

Land Use Board of Appeals

Budget Presentation

Joint Ways and Means

Subcommittee on Natural Resources

February 15, 2021

I. Agency Mission, Goals, and Historical Perspective

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

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

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

LUBA hears appeals of decisions from every city and county in the state and reviews a small number of state agency decisions that qualify as land use decisions. LUBA review is expedited, designed to produce a final decision by LUBA within 77 days after the local government files the record in an appeal. LUBA plays a critical role in the implementation of Oregon's statewide planning program, and its expedited review function helps avoid unnecessary delays in economic development, which often depends on time-sensitive financing or construction seasons. LUBA review also provides a forum to ensure compliance with legislative directives requiring consideration of potential environmental degradation or other undesirable impacts.

Under the current review scheme, the bulk of disputes over land use decisions are speedily resolved at LUBA without any involvement by the circuit courts, limited involvement by the Court of Appeals, and almost no involvement by the Supreme Court. Although it is hard to quantify, LUBA's publication function probably reduces the number of appeals and litigation that would otherwise occur. Uncertainty breeds litigation, and the availability of 40 years of published LUBA opinions that definitively resolve many issues sharply reduces the uncertainty inherent in a complex land use program.

II. Program and Target Groups

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

III. 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 mid-1990s, LUBA was overwhelmed with appeals at a time of 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 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.

The KPM 1 target is to timely resolve appeals 90 percent of the time.

KPM 1	2017	2018	2019	2020
Target: 90%	82	89	73	64

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	2017	2018	2019	2020
Target: 95%	85	96	85	56

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	2017	2018	2019	2020
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.

KPM 4	2017	2018	2019	2020
Target: 90%	83	93	94	91

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*.

Although LUBA has closed its office to the public for one day of the week during much of 2020, LUBA has on average met this performance measure. The target is 90 percent for each variable. 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.

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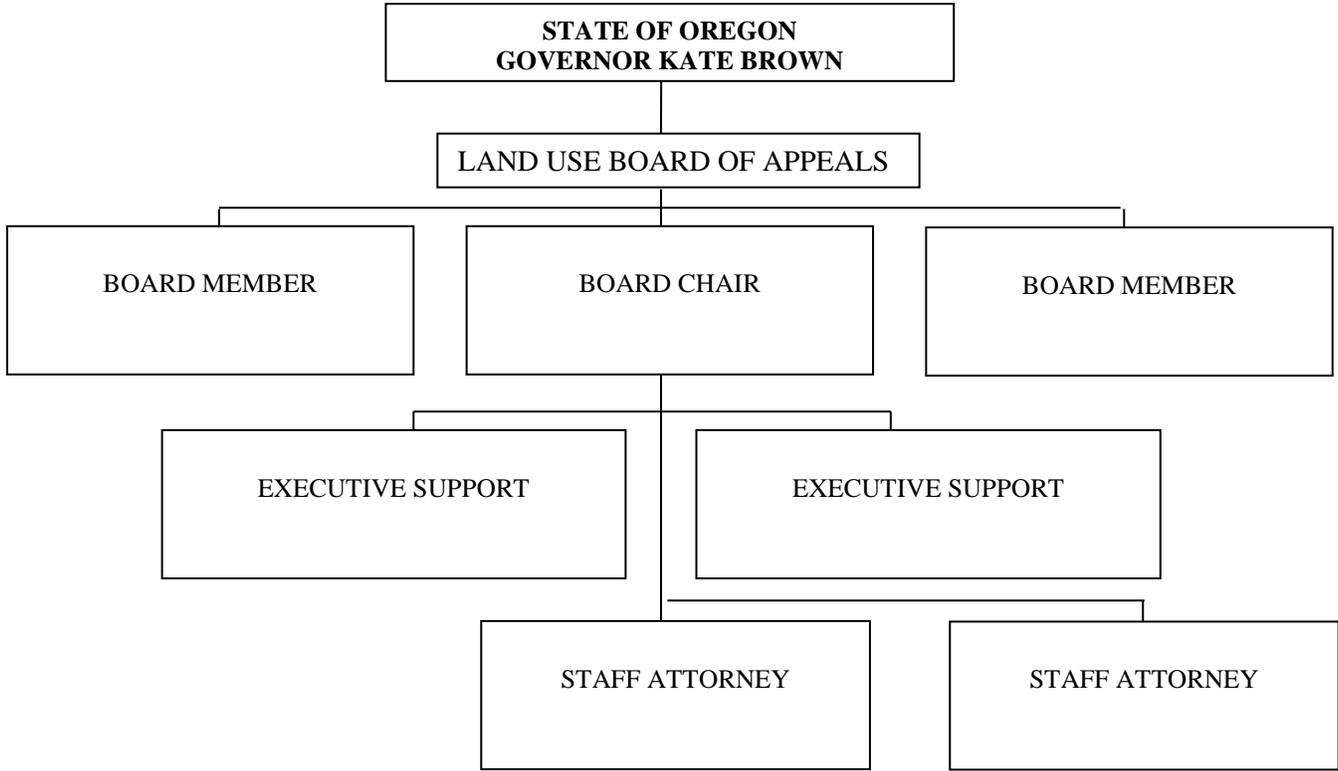
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IV. Agency Organization

