

Land Use Board of Appeals

Budget Presentation

Joint Ways and Means

Subcommittee on Natural Resources

February 7, 2019

I. Agency Mission, Goals and Historical Perspective

The legislature created the Land Use Board of Appeals (LUBA) in 1979. Prior to 1979, circuit courts performed LUBA's review function of civil litigation involving land use decisions, but such litigation was costly, slow, and relatively inefficient. Among the perceived inefficiencies was having 36 different circuit courts rendering inconsistent, legally vulnerable decisions by judges unfamiliar with land use legislation, which required additional appeals to the Court of Appeals to sort out. Further, such circuit court decisions were not generally available to the public to assist future decision making, and carried no precedential authority.

LUBA's primary mission is to quickly and correctly resolve land use appeals. A secondary, related, mission is to make LUBA decisions widely available to the public and decision makers as a guide to resolving land use disputes. The LUBA appeal review function is supported entirely by the General Fund. The publication function is supported entirely by revenue from sales of the LUBA Reports.

LUBA's goals closely mirror these primary and secondary missions. LUBA has eight strategic goals. The four most important are: (1) resolve land use appeals quickly; (2) decide all issues presented in appeals; (3) decide issues correctly and consistently, to minimize further appeals; and (4) provide quick and easy public access to LUBA opinions.

LUBA hears appeals of decisions from every city and county in the state and reviews a small number of state agency decisions that qualify as land use decisions. LUBA review is expedited, designed to produce a final decision by LUBA within 77 days after the local government files the record in an appeal.

LUBA plays a critical role in the implementation of Oregon's statewide planning program, and its expedited review function helps avoid unnecessary delays in economic development, which often depends on time-sensitive financing or construction seasons. LUBA review also provides a forum to ensure that economic development does not come at the cost of avoidable environmental degradation or other undesirable impacts.

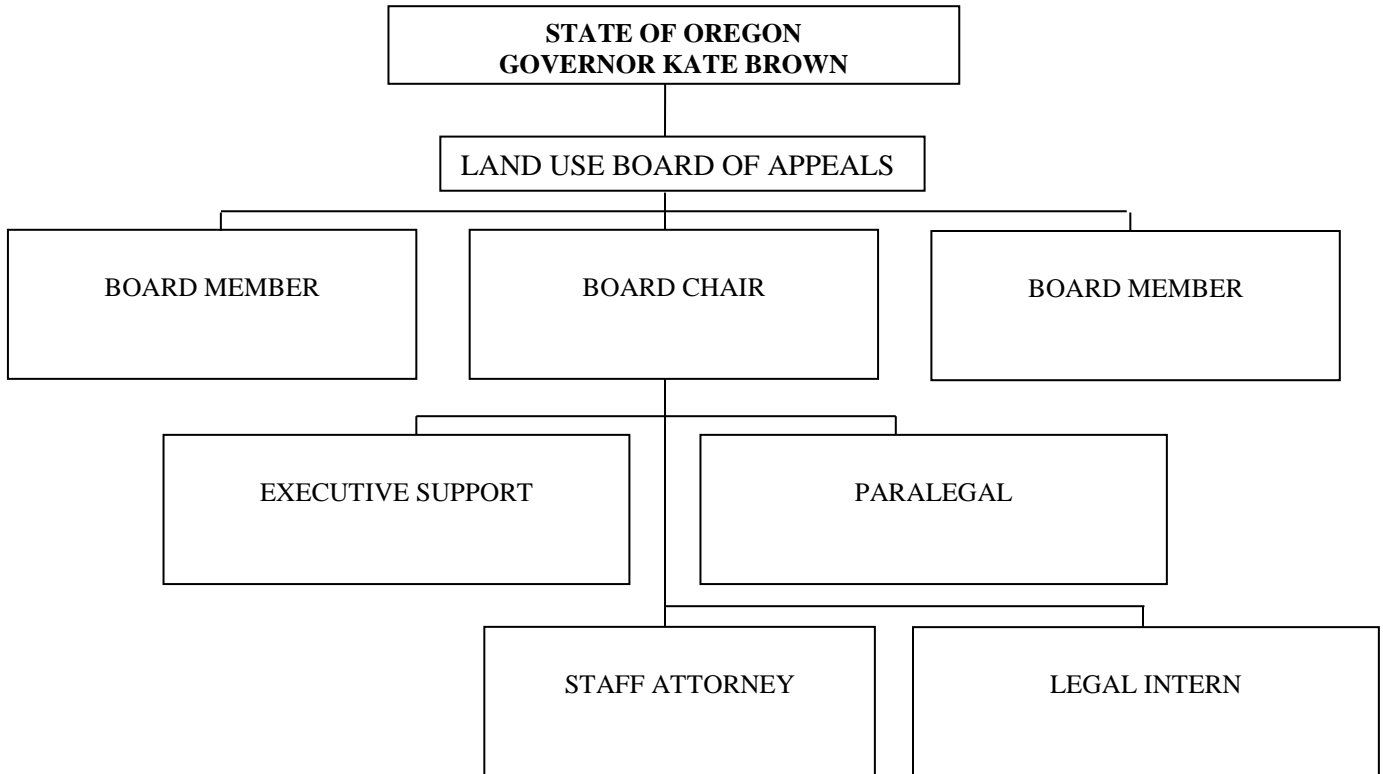
Under the current review scheme, the bulk of disputes over land use decisions are speedily resolved at LUBA without any involvement by the circuit courts, limited involvement by the Court of Appeals, and almost no involvement by the Supreme Court. Although it is hard to quantify, LUBA's publication function probably reduces the number of appeals and litigation that would otherwise occur. Uncertainty breeds litigation, and the availability of 39 years of published LUBA opinions that definitively resolve many issues sharply reduces the uncertainty inherent in a complex land use program.

