Outlook

EOA Comment for the Record — Submitted at City Council Meeting (Jonathan Tallman)"

From Jonathan Tallman <jonathan@tallman.cx>
Date Tue 2/3/2026 7:11 PM
To Amanda Mickles <micklesa@cityofboardman.com>; Brandon Hammond <HammondB@cityofboardman.com>
Cc Derrin Tallman <derrin@tallman.cx>

12 attachments (25 MB)

Transparency_Issue_Letter October 7.pdf; Boardman_PRR_9262025_Filled.pdf; Appellant's Reply Brief AWS.pdf; IMG_3520.jpeg; IMG_3657.png; IMG_2684.jpeg; dji_fly_20260128_131526_770_1769640614232_photo_optimized.jpeg; dji_fly_20260118_140250_717_1768776060986_photo_optimized.jpeg; dji_fly_20260128_131528_771_1769640615113_photo_optimized.jpeg; dji_fly_20260123_155600_721_1769213898972_photo_optimized.jpeg; dji_fly_20251114_153556_692_1763163605912_photo_optimized.jpeg; dji_fly_20240811_183318_498_1723426406334_photo_optimized.jpeg;

Chair, Mayor, Councilors — thank you. My name is Jonathan Tallman.

I want to offer brief comments tonight on the City's Economic Opportunities Analysis — the EOA — and I am also submitting these comments in writing into the official record.

The EOA is not just a neutral report. It becomes the foundation the City relies on for future land needs, infrastructure expansion, and growth assumptions. So it's important that the record reflect the real conditions shaping Boardman right now.

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1. Housing and rents are being distorted by transient industrial demand

First, Boardman is not experiencing ordinary, organic growth.

We are experiencing project-driven demand tied to large-scale industrial expansion and a transient workforce. That dynamic forces locals to compete with temporary housing pressures, which can distort rents and land values in ways that are not reflective of traditional community growth.

That context matters when the City adopts an EOA that assumes the market is functioning normally.

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2. Economic opportunity must account for real public costs, including water burdens

Second, economic development cannot be evaluated only on projected upside while ignoring public burdens.

Recent reporting has highlighted serious groundwater nitrate contamination concerns in this region and the multiplier effect industrial growth can impose on water systems and long-term accountability.

My point is not to litigate headlines — it is that an EOA must evaluate opportunity alongside infrastructure strain, water impacts, and public health externalities, not in isolation.

And importantly, these issues implicate the Oregon Water Resources Department — OWRD — which oversees municipal water rights, capacity, and "water-for-water" exchanges that often become necessary when large-scale industrial growth increases demand.

Before the City relies on EOA growth assumptions, the record should reflect whether OWRD has been formally consulted regarding adequate water supply and water rights capacity for the development being planned.

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3. The EOA is not occurring in isolation — it is part of a cumulative implementation chain

Third, I want the record to reflect a broader procedural concern.

The EOA is being advanced alongside other plans and actions, including:

- The City's Transportation System Plan
- The City's Parks Master Plan
- The Park & Recreation District's adopted plan
- The County Heritage Trail and Recreation Element updates
- And Port of Morrow corridor and trail actions

Individually, each is often described as "conceptual."

But collectively, these actions begin functioning as a connected implementation chain across jurisdictions.

My concern is corridor advancement through segmentation — where multiple agencies take incremental steps that together create real commitments, without a unified, transparent process or coordinated good-faith engagement with affected landowners.

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4. Transparency is essential for the integrity of this process

This is exactly why transparency matters.

I have formally requested, under Oregon public records law, any NDAs, corridor-related correspondence, maps, and supporting documentation involving major industrial actors and development planning, including Amazon, UEC, and BPA.

That request specifically seeks records concerning the Laurel Lane / Loop Road corridor and the "New RV Site" siting south of I-84.

The public cannot evaluate an EOA honestly if key assumptions or arrangements are shielded from view.

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5. Participation must be consistent in practice, not just encouraged in words

Finally, I ask for clarity and consistency regarding public participation.

City leadership has encouraged landowners and business owners like myself to attend meetings and provide insight — including advisory settings — yet in practice participation has been restricted inconsistently.

As I documented previously, the City has stated in writing that my input is welcome, but later walked that back by saying advisory committees do not allow comment opportunities.

Transparency is not achieved when the City's words and actions diverge.

Closing Request

So my request tonight is simple:

Before the City relies on the EOA to justify future land use actions, infrastructure, or corridor advancement, the record should reflect:

- the real rent and workforce pressures affecting locals
- the real environmental and water-quality burdens
- whether OWRD has confirmed adequate municipal water rights and capacity
- and the cumulative nature of these overlapping plans across agencies

I will be emailing my full written comment into the record tonight for confirmation.

Thank you.

Jonathan Tallman

All of this is to add and supplement the continue the record and show the segmentation of all these documents fragmented out.

Online links for written record need to be added.

Rolling stone article.

