

# Land Use Board of Appeals



**Budget Presentation**

**March 6, 2023**

<https://www.oregon.gov/luba/Pages/default.aspx>

- Melissa M. Ryan, Board Chair
- H.M. Zamudio, Board Member
- Michelle Gates Rudd, Board Member

# Historical Perspective

## **1979 Senate Bill 435**

- Created LUBA
- Replaced writ of review in circuit court
- Exclusive jurisdiction to review “land use decisions”
- Defined “land use decision”
- 3 Board Members, required to be attorneys/members of the Oregon State Bar

# Agency Mission

LUBA's mission is to provide a simplified appeal process, a speedy resolution of land use disputes and a consistent and correct interpretation of state and local land use laws.

**240** Cities  
**36** Counties  
Special Districts  
State Agencies

*Agency calls "balls and strikes."  
Agency does not make policy.*

# Guiding Principles

## Two critical principles

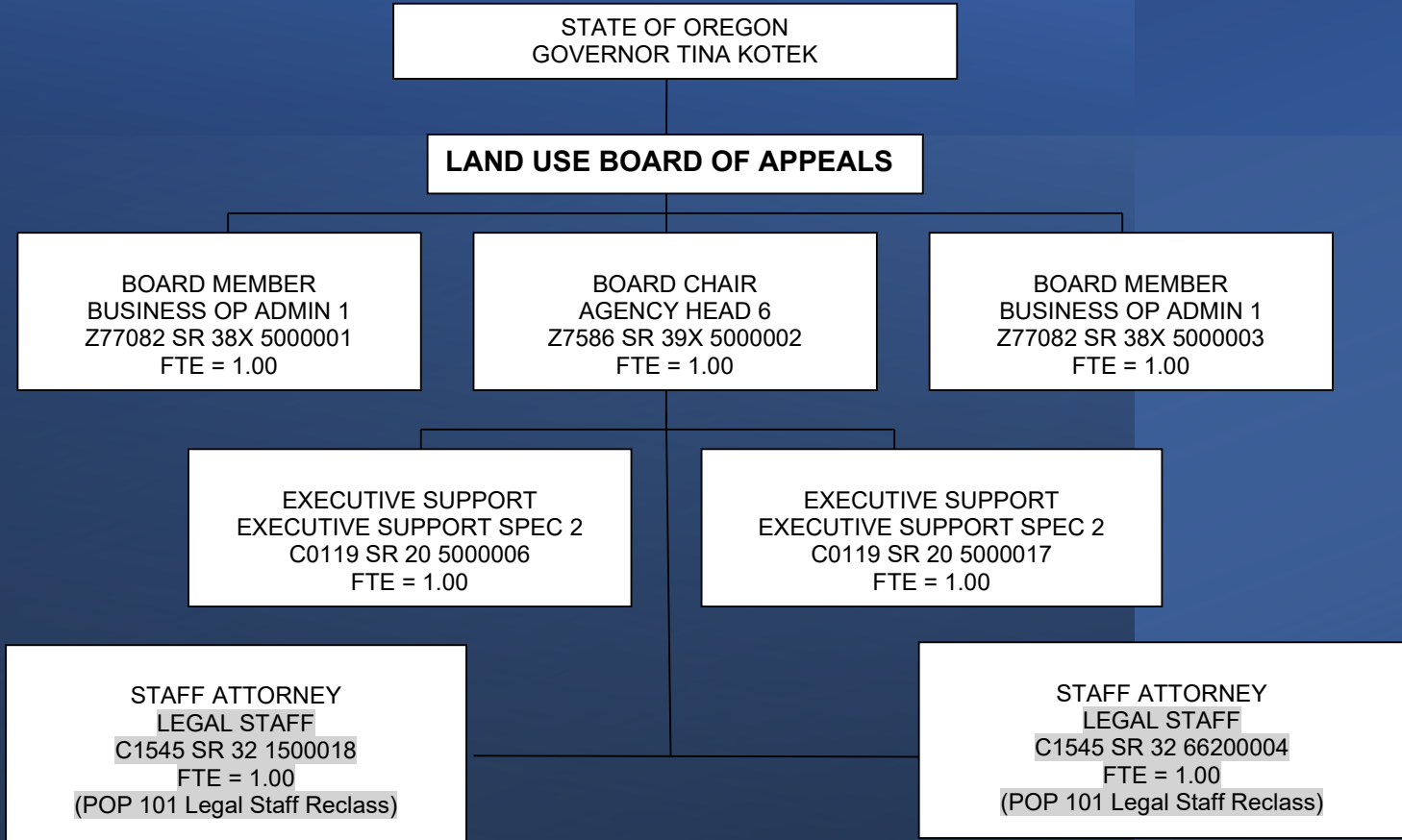
1. Land use decisions should be consistent with the state and local land use planning legislation that they apply.
2. Where there is a dispute concerning whether a land use decision complies with applicable land use planning legislation, that dispute should be resolved efficiently and according to sound principles of judicial review.

This allows land use proposals that comply with the law to go forward without unreasonable delay and allows land use proposals that do not comply with applicable law to be amended or terminated in a timely and efficient manner.

## Other Agency Goals

- Provide quick and easy access to LUBA final opinions.
- Speak at attorney focused continuing legal education programs and other land use seminars; Invite law school classes to attend oral argument and after argument concluded, ask questions.
- Support Sullivan Land Use Fellowship by hosting law student interns.
- Make LUBA's headnote digest available on LUBA's web page as a research tool for the public and parties to a LUBA appeal.

# LAND USE BOARD OF APPEALS – 2023-25 ORGANIZATION CHART



# LUBA Process

## **LUBA review is designed to be efficient:**

- “Notice of Intent to Appeal” filed with LUBA
- Local Government files record – **Day 21**
- Petition for Review filed – **Day 42**
- Respondent’s Brief filed – **Day 63**
- Oral argument at LUBA – **Day 77**
- LUBA issues Final Opinion – **Day 98**

**\* \* \* Circuit Court Review can take between 1 and 5 years**

# EXAMPLE APPEAL TIMELINE

## ***Zenith Energy Terminals Holdings LLC v City of Portland***

**LUBA Number 2021-083**

**City decision denying application for Land Use Compatibility Statement (LUCS)**

**\* LUBA Resolves Appeal Within Five Months**

### **Initial Appeal Phase**

- |                            |                              |
|----------------------------|------------------------------|
| • <b>September 1, 2021</b> | <b>Appeal Filed at LUBA</b>  |
| • September 23, 2021       | Motion to Intervene Received |
| • September 23, 2021       | Record Received by LUBA      |

