maximum Height: The maximum height shall be five feet.

C. Setback Exemption: Utility carrier cabinets are exempt from the minimum setback standards of this Ordinance.

D. Contact Information: Utility companies shall clearly identify their carrier cabinets and provide an emergency telephone number where accidents or public safety concerns may be reported.

E. Design, Screening, or Landscaping: Within the Portland Metropolitan Urban Growth Boundary, utility carrier cabinets shall be designed, screened, or landscaped to blend with the development on the same lot of record or, if the utility carrier cabinet is in the right-of-way, with the development on the lot of record nearest the cabinet.

DISCUSSION ITEMS/QUESTIONS

- Should all utility facilities in road rights-of-way be allowed outright? In staff's view, this approach would be consistent with historic, typical use of rights-of-way and would have the effect of encouraging these facilities in rights-of-way rather than in alternate locations. In addition, it is common for zoning to be different along a right-of-way, even varying from one side to the other. By aligning with what already applies in the EFU, TBR and AG/F zones, administration of the ZDO will be simpler and more consistent.
- Should some facilities in rights-of-way remain a conditional use (e.g., electric transmission poles over a certain height or lines over a certain voltage)? Understandably there may be community concern about the safety and aesthetic impacts of certain utility facilities. That said, there is a clear need for utility lines to cross rural areas, and a conditional use permit process that denies such a line in one location may suggest that the line is more appropriate in a different rural right of way. What criteria would be most appropriate in making that determination?
- Should some utility facilities outside rights-of-way also be allowed outright (e.g., underground facilities or linear facilities)? Key factors to consider are anticipated impacts of these uses, particularly in residential areas.

To aid in the Planning Commission's consideration of these questions, here are the approval criteria for a conditional use permit:

- A. *The use is listed as a conditional use in the zoning district in which the subject property is located.*
- B. *The characteristics of the subject property are suitable for the proposed use considering size, shape, location, topography, existence of improvements, and natural features.*
- C. *The proposed use complies with Subsection 1007.07, and safety of the transportation system is adequate to serve the proposed use.*
- D. *The proposed use will not alter the character of the surrounding area in a manner that substantially limits, impairs, or precludes the use of surrounding properties for the primary uses allowed in the zoning district(s) in which surrounding properties are located.*
- E. *The proposed use is consistent with the applicable goals and policies of the Comprehensive Plan.*
- F. *The proposed use complies with any applicable requirements of the zoning district and any overlay zoning district(s) in which the subject property is located, Section 800, Special Use Requirements, and Section 1000, Development Standards.*

The citation to 1007.07 in C refers to compliance with a traffic congestion standard, which is not something that really applies to a utility line but would be relevant for a manned facility such as a wastewater treatment or water filtration plant.

NEXT STEPS

Staff will prepare the legislative text amendments necessary to implement the proposal as initiated by the Board. The full text of the proposed amendments, along with a brief summary of the proposed changes, will be available and posted online for review on March 4.

The hearing schedule for consideration of ZDO-288 is as follows:

Planning Commission: 6:30 p.m., Monday, April 8, 2024

Board of County Commissioners: 10:00 a.m., Wednesday, June 12, 2024