II. Program and Target Groups

LUBA has only one program, described above. The most immediate beneficiaries of LUBA's expedited review and publication functions are the parties to appeals, the development community, city and county local governments, and state agencies such as DLCD and ODOT, which play a role in the land use program. Most Oregonians benefit indirectly to some degree from LUBA's review and publication functions.

III. Agency Organization

Below is the agency's proposed 2019-21 organizational chart.



As proposed in the Governor's Budget, LUBA is made up of 6.0 FTE, consisting of three Board Members who are attorneys experienced in land use law, a Staff Attorney, and two administrative staff members. Board Members are appointed by the Governor and confirmed by the Senate and serve four-year terms. The Staff Attorney assists the Board Members in researching legal issues presented in appeals, final editing of opinions, and answering questions from participants in the LUBA appeal process. The Paralegal (1) assists the Executive Support Specialist, (2) carries out the publication function, (3) maintains LUBA's website, and (4) assists the Board Members in final editing of opinions. The Executive Support

Specialist is primarily responsible for all the administrative tasks that are necessary to run the office and keep the active appeal files current. The Executive Support Specialist and Paralegal are fully cross trained.

IV. Performance Measures

The Legislature has approved five Key Performance Measures (KPMs) for LUBA, which closely track the agency's primary and secondary missions.

KPM #1 is to **Timely Resolve Appeals** within the statutory 77-day deadline or a stipulated 7-day extension, expressed as the percentage of appeals resolved within that deadline.

This is the most important performance measure. Performance correlates strongly with caseload and staffing. Caseload, in turn, strongly correlates to the state of the economy. In the mid-1990s, LUBA was overwhelmed with appeals, which hit at a time of Board turnover, and the result was a significant backlog that delayed resolution of appeals up to six months. It took five years and extra staffing to eliminate the backlog and return to compliance. Similarly, during the strong 2007-08 economy LUBA struggled to meet this performance measure with no extra staffing.