**\* \* \* 77-Day Timeline Started \* \* \***



# EXAMPLE APPEAL TIMELINE (cont'd)

## **Briefing**

- Day 21 (Oct 15, 2021) Petition for Review Received
- Day 42 (Nov 5, 2021) Response Briefs Received
- Day 42 (Nov 5, 2021) **City's Motion to Take Evidence Received (Motion Incomplete)**
- Day 49 (Nov 12, 2021) Reply Briefs Received

# EXAMPLE APPEAL TIMELINE (cont'd)

## Oral Argument and Final Opinion Phase

- Day 53 (Nov 16, 2021) Oral Argument Held
- Day 69 (Dec 2, 2021) LUBA issues order requiring city to file and serve *complete* Motion to Take Evidence and allows time for responses
- **Day 132 (February 3, 2022)** **LUBA Issues Final Opinion, Remands Decision to City**

**\* LUBA Resolves Appeal Within Five Months**

# EXAMPLE APPEAL TIMELINE (cont'd)

## Appellate Process

- Feb 24, 2022      Appeal to Court of Appeals
- May 11, 2022      Court of Appeals affirms LUBA's decision without opinion (AWOP)
- June 15, 2022      Petition for Supreme Court Review Filed
- **October 6, 2022**      Supreme Court Denies Petition

# 2022 Appeal Data - Resolved Appeals

**143 Appeals Resolved**

**109 Final Opinion and Orders Issued**

- **35 Affirmed**
- **28 Dismissed**
- **28 Remanded**
- **8 Reversed**
- **9 Transferred**
- **1 Invalidated (Moratorium)**

**231 Orders Issued**

- **37 Orders Resolving Record Objections**

# 2022 Appeal Data

## Orders on Motions for Attorney Fees

- 5 Orders Granting Motions for Attorney Fees
  - *Tadei v. City of Astoria, Sept 6, 2022 - \$27,965 awarded to applicant/intervenor*
  - *Riverview Meadows, LLC et al v. City of Nehalem, Oct 13, 2022 - \$44,365 awarded to 4 petitioners*
  - *Hollander Hospitality v. City of Astoria, Mar 21, 2022 - \$18,940 awarded to petitioner*
  - *Hendrickson v. Lane County, Aug 18, 2022 - \$26,380 awarded to petitioner*
  - *East Park, LLC v. City of Salem, Dec 6, 2022 - \$47,384 awarded to petitioner*
- 3 Orders Denying Motions for Attorney Fees
  - *Friends of Douglas County v. Douglas County, December 5, 2022*
  - *Briggs et al v. Lincoln County, December 6, 2022*
  - *1625 Sherman Ave. LLC v. City of North Bend, December 14, 2022*

# 2022 Appeal Data – New Appeals Filed

## 108 New Appeals

### 27 Cities

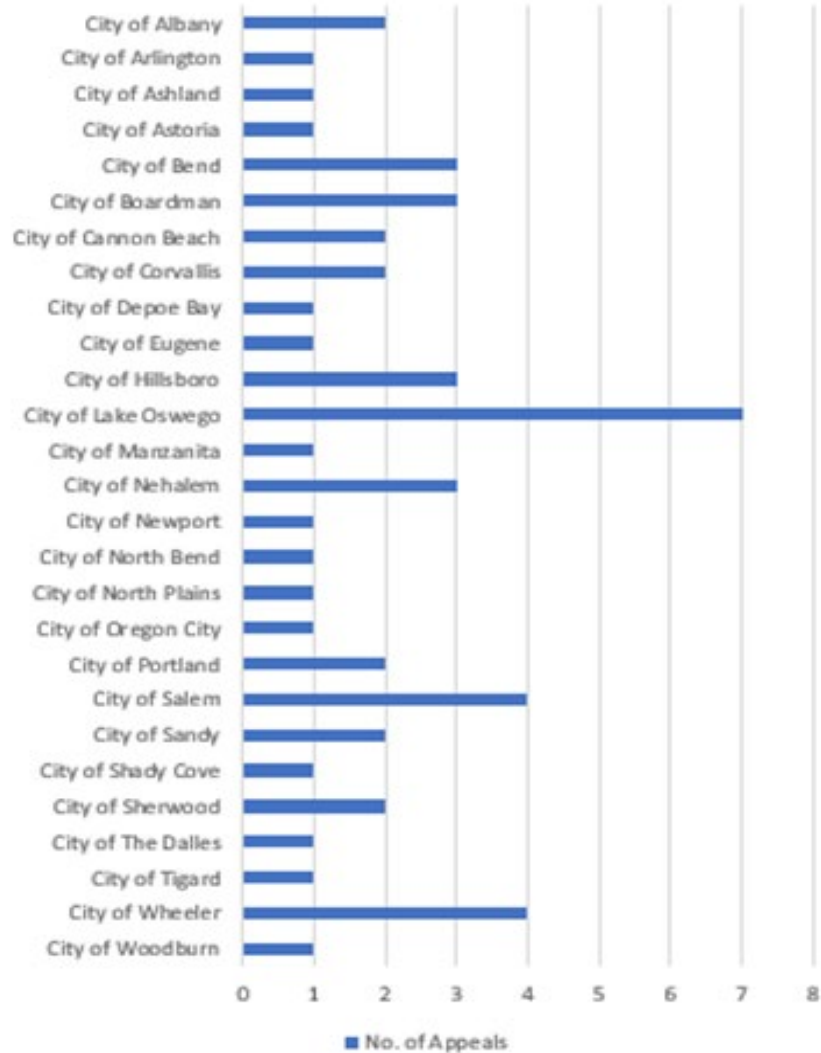
- City of Lake Oswego – 7
- City of Salem – 4
- City of Wheeler – 4
- City of Bend – 3
- City of Boardman - 3

