

# **Land Use Board of Appeals**

## **Budget Presentation**

### **Joint Ways and Means**

#### **Subcommittee on Natural Resources**

**February 14, 2013**

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## **I. Agency Mission, Goals and Historical Perspective**

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, 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 depend on time-sensitive financing or construction seasons.

The legislature created LUBA in 1979. Prior to 1979, circuit courts performed LUBA's review function, but such civil litigation was costly, slow, and relatively inefficient. Among the perceived inefficiencies was having 36 different circuit courts rendering inconsistent, legally vulnerable decisions from 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. 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 33 years of published LUBA opinions that 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 who 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**

**Appendix A** is the agency's proposed 2013-15 organization chart. As proposed in the Governor's Balanced Budget, LUBA is made up of 5.0 FTE, consisting of three Board Members who are attorneys experienced in land use law, and two administrative staff members. Board Members are appointed by the Governor and confirmed by the Senate. The Administrative 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 Paralegal (1) assists the Administrative 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 paralegal position is partially funded by the revenues received from sale of LUBA Reports to approximately 60 subscribers.

From 1997 to 2002, LUBA had two additional staff members to help the agency recover from the serious backlog of cases that developed in the 1990s, and a serious backlog in publications. One position was eliminated in 2002 as no longer necessary, and the second position, a staff attorney, was vacated in November 2010 due to budget cutbacks, and eliminated in the 2011-13 biennium both for budgetary reasons and because during the recession the Board's caseload had declined from an average of over 200 appeals per year to approximately 120 appeals per year. For the 2013-15 biennium, LUBA proposed as a policy option package restoration of the staff attorney position in 2014, in anticipation that by then the recovering economy would increase appeal numbers to more typical levels. Due to continued budget constraints, that policy option package is not recommended in the GBB.

#### **IV. Performance Measures**

The Legislature has approved five Key Performance Measures (KPMs) for LUBA, which closely track the agency's primary and secondary missions. **Appendix C** is the agency's Annual Performance Progress Report.

**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. The target is 90 percent. In 2012, and in most recent years since 2001, LUBA has met this target.

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.

Another variable is the complexity of appeals. About 10 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 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.

**KPM#2** is to **Timely Settle the Record**, expressed as a percentage of objections resolved within 60 days of receipt. The target is 95 percent.

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. Although LUBA usually meets this measure, in 2012 our performance dropped to 84 percent, in part due to the increasingly common practice of parties who request delay to conduct mediation.

**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. The target is 100 percent. LUBA has consistently met this performance measure. This KPM reflects a statutory mandate for LUBA to resolve all issues when reversing or remanding, if consistent with statutory deadlines.

**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. The target is 90 percent. In 2012, LUBA's performance was 85 percent.

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 our 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.

**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 target is 90 percent for each variable. LUBA has consistently met this performance measure. In 2012, the performance for "availability of information" dropped to 85 percent, which may reflect the loss of the staff attorney position in 2010. One of the staff attorney's important functions was to field difficult questions from the parties and the public about the land use appeal process. Due to constraints on ex parte contacts, this is not a function that the board members can perform, and it requires legal and professional judgment that administrative staff do not possess.

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*.

## **V. Major Budget Drivers and Environmental Factors**

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

**Appendix B** is a graph showing appeal numbers from 1987 to 2012. 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 20-year average is approximately 210 appeals per year. Since the most recent recession took hold in 2009, annual appeal numbers have hovered in the low 100s. LUBA anticipates that if the economy continues its current recovery appeal numbers

will increase toward and probably exceed the 20-year average of 210 appeals per year sometime toward the middle or end of the 2013-15 biennium.

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 SB 3661 and more recently with respect to Measure 37 and Measure 49, 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 10 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 urban growth boundaries 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 conducted by the Department of Land Conservation and Development (DLCD) as the main vehicle to ensure that local government comprehensive plan and land use regulations comply with recent statutes, goal and rule requirements. As a result of this shift away from periodic review, more local governments are adopting post-acknowledgment plan amendments 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.

## **VII. Cost Containment/Program Delivery Improvement**

LUBA's unique function as 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 works with the state's three law schools to provide a land use intern program for second and third year law students that provides work experience for those students and unpaid assistance to LUBA in resolving land use appeals. In addition, LUBA coordinates with Willamette University to host a Land Use Fellowship for an outstanding 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 and staff attorney receive the right to unlimited legal research time, at minimal cost to LUBA, in exchange for providing LUBA's opinions to West and LEXIS on-line databases. LUBA also receives on-line cite-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. In turn, the new content will be provided free of charge to OSB members through the bar's Fastcase research database.
- **Local 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 or incurring the cost of mailing the record back to the local government.



- **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 West Law and Lexis and the Supreme Court Library instead. The estimated savings is approximately \$3,700 per biennium.
- **Waived CLE Expenses.** The Board Members and staff attorney obtain much of their continuing legal education through volunteering to speak at continuing legal education seminars and section meetings, which reduces registration, travel and hotel costs (a savings of approximately \$2,000 per biennium).
- **Publication Savings.** LUBA's Paralegal has implemented a number of steps to reduce printing, binding and distribution costs, saving approximately \$2,000 per volume or \$10,000 per biennium. LUBA's published volumes are now delivered to subscribers in many cases 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 long-distance charges. LUBA now uses the state meet-me conference call service at minimal cost.
- **Land Use Fellowship.** As noted, LUBA has long provided unpaid internships for second and third year law students at the state's three law schools. Because these interns tend to be young and inexperienced, they typically do not provide much productive benefit to LUBA. In 2009, LUBA partnered with Willamette University to create a fellowship wherein a highly 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 a well-rounded experience in land use law.

This program has generally improved the quality of the intern program at LUBA.

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

1. **Rule Amendments.** LUBA is currently preparing rule amendments that, it is anticipated, will limit the length of pleadings filed at LUBA, to bring brief sizes in line with those imposed by the Court of Appeals. Potentially this will force parties to be more concise and selective, and reduce the time and resources the parties and the board members need to prepare for oral argument and for the board to resolve the appeal.
2. **Electronic Records.** Currently most local governments provide LUBA and the parties with copies of the local record in paper format. There is increasing interest in providing copies of the local record in electronic format, on a compact disc for example, which would generate considerable savings to local governments, the parties and potentially LUBA. LUBA is considering a pilot program to determine the feasibility of eliminating paper copies of the record in favor of electronic copies.

**VIII. Major Budgetary Issues**

LUBA's experience over the past 20 years indicates that three board members can resolve approximately 150 appeals per year consistent with LUBA's statutory deadlines, assuming average complexity of cases and no significant turnover or vacancies on the board. When appeals exceed 150 per year sporadic delays and performance failures tend to occur. When appeal numbers exceed 200 per year, around the 20-year average, additional staffing is needed to avoid widespread performance failures. Experience has shown that adding a staff attorney is the most cost-effective means to assist the board in handling large caseloads. When appeals exceed approximately 250 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 at some point in 2013 or 2014 appeal numbers will increase from the current low of 100 to 120 appeals to 175 to 200 appeals per year, near the 20-year average, and perhaps beyond. The timing of that caseload increase is uncertain, and it is possible that sometime prior to the end of the 2013-15 biennium

appeal numbers will increase to the point where the three board members cannot continue to comply with statutory deadlines without additional staffing. The agency budget requested restoration of the staff attorney position at approximately .6 FTE, anticipating filling that position in 2014 when it is likely that the board's caseload would so warrant. However, due to general budget constraints, the GBB does not recommend that policy option package. If appeal numbers reach an annual average of 200 or more appeals before the end of the 13-15 biennium, as anticipated, LUBA may have to request funding for additional staffing from the Emergency Board.

