

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

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4                                   JOSEPH SCHAEFER,  
5   *Petitioner,*

6  
7   vs.

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9                                   MARION COUNTY,  
10    *Respondent,*

11    and

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14                                   TLM HOLDINGS LLC,  
15    *Intervenor-Respondent.*

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17    LUBA No. 2020-108

18  
19    ORDER

20             The challenged decision is a board of county commissioners decision  
21 approving (1) exceptions to Statewide Planning Goal 3 (Agricultural Lands) and  
22 Statewide Planning Goal 14 (Urbanization), (2) a comprehensive plan map  
23 amendment from Primary Agriculture to Public and Semi-Public, (3) a zoning  
24 map amendment from Exclusive Farm Use to Public, and (4) a conditional use  
25 permit to establish airport-related uses on a 16.54-acre parcel.

26             The petition for review was due on May 14, 2021. On May 14, 2021,  
27 LUBA received two petitions for review filed by petitioner. One petition for  
28 review conforms to the 11,000-word limit in OAR 661-010-0030(2)(b). The  
29 second petition for review contains 19,955 words and was accompanied by a  
30 Motion for Overlength Petition for Review and Reply Brief. The deadline for

1 filing the response briefs is now running.

2 In their motion, petitioner requests that LUBA allow an overlength petition  
3 for review not to exceed 20,000 words, which is 82 percent more words than the  
4 11,000-word limit. Petitioner also seeks a 50 percent increase in the number of  
5 words allowed in their anticipated reply brief. Petitioner points to the number and  
6 complexity of the applications that the board of county commissioners approved  
7 in the challenged decision, which includes 54 pages of findings. Petitioner also  
8 argues that, together, the county and intervenor-respondent (respondents) may  
9 file briefs with a combined total of 22,000 words and it would therefore be unfair  
10 to limit petitioner to the word count limitation in OAR 661-010-0030(2)(b). The  
11 motion does not state whether respondents consent to the motion.

12 We are not persuaded that the number of respondents or the total words  
13 allowed for responsive briefing have any bearing on our consideration of whether  
14 to allow additional words in the petition for review. The petition for review is  
15 where the petitioners set out their challenges to the appealed decision. OAR 661-  
16 010-0030. As their name suggests, response briefs are limited to responses to  
17 assignments of error raised in the petition for review. OAR 661-010-0035. Given  
18 the different purposes of petitions for review and response briefs, we reject  
19 petitioner's premise that LUBA should allow additional words in the petition for  
20 review merely because, due to the number of respondents, the application of our  
21 rules provides respondents more words for responsive briefing than petitioners  
22 are allowed in the petition for review.

1           Consequently, we are not persuaded that petitioner should be allowed an  
2 additional 9,000 words above the 11,000-word limit for their petition for review.  
3 We are aware of no prior case in which LUBA has granted a non-stipulated  
4 motion to file an overlength brief that included more than an 80 percent increase  
5 in the number of words (or pages, prior to the 2017 rule amendments) allowed by  
6 OAR 661-010-0030(2)(b). In adopting that rule, LUBA determined that 11,000  
7 words is sufficient for the parties to present their case.

8           Moreover, our rules are intended to promote the speediest practicable  
9 review of land use decisions:

10           “These rules are intended to promote the speediest practicable  
11 review of land use decisions and limited land use decisions, in  
12 accordance with ORS 197.805-197.855, while affording all  
13 interested persons reasonable notice and opportunity to intervene,  
14 reasonable time to prepare and submit their cases, and a full and fair  
15 hearing. The rules shall be interpreted to carry out these objectives  
16 and to promote justice.” OAR 661-010-0005.

17 Promoting the speediest practicable review of land use decisions includes parties  
18 filing briefs that LUBA can timely read and consider and that conform as closely  
19 as possible to the word count limitation in OAR 661-010-0030(2)(b). Petitioner  
20 has not established that an increase of more than 80 percent above LUBA’s  
21 adopted word count limitation is necessary in order for them to present their case  
22 and for the Board to understand the issues.

23           We also note that the timing of petitioner’s motion is problematic. While  
24 the timing and manner of filing the motion did not violate any of LUBA’s rules,

1 the better practice is to file a motion for an overlength brief in advance of filing  
2 the brief, and to attempt to obtain the other parties' consent to an overlength brief.  
3 That is because the filing of a non-stipulated motion for an overlength brief on or  
4 close to the deadline for filing it necessitates that the Board either suspend the  
5 appeal in order to allow opposing parties to respond or, in the case of a motion  
6 for overlength petition for review, extend the deadline for filing response briefs,  
7 resulting in delays in briefing and oral argument. If those delays are significant,  
8 they could result in prejudice to a party's substantial rights.

9       While we agree with petitioner that overlength briefing may be warranted  
10 due to the substance of this appeal, where a local government has approved  
11 several complex applications in a single decision, petitioner has not established  
12 that a petition for review that includes up to 20,000 words, or a reply brief that  
13 includes up to 1,500 words, is warranted. Petitioner's motion for an overlength  
14 petition for review up to 20,000 words, and a reply brief up to 1,500 words, is  
15 denied.

16       However, given the complexity of the challenged approvals, we allow  
17 petitioner to file an overlength petition for review not to exceed 14,000 words.  
18 Within 14 days of the date of this order, petitioner shall either (1) file and serve  
19 an amended petition for review not exceeding 14,000 words, or (2) file and serve  
20 a written confirmation that petitioner has chosen to stand on his previously  
21 submitted conforming petition for review.

1           If petitioner files an amended petition for review not exceeding 14,000  
2 words, then respondents shall each be allowed to file overlength response briefs  
3 not exceeding 14,000 words. The deadline for filing the response briefs is  
4 extended to June 21, 2021, and the deadline for issuing the final opinion and order  
5 is extended by the same number of days.

6           Dated this 17th day of May 2021.

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Melissa M. Ryan  
Board Member