

Land Use Board of Appeals

Budget Presentation

Joint Ways and Means

Subcommittee on Natural Resources

March 6, 2023

I. Agency Mission, Goals, and Historical Context

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 Oregon LUBA Reports. LUBA also publishes all final opinions on its website and publishes precedential orders on its website.

LUBA's goals closely mirror these primary and secondary missions. LUBA has seven 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.

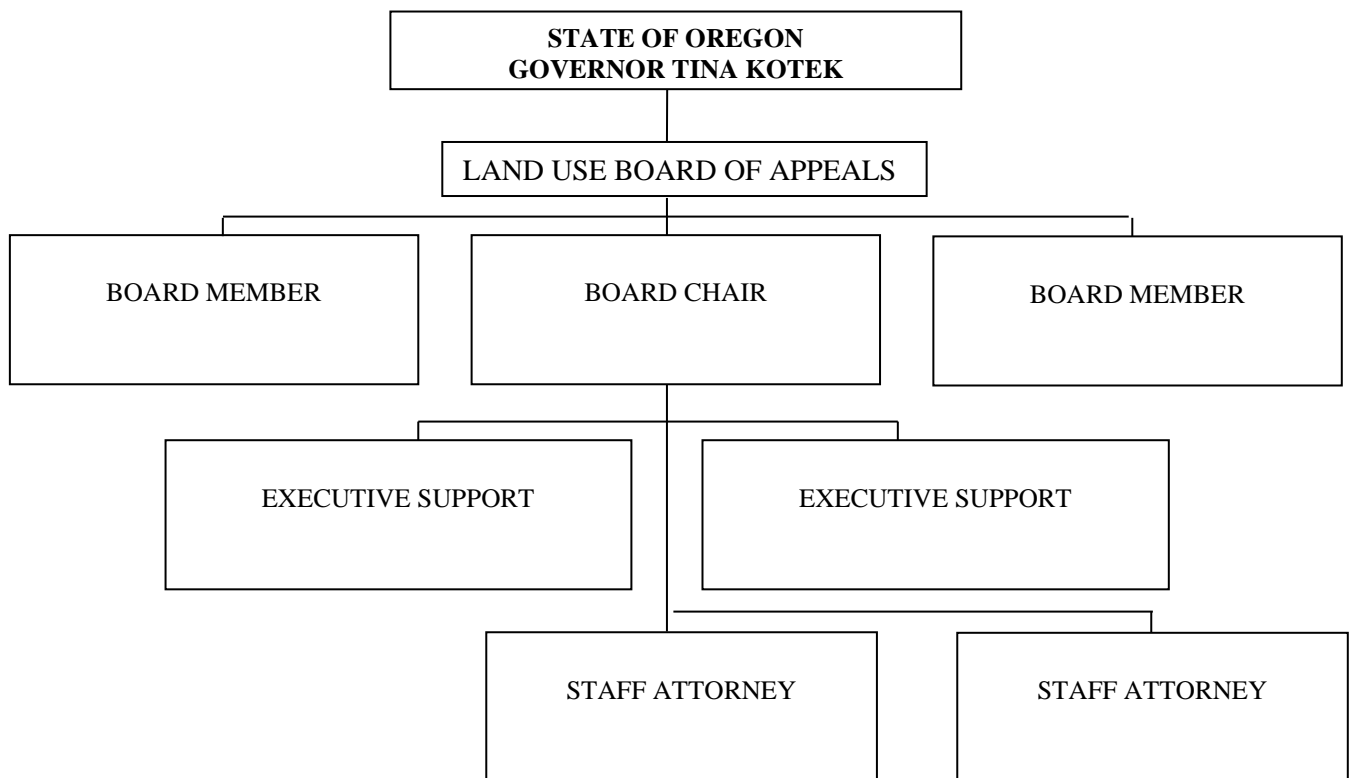
LUBA hears appeals of decisions from every city and county in the state and reviews a small number of state agency decisions that qualify as land use decisions. LUBA review is expedited, designed to produce a final decision by LUBA within 77 days after the local government files the record in an appeal.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

directives requiring consideration of potential environmental degradation or other undesirable impacts.

Under the current review system, 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 40 years of published LUBA opinions that definitively resolve many issues sharply reduces the uncertainty inherent in a complex land use program.

II. Agency Organization

Below is the agency’s proposed 2023-25 organizational chart, which proposes no changes from 2021-23.



As proposed in the Governor's Budget, LUBA will consist of 7.0 FTE, consisting of three Board Members who are attorneys experienced in land use law, two staff attorneys, and two administrative staff members. Board Members are appointed by the Governor and confirmed by the Senate and serve four-year terms. The staff attorneys assist the Board Members in researching legal issues presented in appeals, final editing of opinions, answering questions from participants in the LUBA appeal process and responding to public records and legislative requests. The staff attorneys also carry out the publication function and are responsible for transmitting records of LUBA decisions that are appealed to the Court of Appeals. The Executive Support Specialists are primarily responsible for all of the administrative work that is necessary to run the office and keep the active appeal files and docket current. They also interact with the public.