Below is the agency’s proposed 2021-23 organizational chart.



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 (one additional staff attorney added through POP 101, discussed in Section XII below), and two administrative staff members. Board Members are appointed by the Governor and confirmed by the Senate and serve four-year terms. The staff attorney(s) assists 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 attorney(s) 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 tasks that are necessary to run the office and keep the active appeal files current. They also interact with the public.

V. Major Budget Drivers and Environmental Factors

The major budget drivers and environmental factors 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.

Exhibit A is a graph showing appeal numbers from 1989 through 2020. The graph shows wide variability from approximately 100 appeals per year to over 260 appeals per year, a variability that correlates strongly with 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. Since the most recent recession took hold in 2009, annual appeal numbers have been in the mid-100s. LUBA anticipates that, when the economy rebounds from the COVID-induced recession, appeal numbers will increase toward approximately 200 appeals per year sometime toward the end of the 2019-21 biennium.

In addition, statutory and administrative rule changes to review of some urban growth boundary (UGB) amendments, the roll out of local governments' marijuana regulatory programs, as well as changes to state housing laws 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.

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, for example as happened in 1993 with HB 3661 and more recently with respect to Measure 37, Measure 49, and marijuana legalization, it introduces uncertainty, which breeds litigation until the appellate review process has clarified any ambiguities or uncertainties. Conversely, when the law is or becomes relatively settled, the number of disputes and, hence, the number of appeals is reduced.

VI. Major Changes in the Last Six Years

Shifts in the basic structure of the state economy have affected both the volume and complexity of land use appeals. Over the last two decades, the state economy has continued a general shift from resource-based activities (timber, forest products, agriculture, fisheries) to an emphasis on high-tech and service-related industries. Unlike resource-based economic activity, which predominately occurs in rural areas, much of the new economic growth involves development proposals at the margins of urban areas, increasing pressure on UGBs and rural resource uses and 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 plans and land use regulations comply with statutory, 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 involve more complex issues than typical permit decisions.

During the 2017-19 biennium, 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 has 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 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, and a third employee took FMLA leave in 2020.

In 2019 and the first quarter of 2020, LUBA received eight appeals related to a large proposed development along the southern Oregon coast, resulting in a crunch of complex appeals to resolve at the same time.

VII. Cost Containment/Program Delivery Improvement

LUBA's unique function as an independent appellate review body precludes private partnerships in the usual sense or combining programs with other state agencies, some of whom appear before LUBA as litigants. However, LUBA coordinates with Willamette University School of Law to host a Land Use Fellowship for 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/LEXIS.** LUBA negotiated contracts with Westlaw and LEXIS under which the LUBA Board Members and staff attorney(s) receive the right to unlimited legal research time, at a significantly reduced cost to LUBA, in exchange for providing LUBA's opinions directly to Westlaw's and LEXIS'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.** 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 online subscription with Westlaw or LEXIS.