### 21 Counties

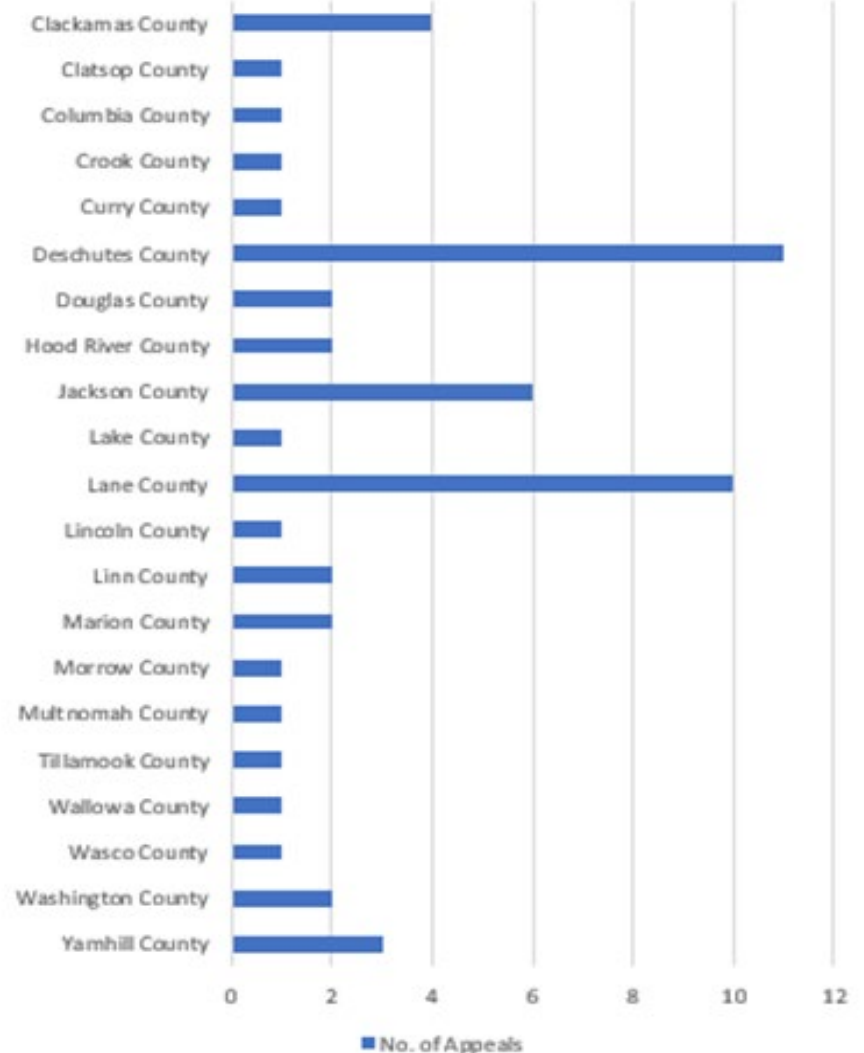
- Deschutes County - 11
- Lane County – 10
- Jackson County – 6
- Clackamas County – 4
- Yamhill County - 3

