

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3
4 YAMHILL CREEK SOLAR, LLC,
5 *Petitioner,*

6
7 vs.

8
9 YAMHILL COUNTY,
10 *Respondent,*

11
12 and

13
14 ATTICUS WINE, LLC,
15 and FRIENDS OF YAMHILL COUNTY,
16 *Intervenors-Respondents.*

17
18 LUBA No. 2018-009

19
20 ORDER ON REPLY BRIEF

21 The petition for review in this appeal was filed on April 26, 2018 and the
22 response briefs were filed on June 19, 2018. Oral argument was initially set for
23 July 17, 2018 and the parties agreed to reset oral argument to September 13,
24 2018. On August 6, 2018, 48 days after the response briefs were filed,
25 petitioner filed a motion to submit a reply brief, accompanied by the proposed
26 five-page reply brief. Under OAR 661-010-0039, a party may request
27 permission to file a reply brief, confined solely to new matters raised in a
28 response brief, within seven days of the date the response brief was filed.¹ In its

¹ OAR 661-010-0039 provides:

1 motion, petitioner argues that the untimely filing of the reply brief should not
2 result in denial of the motion and reply brief. According to petitioner, the
3 untimely filing of the reply did not prejudice any parties' substantial rights in
4 this appeal, because based on the stipulations of the parties oral argument is not
5 scheduled in this appeal until September 13, 2018, and respondents have a
6 more than adequate time to read and prepare responses to arguments in the
7 reply brief. Petitioner contends that the untimely filing of the reply brief is thus
8 only a "technical violation" of LUBA's rules under OAR 661-010-0005, and
9 therefore not a basis to deny the reply brief.²

"A reply brief may not be filed unless permission is obtained from the Board. A request to file a reply brief shall be filed with the proposed reply brief together with four copies within seven days of the date the respondent's brief is filed. A reply brief shall be confined solely to new matters raised in the respondent's brief, state agency brief, or amicus brief. A reply brief shall not exceed five pages, exclusive of appendices, unless permission for a longer reply brief is given by the Board. A reply brief shall have gray front and back covers."

² OAR 661-010-0005 provides:

"These rules are intended to promote the speediest practicable review of land use decisions and limited land use decisions, in accordance with ORS 197.805–197.855, while affording all interested persons reasonable notice and opportunity to intervene, reasonable time to prepare and submit their cases, and a full and fair hearing. The rules shall be interpreted to carry out these objectives and to promote justice. Technical violations not affecting the substantial rights of parties shall not interfere with the review of a land use decision or limited land use decision.

1 OAR 661-010-0039 was amended in 2010. The current, applicable
2 version provides, in pertinent part: “A request to file a reply brief shall be filed
3 with the proposed reply brief together with four copies within seven days of the
4 date the respondent’s brief is filed.” *Former* OAR 661-010-0039 provided in
5 pertinent part: “A request to file a reply brief shall be filed with the proposed
6 reply brief together with four copies as soon as possible after respondent’s brief
7 is filed.”

8 On August 16, 2018, intervenor-respondent Atticus Wine, LLC (Atticus)
9 filed a motion to strike the reply brief, arguing that filing a reply brief more
10 than one month past the seven-day deadline set out in OAR 661-010-0039
11 cannot be viewed as a “technical” violation of that rule, especially because
12 petitioner offers no explanation or justification for filing a reply brief 41 days
13 past the due date. Atticus also argues that the reply brief should be denied in
14 whole or part, because it is not confined to “new matters” raised in the response
15 briefs, but rather simply embellishes arguments already raised in petitioner’s
16 80-page petition for review. On August 21, 2018, petitioner filed a two-
17 sentence response to the motion to strike, in which petitioner simply relies on
18 the arguments set out in its motion to file a reply brief.³

Failure to comply with the time limit for filing a notice of intent to
appeal under OAR 661-010-0015(1) or a petition for review under
OAR 661-010-0030(1) is not a technical violation.”

³ Petitioner’s Opposition to Intervenor-Respondent Atticus Wine, LLC’s
Motion to Strike Petitioner’s Reply Brief states, in full:

1 Petitioner relies on three cases to support the position that a reply brief
2 will be allowed in the absence of any prejudice to the parties. As Atticus
3 correctly observes, those cases applied *former* OAR 661-010-0039. In *Citizens*
4 *for Responsible Development v. City of The Dalles*, 59 Or 369 (2009), the
5 response briefs were filed on June 25, 2009 and June 29, 2009 and oral
6 argument was scheduled for July 23, 2009. On July 14, 2009, the petitioners
7 moved for permission to file a reply brief. The respondent objected to the reply
8 brief in part because it was not filed “as soon as possible” after the response
9 briefs were filed as required by *former* OAR 660-010-0039. The petitioners’
10 motion explained that petitioners’ attorney was on vacation and the earliest the
11 reply brief could be filed was on July 13, 2009. We reasoned that filing a reply
12 brief approximately 10 days before oral argument is scheduled was not a
13 violation of our rules (but disallowed the reply brief for other reasons).

14 In *Friends of Yamhill County v. Yamhill County*, 47 Or LUBA 508
15 (2004), the intervenors’ response brief was filed on July 30, 2004. Eleven days
16 later, on August 10, 2004, petitioner filed a motion to file a reply brief. The
17 intervenors’ attorney received a copy of the brief on August 10, 2004. The

“Petitioner Yamhill Creek Solar, LLC (‘Petitioner’), submits this Opposition in response to the Motion to Strike Petitioner’s Reply Brief (‘Motion’) filed by Intervenor-Respondent Atticus Wine, LLC (‘Atticus’). Petitioner’s Request to File Reply Brief, submitted along with the Reply Brief, identifies the reasons and case law supporting the Board’s acceptance of the Reply Brief and denial of Atticus’s Motion.”