## **IX. Other Requested Information**

1. HB 2010 and HB 4131. The employee to supervisory ratio requirements of these statutes do not apply to LUBA.
2. Audits. The Secretary of State has not conducted an audit of LUBA since 1997.
3. Position Reclassifications. No LUBA positions were reclassified in 2011-13.
4. Capital construction projects. None.
5. Information Technology Improvements. The pilot project for using electronic records that LUBA is considering may require minor technological acquisitions, software etc., but these can probably be handled within the existing budget.

## **X. Agency Reduction Options**

### **1. Introduction**

LUBA currently consists of three board members and two support staff, for 5.0 FTE. 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. Due to an increase in LUBA's annual caseload beginning in the early 1990s, and a complete turnover of Board membership in 1995, a backlog of cases developed that prevented compliance with ORS 197.830(14) between 1995 and 2001.

In 1996 the legislature added a limited duration staff attorney position (later made permanent) to assist LUBA with the case backlogs, increasing permanent staffing from five to six personnel. The staff attorney position was eliminated in the 2011-13 LAB due to statewide

revenue shortfalls. As a policy option package, LUBA proposed restoration of the staff attorney position in the 2013-15 biennium, at .63 FTE (15 months), to help the agency cope with an anticipated increase in the number of appeals as the real estate and development sector of the state economy recovers from the recent recession. However, that package was not recommended in the GBB due to GF funding constraints.

LUBA's Modified Current Service Level 2013-2015 General Fund budget is \$1,455,326. Approximately 89 percent of LUBA's budget is for personal services—salaries and benefits for its employees. Approximately 83% of that personal services allotment pays for the three LUBA board members. The remaining 17% of the personal services allotment pays for the remainder of LUBA's staff. 11 percent of LUBA's Modified Current Service Level General Fund budget is for services and supplies, including rent, human resources, computer support services and fixed special payments to the Department of Administrative Services.

**2. Five Percent Option: Reduce Two Administrative Staff from 1.0 FTE to .6 FTE.**

Five percent of LUBA's Modified Current Service Level 2011-2013 General Fund budget is \$72,766. 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 five percent is to reduce personnel costs.

The least impactful means of achieving a five percent reduction is to reduce the paralegal position to .6 FTE (GF savings: \$32,853) and reduce the executive support specialist position to .6 FTE (\$35,465). This would generate over the 2013/15 biennium approximately \$68,318 in GF savings. Because one-third of the paralegal position is supported by other funds revenue from publications, there would also be some OF savings.

Impacts: As LUBA's caseloads increase during the 2013/15 biennium, these reductions would leave LUBA with insufficient staffing to perform some basic administrative functions, and may make it difficult to keep the front desk consistently open to the public during office hours when the staff person on duty is absent due to illness, family leave, etc. Further, reducing the FTE of the paralegal position would impact the publication function, which generates other funds revenue. Because the paralegal participates in final editing the board's final opinions and orders, reducing the paralegal's FTE may delay issuance of opinions and orders, which may impact compliance with statutory deadlines.

**3. Ten Percent Option: Reduce Two Board Members to .8 FTE reduce ESS1 to .6 FTE.**

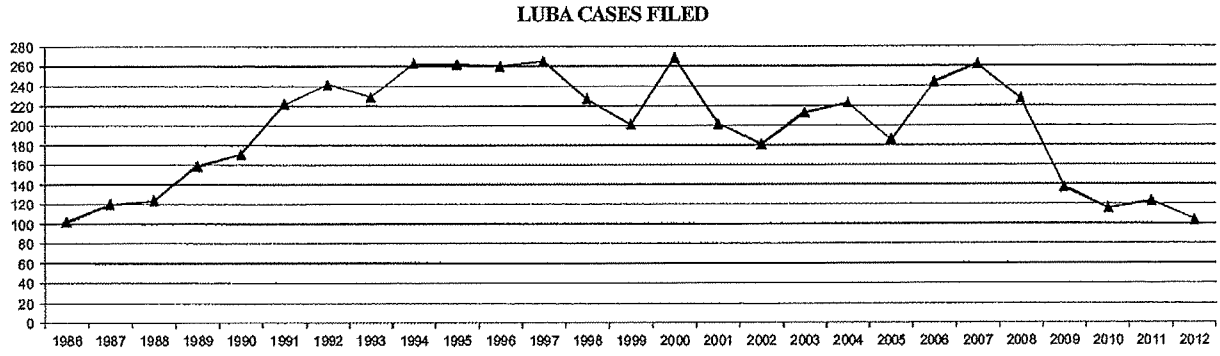
Ten percent of LUBA's Modified Current Service Level 2013-2015 General Fund budget is \$145,533. Because board member salary represents the bulk of personal services, the only feasible way to achieve a permanent 10 percent GF reduction is to reduce board member FTE. Reducing one board member's FTE to .8 would yield GF savings of approximately \$60,000; reducing two board member's FTE to .8 would yield approximately \$120,000 in savings. These cuts could be combined with reductions in the executive support specialists FTE to achieve the required \$145,533 in savings.

The impacts of these reductions on agency function would be severe, however. The board members perform the substantive work of the agency--resolving appeals--by reading briefs and other pleadings, conducting hearings, and writing orders and opinions, etc. A 20 percent reduction in board member FTE would reduce board productivity in resolving appeals by a corresponding amount, which would likely cause agency performance failures and soon create a significant backlog of cases, particularly as the real estate and development sectors of the economy recover and appeal numbers increase. In addition, a 20 percent reduction in FTE would make it much more difficult to retain board members or fill vacancies with qualified replacements. Any significant period of vacancy on the three-person board would compound agency failures to meet deadlines and extend the backlog of appeals, as the agency's experience in the 1990s illustrates.

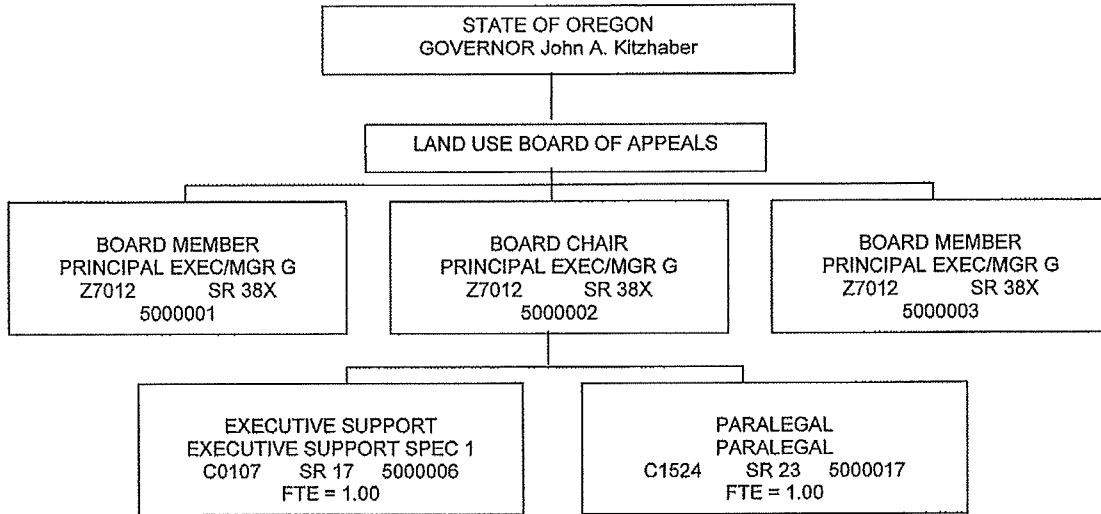
**4. Fifteen Percent Option: Reduce All Three Board Members to .8 FTE, and Reduce ESS1 to .7 FTE**

A 15 percent cut (\$216,000) can be achieved by reducing all three board members to .8 FTE, and reducing the ESS1 to .7 FTE. The loss of board member productivity would result in a significant backlog of cases, and significant agency performance measure failure, as a best case scenario. Worst case is that the board member FTE reductions would result in extended board vacancies and difficulty recruiting qualified replacement board members, which could result in catastrophic backlogs that would take years to overcome, even if full funding/staffing is eventually restored.