## 2022 Appeal Parties

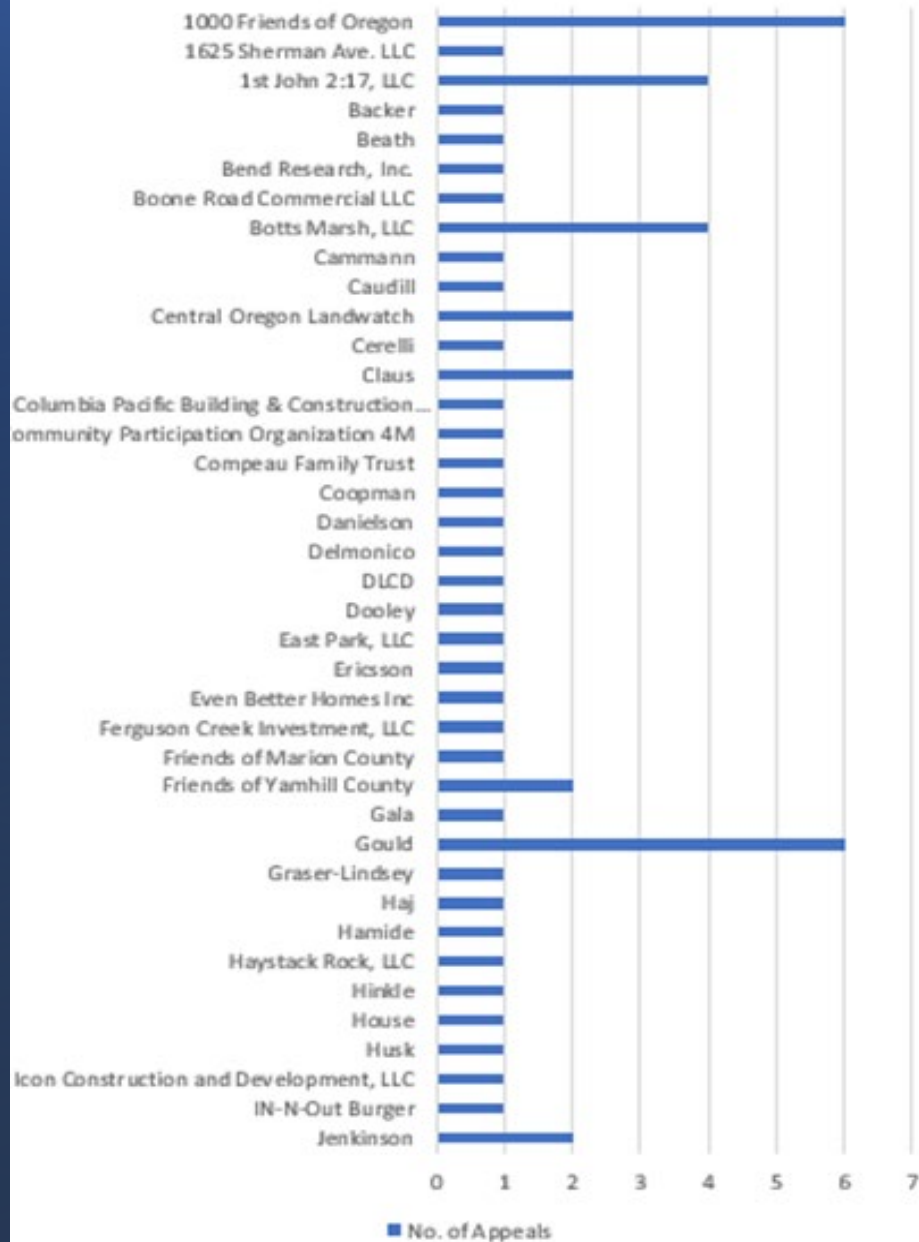
### Respondent Cities



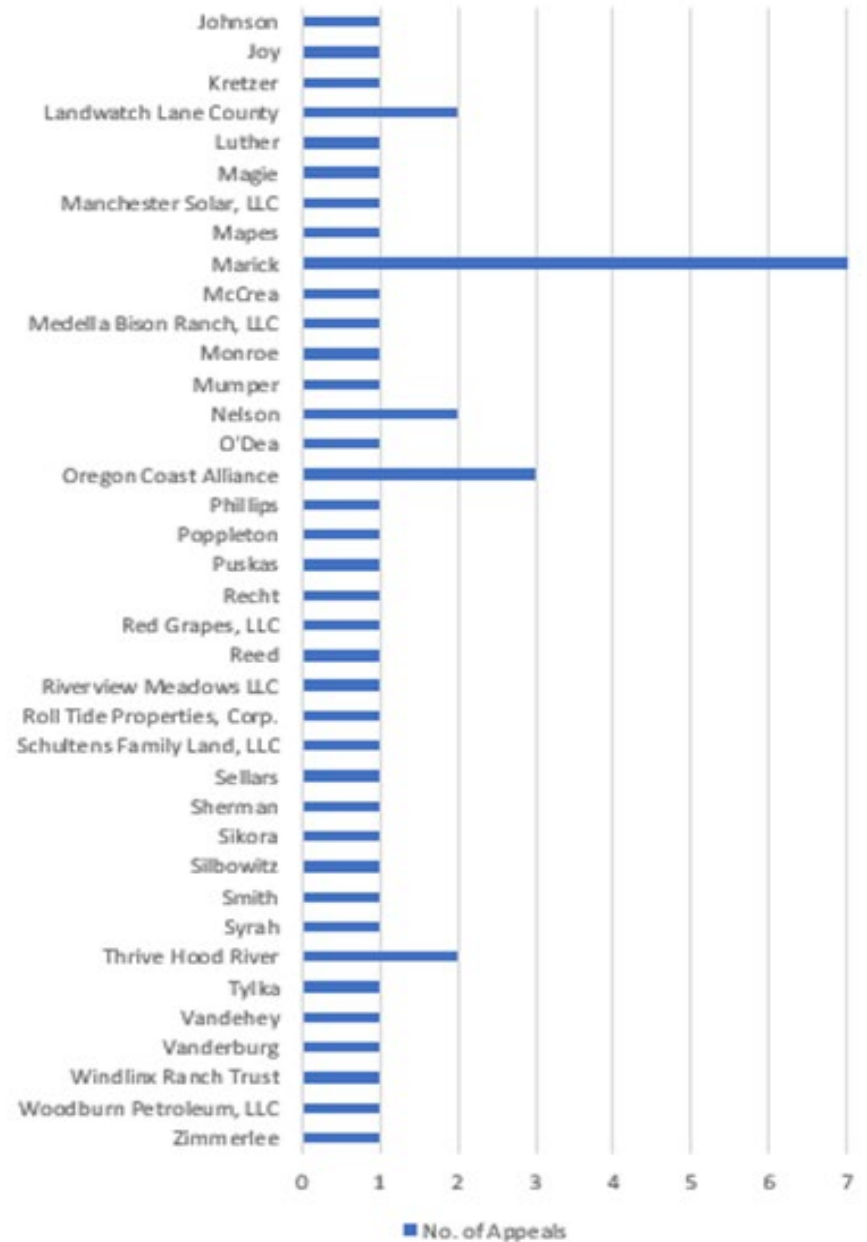
### Respondent Counties



## Petitioners



## Petitioners





# 2021 Appeal Data – Resolved Appeals

**133 Appeals Resolved**

**118 Final Opinions and Orders Issued**

- **38 Affirmed**
- **36 Dismissed**
- **37 Remanded**
- **6 Reversed**
- **1 Transferred**

**214 Orders Issued**

- **41 Orders Resolving Record Objections**

# 2021 Appeal Data

## Orders on Motions for Attorney Fees

- 3 Orders Granting Motions for Attorney Fees
  - *Van Dyke v. Yamhill County*, Apr 1, 2021 - \$44,059 to petitioners
  - *Legacy Development Group Inc v. City of the Dalles*, May 17, 2021 - \$18,039.50 to petitioner
  - *Nieto v. City of Talent*, May 10, 2021 - \$15,387.50 to petitioner
- 2 Orders Denying Motions for Attorney Fees
  - *Lundeen v. City of Waldport*, September 10, 2021
  - *Dahlen v. City of Bend*, September 16, 2021

# 2021 Appeal Data – New Appeals Filed

## 127 New Appeals

### 25 Cities

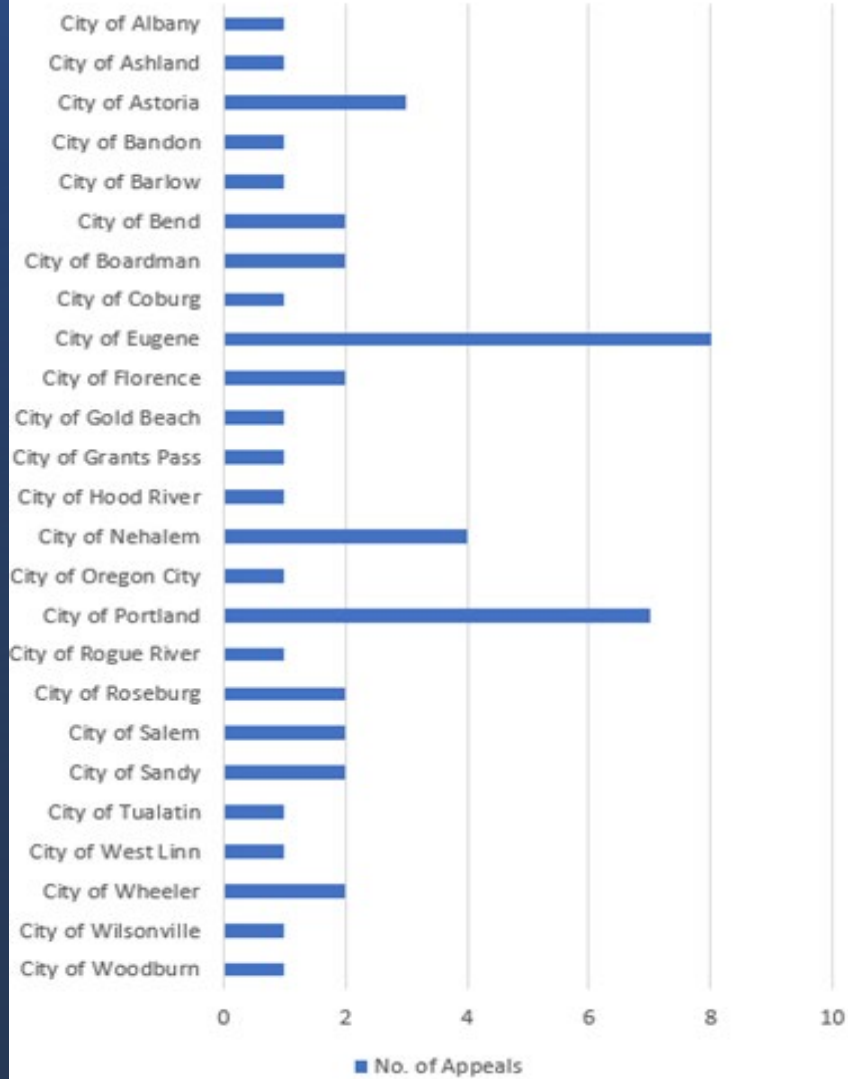
- City of Eugene – 8
- City of Portland – 7
- City of Nehalem – 4
- City of Astoria – 3