Another variable is the complexity of appeals. About ten to twenty percent of appeals involve large-scale legislative or extremely complicated quasi-judicial decisions with many issues and parties. Such complex appeals often cannot practicably be resolved within the statutory 77-day deadline, and if a cluster of complex appeals come through at the same time, it can cause a temporary backlog that affects timely resolution of less complex appeals.

The KPM #1 target is to timely resolve appeals 90 percent of the time. Through the first six quarters of the current biennium, LUBA falls just under the target at 87 percent.

KPM #2 is to **Timely Settle the Record**, expressed as a percentage of objections resolved within 60 days of receipt.

Delay in resolving objections to the record can slow the appeal process, and a statute mandates that LUBA resolves objections within 60 days of receipt.

The target is 95 percent. During the first six quarters of the 2017-19 biennium, LUBA resolved 98 percent of record objections within 60 days of receipt.

KPM #3 is to **Resolve All Issues** when reversing or remanding a decision, expressed as a percentage of assignments of error resolved in final opinions. This KPM reflects a statutory mandate for LUBA to resolve all issues when reversing or remanding, if consistent with statutory deadlines.

The target is 100 percent. LUBA has consistently met this performance measure and met this performance measure during the first six quarters of the 2017-19 biennium.

KPM #4 is to **Decide Appeals Correctly**, expressed as a percentage of final opinions that are sustained on all issues before the Court of Appeals, among the subset of LUBA decisions that are appealed to the court.

This is an important measure of the quality of LUBA's work. LUBA must constantly balance speed (quickly resolving the appeal) and quality (correctly resolving legal issues). Caseload and staffing are the main factors affecting

LUBA's ability to meet this performance measure, as they impact the Board's ability to conduct the research and legal analysis necessary for resolving legal issues correctly. Another fact affecting LUBA's ability to meet this performance measure is new legislation, which unsettles the law.

The target is 90 percent. During the first six quarters of the 2017-19 biennium, the Court of Appeals sustained 23 of the 27 decisions that were appealed to it, resulting in an 85 percent sustained on appeal rate.

KPM #5 is Customer Service, expressed as a percentage of customers rating their satisfaction with LUBA's service as "good" or "excellent," on five different variables: accuracy, availability of information, expertise, helpfulness, timeliness, and overall. The winner/loser nature of appellate review means not all parties will be satisfied with the *outcome* of the appeal, but LUBA has striven successfully to conduct its review in a manner that leaves participants satisfied with the *review process*.

LUBA has consistently met this performance measure. The target is 90 percent for each variable. During the first six quarters of the 2017-19 biennium LUBA met or exceeded the target for all variables except "availability of information," which was 88 percent.

V. Major Budget Drivers and Environmental Factors

The major budget drivers and environmental factors affecting LUBA's functions are the state economic health, state population growth, and resulting impacts on the number of development proposals, disputes over development, and hence the number of appeals to LUBA.

Exhibit A is a graph showing appeal numbers from 1989 through 2017. The graph shows wide variability from approximately 100 appeals per year to over 260 appeals per year, a variability that correlates strongly to economic booms and busts. Typically, there is a significant lag time between the height of the boom or the low of the bust and the resulting increase/decrease in appeal numbers, as development proposals and local appeals work their way through the local land use process. The average number of appeals is approximately 200 appeals per year. Since the most recent recession took hold in 2009, annual appeal numbers have been in the mid-100s. LUBA anticipates that if the economy continues its current recovery, appeal numbers will increase toward the average of approximately 200 appeals per year sometime toward the end of the 2019-21 biennium. In addition, statutory and administrative rule changes to review of some urban growth boundary (UGB) amendments, the roll out of local governments' marijuana regulatory programs, as well as changes to state housing laws, mean that appeals of those amendments will be reviewed by LUBA, and that will increase caseload.