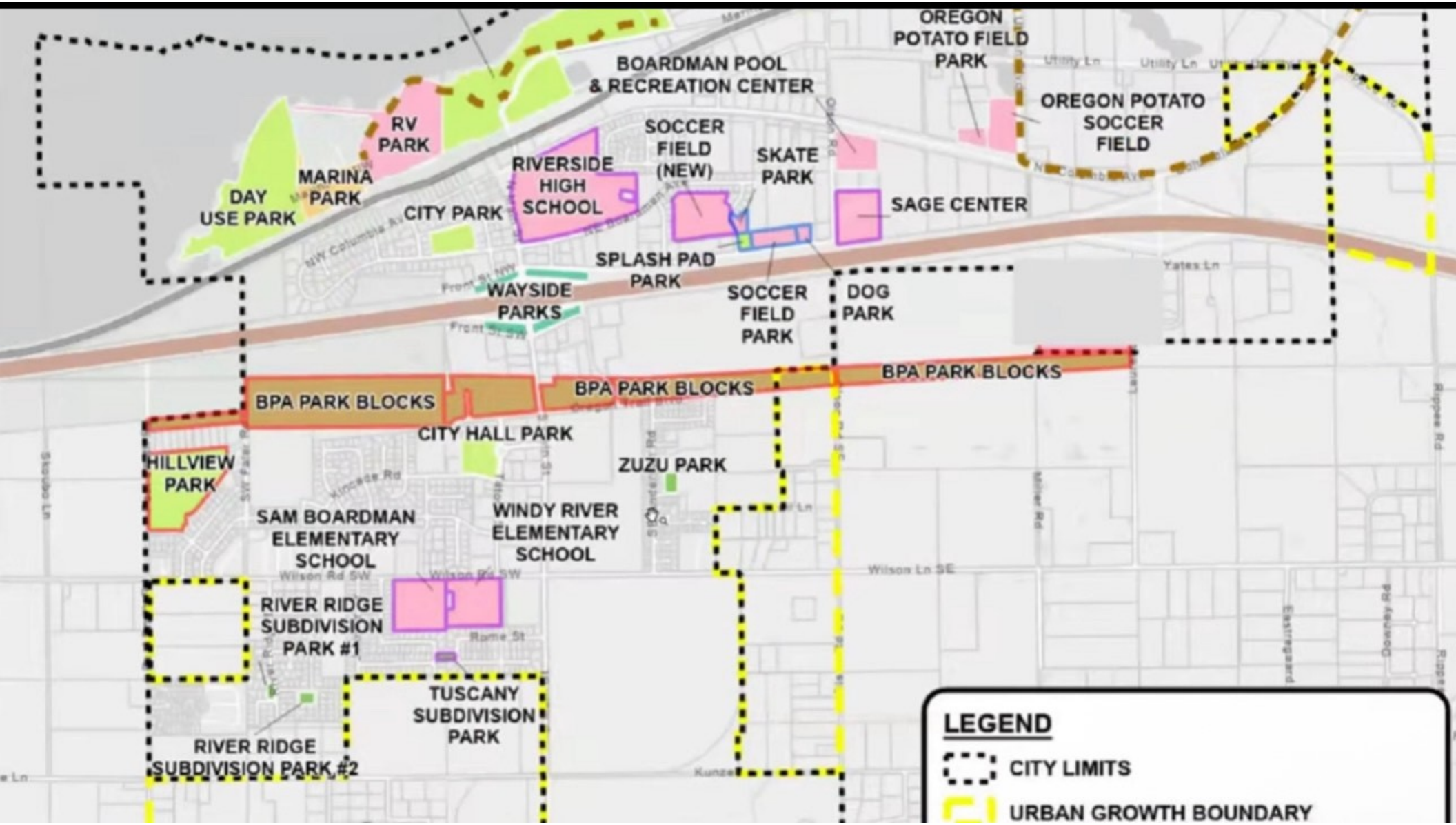
https://www.rollingstone.com/culture/culture-features/data-center-water-pollution-amazon-oregon-1235466613/

Google, Oregon data center concern and rents that need to be shown via transient workforce.

https://youtu.be/wLX_w0TtBpY?si=hrrJZGwqTlp45hd3

I also add the impact and the emails written and copied to the city written to EFSC OREGON department energy of the Umatilla electric coop draft proposal order with the condemnation brief of the corridor being unsettled attached with the 1st John Luba case 2022.

Other pictures of vacant lots taken I. As conceptual designs being implemented now.


OREGON POTATO FIELD PARK
BOARDMAN POOL & RECREATION CENTER
OREGON POTATO SOCCER FIELD
RV PARK
SOCCER FIELD (NEW)
SKATE PARK
MARINA PARK
DAY USE PARK
CITY PARK
RIVERSIDE HIGH SCHOOL
SAGE CENTER
SPLASH PAD PARK
WAYSIDE PARKS
SOCCER FIELD PARK
DOG PARK
BPA PARK BLOCKS
BPA PARK BLOCKS
BPA PARK BLOCKS
CITY HALL PARK
HILLVIEW PARK
ZUZU PARK
SAM BOARDMAN ELEMENTARY SCHOOL
WINDY RIVER ELEMENTARY SCHOOL
RIVER RIDGE SUBDIVISION PARK #1
TUSCANY SUBDIVISION PARK
RIVER RIDGE SUBDIVISION PARK #2
LEGEND
CITY LIMITS
URBAN GROWTH BOUNDARY

BPA EASEMENT EAST

ons

BPA) transmission corridors is subject to BPA review
oordinated with BPA early in design to confirm
ne Park Blocks corridor contains 500 kV lines with the
contains 230 kV lines with somewhat more flexibility.

es such as trails, signage, site furnishings, and
t to BPA confirmation.