### 21 Counties/1 State Agency

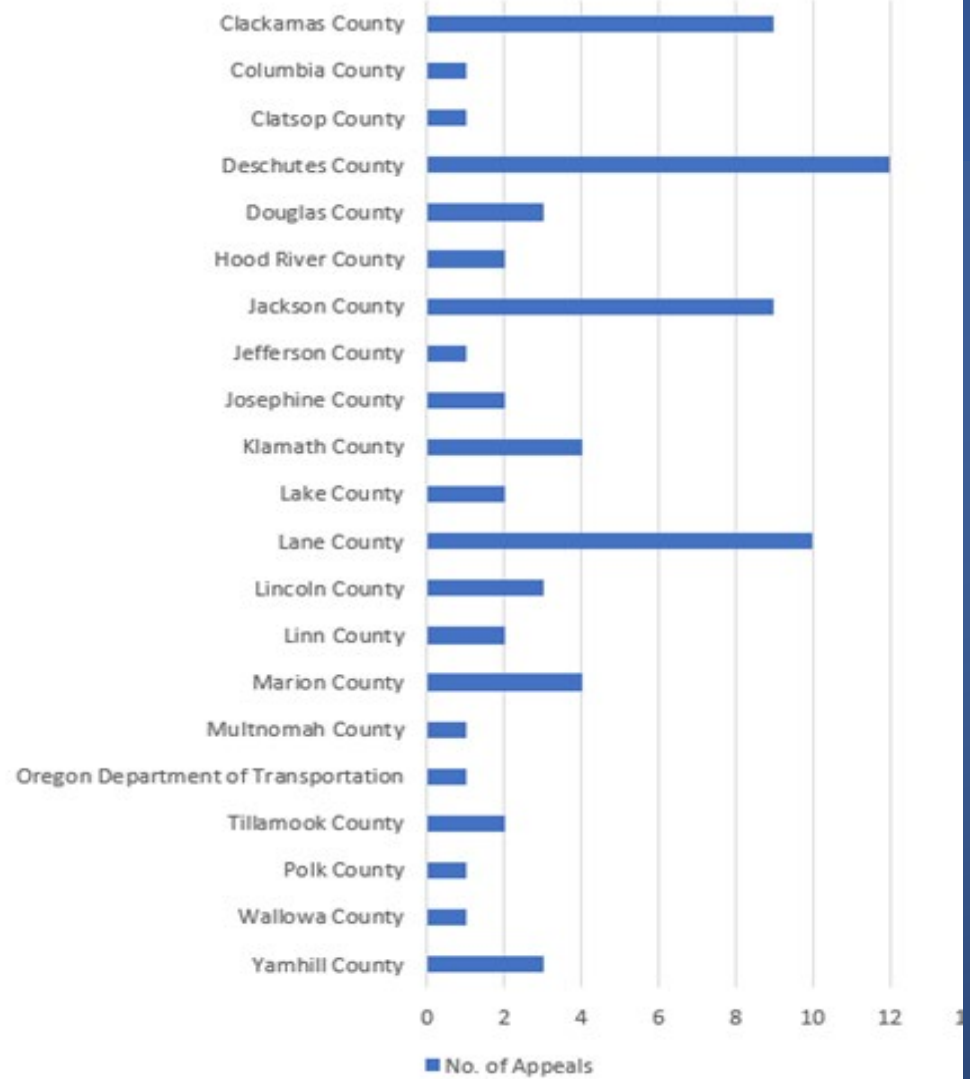
- Deschutes County – 12
- Lane County – 10
- Clackamas County – 9
- Jackson County – 9
- Marion County – 4
- Klamath County – 4
- Lincoln County – 3
- Douglas County – 3
- Oregon Dept of Transportation - 1