# Appendix A



# Appendix B



**LAND USE BOARD of APPEALS**

**Annual Performance Progress Report (APPR) for Fiscal Year (2011-2012)**

Original Submission Date: 2012

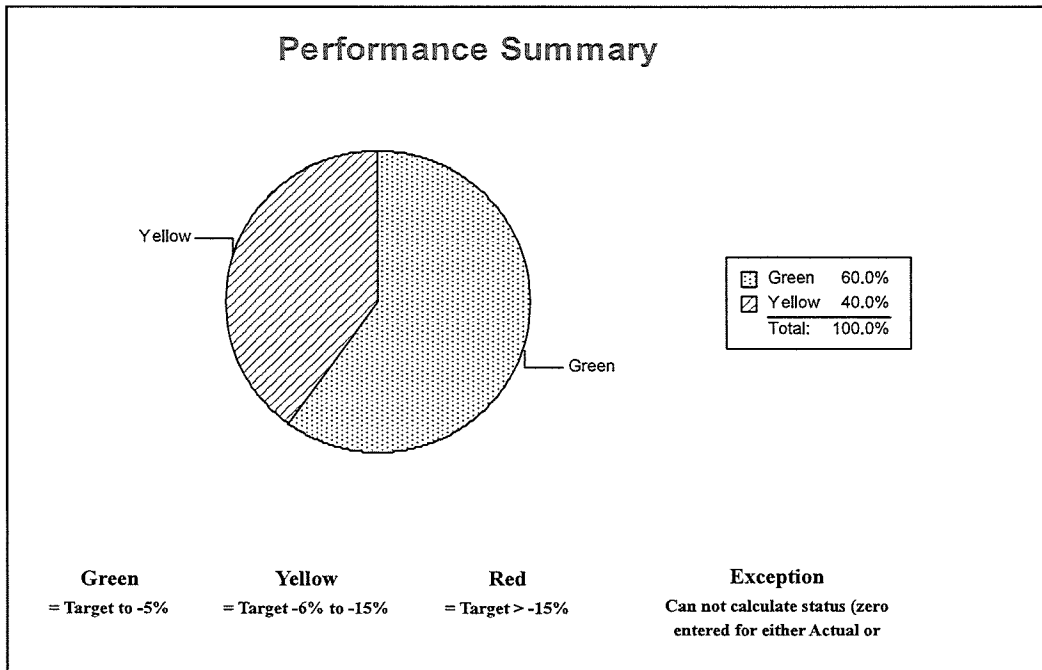
Finalize Date: 1/31/2013



2011-2012 KPM #	2011-2012 Approved Key Performance Measures (KPMs)
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.
2	TIMELY SETTLE RECORD - Percentage of record objections that are resolved within 60 days after the record objection is received by LUBA.
3	RESOLVE ALL ISSUES - Percentage of decisions where all issues are resolved when reversing or remanding a land use decision.
4	SUSTAINED ON APPEAL - Percentage of final opinions that are sustained on appeal.
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.

<b>New Delete</b>	<b>Proposed Key Performance Measures (KPM's) for Biennium 2013-2015</b>
	<b>Title:</b>  <b>Rationale:</b>

<b>LAND USE BOARD of APPEALS</b>		<b>I. EXECUTIVE SUMMARY</b>	
<b>Agency Mission:</b> To provide an accessible forum for resolving land use disputes quickly and efficiently and make LUBA decisions available as a decision making resource to state and local legislators, land use decision makers, property owners and the citizens of Oregon.			
<b>Contact:</b> Tod A. Bassham, Board Chair		<b>Contact Phone:</b> 503-373-1265	
<b>Alternate:</b> Kelly Burgess, Paralegal		<b>Alternate Phone:</b> 503-373-1265	



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Appendix C

**1. SCOPE OF REPORT**

KPMs address the key functions of LUBA: to quickly resolve land use disputes, and make LUBA decisions available to the public and decision makers. All key agency programs/services are addressed by key performance measures.

**2. THE OREGON CONTEXT**

LUBA plays a key but indirect role in the land use planning and land development processes that to a significant extent dictate the states performance in meeting targets for the preservation of agricultural and forest lands (OBM 80 and 81), targets for hours of travel delay or vehicle miles traveled (OBM 68 and 71), or low income housing (OBM 74). Many LUBA appeals concern development projects that are subject to time-limited financing. The speed and efficiency with which LUBA resolves those appeals can have a large bearing on whether those projects are ultimately successful. A significant number of LUBA appeals concern local or state transportation projects directly or land use decisions that will significantly affect the operation of transportation facilities . LUBA's ability to efficiently resolve those appeals in a timely manner can have a significant bearing on whether those projects and land development actions occur in a way that assists the state in meeting targets for these OBMs. Finally, LUBA was created to be a speedier and more accessible forum for finally resolving land use disputes. In performing that function over the years, LUBA contributes indirectly to the sense of community that comes when Oregonians feel they have had an opportunity to have their view fairly considered and addressed in an impartial and objective way.

### 3. PERFORMANCE SUMMARY

Between 1995 and 2000 LUBA struggled with a heavy caseload and significant personnel turnover. At its worst, LUBA was missing the 77-day statutory deadline by several months in many of its appeals. With personnel stability and some additional resources, and reduction in the number of appeals as the state economy cooled in 2000, LUBA began meeting its target for its most important performance measure , KPM #1 (Timely Resolve Appeals) in 2001. The loss of LUBA's staff attorney in the first half of 2003 contributed to a period of several months during 2003 when LUBA was unable to meet target for this performance measure. With the return of the staff attorney in June 2003, LUBA was able to begin meeting its target for the performance measure again . As the state economy began to recover in 2003, the number of appeals rose again to levels last seen in the 1990s. The increasing number and complexity of appeals made it more challenging to meet the KPM #1 target of 90 percent. Compliance with KPM#1 fell sharply in 2008, due to a near-record number of appeals filed that year, causing a minor backlog. With the decline in the state economy starting in 2009, appeal numbers dropped significantly, and LUBA was able to work through the backlog and again achieve compliance with KPM #1. In November 2010, the staff attorney position was vacated for budget reasons, and that position was eventually eliminated in the 2011/13 budget. However, appeal numbers remained low during 2010 and 2011 as the state economy began a slow recovery, and LUBA was able to maintain compliance with KPM#1 with existing resources. With respect to KPM#2 (Timely Settle Record) , LUBA maintained compliance with that performance measure in the 2009/11 biennium. In the first four quarters of the 2011/13 biennium, LUBA fell slightly below the target of 95 percent, due to requests by parties in several cases to delay settlement of the record. With respect to KMP#3 (Resolve All Issues), LUBA met its target of resolving all issues 100 percent of the time in the 2011/13 biennium and anticipates that it will continue to do so in the 2013/15 biennium. With respect to KPM#4 (Sustained on Appeal), LUBA's actual performance during the 2009/11 biennium was 89 percent, slightly below the target of 90 percent. Through the first four quarters of the 2011/13 biennium, LUBA actual performance has been 85 percent. With respect to KPM#5 (Customer Service), LUBA exceeded its target for all customer service categories with the exception of "availability of information ," which LUBA believes reflects the loss of the staff attorney position, one of whose tasks was to field questions from the public about LUBA's review process.