ctures (e.g., play features, poles, or lighting that

4 miles)
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rosswalk on

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ay Use Park

g Park

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with future
ith sidewalk
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ng west
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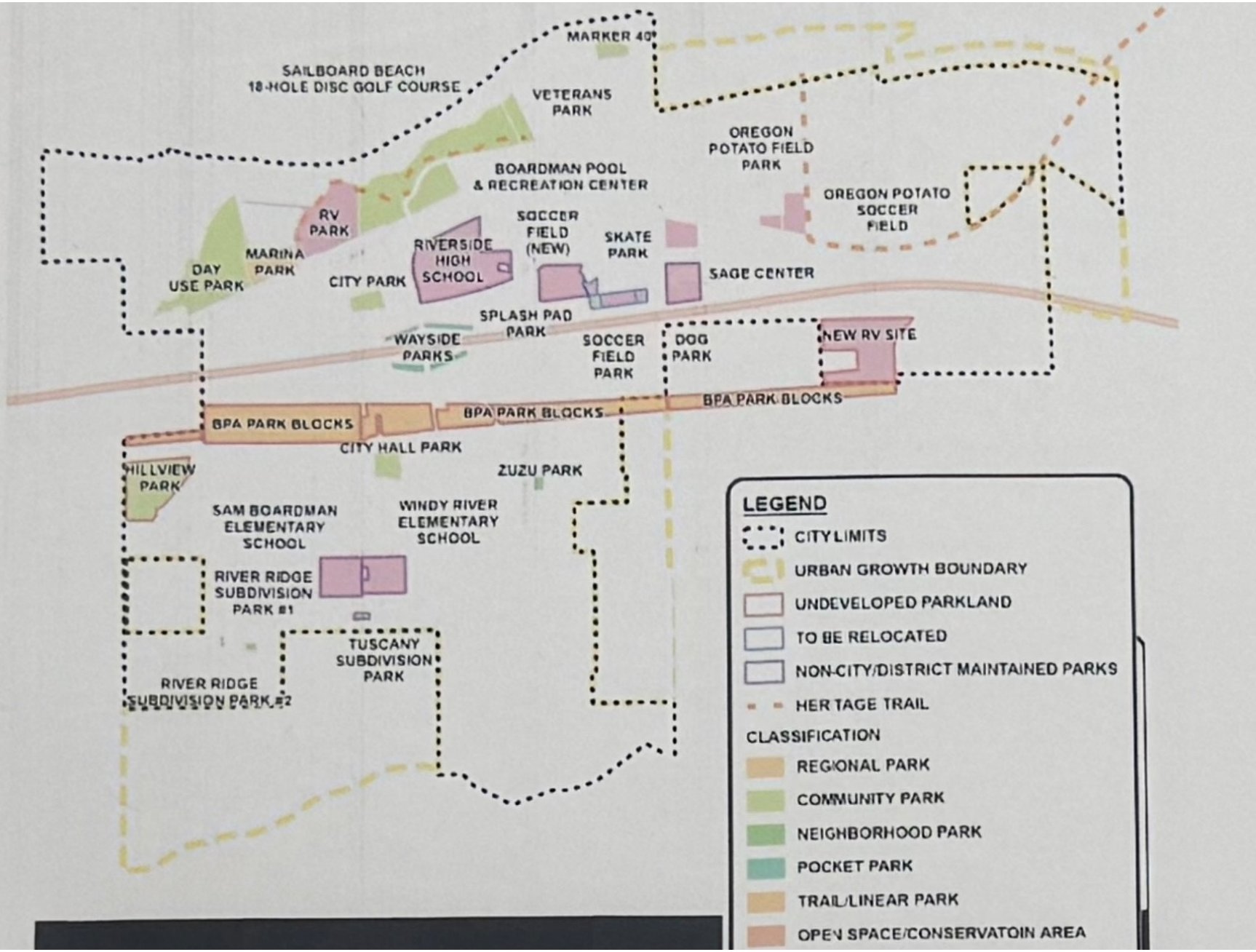
n County



On Wed, Oct 8, 2025 at 6:19 AM Jonathan Tallman wrote:

Dear Mayor Keefer,

I am forwarding the attached email correspondence with City Manager Brandon Hammond, as it illustrates the ongoing transparency issues that were raised with me directly at the recent Council meeting last night October 7th 2025.

You stated to me in person that I should attend City meetings and participate (which I am glad you mentioned). I have done so in good faith in the past. Yet, when I attempt to speak at advisory or committee meetings, I am told I do not have the right to talk. This directly contradicts Brandon's earlier written encouragement that I "continue to attend the various meetings (Planning Commission, City Council, advisory committees, etc.) to share your insights and thoughts." His later email, however, walks this back by saying advisory committees and workshops do not call for public comment opportunities.

This is at the heart of the transparency issue. On paper or out loud, the City tells me my input is welcome at the city council meeting. In practice, when I show up and try to participate, I am shut down. The result is confusion, unnecessary confrontation (which I don't want), and an appearance at public meetings that questions are being acknowledged, when in reality they are being deflected or silenced on purpose like I stated in all my examples last night.

I am not seeking special treatment only clarity and consistency. If the City intends for certain meetings to be closed to public comment, then that should be clearly stated in advance and on the agenda, not left to the discretion of staff during the meeting. Conversely, if the City's leadership is going to encourage landowners and business owners to participate, then that commitment should be honored.

Transparency is not achieved when words in writing or in public forums differ from the actions that follow. To restore public trust, I respectfully ask that this matter be clarified in writing and reflected in future agendas. I also ask that the City ensure all landowners and residents are given equal and fair opportunities to participate in the processes that directly impact their property and livelihoods.

Thank you for your attention to this matter.

Sincerely,

Jonathan Tallman

---------- Forwarded message ---------

From: Jonathan Tallman

Date: Tue, Jul 29, 2025 at 4:55 PM

Subject: Re: Public Comment Regarding July 29th EOA Meeting & Request for Fair Dialogue

To: Brandon Hammond

CC: Derrin Tallman , Amanda Mickles

Brandon,

You wrote, and I quote:

"Thank you for your thoughts and insights. I agree, there needs to be an open and transparent process. I would encourage you to continue to attend the various meetings (Planning Commission, City Council, advisory committees, etc.) to share your insights and thoughts."

Your inclusion of "advisory committees" led me to believe that I was welcome to speak and share my insights at those meetings. I participated based on that good faith understanding.

To prevent any future confusion or unintended confrontation, I respectfully ask for clarification. The disconnect between what is stated in writing and how participation is handled during meetings creates

uncertainty and undermines transparency and accountability. This kind of inconsistency discourages meaningful public engagement.

Could you ensure that this matter is clearly addressed and reflected in future agendas? I simply want to avoid any unnecessary conflict (especially with Carla because she has called cops in the past on me) that stems from written words not aligning with how policies are applied in practice by the city of Boardman.

I am not asking for to much here am I? Thank you for your time and attention to this matter.