Another minor variable affecting appeal numbers is the extent to which the legal framework is settled or has become unsettled by new land use legislation. When the existing framework of land use statutes or laws is changed significantly, as happened in 1993 with HB 3661, and more recently with respect to Measure 37 and Measure 49, and marijuana legalization, it introduces uncertainty, which breeds litigation until the appellate review process has clarified any ambiguities or uncertainties. Conversely, when the law is or becomes relatively settled, the number of disputes and hence the number of appeals is reduced.

VI. Major Changes in the Last 6 Years

Shifts in the basic structure of the state economy have affected both the volume and complexity of land use appeals. Over the last two decades the state economy has continued a general shift from resource-based activities (timber, forest products, agriculture, fisheries) to an emphasis on high-tech and service-related industries. Unlike resource-based economic activity, which predominately occurs in rural areas, much of the new economic growth involves development proposals at the margins of urban areas, increasing pressure on UGBs and rural resource uses, resulting in a greater potential number of land use conflicts. In addition, land use conflicts in urban areas tend to involve more complex regulations and circumstances, compared to conflicts in rural areas. This contributes to the trend of more complex appeals.

Another recent change affecting LUBA's caseload and the complexity of appeals is the de-emphasis on periodic review that is conducted by the Department of Land Conservation and Development (DLCD) as the main vehicle to ensure that local government comprehensive plans and land use regulations comply with recent statutes, goal and rule requirements and amendments. As a result of this shift away from periodic review, more local governments are adopting post-acknowledgment plan amendments (PAPAs) outside the context of periodic review, which means that they are subject to appeal to LUBA. Appeals of such legislative amendments tend to involve more complex issues than typical permit decisions.

During the 2017-19 biennium, two Board members who have each been with LUBA for more than twenty years have retired or will retire, and thus LUBA is experiencing significant turnover on the Board this biennium. The Board

Members that the Governor has appointed to replace the retiring Board Members are both experienced land use lawyers with significant experience practicing law. While LUBA anticipates that both new Board Members will quickly be up to speed in resolving appeals, it is possible that a 66 percent turnover on the Board within nine months' time may result in slight delays in resolving appeals consistent with LUBA's statutory deadlines, while the new Board Members get up to speed on pending appeals and the LUBA process.

VII. Cost Containment/Program Delivery Improvement

LUBA's unique function as an independent appellate review body precludes private partnerships in the usual sense, or combining programs with other state agencies, some of whom appear before LUBA as litigants. However, LUBA coordinates with Willamette University School of Law to host a Land Use Fellowship for a third year law student to intern sequentially with LUBA, a local government, and a private law firm through the academic year.

In recent years LUBA has initiated a number of cost containment or service improvement measures; the most important are described below.

- **Westlaw/LEXIS.** LUBA negotiated contracts with Westlaw and LEXIS under which the LUBA Board Members, Staff Attorney, and Legal Intern receive the right to unlimited legal research time, at a significantly reduced cost to LUBA, in exchange for providing LUBA's opinions directly to Westlaw's and LEXIS' on-line databases. LUBA also receives on-line citation-checking services, which reduces the need to purchase printed research materials. The cost to obtain these essential

online research services would otherwise be several thousand dollars per year.

- **Website Improvements.** In 2012, LUBA obtained a \$4,000 grant from the Oregon State Bar (OSB) to digitize and place on LUBA's website copies of LUBA opinions and orders from the 1980s, which were otherwise unavailable to the public except through an on-line subscription with Westlaw or LEXIS. Those opinions have been digitized and were placed on LUBA's website during 2015. The new content is provided free of charge to OSB members through the Bar's Fastcase research database. That content is also available to the public free of charge on LUBA's website. Since 2017, LUBA has posted copies of its final opinions, and some orders, on its website the morning after they are issued.
- **Local Records/Electronic Records.** LUBA now recycles copies of the local record at the conclusion of an appeal rather than incurring the cost of storing the local record at State Archives (Archives) or incurring the cost of mailing the record back to the local government. In addition, LUBA's rules now allow for submission of electronic records, which reduces the need for storage and associated storage costs.
- **Court of Appeals' Records.** Since 2017, LUBA has been preparing records for LUBA decisions that are appealed to the Court of Appeals in electronic format, and if the parties agree, providing only an electronic copy to the parties. This has

