

**Land Use Board of Appeals**

**Budget Presentation**

**Joint Ways and Means**

**Subcommittee on Natural Resources**

**February 12, 2015**

## **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

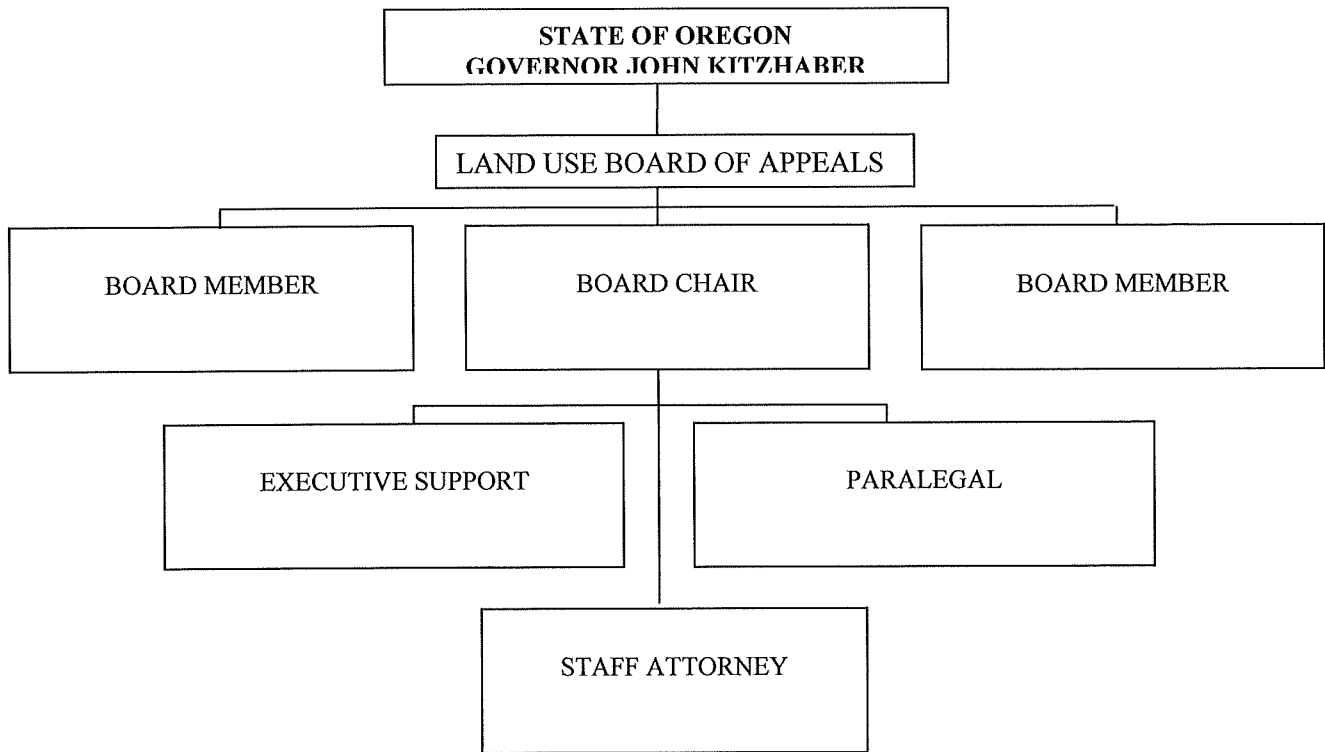
unfamiliar with land use legislation, which required additional appeals to the Court of Appeals to sort out. Further, such circuit court decisions were not generally available to the public to assist future decision making, and carried no precedential authority. Under the current review scheme, the bulk 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 36 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**

Below is the agency's proposed 2015-17 organizational chart.



As proposed in the Governor’s Budget, LUBA is made up of 6.0 FTE, consisting of three Board Members who are attorneys experienced in land use law, a staff attorney, and two administrative staff members. Board Members are appointed by the Governor and confirmed by the Senate. The Staff Attorney assists the Board Members in researching legal issues, final editing of opinions, and answering questions from participants in the LUBA appeal process. 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 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 staff attorney position 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, the legislature approved restoration of the staff attorney position for the last 18 months of the biennium, resulting in .75 FTE. The position was filled effective September, 2014. The Governor's Budget recommends restoration of the staff attorney position to 1.0 FTE.