Jonathan Tallman

On Tue, Jul 29, 2025 at 4:31 PM Brandon Hammond wrote:

Johnathan,

During our planning commission and city council meetings there are specified public comment times, as these are governing bodies, which allows any public input. The advisory committee's and workshops do not call for the same public comment opportunities.

From: Jonathan Tallman

Sent: Tuesday, July 29, 2025 3:21 PM

To: Brandon Hammond

Cc: Derrin Tallman

Subject: Re: Public Comment Regarding July 29th EOA Meeting & Request for Fair Dialogue

Hi Brandon,

Thank you for allowing me to speak during today's meeting and for your prior message encouraging continued engagement. I appreciate your acknowledgment that an open and transparent process is essential. As both a business owner and a landowner in the City of Boardman, I've made a genuine effort to participate constructively and provide insights that I believe are important for the community.

However, I'm confused by the inconsistency between your written encouragement and what occurred at the meeting. When I raised my hand to speak, Carla stated that I was not a PAC member and would decide whether I could speak or not. This seemed to contradict the inclusive message you had expressed in writing, and frankly, it felt dismissive of my efforts to engage in good faith in the future.

This kind of disconnect is exactly what causes meetings to become confrontational—it's when the words don't align with the actions. I would have asked you for clarification during the meeting, but I wasn't sure if you were present, and I didn't want to escalate the situation in that setting.

To prevent future confusion or tension, I'd appreciate your clarification: moving forward, as a business and land owner in Boardman, am I permitted to speak during Planning Commission, City Council, and advisory committee meetings when I attend? This issue needs to be addressed clearly so that I and others can participate without conflict or second-guessing whether our voices will be heard.

Thank you again for your time and for addressing this matter directly and in writing.

Sincerely,

Jonathan Tallman

On Mon, Jul 28, 2025 at 4:50 PM Brandon Hammond wrote:

Jonathan,

Thank you for your thoughts and insights. I agree, there needs to be an open and transparent process. I would encourage you to continue to attend the various meetings (planning Commission, City Council, advisory committees, etc.) to share your insights and thoughts.

From: Jonathan Tallman

Sent: Sunday, July 27, 2025 1:33 PM

To: Derrin Tallman ; Brandon Hammond

Subject: Public Comment Regarding July 29th EOA Meeting & Request for Fair Dialogue

Dear Brandon,

As I continue reviewing the July 2025 Economic Opportunities Analysis (EOA) prepared for the City of Boardman, I feel compelled to submit this letter in advance of the July 29th meeting to formally express my concerns, outline considerations, and request a good faith dialogue moving forward.

Although I have NOT received previous communications related to economic development on record requests, I have been removed from past meetings after raising legitimate questions—despite having written documentation supporting involvement and requests for meeting notes and related materials.

I must again note the troubling pattern of repeated code inspections and what I believe to be retaliatory enforcement actions against my property. These actions have occurred while the value of my land has been significantly diminished due to Amazon-driven expansion and infrastructure plans. A primary driver of this expansion—the 230kV powerline—has directly harmed my land while increasing revenue for the City. From 2019 to 2026, the Boardman city budget has grown from $21 million to over $90 million, largely funded through corporate projects and specifically UEC excise fee taxes tied to this infrastructure buildout.

I do not wish to dwell on past grievances, but I am committed to avoiding the same entanglements that have already harmed this community. The Windwave complaint filed by the Oregon Department of Justice illustrates the real consequences when public officials suppress financial transparency, manipulate valuations, and prioritize private corporate gain over the public good. I bring this up not to cast accusations, but to express clear concern: Boardman's UGB expansion and future development must not follow the same closed-door patterns and selective dealings.

My Recommendation

As a lifelong resident, business owner, and developer in Boardman, I want to see this community grow—but it must happen responsibly. I would like to either develop or sell my property, but not under conditions where I am excluded, undervalued, or unfairly treated.

I am open to a fair and reasonable offer—one that reflects what other people have been paid for on their property. However, I cannot accept a process that proceeds while impacted landowners like myself are sidelined. I intend to participate more actively going forward and will present documentation that challenges any misrepresentation of my property's value or role in the city's development plans.

If the City Proceeds Without Expanding the UGB:

Boardman may face constraints under Oregon's land use laws, such as Statewide Planning Goal 14, which limits urban-style development on rural lands. This could restrict Amazon-related infrastructure, residential growth, and commercial zoning changes—potentially exposing the City to legal risk or development delays.

If the City Expands the UGB Without a Good Faith Process:

Under ORS 197.298, ORS 197.626, and LCDC rules, the UGB amendment must be supported by a transparent, data-driven process, public involvement, and clear alignment with statewide planning goals. Failure to do so could result in legal challenges before the Land Use Board of Appeals (LUBA), especially if favoritism or exclusion is evident. Oregon Rural Action has this same concern.

Given the Windwave Precedent in Morrow County:

The Windwave case shows the consequences of insider manipulation, lack of transparency, and the suppression of public input. If similar behavior emerges in Boardman's UGB process—such as selective treatment or undisclosed arrangements with Amazon or other developers—it could invite further scrutiny from the Oregon DOJ or other regulatory bodies. The community is already burdened by the fallout, including rising property taxes. Boardman must not compound that damage.

I am formally requesting a transparent, written dialogue regarding the EOA, the proposed UGB expansion, and a fair path forward for my property. I will also be submitting a formal response to the EOA report. All I ask is for equity, transparency, and the same respect afforded to others and emails on all future meetings times going forward as I have asked before.

I am still awaiting responses to my public records, open meetings requests, including meeting documents, notes, audio, and video. I can show you on meetings that show the redlining specifically referenced. The continued advancement of meetings without addressing these concerns is deeply troubling. If this pattern continues, I will have no choice but to show these matters further, but that is not my intent. It is to get this resolved.

Thank you for your time and attention. I welcome your written response.