resulted in savings in office supply and mailing costs. Beginning in 2019, consistent with new amendments to the Oregon Rules of Appellate Procedure, LUBA will now transmit only electronic copies of the LUBA record to the court and the parties unless the parties request a paper copy.

- **Archiving.** LUBA now archives only copies of the final opinion and the briefs filed by the parties, and recycles all other documents in LUBA's appeal files. This reduces storage costs for both LUBA and Archives.
- **Reduced LUBA Library.** In recent years LUBA has discontinued subscriptions to several legal treatises and relies on Westlaw and LEXIS and the Supreme Court Library instead. The estimated savings is approximately \$4,000 per biennium.
- **Publication Savings.** LUBA has implemented a number of steps to reduce printing, binding and distribution costs, saving approximately \$2,000 per volume or approximately \$10,000 per biennium. LUBA's published volumes are now delivered to some subscribers by state shuttle, at a significant savings.
- **Conference Calls.** LUBA's rules allow parties to participate in oral argument via conference call, which sometimes saves the parties a long drive to Salem. LUBA used to initiate the conference calls, which meant LUBA incurred long-distance charges. LUBA now uses the state "Meet-Me" conference call service at a much lower cost to LUBA.

- **Land Use Fellowship.** As noted, since 2009, LUBA has partnered with Willamette University School of Law to create a fellowship wherein a qualified third year law student is awarded a stipend (paid by the University) to intern with LUBA, a local government, and a private land use firm, to gain well-rounded, practical work experience in land use law. This program has generally improved the quality of the prior intern program at LUBA, which has existed for many years.

Potential Future Cost Containment/Service Improvements.

- **Electronic Filing of Pleadings.** LUBA's limited technology budget does not currently allow for electronic filing of pleadings. All pleadings are filed with paper copies. Although converting from paper filings to electronic filings would involve a large upfront cost to procure the software, licenses, and required security features, electronic filing would eventually reduce the need for paper copies and would bring LUBA more fully into the digital age, in line with the state and federal judicial branches.

VIII. Major Budgetary Issues

LUBA's experience over the past 20 years indicates that three Board Members with the assistance of a Staff Attorney can resolve approximately 150 appeals per year consistent with LUBA's statutory deadlines, assuming average complexity of cases, and no significant turnover on the Board. As noted, during the

2017-19 biennium, two Board Members who have each been on LUBA for more than 20 years have retired or will retire. This transition may result in slight delays in meeting statutory deadlines as the two new Board Members get up to speed.

When appeals exceed 150 per year or when significant turnover occurs on the Board, sporadic delays and performance failures tend to occur. When appeals exceed approximately 220 per year, as they last did in 2007, performance failures will occur even with the help of a Staff Attorney. LUBA anticipates that as the economy continues its recovery that appeal numbers will increase from the current 150 appeals to 175 to 200 appeals per year, near the 20-year average, and perhaps beyond. For 2018, 150 appeals were filed. The timing of a caseload increase is uncertain. However, LUBA will almost certainly be able to continue to comply with statutory deadlines without additional staffing. The Governor's Recommended Budget proposes to maintain LUBA at its current staffing level.

IX. Proposed Legislation Affecting Agency Operations

- **UGB Amendments.** DLCD's administrative rules regarding certain urban growth boundary amendments took effect in 2016. LUBA has not yet seen any appeals of these kinds of UGB amendments, but these appeals may result in an increase in LUBA's caseload. Given current appeal numbers, LUBA should be able to absorb the increased caseload with existing staffing.
- **Transfers of Measure 49 Development Rights.** DLCD also adopted administrative rules regarding transfers of development rights in

connection with Measure 49 entitlements. It is unknown whether the new rules will result in an increase in appeals to LUBA.