## 2021 Appeal Parties

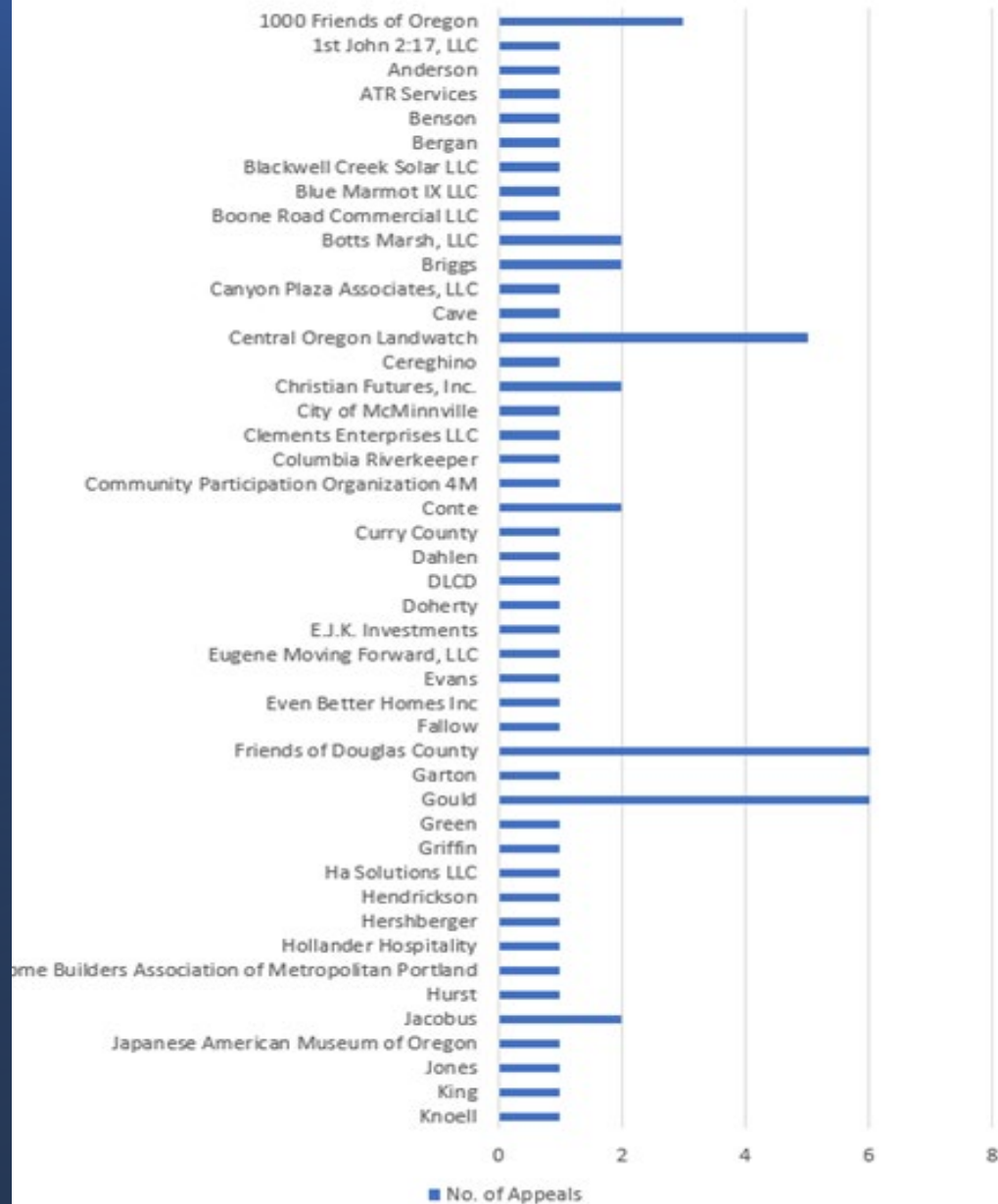
### Respondent Cities



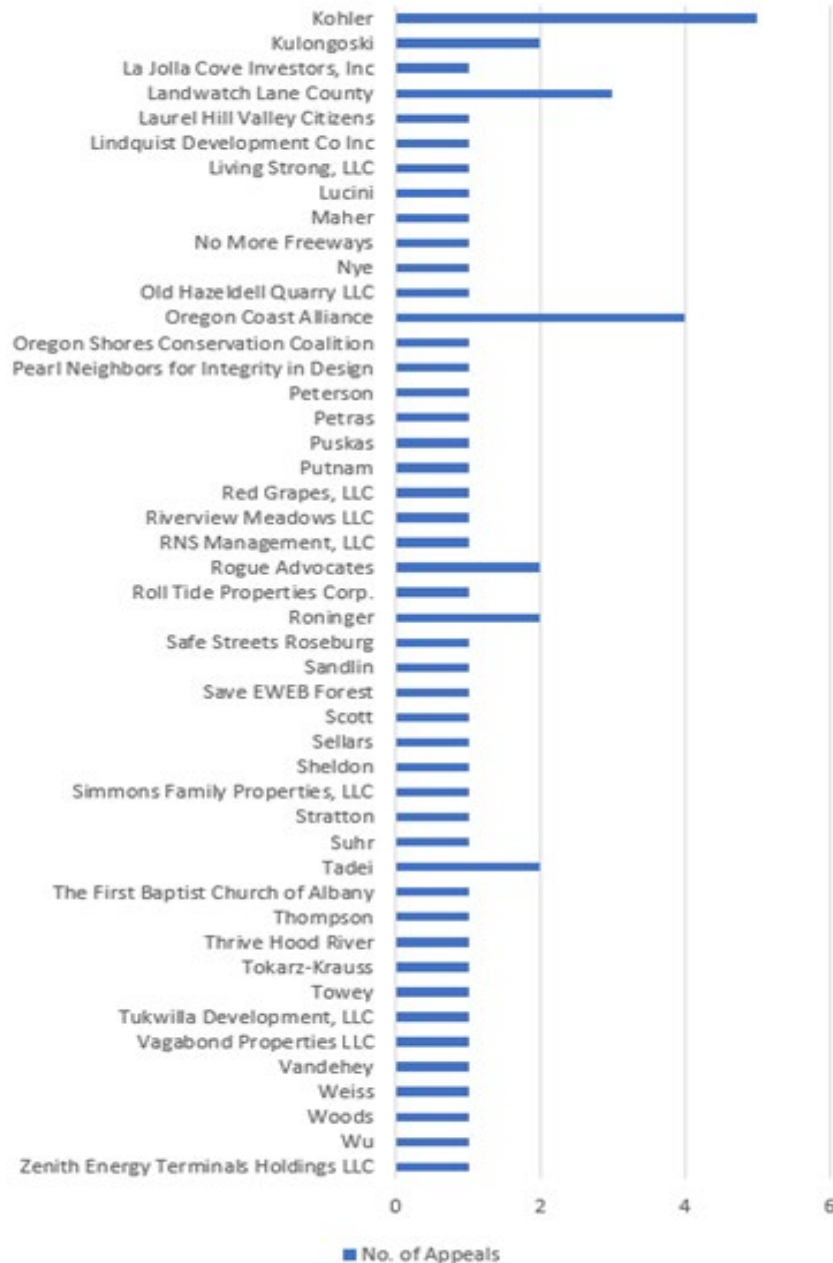
### Respondent Counties



## Petitioners



## Petitioners



# Appeals of Housing Proposals

## 2022

- Apartment – 1 (City of Salem)
- Subdivisions – 5
- Partitions – 2
- Resource Land Dwellings – 12

## 2021

- Apartment (+ Annexation) – 2 (City of Ashland, City of Garibaldi)
- Subdivisions – 4
- Partitions – 1
- Resource Land Dwellings – 22

# Changes Over Time

- Since LUBA was created, shift in basic structure of economy to proposals at urban fringe
  - Increased conflicts between urban uses and resource uses
  - More complex regulations in urban areas
- De-emphasis on Periodic Review by DLCD - Reviewed by LCDC
- Concurrent shift to complex Post-Acknowledgement Plan Amendments - Reviewed by LUBA

# Changes Last Six Years

- 2018-2019 – Board Member Turnover - Two Board Member retirements
- COVID 19 related staff turnover in 2020 and 2021
- Other protected leave in 2020, 2021 and 2022
- Challenging recruitment and retention environment
- Between 2009 and 2021, 22 separate appeals of local land use decisions from coastal counties and cities related to the proposed Jordan Cove Energy Project and related pipeline were filed
- 12 of those appeals were filed and resolved between 2018 and 2021



# LUBA's Performance Measures

## **Five Performance Measures**

- 1. Issue 90% of final opinions within statutory deadlines or with no more than a 7-day stipulated delay.**
- 2. Resolve Objections to Record within 60 days of receipt.**
- 3. Decide all legal issues that are presented in appeals.**
- 4. LUBA opinions should be sustained on appeal to the Court of Appeals and the Supreme Court 90% of the time.**
- 5. Customer Service Performance Measure-Six Measurement Variables**

# Performance Measure 1 - Timely Resolve Appeals

- Issue 90% of final opinions within statutory deadlines or with no more than a 7-day stipulated delay (or within 84 days of settling the record).
- For opinions that were issued outside of the target, **a few were issued within 3 days of the target, and the majority were issued within 7 to 21 days of the target.**

# Performance Measure 1 - Timely Resolve Appeals

- Factors affecting performance
  - 66% Board Member turnover 2018-2019
  - Staff turnover (COVID related and other protected leave absences and turnover)
  - Caseload fluctuations
  - Complexity of appeals (new legislation unsettles the law)
  - Management of change of service providers for Financial and Human Resources Services.
  - Other challenges.