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

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

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

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 without extra staffing.

Another variable is the complexity of appeals. About 10-20 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 deadline, and if a cluster of complex

appeals come through at the same time, it can cause a temporary backlog that affects timely resolution of less complex appeals.

The target is 90 percent. In 2012, and in most recent years since 2001, LUBA has met this target. In the first three quarters of the 2013-15 biennium, through December 2014, LUBA fell slightly short of the target at 85%. With the hiring of LUBA's staff attorney in September, 2014, LUBA expects to meet the target in the future.

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

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

The target is 95 percent. During the first three quarters of the 2013-015 biennium, LUBA resolved 93% of record objections within 60 days of receipt. The two appeals with objections that were not resolved within 60 days of receipt involved complex appeals with multiple pleadings on the objections.

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

The target is 100 percent. LUBA has consistently met this performance measure and met this performance measure during the first three quarters of the 2013-15 biennium.

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

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

The target is 90 percent. During the first three quarters of the 2013-15 biennium, the Court of Appeals sustained 22 of the 26 decisions that were appealed to it, resulting in an 85% sustained on appeal rate.

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

LUBA has consistently met this performance measure. In 2012, the performance for “availability of information” dropped to 85 percent, which may have reflected 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 target is 90 percent for each variable. During the first three quarters of the 2013-15 biennium LUBA exceeded the target for all variables except “availability of information,” which was 87%. It is anticipated that the performance rating for that variable will increase with the hiring of the staff attorney, who interfaces with the public more regularly than administrative staff is able to.

## **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 A** is a graph showing appeal numbers from 1987 to 2013. 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 2015-17 biennium. In addition, statutory and administrative rule changes to review of some urban growth boundary amendments mean that appeals of those amendments will be reviewed by LUBA beginning in 2016, and that will increase caseload.

Another minor variable affecting appeal numbers is the extent to which the legal framework is settled or has become unsettled by new land use legislation. When the existing framework of land use statutes or laws is changed significantly, as happened in 1993 with 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 and amendments. As a result of this shift away from periodic review, more local governments are adopting post-acknowledgment plan amendments (PAPAs) outside the context of periodic review, which means that they are subject to appeal to LUBA. Appeals of such legislative amendments tend to involve more complex issues than typical permit decisions.

## **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. Those opinions have been digitized and will be placed on LUBA's website during 2015. At that time, the new content will be provided free of charge to OSB members through the bar's Fastcase research database.
- **Local Records/Electronic Records.** LUBA now recycles copies of the local record at the conclusion of an appeal rather than incurring the cost of storing the local record at state archives or incurring the cost of mailing the record back to the local government. In addition, LUBA's rules now allow for

submission of electronic records, which reduces the need for storage and associated storage costs.

- **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.
- **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.

- **Rule Amendments.** LUBA adopted rule amendments that 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.

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

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

LUBA more fully into the digital age, in line with the judicial branch.

### **VIII. Major Budgetary Issues**

LUBA's experience over the past 20 years indicates that three board members with the assistance of a staff attorney can resolve approximately 150 appeals per year consistent with LUBA's statutory deadlines, assuming average complexity of cases and no significant turnover or vacancies on the board. When appeals exceed 150 per year sporadic delays and performance failures tend to occur. When appeals exceed approximately 220 per year, as they last did in 2007, performance failures will occur even with the help of a staff attorney.

LUBA anticipates that as the economy continues its recovery that appeal numbers will increase from the current 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. However, the agency will almost certainly be able to continue to comply with statutory deadlines without additional staffing. The Governor's Budget recommends restoration of the staff attorney position at 1.0 FTE rather than the current .75 FTE.

### **IX. Proposed Legislation Affecting Agency Operations**

DLCD is in the preliminary stages of adopting administrative rules that would apply to certain urban growth boundary amendments. Those rules will provide that appeals of those urban growth boundary amendments will be reviewed by LUBA, which will result in an increase in LUBA's caseload. Given current

appeal numbers, LUBA should be able to absorb the increased caseload with existing staffing.