III. Overview of 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.

Performance correlates strongly with caseload and staffing. Caseload, in turn, strongly correlates with the state of the economy and also with changes in the law. In the late-1990s, LUBA experienced Board Member 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 in performance is the complexity of appeals. About 20 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.

In a seven-month period between June 2018 and January 2019, two Board Members who had served on LUBA for 28 and 20 years, respectively, retired, resulting in a 66% turnover of the Board in approximately seven months. In addition, in 2019 and 2020, and again in 2021, LUBA experienced a full turnover of administrative support staff. The retirements of two Board Members and the ensuing transition as new Board Members on-boarded, and the delays caused by hiring processes and training for support staff has contributed to a delay in issuing final opinions within the target. In addition, in the years between 2020 and 2022, LUBA has faced operational changes, turnover, prolonged absences due to the COVID-19 pandemic and other protected leave, and difficulty filling vacant positions. However, for the 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.

KPM #1	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.				
	Most Recent Data Collection Period: July 1, 2021, to June 30, 2022				
Report Year	2018	2019	2020	2021	2022
Actual	89%	83%	64%	57%	53%
Target	90%	90%	90%	90%	90%

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 resolve objections within 60 days of receipt.

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

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.

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

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 the most important measure of the quality of LUBA’s work. 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. Also affecting LUBA’s ability to meet this performance measure are new legislation and new court decisions, which unsettle the law.

For approximately 80% of appeals, LUBA’s decision is the final word. Approximately 20% of LUBA’s decisions are appealed to the Court of Appeals. LUBA opinions were affirmed on appeal 93% during 2018, 81% during 2019, 95% during 2020, 89% during 2021, and 80% during 2022 (all measured July 1 through June 30). These percentages were slightly short of the performance measure target of 90% in 2019, 2021, and 2022, and exceeded the target in 2018 and 2020. These numbers are a strong indicator that LUBA is producing quality opinions that correctly resolve land use disputes.

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
Actual	93%	81%	95%	89%	80%
Target	90%	90%	90%	90%	90%

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*.

During 2020, LUBA met or exceeded the target for all variables except “availability of information,” which was 83 percent, and “helpfulness,” which was 88 percent. During 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. After the change, LUBA’s customer service metrics have not met targets, and the agency is undertaking an evaluation of the possible reasons for the decrease in customer service metrics, and of 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 a LUBA Appeal.

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
Timeliness					
Actual	97%	100%	92%	No data collected	60%
Target	90%	90%	90%	95%	95%
Expertise					
Actual	90%	96%	88%	No data collected	49%
Target	90%	90%	90%	95%	95%

Accuracy					
Actual	100%	100%	92%	No data collected	77%
Target	90%	90%	90%	95%	95%
Overall					
Actual	100%	100%	92%	No data collected	57%
Target	90%	90%	90%	95%	95%
Helpfulness					
Actual	98%	98%	88%	No data collected	57%
Target	90%	90%	90%	95%	95%
Availability of Information					
Actual	86%	83%	80%	No data collected	53%
Target	90%	90%	90%	95%	95%

IV. Unresolved Issues 2021-23

In the 2021-23 legislatively approved budget, LUBA received \$50,000 as a one-time appropriation from the legislature “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.

V. Major Budget Drivers/Major Changes in the Last Six Years

A. Major Budget Drivers

The major budget drivers and risks affecting LUBA's functions are the state's economic health and population growth and the resulting impacts on the number of development proposals, disputes over development, and hence the number of appeals to LUBA. An additional risk affecting LUBA's functions is its outdated docket management system, which is a Microsoft Access database system.

Since 2009, annual appeal numbers have been in the low to mid-100s. LUBA anticipates that appeal numbers will remain steady during the 2023-25 biennium.

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 and allowed uses on farm and forest land mean that appeals of related local government decisions will be reviewed by LUBA, and that will increase caseload and the complexity of appeals.

Another 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, for example as happened in 1993 with HB 3661 and more recently with respect to Measure 37, Measure 49, marijuana legalization, and the middle housing statute, 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.

Beginning in 2009 and continuing through late 2020, 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, with 12 of those appeals filed and resolved between 2018 and 2021. LUBA resolved the majority of those appeals in 2020 and 2021.

B. Major Changes in the Last Six Years

In 2018 and 2019, two Board Members who had each been with LUBA for more than 20 years retired. The Board Members that the Governor appointed to replace the retiring Board Members are both experienced land use lawyers with significant experience practicing law. While both new Board Members are quickly getting up to speed in resolving appeals, a 66 percent turnover on the Board within nine months' time resulted in delays in resolving appeals consistent with LUBA's statutory deadlines.

In addition, in 2019 and again in 2020, LUBA experienced a complete turnover in administrative staff, due in part to the spring 2020 COVID-19 pandemic-related proposed reductions to the agency's 2019-21 budget that would have required elimination of almost half the agency's personnel. Two agency employees also took COVID-related leave, a third employee took FMLA leave in 2020, and the agency experienced other protected leave in 2021 and 2022.