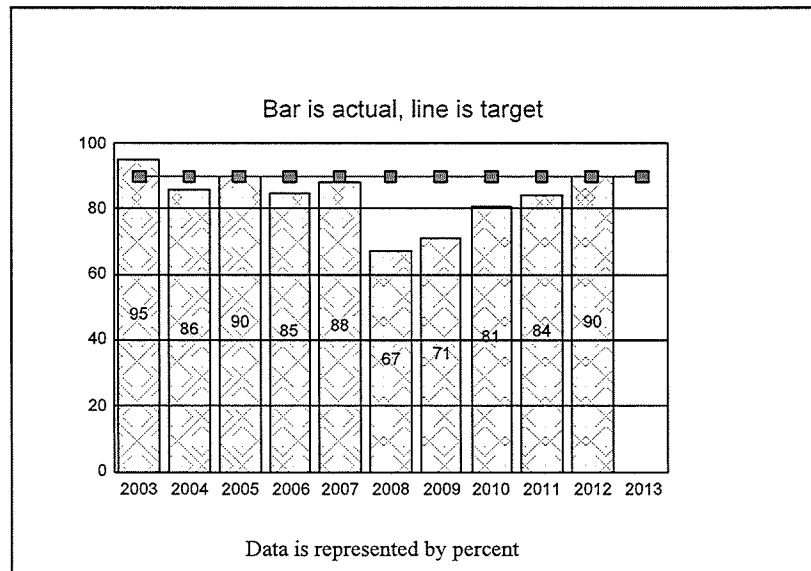
#### **4. CHALLENGES**

Both long-term and recent experience has shown that when appeal numbers go beyond approximately 220 per year, it becomes much more challenging to meet the 77-day deadline and perform all of the other related functions that LUBA must perform. When appeal numbers reach 250 to 260 per year for a sustained period, LUBA will fall behind and can recover only when appeal numbers drop for an extended period of time, or additional staffing is made available. With the economic recession that began in 2009, the annual number of LUBA appeals has declined significantly. Notwithstanding the elimination of the staff attorney position, LUBA has managed to achieve compliance with nearly all of its performance measures. As the state economy recovers, LUBA anticipates that appeal numbers will again approach historical averages in the 2013/15 biennium. When that happens, LUBA will be challenged to maintain compliance with its performance measures without additional resources, such as restoration of the staff attorney position.

#### **5. RESOURCES AND EFFICIENCY**

LUBA's 2011/13 legislatively approved biennial budget is \$1,295,875 General Fund and \$83,644 Other Funds.

<b>KPM #1</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.	1992
<b>Goal</b>	Resolve land use appeals quickly.	
<b>Oregon Context</b>	BM 68 (Traffic Congestion), 71 (Vehicle Miles Traveled), 74 (Affordable Housing), 80 (Agricultural Lands), 81 (Forest Lands).	
<b>Data Source</b>	LUBA's Access Database, reports generated from that database, and supporting central files.	
<b>Owner</b>	LUBA Board Chair. Contact: Tod A. Bassham (Board Chair) 503-373-1265; Alternate Contact: Kelly Burgess (Paralegal) 503-373-1265.	



1. OUR STRATEGY

Shift resources and attempt to maintain full staffing to focus on issuing opinions within the statutory or stipulated deadline .

## 2. ABOUT THE TARGETS

This performance measure directly and objectively measures LUBA's compliance with the 77-day statutory deadline for issuing final opinions in appeals of land use decisions.

## 3. HOW WE ARE DOING

In the fiscal year 2007-2008, with a significant increase in appeals, LUBA's average fell below target to 67% percent. In the 2009/ 11 biennium, the economic downturn caused a significant decline in the number of LUBA appeals, and despite the loss of the staff attorney position LUBA regained compliance with KPM #1 and has maintained compliance through the first four quarters of the 2011/13 biennium.

## 4. HOW WE COMPARE

Page 23 There are no comparable private industry standards. LUBA was created in large part to create an appellate review body that would resolve land use disputes much more quickly than circuit courts.

## 5. FACTORS AFFECTING RESULTS

The most significant factor that drives the number of appeals is the economy, since the number of LUBA appeals closely follows the level of development activity, which in turn is significantly affected by the economy. Until the economy recovers, LUBA should be able to meet KPM with the current level of staffing. LUBA anticipates that in the 2013/15 biennium the number of appeals will again approach the historic average as the state economy continues to recover. In that circumstance, it is unlikely that LUBA will be able to maintain compliance with KPM#1 with the current staffing level.

## 6. WHAT NEEDS TO BE DONE

No action is required. Under LUBA's current level of staffing, it has sufficient resources to meet its performance measure targets.

## 7. ABOUT THE DATA

LUBA's Access Database is programmed to automatically generate a report on this performance measure based on a query. Once the

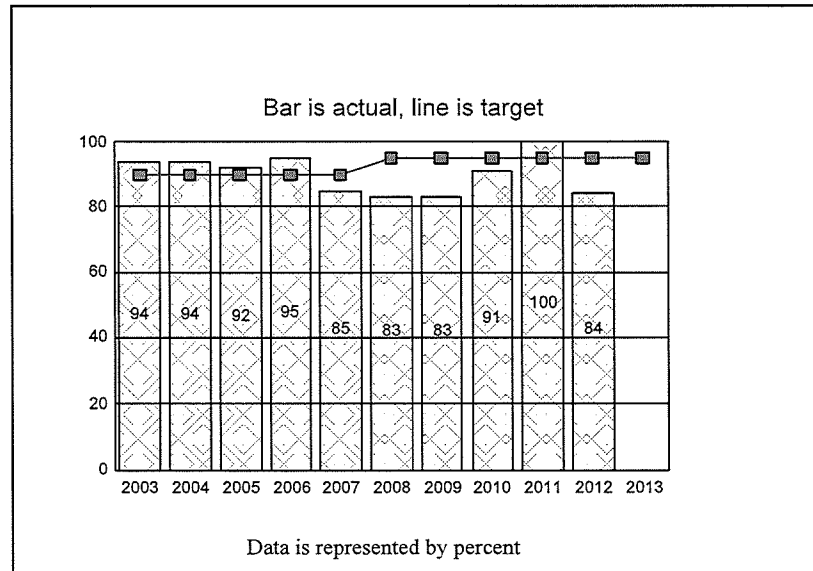
time period for the report is entered in the query, Access generates the report by automatically comparing the statutory due date with the date the decision was actually issued. LUBA staff manually enter the date the record is filed, and the number of days the 77-day deadline is suspended for record objections and other motions. The central file for each appeal is available to confirm the accuracy of the manual entries. LUBA's reports are based on the Oregon fiscal year.