<b>KPM #1</b>	<b>TIMELY RESOLVE APPEALS - Percentage of appeals of land use decisions that are resolved within statutory deadlines or, if all parties agree, with no more than a 7-day extension of the statutory deadline.</b>				
	Most Recent Data Collection Period: July 1, 2021, to June 30, 2022				
<b>Report Year</b>	2018	2019	2020	2021	2022
<b>Metric Value</b>					
<b>Actual</b>	89%	83%	64%	57%	53%
<b>Target</b>	90%	90%	90%	90%	90%

## Performance Measure 2- Timely Settle the Record

- Objections resolved within 60 days of receipt
- Target is 95% of record objections resolved within 60 days
- **In last six months of 2022, LUBA resolved 100% of record objections on target**

<b>KPM #2</b>	<b>TIMELY SETTLE RECORD - Percentage of record objections that are resolved within 60 days after the record objection is received by LUBA.</b>				
	Most Recent Data Collection Period: July 1, 2021, to June 30, 2022				
<b>Report Year</b>	2018	2019	2020	2021	2022
<b>Metric Value</b>					
<b>Actual</b>	96%	94%	67%	57%	94%
<b>Target</b>	95%	95%	95%	95%	95%

## Performance Measure 3- Resolve All Issues

- Decide all legal issues that are presented in appeals.
- This legislative directive increases the chances that the local government will be able to adopt a decision on remand that finally resolves all legal issues.

<b>KPM #3</b>	<b>RESOLVE ALL ISSUES - Percentage of decisions where all issues are resolved when reversing or remanding a land use decision.</b>				
	Most Recent Data Collection Period: July 1, 2021, to June 30, 2022				
<b>Report Year</b>	2018	2019	2020	2021	2022
<b>Metric Value</b>					
<b>Actual</b>	100%	100%	100%	100%	100%
<b>Target</b>	100%	100%	100%	100%	100%



Performance  
Measure 4-  
Decide Appeals  
Correctly  
(Affirmed by the  
Court of Appeals  
or Supreme  
Court)

- LUBA opinions should be sustained on appeal to the Court of Appeals and the Supreme Court.
- Approximately **20%** of LUBA decisions are appealed to the appellate courts.
- The central goal of speedy resolution of land use disputes is furthered when very few LUBA decisions are appealed to the appellate courts, and most of the decisions that are appealed are affirmed by the appellate courts.

## KPM #4

# SUSTAINED ON APPEAL - Percentage of final opinions that are sustained on appeal.

Most Recent Data Collection Period: July 1, 2021, to June 30, 2022

Report Year	2018	2019	2020	2021	2022
Metric Value					
Actual	93%	81%	95%	89%	80%
Target	90%	90%	90%	90%	90%

## Performance Measure 5 - Customer Service

- The nature of appellate review means that in almost all cases some parties will prevail, and some parties will not.
- This means that in almost all cases some parties to the appeal will not be satisfied with the outcome of that appeal.
- LUBA strives to conduct LUBA's review in a manner that leaves participants satisfied with the review process, for example: the assistance LUBA's staff provide to parties; making information on LUBA's procedures and case law available, timely response to questions, etc.

## Performance Measure 5 (cont'd)

- Six Measurement Variables
  - Accuracy of information given
  - Availability of information
  - Expertise
  - Helpfulness
  - Timeliness
  - Overall

## Performance Measure 5 (cont'd)

- LUBA has experienced a full turnover of its support staff two times since COVID began
- In 2021, LUBA began implementing a new way of tracking customer service by emailing a web-based survey to participants in oral argument for a LUBA appeal, rather than by sending postcards in the mail to participants in the appeal.
- The agency is increasing the number of persons who are emailed a survey to include persons who are not participants in a LUBA appeal but receive assistance from LUBA regarding LUBA.

KPM #5	CUSTOMER SERVICE - Percent of customers rating their satisfaction with the agency's customer service as "good" or "excellent": overall, timeliness, accuracy, helpfulness, expertise, availability of information.				
	Most Recent Data Collection Period: July 1, 2021, to June 30, 2022				
Report Year	2018	2019	2020	2021	2022
<b>Timeliness</b>					
Actual	97%	100%	92%	No data collected	60%
Target	90%	90%	90%	95%	95%
<b>Expertise</b>					
Actual	90%	96%	88%	No data collected	49%
Target	90%	90%	90%	95%	95%
<b>Accuracy</b>					
Actual	100%	100%	92%	No data collected	77%
Target	90%	90%	90%	95%	95%
<b>Helpfulness</b>					
Actual	98%	98%	88%	No data collected	57%
Target	90%	90%	90%	95%	95%
<b>Availability of Information</b>					
Actual	86%	83%	80%	No data collected	53%
Target	90%	90%	90%	95%	95%
<b>Overall</b>					
Actual	100%	100%	92%	No data collected	57%
Target	90%	90%	90%	95%	95%

# Unresolved Issues from 2021-23

## **IT Modernization**

### **• Electronic Filing**

- In the 2021-23 legislatively approved budget, LUBA received \$50,000 as a one-time appropriation from the legislature to work with DAS “for an electronic filing and case management system.” HB 5006 (2021).
- Due to workload and personnel constraints, LUBA has not completed significant planning work on that project to date.
- LUBA plans to pursue this effort during the 23-25 biennium by first building internal agency capacity to handle this project, which the agency estimates is a four- to five-year project.
- The agency will first need to complete internal operational and prioritization planning in the near term, with support and assistance from DAS EIS, dependent on whether DAS EIS has business analyst resources to help the agency develop a Business Case.
- The agency will also need to plan for managing that contract as well, while meeting our main agency mission of timely and correctly resolving land use appeals.

### **• Docket Management Database**

- LUBA’s docket is a Microsoft Access database; and Microsoft will soon stop supporting the Access program. LUBA will need to convert its database to a supported program.