Sincerely,

Jonathan Tallman

CITY OF BOARDMAN
REQUEST FOR PUBLIC RECORD

Date of Request: 9/26/2025

I, Jonathan Tallman, pursuant to ORS 192.311–192.478, am requesting the following public record(s) from the City of Boardman:

1. Any and all Non-Disclosure Agreements (NDAs), confidentiality agreements, or similar contracts signed by the Mayor, City Councilors, the City Manager, City Recorder, Planning Staff, or consultants from January 1, 2018 to present, including agreements with Amazon, Umatilla Electric Cooperative (UEC), Bonneville Power Administration (BPA), or any data center–related entities.

2. All emails, text messages, meeting notes, or correspondence between City officials/staff/consultants and Amazon, UEC, BPA, or their representatives concerning: • The Laurel Lane / Loop Road corridor; • The 'New RV Site' near the BPA Park Blocks (including records of its later blurring/removal from maps); • Road access classifications under the IAMP; • Development of Parcels 3302, 3207, and 3205.

3. All maps, exhibits, or draft planning materials that depict or reference park and RV site siting south of I-84, including Zuzu Park, Hillview Park, BPA Park Blocks, Tuscany/River Ridge subdivision parks, and the 'New RV Site' — provide both pre-blurred and post-blurred/removed versions.

4. All staff reports, findings, technical memoranda, and supporting documentation included in or relied upon for the City's September 15, 2025 Transportation System Plan (TSP) and Urban Growth Boundary (UGB) amendment submission to DLCD, especially those referencing my property (28.11 acres, Laurel Lane).

5. All agendas, minutes, recordings, and transcripts of the April 15, 2025 City/Planning meeting, in which Amazon's potential funding of an RV park was discussed.

Fee Waiver Request: This request should be fulfilled without charge because these records are already required to be part of the City's public record and included in the DLCD draft submission under ORS 197.610–197.650. They directly affect the public interest and my ability to participate in TSP/UGB planning proceedings.

Signature of Requester: Jonathan Tallman
Email Address: [Insert Email]
Mailing Address: 706 Mt Hood Ave, Boardman, OR 97818
Phone Number: 208-570-7589

IN THE COURT OF APPEALS OF THE STATE OF OREGON

UMATILLA ELECTRIC COOPERATIVE, an Oregon cooperative corporation,
Plaintiff-Respondent,

v.

1st JOHN 2:17, LLC, an Oregon limited liability company, successor-in-interest to Terry Tallman and Cheryl Tallman, as tenants by entirety,
Defendant-Appellant.

Morrow County Circuit Court
21CV28343
CA No. A184850

APPELLANT'S REPLY BRIEF

Honorable Eva J. Temple

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9/2025

TABLE OF CONTENTS

SUMMARY OF ARGUMENT 1

ASSIGNMENT OF ERROR 2

The trial court erred when it ruled that Defendant was not entitled to recover its costs, disbursements and attorney fees under ORS 35.346(7), and that Plaintiff was therefore entitled to recover its costs and disbursements under ORS 35.346(9).

REPLY ARGUMENT 2

A. UEC's "Plain Language" Argument Fails to Consider Context. 2

B. The Last Antecedent Rule Yields to Contrary Contextual Evidence. 5

C. UEC's Argument on Surplusage Misunderstands the Statute. 6

D. This Court Interpreted the Statute's Language Correctly in *Mead*. 7

E. The Answering Briefs Depend Upon the Same Starting Assumption. 8

1. Statutory Context. 9

2. Legislative History. 12

CONCLUSION 14

TABLE OF AUTHORITIES

CASES

Bridgeview Vineyards, Inc. v. State Land Bd. of Or.,
211 Or App 251, 270, 154 P3d 734, *rev. denied,* 343 Or 690 (2007) 1, 5

City of Portland v. Kessler,
334 Or App 189, 556 P3d 648 (2024).....1, 5

Davis v. Wasco Intermediate Education Dist.,
286 Or 261, 266, 593 P2d 1152 (1979).....5

Fifth Ave. Corp. v. Washington County,
282 Or 591, 581 P2d 50 (1978).....2, 4

Johnson v. Craddock,
228 Or 308, 365 P2d 89 (1961).....6

Krieger v. Just,
319 Or 328, 876 P2d 754 (1994).....3

Portland Gen. Elec. Co. v. Bureau of Labor & Indus.,
317 Or 606, 859 P2d 1143 (1993).....2

Portland General Elec. Co. v. Mead,
235 Or App 673, 234 P3d 1048 (2010)..... 1, 2, 7, 8

State v. Bryan,
221 Or App 455, 190 P3d 470 (2008).....8

State v. Davis,
207 Or 525, 296 P2d 240 (1956).....3

State v. Gaines,
346 Or 160, 206 P3d 1042 (2009).....1, 2

Yeager v. Montgomery,
331 Or App 263, 275-77, 546 P3d 10 (2024) 10

STATE STATUTES

Or Laws 2007, ch. 1 (B.M. 39) 4

ORS 35.300 ..... 4, 8, 9, 11, 12

ORS 35.346(1) ..... *passim*

ORS 35.346(4) 11

ORS 35.346(7) 6

ORS 35.346(7)(a) ..... *passim*

OTHER AUTHORITIES

IA J. Sutherland, Statutes and Statutory Construction §22.30 (1972) 5

SUMMARY OF ARGUMENT

The parties' dispute is resolved on the first level of analysis described in *State v. Gaines*, 346 Or 160, 206 P3d 1042 (2009), requiring examination of the statute's text in the context provided by other provisions of the statute and related statutes, including the historical context provided by earlier versions of the statute.

Plaintiff Umatilla Electric Cooperative's ("UEC") interpretation of ORS 35.346(7)(a) hinges on its view that the statute's reference to "subsection (1)" was not intended to identify an *offer* made pursuant to that subsection but simply the *parties appearing* pursuant to that subsection to whom pre-suit offers are made. UEC argues that this reading is compelled by the "last antecedent" rule, suggesting that, absent a comma, a phrase within a statute is normally read to modify the immediately preceding text.