VI. Pandemic Related Budget Issues

As mentioned, during the budget uncertainty at the beginning of the COVID-19 pandemic, two LUBA employees accepted jobs in other state agencies and LUBA experienced additional turnover. During the pandemic, staff also took related leave. These experiences brought additional attention to the current staffing shortages and the added agency resilience a second staff attorney position provides.

VII. Agency Reduction Options

A. Five Percent Option: Reduce one staff attorney to .5 FTE.

LUBA's 2023-25 Modified Current Service Level (CSL) General Fund budget is \$2,706,702. Five percent of LUBA's General Fund budget is \$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.

B. Ten Percent Option: Eliminate One Staff Attorney

Ten percent of LUBA's 2023-25 CSL General Fund budget is \$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.

C. Fifteen Percent Option: Eliminate One Staff Attorney and Reduce One Staff Attorney to .5 FTE

Fifteen percent of LUBA's Modified CSL is \$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.

VIII. Summary of Long Term Vacancy Information

LUBA has no long term vacancies to report.

IX. 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 (Sullivan Fellowship) for third year law students to intern sequentially with LUBA, a local government, and a private or non-profit law firm throughout 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.** LUBA negotiated contracts with Westlaw and LEXIS under which the LUBA Board Members and staff attorneys 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 online databases. LUBA also receives online 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.** Since 2017, LUBA has posted copies of its final opinions, and some orders, on its website the morning after they are issued. The content is provided free of charge to OSB members through OSB's Fastcase research database. That content is also available to the public free of charge on LUBA's website.
- **Local Records/Electronic Records.** LUBA 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 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 its associated costs.

- **Court of Appeals Records.** Beginning in 2019, consistent with new amendments to the Oregon Rules of Appellate Procedure, LUBA now transmits 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 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 the printing, binding, and distribution costs associated with publishing volumes of the Oregon LUBA Reports, saving approximately \$2,000 per volume or approximately \$4,000 per biennium. LUBA's published volumes are now delivered to some subscribers by state shuttle, at a significant savings.
- **Video Oral Arguments.** LUBA's rules allow parties to participate in oral argument via conference call. During the pandemic, LUBA moved exclusively to telephonic oral argument. LUBA recently transitioned to Video oral arguments on the Zoom platform, with the parties participating via Zoom and the oral argument streamed on the state's You Tube channel.
- **Land Use Fellowship.** As noted, for approximately years, 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. LUBA uses Microsoft Access for its docket management database, and Microsoft will soon stop supporting the Access program. LUBA will need to convert its database to a supported program. Currently, 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. It would also help participants in the process when, due to unanticipated circumstances such as the pandemic, filing documents by mail or in person is challenging. This could be accomplished in tandem with a conversion from Access to a different database management system.

X. Other Requested Information

1. Link to [2023-2025 Governor's Budget](#)
2. Audits. The Secretary of State has not conducted an audit of LUBA in 2021-23.
3. Changes to agency budget and management flexibility and effect on agency operations.

LUBA's budget includes **Policy Option Package (POP) 101** to reclassify the two staff attorney positions to Legal Staff (1545). 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.

LUBA's budget also includes **Policy Option Package 103** to fund cellular phone plan costs. 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. The recruitment and retention environment has evolved and become more challenging 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.

4. Span of Control. Not applicable.
5. Information Technology and capital construction projects. None.
6. Other Funds Ending Balance Form. See attached Exhibit A.
7. 5/10/15 percent Reduction Options Form. See attached Exhibit B.
8. Long Term Vacancy List. See attached Exhibit C.

Exh B 662

Agency Name (Acronym) LUBA																					
2023 - 2025 Biennium																					
Detail of Reductions to 2023-25 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	5% Reduction	135,335						\$ 135,335	1	0.50		Likelihood that statutory deadlines for resolving recording objections within 60 days will not be met. Will not be able to eliminate backlog of Published Volumes or Headnotes. Will likely result in vacant position due to part time status.							
			Reduce one staff attorney to .5 FTE							\$ -											
										\$ -											
										\$ -											
		LUBA	10% Reduction	270,670						\$ 270,670	1	1.00		Probable that statutory deadlines for resolving recording objections within 60 days will not be met. Other Statutory Deadlines will not be met. Will not be able to eliminate backlog of Published Volumes or Headnotes. Customer service may decline. May miss statutory deadlines for transmittal of records to Court of Appeals.							
			Eliminate one staff attorney position							\$ -											
										\$ -											
		LUBA	15% Reduction	406,005						\$ 406,005	2	1.50		Statutory Deadlines will not be met. Will not eliminate backlog of Published Volumes or Headnotes. Customer service may decline. Will miss statutory deadlines for transmittal of records to Court of Appeals. May miss deadlines for responding to Public Records Requests. Will not be able to undertake Procedural Rule Amendments. Will likely result in vacant position due to part time status of one staff attorney.							
			Eliminate one staff attorney position; reduce second SA to .5 FTE							\$ -											
				812,010	-	-	-	-	-	\$ 812,010	4	3.00									
OF - CSL = 38,019																					
5% = 1,901																					
10% = 3802																					
15% = 5702																					
Due to the nature of the only program supported by OF, publications, reduction options are not feasible and any cuts would have to be absorbed.																					