- **Local Marijuana Regulation.** Recent marijuana legislation has already generated a number of appeals and likely will continue to generate additional appeals in the future.
- **Housing.** Proposed statutory changes to how the state and local governments address housing needs and the state's housing crisis will likely continue to affect appeals, and may generate additional appeals in the future. In addition, proposed state legislation regulating short-term rentals may produce additional appeals.
- **Changes to EFU statutes.** Proposed legislation amending the Exclusive Farm Use zoning statutes in various ways could, if enacted, produce additional appeals.

X. Agency Reduction Options

Ten Percent Option: Eliminate Staff Attorney.

LUBA has only one program unit, corresponding to its primary mission: to expeditiously resolve appeals of local government land use decisions. ORS 197.830(14) requires LUBA to issue a final order within 77 days after the date that the local record is transmitted to LUBA.

LUBA is a six-person agency that currently consists of three Board Members, one Staff Attorney and two support staff. In 2010, the Staff Attorney position was vacated due to budgetary constraints, and the position was eliminated

in 2011-13. The Staff Attorney position was restored for the last 18 months of the 2013-15 biennium; the position was filled in September 2014, and has been filled since.

LUBA's 2019-21 Current Service Level budget is \$2,083,485. Ten percent of that amount is \$208,348. Because LUBA has only one program, and the large majority of its budget is for personnel, the only feasible means of reducing LUBA's budget by ten percent is to reduce personnel costs. The most feasible option to effect a 10 percent reduction is to eliminate the Staff Attorney position. Achieving the same amount of reduction by other means would require the reduction if not elimination of at least two staff FTEs, which would leave LUBA unable to perform necessary administrative functions.

Historically, on average, each Board Member resolves approximately 135 appeals and issues about 140 orders per biennium. At least a third of each Board Member's workload represents essential work that does not directly produce any orders or opinions, such as preparing for and conducting oral argument, peer review of other Board Members' drafts, etc. The three LUBA Board Members conduct most of the legal research necessary to write opinions and orders and do the majority of the necessary writing themselves. However, all Board Members also assign work to the Staff Attorney. This work assigned to the Staff Attorney must be completed before opinions and orders can be issued.

The effect of eliminating the Staff Attorney will be to require that the Board Members absorb the work that the Staff Attorney would otherwise have produced. This would reduce substantially those Board Members' ability to produce orders and opinions. The net effect would be to reduce LUBA's biannual production of orders and opinions by approximately one-fourth or approximately 100 fewer cases being resolved, and 100 fewer intermediate orders being issued over the biennium

during a biennium with a normal number of appeals. That reduction would likely mean a return of the final opinion backlog that existed between 1995 and 2001. The negative impact of the above-described 10 percent cut will be even more dramatic if the number of land use appeals exceeds 200 annual appeals.

XI. Other Requested Information

1. Audits. The Secretary of State has not conducted an audit of LUBA in 2017-19.
2. Changes to agency budget and effect on agency operations. None.
3. Span of Control. Not applicable.
4. Information Technology and capital construction projects. None.
5. Other Funds Ending Balance Form. See attached Exhibit B.
6. 10 percent Reduction Options Form. See attached Exhibit C.