The last antecedent rule, however, "is only a textual aid, and its application yields to more persuasive contextual evidence of the legislature's intent and to common sense." *City of Portland v. Kessler*, 334 Or App 189, 194, 556 P3d 648 (2024), quoting *Bridgeview Vineyards, Inc. v. State Land Bd. of Or.,* 211 Or App 251, 270, 154 P3d 734, rev. denied, 343 Or 690 (2007). Here, compelling evidence of the legislature's intent—as well as common sense—weigh against UEC. The origin and evolution of the statute's language indicate that, as this Court previously concluded in *Portland General Elec. Co. v. Mead*, 235 Or App 673, 678,

234 P3d 1048 (2010), the legislature intended to reference pre-suit purchase offers made pursuant to ORS 35.346(1).

The legislature subsequently amended other language within ORS 35.346(7)(a), but that change indicates no intention to alter its reference to subsection (1), which was not amended. *See, e.g., Fifth Ave. Corp. v. Washington County,* 282 Or 591, 597-98, 581 P2d 50 (1978) ("amendatory acts do not change the meaning of preexisting language further than is expressly declared or necessarily implied"). Ignoring this contextual history, Plaintiff and the *amicus* make a series of further arguments. Because each depends on the same dogged but mistaken assumption about the text's intended meaning, none adds anything that is helpful to understanding the statute.

ASSIGNMENT OF ERROR

The trial court erred when it ruled that Defendant was not entitled to recover its costs, disbursements and attorney fees under ORS 35.346(7), and that Plaintiff was therefore entitled to recover its costs and disbursements under ORS 35.346(9).

REPLY ARGUMENT

A. UEC's "Plain Language" Argument Fails to Consider Context.

Under the framework for statutory interpretation established by *Gaines*, 346 Or 160 and *Portland Gen. Elec. Co. v. Bureau of Labor & Indus.*, 317 Or 606, 859

P2d 1143 (1993), the analysis of text and context includes the examination of other provisions of the same statute and related statutes, *PGE*, 317 Or at 611, as well as prior versions of the statute or predecessor statutes. *See Krieger v. Just*, 319 Or 328, 876 P2d 754 (1994); *State v. Davis*, 207 Or 525, 533–535, 296 P2d 240 (1956).

Without considering what was intended when the reference to "subsection (1)" was first added in 2007, UEC argues that the "plain language" of the current statute refers to "those *defendants appearing in the action pursuant to subsection (1)"* and not to the offer. (Resp't's. Br. at 6-7 (emphasis in original))[1]. UEC explains that ORS 35.346(1) has two parts, first identifying to whom the offer must be made, and then defining other conditions applicable to the offer. *Id.* Assuming that this were a plausible explanation of the text viewed in isolation, it is far from the most reasonable interpretation—and it does not survive an analysis of the statute's historical context.

As previously discussed, the language at issue was added when ORS 35.346(7)(a) was amended in 2007, and the earlier "30-day offer" framework was replaced with a formulation that essentially returned the fee recovery process to that established when Chapter 35 was first enacted in 1971:

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[1] Based on its reading of the statute, UEC argues that Defendant "repeatedly misrepresents the statutory text." (Resp't's Br. 7). Although Defendant has frequently employed ellipses, the text was set out in full at the beginning of its argument in its opening brief (Op. Br. 7-8), and appropriately described throughout the brief.

> (a) If the amount of just compensation assessed by the verdict in the trial exceeds the [*highest]* **initial** written offer in settlement submitted by condemner to those defendants appearing in the action *[at least 30 days prior to commencement of said trial]* **pursuant to subsection (1) of this section**[.]

Or Laws 2007, ch. 1 (B.M. 39) (additions bolded and deletions bracketed in original) (ER-115; App-21); (Op. Br. 33-34). Just as the earlier statute required an *offer* made at least 30 days before trial, rather than an offer that could be made—at any time—to *those defendants appearing* at least 30 days before trial, the substitution of "pursuant to subsection (1) of this section" was intended to require an *offer* made *pursuant to* ORS 35.346(1), and *not* simply an offer made *to defendants appearing* "pursuant to" that provision. And, not surprisingly, that was the reading given the 2007 statute by this Court in *Mead*.[2]

In 2009, ORS 35.346(7)(a) was amended again to allow the government to make more than one offer pursuant to subsection (1), so that the "highest" rather than the "initial" written offer became the starting benchmark for recovery of fees (until and unless a subsequent offer was made under ORS 35.300). The 2009 amendments did not change the language requiring compliance with subsection (1) of the statute. And any legislative intention to change the meaning of that language must be clear. *See Fifth Ave. Corp.,* 282 Or at 597-98 ("amendatory acts do not change the meaning of preexisting language further than is expressly declared or

[2] Again, parties do not appear "pursuant to" ORS 35.346(1). (Op. Br. 31-32).

necessarily implied."), citing IA J. Sutherland, *Statutes and Statutory Construction* §22.30 (1972).

Plaintiff—and the *amicus*—simply ignore this historical evidence of context. UEC's answering brief does not address Defendant's argument; indeed, UEC does not support its textual argument with any genuine analysis of context.

B. The Last Antecedent Rule Yields to Contrary Contextual Evidence.

Plaintiff's reliance on the "last antecedent" rule to buttress its analysis of the statute's textual syntax is similarly misplaced. As noted in defendant's opening brief, the doctrine of the last antecedent, like other rules of construction, is "only a textual aid, and its application yields to more persuasive contextual evidence of the legislature's intent and to common sense." *Kessler*, 334 Or App at 194, quoting *Bridgeview Vineyards, Inc.* 211 Or App at 270. (Op Br 30-31). *See also Davis v. Wasco Intermediate Education Dist*., 286 Or 261, 266 n 3, 593 P2d 1152 (1979) ("the various 'rules' of statutory construction are not 'rules' in the legal sense but are no more than 'aids' or 'guides' in statutory construction").