<b>KPM #2</b>	TIMELY SETTLE RECORD - Percentage of record objections that are resolved within 60 days after the record objection is received by LUBA.	2001
<b>Goal</b>	Resolve land use appeals quickly.	
<b>Oregon Context</b>	BM 68 (Traffic Congestion), 71 (Vehicle Miles Traveled), 74 (Affordable Housing), 80 (Agricultural Lands), 81 (Forest Lands).	
<b>Data Source</b>	LUBA's Access Database, reports generated from that database, and supporting central files.	
<b>Owner</b>	LUBA Board Chair. Contact: Tod A. Bassham (Board Chair) 503-373-1265; Alternate Contact: Kelly Burgess (Paralegal) 503-373-1265.	

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Appendix C



1. OUR STRATEGY

LUBA staff generate a weekly needs list alerting Board Members to the status of record objections .

## 2. ABOUT THE TARGETS

The performance measure directly and objectively measures LUBA's compliance with the 60-day statutory deadline for resolving record objections.

## 3. HOW WE ARE DOING

In the 2009/11 biennium, LUBA failed to meet the target of 95 percent in this KPM, achieving 92 percent. In the first four quarters of the 2011/13 biennium, LUBA's performance so far is 84 percent. In part this reflects delays attributable to party requests to delay settlement of the record.

## 4. HOW WE COMPARE

Page 26 There is no relevant public or industry comparable standard.

## 5. FACTORS AFFECTING RESULTS

Caseload and staffing are the main factors affecting LUBA's ability to meet this performance measure. Occasionally the parties will request or delay settlement of the record more than 60 days from the date the record objection is filed, in order to explore a mediated resolution of the appeal or other purposes.

## 6. WHAT NEEDS TO BE DONE

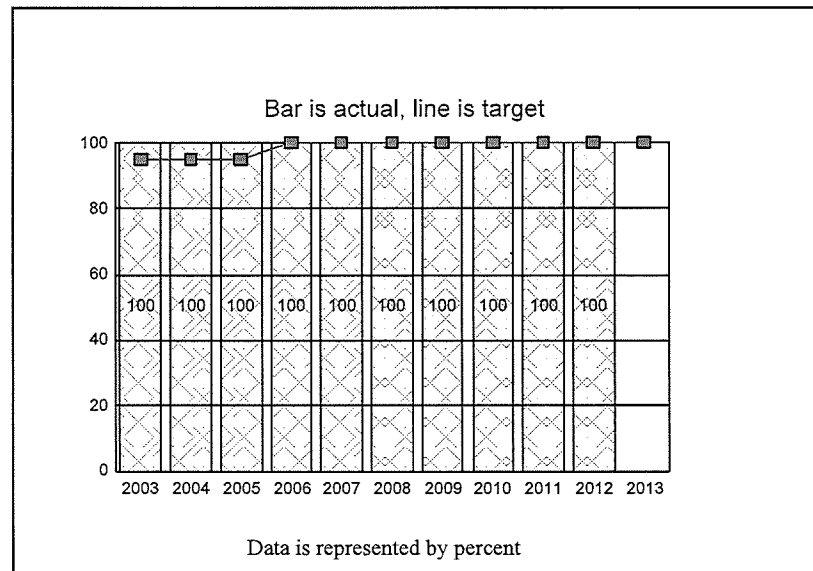
No action is required.

## 7. ABOUT THE DATA

LUBA's Access Database is programmed to automatically generate a report on this performance measure based on a query. Once the time period for the report is entered in the query, Access generates the report by automatically comparing the date the record objection was filed with LUBA with the date the order resolving the record objection was issued. The date the record objection is filed and the date the order resolving the record objection is issued are entered manually by LUBA staff. The central file for each appeal is available to

confirm the accuracy of the manual entries. LUBA's reports are based on the Oregon fiscal year.

<b>KPM #3</b>	RESOLVE ALL ISSUES - Percentage of decisions where all issues are resolved when reversing or remanding a land use decision.	1992
<b>Goal</b>	Decide all legal issues that are presented in appeals.	
<b>Oregon Context</b>	BM 68 (Traffic Congestion), 71 (Vehicle Miles Traveled), 74 (Affordable Housing), 80 (Agricultural Lands), 81 (Forest Lands).	
<b>Data Source</b>	LUBA's Access Database, reports generated from that database, and supporting central files.	
<b>Owner</b>	LUBA Board Chair. Contact: Tod A. Bassham (Board Chair) 503-373-1265; Alternate Contact: Kelly Burgess (Paralegal) 503-373-1265.	



1. OUR STRATEGY

This KPM responds directly to a statutory requirement that the Board decide all issues presented to it when reversing or remanding

decisions, which is an attempt to limit most land use decisions to a single trip up and down the appellate ladder.

## 2. ABOUT THE TARGETS

This performance measure directly and objectively measures LUBA's compliance with the statutory requirement that LUBA resolve all legal questions when it remands a land use decision.

## 3. HOW WE ARE DOING

LUBA has consistently met its target for this performance measure .

## 4. HOW WE COMPARE

There are no relevant public or private industry standards.

## 5. FACTORS AFFECTING RESULTS

Caseload and staffing are the main factors affecting LUBA's ability to meet this performance measure .

## 6. WHAT NEEDS TO BE DONE

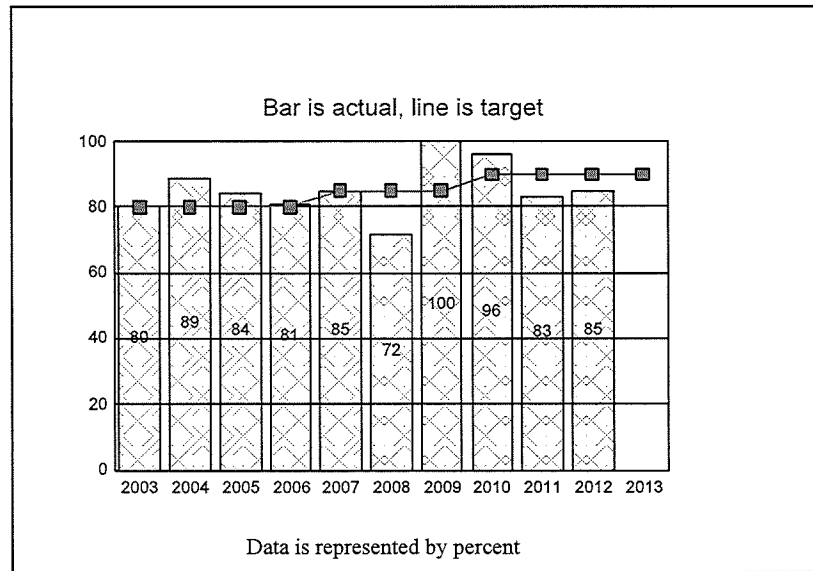
No action is required.

## 7. ABOUT THE DATA

LUBA's Access Database is programmed to automatically generate a report on this performance measure based on a query . The Board Member who issues a final opinion advises LUBA's administrative staff if one or more issues that could have been resolved were left unresolved in an opinion that reversed or remanded a decision. A field is available to note such cases and the query totals those entries to generate the report. The central file for each appeal is available to confirm the accuracy of the manual entries. LUBA's reports are based on the Oregon fiscal year.