Exhibit A

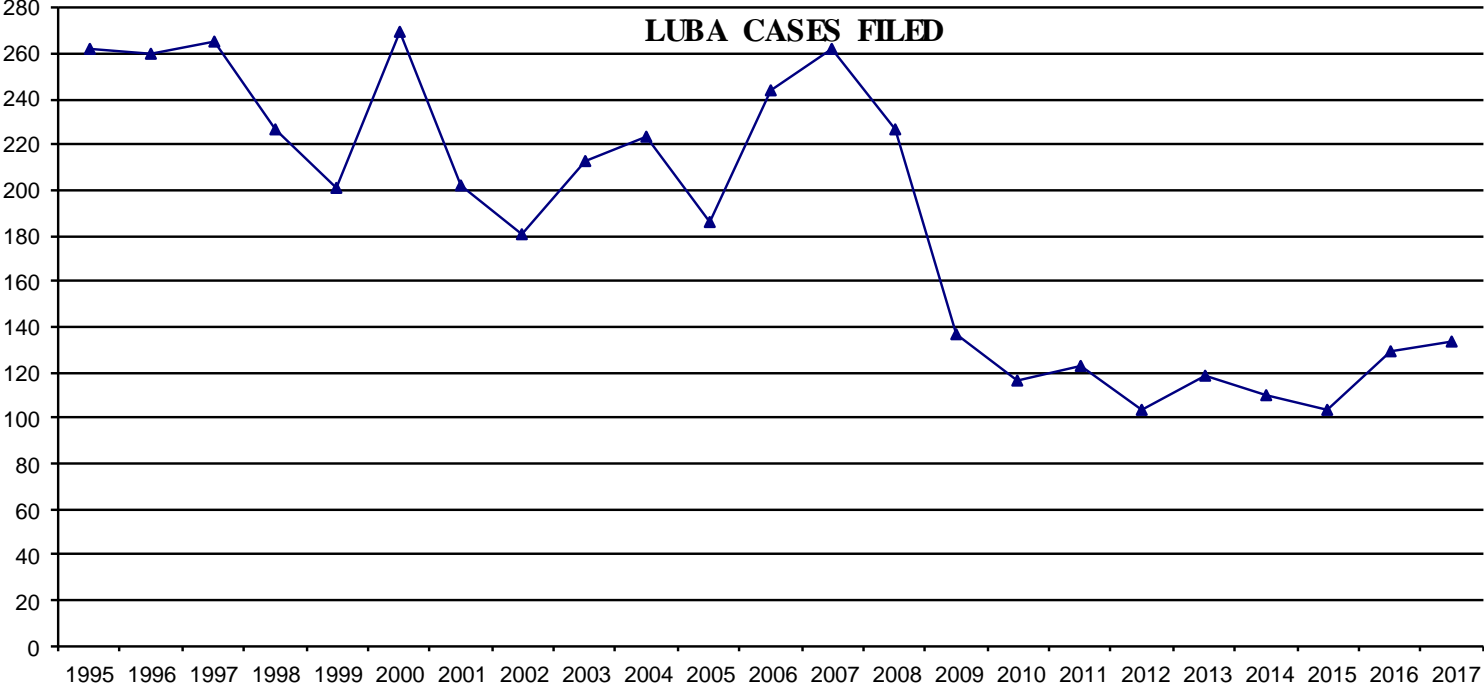


Exhibit B Other Funds Ending Balance

UPDATED OTHER FUNDS ENDING BALANCES FOR THE 2017-19 & 2019-21 BIENNIA

Agency: Land Use Board of Appeals
Contact Person (Name & Phone #): Melissa Ryan, (503) 373-1265

(a) Other Fund Type	(b) Program Area (SCR)	(c) Treasury Fund #/Name	(d) Category/Description	(e) Constitutional and/or Statutory reference	(f) Ending Balance		(g) Ending Balance		(h) In CSL	(i) Revised	(j) Comments
					In LAB	Revised	In CSL	Revised			
Limited	66200-000-00-00-0000	Cash on Deposit with Treasurer	Operational	ORS 197.805 - .860	12,196		12,215				Revenues are generated by the sale of hard copies of Board issued Opinions. Revenue estimate of \$35,000 in the 17-19 budget is optimistic and ending balance is therefore adjusted downward by \$10,000.