UEC's response on this point again ignores Defendant's contextual evidence, instead arguing that that the legislative history does not provide testimony indicating that the highest pre-suit offer "will only be counted if it was held open 40 days and accompanied by a matching appraisal." (Resp't's Br. at 10). While the inferences that can be drawn from the available legislative history support rather than contradict

the meaning indicated by the statute's text and context, Plaintiff's argument that more explicit testimony is required to sustain defendant's interpretation misunderstands the analysis mandated under *Gaines*.

Even before legislative history is considered, the *contextual evidence*—including the meaning discernable from the use of same language in a predecessor statute—overwhelms UEC's reliance on the doctrine of the last antecedent. *See, e.g., Johnson v. Craddock*, 228 Or 308, 317, 365 P2d 89 (1961) (even "a slight indication of the legislative intent to extend the relative term to a more remote antecedent is sufficient"). The intended meaning of the language at issue was clear when the words were added in 2007, as this Court recognized in *Mead*. They were not changed by the 2009 amendments. Plaintiff's effort to revise that meaning now by arguing for a different grammatical construction of the text is unavailing.

C. UEC's Argument on Surplusage Misunderstands the Statute.

The rule against surplusage is, like the last antecedent rule, simply an aid to textual interpretation. Nonetheless, the rule is applicable here. (Op. Br. 32).

UEC argues that its reading is not redundant because the first portion of ORS 35.346(7)—referencing the trial fixing compensation for the "defendant owner or party having an interest in the property being condemned"—describes a different and broader group of defendants than those described by subsection (7)(a)'s reference to subsection (1). As UEC reads the statute, subsection (1) defines a

narrower subset of persons to whom an offer must be made: (1) the owner and (2) any "party having an interest to purchase the property"—*i.e.*, a potential owner. (Resp't's Br. 11). ORS 35.346(1) reads as follows:

> (1) At least 40 days before the filing of any action for condemnation of property or any interest in property, the condemner shall make a written offer to the owner or party having an interest to purchase the property or interest, and to pay just compensation therefor and for any compensable damages to remaining property.

It is more logical to read the language of subsection (1) as describing an offer to *purchase the property or interest in the property* made to *the owner or party having an interest*. Subsection (7) is intended to parallel subsection (1) and defines the defendants to whom the pre-suit purchase offer is made in the same way. Thus, the further reference to subsection (1) in ORS 35.346(7)(a) appears redundant if it is intended simply to identify "*those defendants appearing*," as UEC contends, and not to describe the nature of the offer required.

D. This Court Interpreted the Statute's Language Correctly in *Mead*.

In its opening brief Defendant noted that when this Court decided *Mead*, it understood the statute's "pursuant to subsection (1)" reference to describe "the prefiling offer required by ORS 35.346(1)." *Mead*, 235 Or App at 678.

> ORS 35.346(7) required an award of costs only if a verdict entered after its effective date exceeded the "initial written offer in settlement submitted by condemner * * * pursuant to subsection (1) of this section." ORS 35.346(1) describes the required 40–day prefiling offer of just compensation and damages.

235 Or App at 684 (ellipses are the Court's). While *Mead* addressed whether that requirement of the 2007 statute should be applied in an action commenced prior to the amendment, the Court's common sense reading of the statutory text is clear. UEC's arguments that the Court's interpretation was *dicta*, and that *other* language elsewhere in the statute has since been amended, miss the point. (Resp't's Br. 32-33).

While not binding, "[p]rior construction of a statute by this court is always relevant to our analysis of the statute's text." *State v. Bryan*, 221 Or App 455, 459, 190 P3d 470 (2008). *Mead's* construction is persuasive—and was compelled by the historical context. Plaintiff offers no cogent reason why the same language, which has not since been amended, should be read differently today.

E. The Answering Briefs Depend Upon the Same Starting Assumption.

The further arguments advanced by UEC and the *amicus* all depend upon their starting assumption that the statute's text must mean what they wish it does. As a result, they conflate the apparent legislative policy supporting fee-limiting offers of compromise under ORS 35.300 with the distinct and much narrower amendment of ORS 35.346(7)(a) to allow the *highest* pre-suit offer to be fee-limiting in those few cases where more than one 40-day purchase offer is made.

1. Statutory Context.

UEC's discussion of ORS 35.300 emphasizes the legislature's obvious desire to encourage settlements but then simply assumes that the same purpose is reflected in the same way in the simultaneous amendment of ORS 35.346(7)(a) to allow for more than one pre-suit offer and make the highest such offer fee-limiting. From this perspective, ORS 35.300 becomes merely "another tool" for condemners to limit their fee exposure. (Resp't's Br. 20). Arguing that "there is good reason for the legislature to treat the initial 40-day offer differently from subsequent pre-litigation settlement offers" (*Id.*), UEC does not recognize that there are even better reasons to distinguish between pre-suit offers under ORS 35.346(7)(a) and offers of compromise made pursuant to ORS 35.300 after the case is filed.

First, ORS 35.300 specifically describes the effect of the offers made and their minimum requirements, including, significantly, the period they must be left open. In contrast, the only time frame referenced in ORS 35.346(7)(a) is the 40-day period applicable to offers made pursuant to ORS 35.346(1). If that limitation is to be ignored, as Plaintiff and the *amicus* insist, the condemner is free to define the time for acceptance and may even specify a period shorter than that required under ORS 35.300—as Plaintiff did here. Indeed, as Defendant has noted, nothing would prevent a condemner from immediately supplementing its 40-day offer with a separate (possibly higher) offer expiring in 24 hours.