1 Board allowed the reply brief, reasoning that, even assuming it was not filed
2 “as soon as possible” after the intervenors’ brief was filed, the late filing did
3 not prejudice the intervenors’ substantial rights because the intervenors
4 received a copy of the reply brief approximately 48 hours before oral argument.
5 *Id.* at 511. In so ruling, the Board explained:

6 “LUBA will deny permission to file a reply brief that is not filed
7 ‘as soon as possible’ after the respondent’s brief only if a
8 respondent’s substantial rights are prejudiced. *Shaffer v. City of*
9 *Salem*, 29 Or LUBA 592, 593–94 (1995) (reply brief submitted 35
10 days after the response briefs were filed, but 27 days prior to oral
11 argument, did not violate respondent’s substantial rights). Where
12 respondents do not have adequate time to review the brief and
13 prepare a response for oral argument, however, their substantial
14 rights are prejudiced, and a request to file a reply brief will be
15 denied. *See Sequoia Park Condo. Assoc. v. City of Beaverton*, 36
16 Or LUBA 317, 322, *aff’d* 163 Or App 592, 988 P2d 422 (1999)
17 (32-page reply brief filed two days before oral argument and more
18 than a month after response briefs were filed violates respondents’
19 substantial rights). Whether respondents have adequate time to
20 respond to the motion and prepare for oral argument depends on
21 the length of the reply brief and the timing of oral argument. *Id.*
22 The length of time the reply brief is filed after respondent’s brief is
23 also a critical factor. OAR 661-010-0039.” *Id.*

24 Finally, petitioner cites *Sparrows v. Clackamas County*, 24 Or LUBA
25 318, 320 (1992), in which the Board allowed a seven-page reply brief that was
26 filed 17 days after the response briefs were filed and received four days before
27 oral argument, holding that the late reply brief did not prejudice the
28 respondents’ substantial rights.

29 We agree with petitioner that those three cases seem to stand for the
30 proposition that, at least under *former* OAR 661-010-0039, the primary inquiry

1 was whether a late-filed reply brief prejudiced the respondents’ substantial
2 rights. The practical inquiry was whether the reply brief was filed so that
3 respondents had adequate time to respond to the motion and prepare for oral
4 argument.

5 However, other cases decided under *former* OAR 661-010-0039 indicate
6 that prejudice alone was not dispositive. For example, in *DLCD v. Coos*
7 *County*, 29 Or LUBA 415, 417 (1995), the Board denied a motion to file a
8 reply brief that was filed 45 days after the intervenor filed the response brief,
9 six days before oral argument and received three days prior to oral argument,
10 after observing that the petitioner did not explain its 45-day delay in moving to
11 file a reply brief.

12 Differently, in *Lett v. Yamhill County*, 32 Or LUBA 98, 100-02 (1996),
13 the Board allowed the petitioner’s motion to file a 20-page reply brief that was
14 filed 21 days after the intervenors filed their response brief, six days prior to
15 oral argument, and received only three days prior to oral argument. The
16 petitioner’s attorney had explained that the delay was caused by a vacation, a
17 hearing on another appeal, and lengthy preparation of the reply brief. The
18 Board concluded that petitioner’s explanation was adequate to show the reply
19 brief was filed as soon as possible after respondent’s brief was filed and
20 concluded that three days before oral argument was “barely adequate, but
21 adequate nonetheless” to allow the intervenors to review and respond to the
22 reply brief. *Id.* at 101.

1 Reading those cases together, under *former* OAR 661-010-0039, LUBA
2 considered the following factors in deciding whether to allow a late motion to
3 file a reply brief: (1) length of delay of filing motion after response briefs were
4 filed; (2) validity of petitioner’s explanation for the delay (good cause); (3)
5 proximity to oral argument; (4) length and complexity of the proposed reply
6 brief; and (5) adequacy of time for respondents to review the reply brief,
7 respond to the motion to file the reply brief, and prepare for oral argument
8 (prejudice).

9 Similarly, but in a different context—determining whether to accept a
10 late petition for attorney fees and damages—LUBA considers several factors:
11 (1) length of delay; (2) validity of the explanation of lateness; and (3) presence
12 or absence of prejudice. *Save Amazon Coalition v. City of Eugene*, 30 Or
13 LUBA 448, 452 (1995)(“When a party makes a colorable claim that it will be
14 substantially prejudiced by our failure to enforce any of our rules, we will
15 enforce them. A party that does not follow the rules takes a risk it will be
16 denied the relief it seeks from LUBA.”).

17 As noted OAR 661-010-0039 was amended to require a request to file a
18 reply brief be filed “within seven days of the date the respondent’s brief is
19 filed.” *See* n 1. That amendment created a filing deadline. We note that
20 petitioner did not move for an extension of time or obtain the written consent
21 of the other parties to file a late reply brief. As explained in *Save Amazon*

1 *Coalition*, a party that does not follow LUBA’s rules risks that a request will be
2 denied.

3 Turning to the facts of this case, petitioner filed the request to file the
4 reply brief 48 days after the response briefs were filed. The proposed reply
5 brief is not especially lengthy and oral argument is not scheduled in this appeal
6 until September 13, 2018, so respondents have adequate time to read and
7 prepare responses to arguments made in the reply brief. Nevertheless, because
8 the delay is so egregious, and petitioner offers no explanation or justification
9 for it, we agree with Atticus that the violation of the seven-day filing deadline
10 is not a mere “technical violation” that can be overlooked under OAR 661-010-
11 0005. Petitioner’s motion to file a reply brief and the proposed reply brief are
12 denied.

13 Dated this 7th day of September, 2018.

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17 _____
18 Tod A. Bassham
19 Board Member