- Objective:** Provide updated Other Funds ending balance information for potential use in the development of the 2019-21 legislatively adopted budget.
- Instructions:**
- Column (a): Select one of the following: Limited, Nonlimited, Capital Improvement, Capital Construction, Debt Service, or Debt Service Nonlimited.
 - Column (b): Select the appropriate Summary Cross Reference number and name from those included in the 2017-19 Legislatively Approved Budget. If this changed from previous structures, please note the change in Comments (Column (j)).
 - Column (c): Select the appropriate, statutorily established Treasury Fund name and account number where fund balance resides. If the official fund or account name is different than the commonly used reference, please include the working title of the fund or account in Column (j).
 - Column (d): Select one of the following: Operations, Trust Fund, Grant Fund, Investment Pool, Loan Program, or Other. If "Other", please specify. If "Operations", in Comments (Column (j)), specify the number of months the reserve covers, the methodology used to determine the reserve amount, and the minimum need for cash flow purposes.
 - Column (e): List the Constitutional, Federal, or Statutory references that establishes or limits the use of the funds.
 - Columns (f) and (h): Use the appropriate, audited amount from the 2017-19 Legislatively Approved Budget and the 2019-21 Current Service Level at the Agency Request Budget level.
 - Columns (g) and (i): Provide updated ending balances based on revised expenditure patterns or revenue trends. Do not include adjustments for reduction options that have been submitted unless the options have already been implemented as part of the 2017-19 General Fund approved budget or otherwise incorporated in the 2017-19 LAB. The revised column (i) can be used for the balances included in the Governor's budget if available at the time of submittal. Provide a description of revisions in Comments (Column (j)).
 - Column (j): **Please note any reasons for significant changes in balances previously reported during the 2017 session.**

Additional Materials: If the revised ending balances (Columns (g) or (i)) reflect a variance greater than 5 percent or \$50,000 from the amounts included in the LAB (Columns (f) or (h)), attach supporting memo or spreadsheet to detail the revised forecast.

Exhibit C 10 Percent Reduction Options

Land Use Board of Appeals (LUBA)																
2019 - 2021 Biennium																
Detail of Reductions to 2019-21 Current Service Level Budget																
1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	
Priority (ranked most to least preferred)	Agency	SCR or Activity Initials	Program Unit/Activity Description	GF	LF	OF	NL-OF	FF	NL-FF	TOTAL FUNDS	Pos.	FTE	Used in Gov. Budget Yes / No	Impact of Reduction on Services and Outcomes		
Dept	Prgm Div															
	LUBA		Reduce LUBA Staff Attorney to .5 FTE (5% GF Reduction)	104,174						\$ 104,174	1	0.50		Reduced Efficiency - Chance that statutory deadlines for issuing final opinions will not be met.*		
	LUBA		Eliminate LUBA Staff Attorney Position (10% GF Reduction)	208,349						\$ 208,349		1.00		Reduced Efficiency - Statutory deadlines almost certainly will not be met		
				-						\$ -						
				-						\$ -						
			THE ABOVE REDUCTION OPTIONS ARE NOT INCLUDED IN THE GOVERNOR'S RECOMMENDED BUDGET								\$ -					
				-						\$ -						
				-						\$ -						
				-						\$ -						
				-						\$ -						
				-						\$ -						
				-						\$ -						
				312,523	-	-	-	-	-	\$ 312,523	1	1.50				

	Target	\$ 312,523
GF - CSL 2019-21	2,083,485	
GF Target Amounts		
5%	104,174	
10%	208,349	
Total	312,523	
OF - CSL 2017-19	34,981	
5%	1,749	
10%	3,498	

Target \$ 312,523
Difference \$ -

A
*Part time Staff Attorney position likely will experience high turnover rate.

Other Fund Reduction have not been proposed and are not included in the Governor's Recommended Budget.
Due to the nature of the only program supported by OF, reduction option are not feasible and any cuts would simply have to be absorbed.