Neither Plaintiff nor the *amicus* provide a response on this point. Nor do they explain how their reading of the statute can be squared with the legislative purpose evident in requiring that the property owner have at least 40 days to review the pre-suit offer and appraisal before deciding how to proceed. UEC's conviction that "there is nothing coercive about a condemner increasing its settlement offer in an attempt to avoid litigation," (Resp't's Br. 21) fails to appreciate the dilemma faced by the property owner. Fee-limiting offers are inherently coercive. Because they are intended to create pressure for settlement, they are both an olive branch and a sword.

The *amicus* does not take up UEC's textual argument based on the rule of the last antecedent but argues simply that the statutory context provided by the 2009 amendments makes it clear that the legislature's adoption of the "highest written offer" language was also intended to repeal the requirement that the offer be made "pursuant to subsection (1)"—*even though the legislature did not do so.* (*Amicus* Brief ("Am. Br.") at 2, 10).[3] Although conceding that "without doubt, that intended effect would be clearer if the legislature had simply deleted the cross-reference [to subsection (1)]" (*Id.* at 10), the *amicus* refuses to accept that the legislature might

[3] The *amicus*' citation to *Yeager v. Montgomery*, 331 Or App 263, 275-77, 546 P3d 10 (2024) is confusing, as that decision emphasized the necessity of interpreting statutes to give effect to all provisions rather than implying a repeal of some.

allow for more than one 40-day offer yet choose to delay other fee limiting offers until after the action was filed and ORS 35.300 came into play. That would give the defendant 40 days to consider the appraisal (and perhaps seek advice)—a concern the legislature expressed twice. *See* ORS 35.346(1) and (4).

Going outside the record, the *amicus* asserts that "ODOT regularly makes settlement offers until the eve of filing * * *." (Am. Br. 19). But that does not explain why such offers should be fee-limiting even if they do not comply with ORS 35.346(1)—especially when ORS 35.300 allows fee-limiting offers once the case is filed. Similarly, both UEC and the *amicus* argue the impracticality of settlement negotiations dependent on a series of increasing 40-day offers supported by appraisals. (Resp't's Br. 13-19); (Am. Br. 10-12).[4] But such arguments are persuasive only if one assumes the legislature intended to incentivize acceptance of any higher pre-suit offer rather than restricting the government's fee-limiting offers to those that allowed the owner at least 40 days to consider the government's appraisal.

A more logical reading of ORS 35.346(7)(a) is that it permits adjustment of the purchase offer to correct factual or appraisal errors discovered before an action

[4] All of Plaintiff's concerns with the burden of multiple appraisals, and with the need to file in order to obtain possession, can be avoided by simply making an offer under ORS 35.300 after filing the complaint—which Plaintiff might have done but chose not to do.

is filed and the complaint's allegation of just compensation is set. The condemner gets the benefit of the higher offer, even though it is unlikely to occur often, or impact settlement negotiations if it is declined and suit is filed.

2. Legislative History.

The understanding of ORS 35.346(7)(a) that is most easily harmonized with other related statutes and the history of the statutory language as it has evolved over time, is also consistent with its legislative history. Both answering briefs emphasize the 2009 amendments in Senate Bill 794, and the testimony of Portland Commissioner Nick Fish.

That legislative history is primarily concerned with the creation of the condemnation-specific offer of compromise provisions codified in ORS 35.300. They provide most of the text in the bill and were the focus of the most extensive discussions and negotiations between the bill's proponents, including the City of Portland, Oregonians in Action and the League of Oregon Cities. The post-filing offers of compromise did not require appraisals and could limit the condemnation Defendant's ability to recover fees later incurred if they were not accepted within three days.

Given the care that went into defining the offer of compromise process, including the effect of the offer and time allowed for acceptance, it is telling that no similar definition was provided for the offer contemplated by ORS 35.346(7)(a)—

unless, of course, that definition was provided elsewhere in the express reference to subsection (1).

UEC's effort to find contrary evidence in the testimony of Commissioner Fish is also telling.

> Indeed, there are important reasons why the legislature would not want to require the highest pre-litigation offer be held open 40 days. As Commissioner Fish noted, allowing multiple pre-suit offers is crucial to keeping public projects on track. (ER-118) ("[G]iven the time constraints of many public projects, it will increase the likelihood that the city can settle some cases without having to file suit at all.")

(Resp't's Br. 29-30) (brackets are Plaintiff's). Reading the full passage in context, however, reveals a different understanding of the statute. Describing the amendment to ORS 35.346(7)(a), Commissioner Fish explained:

> This is a minor change to the current law, because it merely allows the public entity to make more than one pre-suit written offer. *Even though this may not happen very often, given the time constraints of many public projects,* it will increase the likelihood that the city can settle some cases without having to file suit at all.
>
> The second, and more important feature of the bill, is that it would make offers of compromise available in condemnation actions.

(ER 118 (emphasis added)). If compliance with subsection (1) were not required, it is hard to understand how "project time constraints" would be any impediment and the government would have every incentive to make one, or even many, fee-limiting settlement offers before the condemnation action was filed.

Nothing in the proffered legislative history indicates an intention to repeal the requirement, evident from the statute's text and context, that only a pre-suit offer made "pursuant to subsection (1)" is fee-limiting under ORS 35.346(7)(a).

CONCLUSION

This Court should reverse the trial court's decision concerning entitlement to costs and fees, vacate the existing supplemental judgment awarding Plaintiff its costs, and remand the case for determination of Defendant's reasonable costs, and attorney and expert fees pursuant to ORS 35.346(7).

Respectfully submitted: September 9, 2025

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I certify that on September 9, 2025, I directed the foregoing brief to be filed with the Appellate Court Administrator through the appellate eFiling system. I certify that service of a copy of this brief will be accomplished on the following participant in this case, who is a registered user of the appellate courts' eFiling system, by the appellate courts' eFiling system at the participant's email address as recorded this date in the appellate eFiling system.

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4934-5474-7429 v.6