# Budget Drivers and Environmental Factors Influencing Appeal Numbers

- State economy
- State population growth
- Resulting impacts on number of development proposals and disputes over development
- New legislation that unsettles the existing legal framework:  
Examples:
  - 1993 HB 3661; Measures 37/49; Marijuana Legislation; M49 Transfer of Development Rights
  - Proposed Amendments to Housing statutes
  - Proposed Amendments to Exclusive Farm Use statutes



# Proposed Legislation That May Affect LUBA

- Bills that affect housing
- Bills that modify allowed uses on farm and forest land
- Bills affecting LUBA's procedures

# Cost-Containment Strategies

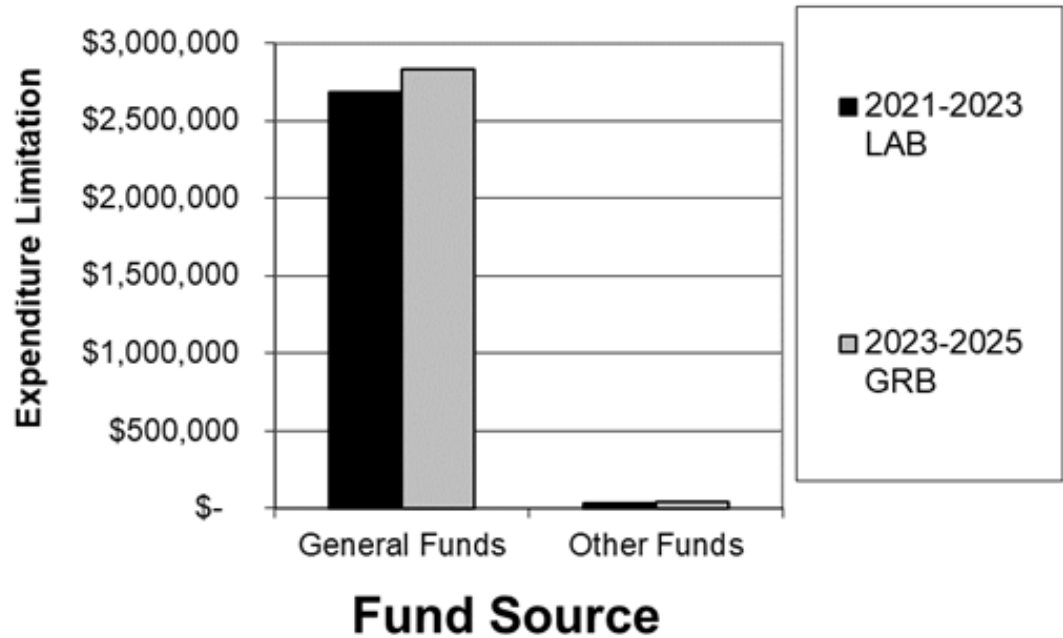
## **Current Cost Containment Strategies**

- Westlaw/Lexis Contracts
- Website improvements – Digitized early LUBA opinions
- Local records returned, not stored
- Electronic records accepted by LUBA from local governments
- Electronic records for LUBA decisions appealed to the Court of Appeals
- Archiving streamlined
- Land Use Fellowship – Willamette University School of Law

## **Potential Future Cost Containment/Service Improvements**

- Electronic Filing of Pleadings

**Governor's  
Budget – LUBA**  
General Fund:  
\$2,741,598  
Other Funds:  
\$38,019



# Governor's Budget – General Fund

The Governor's LUBA 2023-25 General Fund budget request is \$2,741,598

- In its 2023-25 budget, LUBA is authorized 7 permanent staff (3 Board Members, 2 staff attorneys, and 2 administrative support staff).
- 85% of LUBA's Budget is for Personal Services
- 15% of LUBA's budget is for Services and Supplies

# Governor's Budget – Other Funds

LUBA's 2023-25 Other Funds Budget request is \$38,019.

- LUBA's Other Funds revenue comes from nonbusiness licenses and fees, royalties for publication of final decisions and orders, sale of LUBA Reporters, and fees paid for public records provided in response to public records requests.
- LUBA's Other Funds expenditures are related to publication of final decisions and orders. The cost of publishing the LUBA Reporters is paid by the fees paid by LUBA Reporter subscribers.
- LUBA's Other Funds are also authorized by the legislature to pay for required continuing education credits for the Board and staff attorneys.

# Governor's Budget – Policy Option Packages

## **Policy Option Package 101 to reclassify the two staff attorney positions to Legal Staff (1545) - \$47,191**

- The compensation range for the LUBA staff attorney classified as a CS3 is not commensurate with the education and duties required for the position. This has made it difficult for LUBA to recruit and retain staff attorneys. The purpose of this package is to reclassify the two staff attorney positions to Legal Staff 1545 to accurately reflect position requirements and duties and aid recruitment for and retention of employees in these positions.

# Governor's Budget – Policy Option Packages

## **Policy Option Package 103 to fund cellular phone plan costs - \$10,339**

- During 2020, LUBA first acquired state-issued cell phones for LUBA employees to enable remote work including Multi Factor Authentication. This action was motivated by DAS IT policies and requirements, and increased remote and hybrid work in response to the COVID-19 pandemic.
- State policy (Work Reimagined) highlights and encourages the ability to work remotely. The purpose of this package is to capture the ongoing telecommunication cost for cellular phone plans.

# Summary of Reduction Options

## **5% Percent Option: Reduce one staff attorney to .5 FTE; \$135,335.**

- Reducing one staff attorney to .5 FTE will increase the likelihood that statutory deadlines for resolving recording objections within 60 days (KPM # 2) will not be met.
- The agency will not be able to eliminate a backlog of Published Volumes or Headnotes.
- This reduction will also likely result in vacant position due to part time status that has been difficult to fill given the recruitment environment.



# Summary of Reduction Options (cont'd)

## **10% Percent Option: Eliminate One Staff Attorney; \$270,670.**

- Eliminating a staff attorney position will mean it is probable that statutory deadlines for resolving recording objections within 60 days (KPM # 2) will not be met, and other statutory deadlines will not be met (KPM #1).
- The agency will not be able to eliminate backlog of Published Volumes or Headnotes.
- Customer service may decline.
- The agency may miss statutory deadlines for transmittal of records to Court of Appeals.

# Summary of Reduction Options (cont'd)

## **15% Percent Option: Eliminate One Staff Attorney and Reduce One Staff Attorney to .5 FTE; \$406,005.**

- Eliminating a staff attorney and reducing the other staff attorney to .5 FTE will mean that statutory deadlines will not be met.
- The agency will not eliminate backlog of Published Volumes or Headnotes.
- Customer service will decline.
- The agency will miss statutory deadlines for transmittal of records to the Court of Appeals.
- The agency may miss deadlines for responding to Public Records Requests.
- The agency will not be able to undertake Procedural Rule Amendments.
- This reduction will likely result in vacant position due to the part time status of one staff attorney.

Final  
Thoughts

Questions?

“No one pretends that democracy is perfect or all-wise. Indeed, it has been said that democracy is the worst form of government except all those other forms that have been tried from time to time.”

—Winston Churchill