<b>KPM #4</b>	SUSTAINED ON APPEAL - Percentage of final opinions that are sustained on appeal.	2001
<b>Goal</b>	Resolve land use appeals quickly.	
<b>Oregon Context</b>	BM 68 (Traffic Congestion), 71 (Vehicle Miles Traveled), 74 (Affordable Housing), 80 (Agricultural Lands), 81 (Forest Lands).	
<b>Data Source</b>	LUBA's Access Database, reports generated from that database, and supporting central files.	
<b>Owner</b>	LUBA Board Chair. Contact: Tod A. Bassham (Board Chair) 503-373-1265; Alternate Contact: Kelly Burgess (Paralegal) 503-373-1265.	

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Appendix C

**1. OUR STRATEGY**

Board Members regularly research appellate court decisions and discuss their implications to ensure that LUBA opinions adhere to

established court precedent or, where there is no precedent, that LUBA decisions are likely to be consistent with how appellate courts will resolve novel issues.

## 2. ABOUT THE TARGETS

This performance measure directly and objectively measures the rate at which LUBA opinions are affirmed on appeal to the appellate courts.

## 3. HOW WE ARE DOING

In the 2009/11 biennium, LUBA opinions were affirmed on appeal 89 percent of the time, slightly below the 90 percent target. In the first four quarters of the 2011/13 biennium, 22 of 26 appeals were affirmed, or 85 percent.

## 4. HOW WE COMPARE

There are no known comparable public or private industry standards.

## 5. FACTORS AFFECTING RESULTS

Caseload and staffing are the main factors affecting LUBA's ability to meet this performance measure. In 2007 a record number of appeals were filed. As caseloads grow, Board Members have less time to conduct necessary research, keep abreast of recent appellate decisions, and ensure that appeals are resolved free of reversible legal error. As case loads decrease there is more time for these activities and performance tends to increase.

## 6. WHAT NEEDS TO BE DONE

No action is required.

## 7. ABOUT THE DATA

LUBA's Access Database is programmed to automatically generate a report on this performance measure based on a query. The appellate court's disposition is manually entered into a field. Once the time period for the report is entered in the query, Access generates

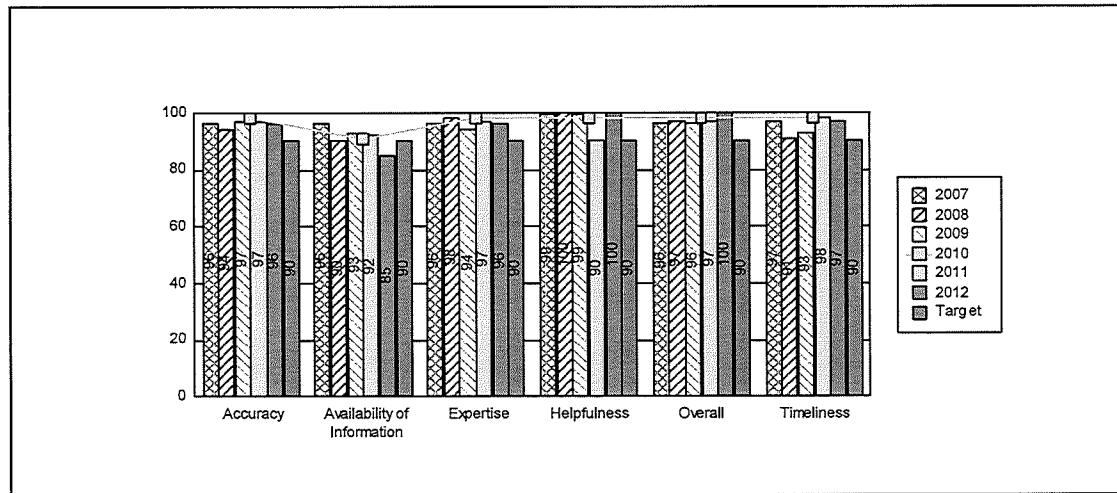
the report based on the entries in that field. The central file for each appeal is available to confirm the accuracy of the manual entries of the appellate court disposition. LUBA's reports are based on the Oregon fiscal year.



<b>LAND USE BOARD of APPEALS</b>	<b>II. KEY MEASURE ANALYSIS</b>
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<b>KPM #5</b>	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.	2005
<b>Goal</b>	Resolve land use appeals quickly.	
<b>Oregon Context</b>	BM 68 (Traffic Congestion), 71 (Vehicle Miles Traveled), 74 (Affordable Housing), 80 (Agricultural Lands), 81 (Forest Lands).	
<b>Data Source</b>	LUBA staff manually maintain data, which can be verified by consulting LUBA's central files.	
<b>Owner</b>	LUBA Board Chair. Contact: Tod A. Bassham (Board Chair) 503-373-1265; Alternate Contact: Kelly Burgess (Paralegal) 503-373-1265.	

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Appendix C

**1. OUR STRATEGY**

LUBA conducts daily and weekly meetings among Board Members and staff to ensure that administrative procedures and the Board's review are conducted promptly and efficiently, and that staff provide appropriate help and information to the public.

## 2. ABOUT THE TARGETS

The nature of appellate review means some parties will prevail and some will not, which means that not all parties to an appeal will necessarily be satisfied with the outcome of that appeal. Nonetheless, the LUBA Board Members and LUBA staff strive to conduct LUBA's review in a manner that leaves participants satisfied with the review process, for example, the timeliness of LUBA's resolution of issues, the assistance LUBA's staff provide to parties, the availability of information on LUBA's procedures and case law, etc. The 90 percent target represents a realistic initial measurement of how an efficient LUBA should be expected to provide customer service in these areas. As more data is developed on LUBA's current performance, the Board may revise the target upwards.

## 3. HOW WE ARE DOING

In the 2009/11 biennium, LUBA exceeded the 90 percent target for all categories of customer service. In the first four quarters of the 2011/13 biennium, LUBA exceeded the 90 percent target for all categories, with the exception of "Availability of Information," which fell to 85 percent. The Board believes this reflects the loss of the staff attorney position, one of whose functions was to interact with the public and answer, if appropriate, questions about the LUBA review process.

## 4. HOW WE COMPARE

There are no known public or private industry comparisons. As this KPM is implemented by state agencies, LUBA will attempt to determine how other, similar agencies or courts provide and measure customer service.

## 5. FACTORS AFFECTING RESULTS

Caseload and staffing are the main factors affecting results.

## 6. WHAT NEEDS TO BE DONE

LUBA is in the process of determining how other similar agencies are performing under this new performance measurement and reviewing targets to confirm whether the existing target is appropriate. LUBA will continue with on-going reviews to assure quality of customer service.

## 7. ABOUT THE DATA

Report generated by LUBA staff, based on returned survey cards sent to all parties to appeals before LUBA. LUBA's reports are based on the Oregon fiscal year.

<b>LAND USE BOARD of APPEALS</b>	<b>III. USING PERFORMANCE DATA</b>
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**Agency Mission:** To provide an accessible forum for resolving land use disputes quickly and efficiently and make LUBA decisions available as a decision making resource to state and local legislators, land use decision makers, property owners and the citizens of Oregon.