DLCD is also in the early stages of adopting administrative rules regarding transfers of development rights in connection with Measure 49 entitlements. It is unknown whether the new rules will result in an increase in appeals to LUBA.

## **X. Agency Reduction Options**

### **Ten Percent Option: Eliminate Staff Attorney.**

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

LUBA is a six-person agency that currently consists of three board members, one staff attorney and two support staff. In 1996 the legislature added a limited duration staff attorney position, later made permanent, to assist LUBA with case backlogs, increasing permanent staffing from five to six personnel. In 1999, the legislature approved a limited duration copy editor position, replacing an outside consultant and a limited duration staff attorney position, to assist LUBA in reducing the publication backlog. With these additional personnel, LUBA was able to eliminate both the final opinion and publications backlogs and begin meeting relevant performance measure targets. In 2010, the staff attorney position was vacated due to budgetary constraints, and the position was eliminated in 2011-13. The staff attorney position was restored for the last 18 months of the 2013-15 biennium and the position was filled in September, 2014.

LUBA's 2015-17 Agency Requested General Fund budget is \$1,775,496. Ten percent of LUBA's 2015-2017 General Fund budget is \$177,550. Because

LUBA has only one program, and the large majority of its budget is for personnel, the only feasible means of reducing LUBA's budget by ten percent is to reduce personnel costs. The most feasible option to effect a 10% reduction is to eliminate the staff attorney position. Achieving the same amount of reduction by other means would require the reduction if not elimination of at least two staff FTEs, which would leave the agency unable to perform necessary administrative functions.

Historically, on average, each board member resolves approximately 150 appeals and issues about 140 orders per biennium. At least a third of each board member's workload represents essential work that does not directly produce any orders or opinions, such as preparing for and conducting oral argument, peer review of other board members' drafts, etc. The three LUBA board members conduct most of the legal research necessary to write opinions and orders and do the majority of the necessary writing themselves. However, all board members also assign work to the staff attorney. This work assigned to the staff attorney must be completed before opinions and orders can be issued.

The effect of eliminating the staff attorney will be to require that the board members absorb the work that the staff attorney would otherwise have produced. This would reduce substantially those board members' ability to produce orders and opinions. The net effect would be to reduce LUBA's biannual production of orders and opinions by approximately one-fourth or approximately 100 fewer cases being resolved, and 100 fewer intermediate orders being issued over the biennium. That reduction would likely mean a return of the final opinion backlog that existed between 1995 and 2001. The negative impact of the above-described 10% cut will be even more dramatic if the number of land use appeals returns to the approximately 220 annual appeals that LUBA experienced during economically



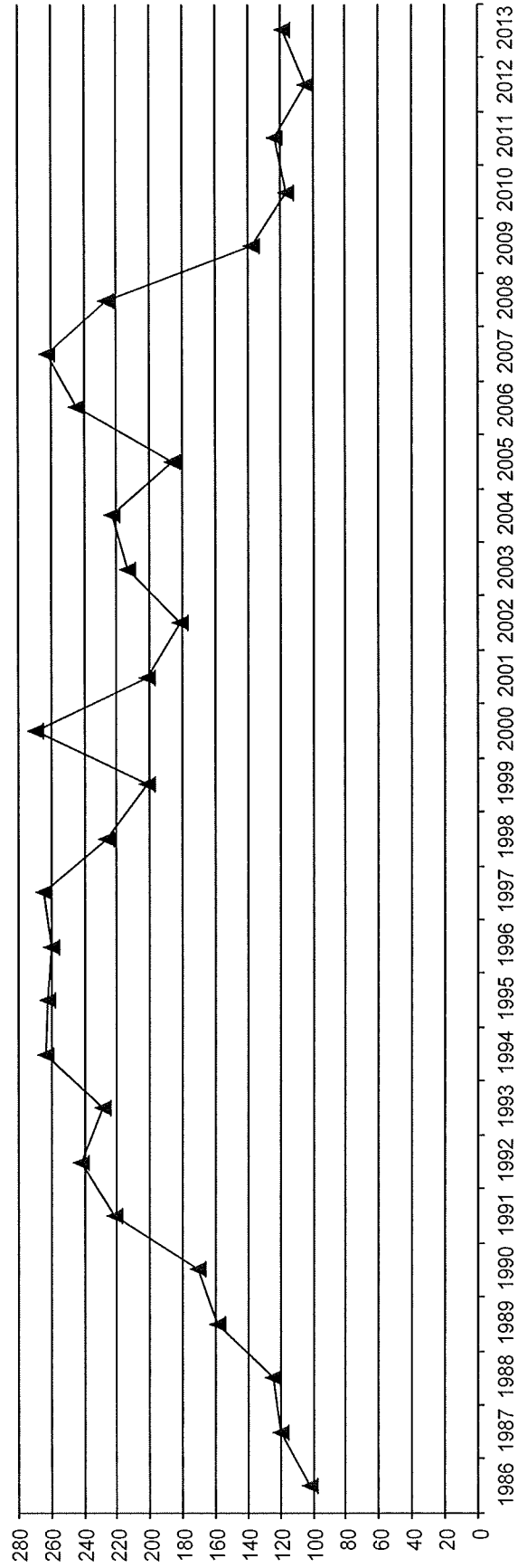
booming 1990s and early 2000s, and which increased to 260 appeals occurred during calendar year 2007.