Those opinions have been digitized and were placed on LUBA's website in 2015. The new 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. Since 2017, LUBA has posted copies of its final opinions, and some orders, on its website the morning after they are issued.

- **Local Records/Electronic Records.** LUBA now recycles copies of the local record at the conclusion of an appeal rather than incurring the cost of storing the local record at State Archives (Archives) or 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.** Since 2017, LUBA has been preparing records for LUBA decisions that are appealed to the Court of Appeals in electronic format and, if the parties agree, providing only an electronic copy to the parties. This has resulted in savings in office supply and mailing costs. Beginning in 2019, consistent with new amendments to the Oregon Rules of Appellate Procedure, LUBA 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, LEXIS, and the Supreme Court Library instead. The estimated savings is approximately \$4,000 per biennium.
- **Publication Savings.** LUBA has implemented a number of steps to reduce the printing, binding, and distribution costs associated with publishing

volumes of the Oregon LUBA Reports, saving approximately \$2,000 per volume or approximately \$10,000 per biennium. LUBA's published volumes are now delivered to some subscribers by state shuttle, at a significant savings.

- **Conference Calls.** LUBA's rules allow parties to participate in oral argument via conference call. During the pandemic, LUBA has moved exclusively to telephonic oral argument. LUBA used to initiate the conference calls itself, which meant that LUBA incurred long-distance charges. LUBA now uses the state's "Meet-Me" conference call service at a much lower cost to LUBA.
- **Land Use Fellowship.** As noted, since 2009, LUBA has partnered with Willamette University School of Law to create a fellowship wherein a qualified third year law student is awarded a stipend (paid by the University) to intern with LUBA, a local government, and a private land use firm to gain well-rounded, practical work experience in land use law. This program has generally improved the quality of the prior intern program at LUBA, which has existed for many years.

Potential Future Cost Containment/Service Improvements.

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

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VIII. Major Budgetary Issues

LUBA's experience over the past 20 years indicates that three Board Members with the assistance of support staff can resolve approximately 150 appeals per year in a way that is generally consistent with LUBA's statutory deadlines, assuming average complexity of cases and no significant turnover on the Board. As noted, during the 2017-19 biennium, two Board Members who had each been with LUBA for more than 20 years retired. This transition resulted in delays meeting statutory deadlines.

When appeals exceed 150 per year, or when significant turnover occurs on the Board, 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 and no Board turnover. LUBA anticipates that, as the economy continues its recovery, appeal numbers will increase from the current 130 to 150 appeals to 175 to 200 appeals per year, near the 20-year average, and perhaps beyond.

For 2019, 140 appeals were filed. For 2020, 122 appeals were filed, with an approximately 20 percent drop off in the pace of appeals during the second half of 2020, likely due to the closure of local government planning offices and resulting delayed hearings on land use applications. LUBA is on pace to see approximately 192 appeals filed in 2021 as local governments reopen and continue to process land use applications, and as the economy begins to recover from the pandemic-induced recession. However, the timing of a caseload increase is uncertain. For those reasons, the Governor's Budget proposes increasing LUBA's staffing level to add a staff attorney to assist the Board in meeting its performance measures and resolving appeals in a timely manner.

IX. Proposed Legislation Affecting Agency Operations

- **Local Marijuana Regulation.** Legalization of marijuana and accompanying integration into the land use program has already generated a number of appeals and likely will continue to generate additional appeals in the future.

- **Housing.** Proposed statutory changes to how the state and local governments address housing needs and the state’s housing crisis will likely continue to affect appeals, and may generate additional appeals in the future.
- **Changes to EFU statutes.** Proposed legislation amending the Exclusive Farm Use zoning statutes and forest zoning in various ways could, if enacted, produce additional appeals.
- **LUBA’s Fee Bill HB 2110.** Currently, a Notice of Intent to Appeal (NITA) a land use decision to LUBA must “be accompanied by a filing fee of \$200 and a deposit for costs to be established by the board.” ORS 197.830(9). The deposit for costs is currently \$200, established by rule.