<b>Contact:</b> Tod A. Bassham, Board Chair	<b>Contact Phone:</b> 503-373-1265
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<b>Alternate:</b> Kelly Burgess, Paralegal	<b>Alternate Phone:</b> 503-373-1265
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**The following questions indicate how performance measures and data are used for management and accountability purposes.**

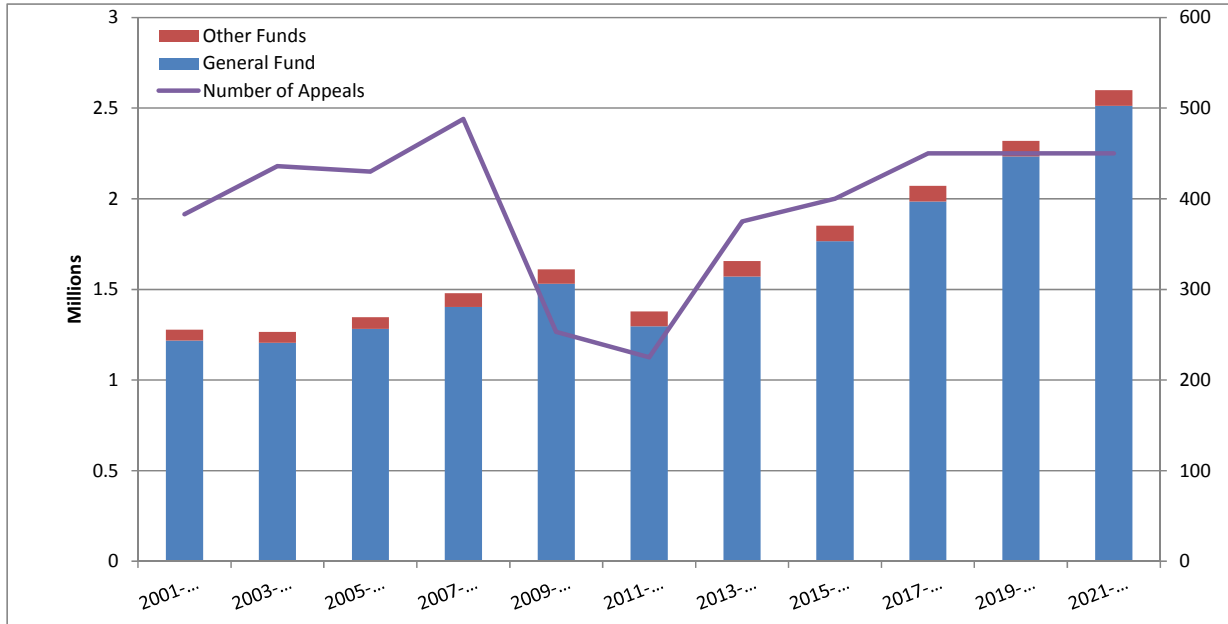
<p><b>1. INCLUSIVITY</b></p> <p style="writing-mode: vertical-rl; transform: rotate(180deg);">Page 36</p>	<p>* <b>Staff :</b> The Board Members drafted and finalized proposed performance measures, consulting staff as appropriate. Staff reviewed final performance measures and developed means to implement them. The Board does not have an ongoing stakeholder group and did not form such a group in developing performance measures. The legislature reviewed LUBA’s KPMs during budget review following the last major development cycle in 2004. The Board did not solicit citizen input in developing KPMs.</p> <p>* <b>Elected Officials:</b></p> <p>* <b>Stakeholders:</b></p> <p>* <b>Citizens:</b></p>
<p><b>2 MANAGING FOR RESULTS</b></p>	<p>The Board reviews performance measures on a monthly and quarterly basis. Based on that review, the Board may reallocate resources or make other adjustments to ensure that performance measures are met. The central focus of weekly Board Member workflow meetings and weekly workflow meeting between the Board Chair and administrative staff is making any adjustments necessary to meet performance measure targets. Because LUBA has largely complied with its performance measures over the past year, no major changes have been made in the management of the agency in the last year.</p>
<p><b>3 STAFF TRAINING</b></p>	<p>LUBA staff has been trained in database management, and those skills are used in implementing and gathering data for performance measures. Staff follow performance measure data closely to aid the Board in managing performance.</p>
<p><b>4 COMMUNICATING RESULTS</b></p>	<p>* <b>Staff :</b> Performance measure data is supplied to the Department of Administrative Services every quarter, and is incorporated into the agency budget presentations to the legislature at every biennial session. Beginning in January 2004, performance measure data has been available on LUBA's website. (<a href="http://cms.oregon.gov/LUBA/pages/index.aspx">http://cms.oregon.gov/LUBA/pages/index.aspx</a>).</p>

Appendix C

# Agency Name: Land Use Board of Appeals

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Primary Outcome Area: Healthy Environment  
Secondary Outcome Area: N/A  
Program Contact: Tod A. Bassham, Board Chair, (503) 373-1265



(1) LUBA employed 7 FTE during the majority of the 2001-03 biennium when LUBA received 379 appeals. LUBA employed 6 FTE during the 2003-05 and 2005-07 biennia, when the number of appeals increased to 447 during each of those biennia. During the 2009-11 biennium, the number of appeals decreased to 235 appeals due to the recession, and LUBA eliminated its staff attorney position in October, 2010. LUBA currently employs 5 FTE, the same number as in 1979 when LUBA was created.

## Executive Summary

The Land Use Board of Appeals (LUBA) was created by the 1979 Legislature to provide a specialized appellate review body that (1) provides an accessible forum for resolving land use disputes quickly and effectively and (2) makes its decisions available as an authoritative resource to state and local legislators, land use professionals, city and county land use decision makers, property owners and the citizens of Oregon.

## Program Funding Request

LUBA is requesting funding at its current service level of GF \$1,455,326 and OF \$88,865. In addition, LUBA is requesting as a policy option package restoration of the staff attorney position at .63 FTE (15 months full-time equivalent) to help the agency cope with the anticipated increase in appeal numbers over the 2013-15 biennium as the real estate and development sector recovers from the recession. Restoring the staff attorney position will cost GF \$115,000, but will likely be necessary to allow the agency to continue its core function of timely resolving land use appeals.

## **Program Description**

LUBA is a single program agency, the primary purpose of which is to resolve appeals of land use decisions quickly and in accordance with sound principles of judicial review. LUBA's organic statute, ORS 197.805, provides that "time is of the essence in reaching final decisions in matters involving land use [.]". Quickly resolving land use disputes has important economic consequences, as many development proposals are subject to time-sensitive financing or construction windows, which may be threatened by lengthy appellate delays. LUBA fulfills the policy set out in ORS 197.805 by conducting expedited land use appeals, described below, resulting in final opinions that resolve the issues presented on appeal. 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.

LUBA review takes approximately 98 days from the time the appeal is filed (a longer period may result if there are record disputes or other motions requiring delay). The statutory and LUBA established deadlines are set out below:

- Notice of Intent to Appeal filed with LUBA
- Local Government files Record with LUBA – Day 21
- Petition for Review Filed with LUBA (Appellant's Brief) – Day 42
- Respondent's Brief Filed with LUBA (Local Government/Applicant's Brief) – Day 63
- Oral Argument at LUBA – Day 77
- LUBA Issues Final Opinion – Day 98

This review process is significantly more expedited and efficient than the writ of review process in circuit court, which was the review process used prior to LUBA's creation.

ORS 197.830(17) requires LUBA to publish its orders and opinions. This represents an important secondary policy objective: to make LUBA's decisions on land use appeals widely available to decision makers and the citizens of Oregon as a resource for future land use decision making. LUBA's final opinions are collected in volumes (LUBA Reporter) that cover approximately 5 months and that are published and sold to subscribers. At the end of each week, final opinions are posted on LUBA's web page.