**XI. Other Requested Information**

1. HB 4131 (2012). 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. Changes to agency budget and effect on agency operations. None.
4. Information Technology and capital construction projects. None.
5. Position Reclassifications. No LUBA positions were reclassified in 2013-15.
6. LUBA hired a staff attorney in September, 2014 at Step 2.
7. Ending Balance Form. See attached.

Appendix A

LUBA APPEALS FILED



UPDATED OTHER FUNDS ENDING BALANCES FOR THE 2013-15 & 2015-17 BIENNIA

Agency: Land Use Board of Appeals (LUBA)  
 Contact Person (Name & Phone #): TriciaLynn Atalig (503) 986-5253

(a) Other Fund Type	(b) Program Area (SCR)	(c) Treasury Fund #/Name	(d) Category/Description	(e) Constitutional and/or Statutory reference	(f) 2013-15 Ending Balance In LAB	(g) 2015-17 Ending Balance Revised	(h) 2015-17 Ending Balance In CSL		(i) Comments
LUBA Other Funds	LUBA (66200-010-00-00-00000)	0401-LUBA OTHER FUNDS	LUBA Other Fund	Statutory ORS 197 Administrative Rules 661-010-00000	4,537		10,896		

**Objective:** Provide updated Other Funds ending balance information for potential use in the development of the 2015-17 legislatively adopted budget.

**Instructions:**

**Column (a):** Select one of the following: Limited, Nonlimited, Capital Improvement, Capital Construction, Debt Service, or Debt Service Nonlimited.

**Column (b):** Select the appropriate Summary Cross Reference number and name from those included in the 2013-15 Legislatively Approved Budget. If this changed from previous structures, please note the change in Comments (Column (i)).

**Column (c):** Select the appropriate, statutorily established Treasury Fund name and account number where fund balance resides. If the official fund or account name is different than the commonly used reference, please include the working title of the fund or account in Column (j).

**Column (d):** Select one of the following: Operations, Trust Fund, Grant Fund, Investment Pool, Loan Program, or Other. If "Other", please specify. If "Operations", specify the number of months the reserve covers, the methodology used to determine the reserve amount, and the minimum need for cash flow purposes.

**Column (e):** List the Constitutional, Federal, or Statutory references that establishes or limits the use of the funds.

**Column (f) and (h):** Use the appropriate, audited amount from the 2013-15 Legislatively Approved Budget and the 2015-17 Current Service Level as of the Agency Request Budget.

**Column (g) and (i):** Provide updated ending balances based on revised expenditure patterns or revenue trends. Do not include adjustments for reduction options that have been submitted unless the options have already been implemented as part of the 2013-15 General Fund approved budget or otherwise incorporated in the 2013-15 LAB. The revised column (i) can be used for the balances included in the Governor's budget if available at the time of submittal. Provide a description of revisions in Comments (Column (j)).

**Column (j):** Please note any reasons for significant changes in balances previously reported during the 2013 session.

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