HB 2110 amends ORS 197.830 in two ways. First, it increases the filing fee from \$200 to \$300. LUBA’s filing fee was originally \$50, when the agency was created in 1979. The last increase to the filing fee was 11 years ago in 2009, when the Legislature increased the filing fee from \$175 to \$200. An increase in the filing fee from \$200 to \$300 for the first time in 11 years is a reasonable increase given inflation. For comparison, the filing fee for state circuit courts is \$263 and the filing fee for the Court of Appeals is \$391.

Second, HB 2110 eliminates the requirement that a NITA be accompanied by a deposit for costs. LUBA currently has discretion to award the \$200 deposit for costs to a successful local government. In practice, in the majority of cases where the local government is the prevailing party, the local government does not seek an award of the deposit for costs. Consequently, the \$200 deposit for costs is returned to the petitioner at the conclusion of an appeal. The administrative costs of this practice to the agency far outweigh any benefit to the local government of receiving a check *directly from LUBA* for the cost of preparing the local record. Rather than having those costs paid from the deposit held by LUBA, LUBA will amend its procedural rules concurrent with this legislation to provide that, when the local government is the prevailing party and seeks reimbursement for the cost of preparing the record, LUBA will award the local government up to \$200 to be paid directly by

the petitioner/losing party. This will largely eliminate the need for accounting by agency staff, allowing LUBA staff to focus more attention on duties that allow the agency to meet its statutory deadlines to resolve land use appeals. The state courts long ago ceased collecting a deposit for costs.

X. Agency Reduction Options

Ten Percent Option: Eliminate ESS-2 and reduce second ESS-2 to 70 percent.

LUBA is a six-person agency that currently consists of three Board Members, one staff attorney, and one ESS-2 support staff. (LUBA is in the process of filling the second ESS-2 position for the second time since 2019.) LUBA support staff's primary duties are processing pleadings filed by mail and in person, keeping LUBA's docket database and master filings up to date, assisting the Board with issuing and serving opinions and orders, communicating with the parties about appeals, assisting the staff attorney with publishing the Oregon LUBA Reports, assisting the staff attorney with preparing and transmitting the record of a LUBA appeal to the Court of Appeals, and assisting the Board Chair with administrative matters.

LUBA's 2021-23 Current Service Level General Fund budget is \$2,237,153. Ten percent of LUBA's 2019-21 General Fund budget is \$223,000. 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 achieve a 10 percent reduction is to eliminate one ESS-2 position and reduce other ESS-2 position to .70 FTE.

If one ESS-2 position is eliminated and the second ESS-2 position is reduced to .70 FTE, LUBA will be able to be open to the public only three days per week for processing mail, responding to telephone and email inquiries, and logging appeals into LUBA's docket database, and it will be closed two days per week. This will result in slower processing of filings related to appeals and slower resolution of appeals as LUBA's support staff are not in the office daily to issue opinions and orders and update LUBA's docket or respond to inquiries from the public.

This will likely translate into failing to meet the KPM 5 target for customer service, as well as the KPM 1 and 2 targets for issuing timely final opinions and orders.

XI. Pandemic Related Issues/Effect of 2019-21 Actions on the Agency's 2021-23 Budget

During the budget uncertainty, 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 would provide.

LUBA requested approximately \$25,000 in reimbursement. A small amount of the funds were used for protective supplies and disinfectant. The majority of the funds were for leave needed by staff.

How disruptive COVID-19 and its variants will be in 2021-23 will depend greatly on the efficacy of public health management. LUBA does not anticipate its staff receiving vaccines until the second half of 2020 at the earliest. Only some of LUBA's work may be done remotely, decreasing office efficiency. Concern for the health of self and family also makes it hard to stay dedicated to public service and may make it difficult to retain staff. Future school closures may impact staff retention as well.