## **Program Justification and Link to 10-Year Outcome**

LUBA supports Strategy 5.2 by providing a mechanism to quickly and efficiently resolve land use conflicts involving a wide range of natural resource and economic development issues. Over the last 40 years the state and local governments have made a considerable investment in developing comprehensive plans, and all of those comprehensive plans have now been reviewed for consistency with the Statewide Planning Goals and formally acknowledged by LCDC. As the principal adjudicatory body handling land use cases, LUBA is a nationally recognized and distinctive feature of the Oregon land use system compared with other states. Prior to LUBA being created in 1979, land use disputes were resolved by circuit courts. Many circuit courts had difficulty resolving those disputes quickly and consistently. LUBA provides a fast, consistent, and comparatively inexpensive alternative to circuit courts for resolving land use conflicts. Without LUBA, parties, including local governments, affected persons and applicants, would

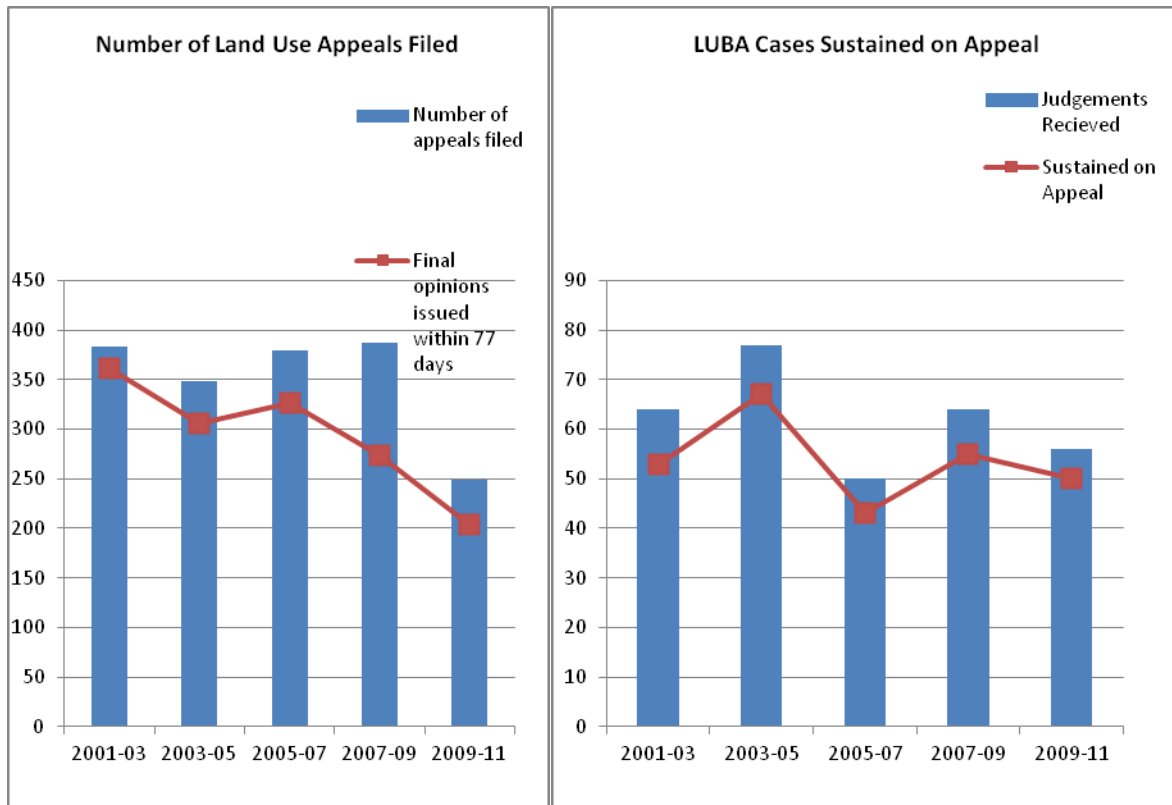
otherwise be forced to resort to expensive and time consuming civil litigation in one of the state's 36 circuit courts, many of which are already overburdened with cases.

The availability of LUBA review to DLCD, other state agencies, and individuals and the predictability of outcomes at LUBA plays a significant role in the success of the state's landmark land use program. DLCD tracks local government land use decisions. If DLCD has concerns with a local government land use decision, DLCD has the right to appear before the local government and to appeal to LUBA or to intervene in a LUBA appeal that is filed by others. Other state agencies also appeal land use decisions to LUBA and intervene in a LUBA appeal filed by others.

Additionally, LUBA has for more than 30 years published the LUBA Reporter. Land use applicants, citizens, local governments and DLCD all use the LUBA Reporter as an authoritative resource in making sense out of complicated land use laws.

### **Program Performance**

One way LUBA's performance is measured is the percentage of appeals that meet the statutory deadline for issuing final opinions 77 days after the local government submits the record to LUBA. During the 2009/2011 biennium, LUBA issued 84% of its final opinions in an appeal within the 77-day statutory deadline or within one week after the expiration of the deadline. Another way LUBA's performance is measured is the percentage of LUBA opinions that are affirmed on appeal by the Court of Appeals, since ensuring that appeals are resolved free of legal error is as important as quickly resolving the appeals. LUBA opinions were affirmed on appeal 83% of the time during the 2009/2011 biennium.



**Enabling Legislation/Program Authorization**

LUBA was authorized by the 1979 Legislature, with exclusive jurisdiction to hear and resolve land use appeals under Oregon Laws 1979, Chapter 772. The law provided a Sunset Review in 1981. The Sunset provisions were repealed, and LUBA's present authority is found in ORS 197.805 to 197.860.

**Funding Streams**

LUBA is almost entirely funded by the general fund. Other Funds revenue sufficient to cover the expenses of publication, including part of the personal services cost of the agency paralegal, is generated by sales of LUBA Reporters.

**Significant Proposed Program Changes from 2011-13**

LUBA proposes to restore the staff attorney position at approximately at .63 FTE (15 months full time equivalent) during the 2013-15 biennium, on the assumption that as the state economy recovers the numbers of appeals to LUBA will significantly increase, but will not reach a critical level affecting LUBA's ability to comply with its statutory mandates until midway into the 2013-15 biennium.



Land Use Board of Appeals  
General Program

	2001-03	2003-05	2005-07	2007-09	2009-11	2011-13	2013-15	2015-17	2017-19	2019-21	2021-23
<b><u>Program Budget</u></b>											
General Fund	1,217,006	1,205,116	1,282,198	1,403,105	1,531,111	1,295,278	1,570,326	1,757,171	1,967,666	2,204,705	2,472,109
Lottery Funds											
Other Funds	60,747	60,507	64,677	75,066	80,003	83,620	86,065	94,389	103,690	114,064	125,712
Other Funds - Nonlimited											
Federal Funds											
Federal Funds - Nonlimited											
<b>Total Funds</b>	<b>1,277,753</b>	<b>1,265,623</b>	<b>1,346,875</b>	<b>1,478,171</b>	<b>1,611,114</b>	<b>1,378,898</b>	<b>1,656,391</b>	<b>1,851,560</b>	<b>2,071,356</b>	<b>2,318,769</b>	<b>2,597,821</b>
Positions	7	6	6	6	6	5	6	6	6	6	6
FTE	6.50	6.00	6.00	6.00	6.00	5.00	5.63	6.00	6.00	6.00	6.00

**Program Performance**

Quantity Metric	379	437	447	447	235	220	375	400	450	450	450
<i>Number of appeals Filed</i>											

Quality Metric

*Example: % of students  
graduating within 5  
years*

Timeliness Metric

*Example: % of awards  
picked up within 2 weeks*

Cost Per Unit Metric

*Example: Biennial  
Average Award*