Local governments are experiencing challenges preparing records for LUBA appeals with largely remote staffs. This results in delays in LUBA appeals as the initial filing of the record often requires more time and resolving any objections may be time consuming as well. LUBA is also experiencing an increase in the number of filings that do not comply with our rules, requiring additional time to issue orders directing the parties to correct filings.

XII. Other Requested Information

1. [2021-2023 Governor's Budget](#)
2. Audits. The Secretary of State has not conducted an audit of LUBA in 2019-21.
3. Changes to agency budget and effect on agency operations. LUBA's budget includes Policy Option Package (POP) 101 to add a second staff attorney.

In the last several years, LUBA has had to resolve approximately 300 appeals and issue approximately 315 intermediate orders per biennium. Thus, on average, each Board Member resolves approximately 100 appeals and issues about 105 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 and supervise the work of the staff attorney. This work assigned to the staff attorney must be completed before opinions and orders can be issued.

Since 1996, LUBA has had a single staff attorney position. However, during the great recession, due to mandatory budget cuts, the staff attorney position was eliminated and LUBA did not have a staff attorney for approximately four years. During that time, LUBA's performance measures for timely issuance of opinions and orders (KPMs 1 and 2) decreased. The staff attorney position was restored by the Legislature for the last 18 months of the 2013-15 biennium, and LUBA began meeting its performance measures again.

The staff attorney assists Board Members by drafting orders and final opinions for their review, by researching case law, statutes and rules, and by copy editing final opinions and orders. The staff attorney is also responsible for publishing the Oregon LUBA Reports, a bound collection of LUBA's opinions and orders similar to the

Oregon appellate court reporter volumes. The staff attorney is also responsible for preparing the appellate court record for transmittal to the Court of Appeals for LUBA decisions that are appealed. The staff attorney works with LUBA administrative staff to ensure that appeals are accurately and efficiently processed. The staff attorney works with members of the public to answer questions about the appeal process and other questions, responds to public records requests, and assists with the preparation of fiscal impact statements.

LUBA does not have an office manager or equivalent. Rather, each Board Member serves as the rotating Board Chair, generally for a one-year term. The Board Chair is responsible for oversight of the agency, including handling personnel issues, budget and finance issues, and addressing issues regarding deficient pleadings filed in appeals, while also maintaining a full case load and resolving appeals. In the last decade, the responsibilities of the Board Chair and the time spent on Board Chair duties have greatly increased, leaving less time for the Board Chair to complete the core duties of serving as a LUBA Board Member. LUBA proposes this package to address, in part, the increased workload that the Board Chair position has experienced.

This policy option package seeks to add a second staff attorney position during the 2021-23 biennium. Having a second staff attorney will allow a staff attorney to be assigned to primarily assist the Board Chair in drafting orders and final opinions and researching case law, statutes, and rules while the second staff attorney will be assigned to assist the other two Board Members with the same functions. This structure is very similar to the Oregon Court of Appeals' structure, in which two staff attorneys are assigned to a single court "department" of three Judges, with one primarily assisting the Presiding Judge, while the second assists the other two Judges in the department. Additionally, the Chief Judge, the court's administrative head, is assisted by one staff attorney who drafts decisions and assists with court-wide

administrative tasks. Having a second staff attorney will allow the Board to continue to meet its statutory obligation to resolve land use appeals correctly and quickly.

The package will allow LUBA to better meet its statutory obligation to issue final opinions and orders within the statutory deadlines or within one-week of the deadline (KPMs 1 and 3), to resolve record objections within 60 days of filing (KPM 2), and to meet its performance measure of issuing final decisions that are sustained on appeal 90 percent of the time (KPM 4).

4. Span of Control. Not applicable.
5. Information Technology and capital construction projects. None.
6. Other Funds Ending Balance Form. See attached Exhibit B.
7. 10 percent Reduction Options Form. See attached Exhibit C.

Exhibits

Exhibit A

