



## MEMORANDUM

**TO:** Deschutes County Board of County Commissioners

**FROM:** Nicole Mardell, AICP, Senior Planner  
Will Groves, Planning Manager  
Stephanie Marshall, Senior Assistant Legal Counsel

**DATE:** April 16, 2025

**SUBJECT:** Public Hearing: Reconsideration of Deschutes County 2040 Comprehensive Plan Update

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The Deschutes Board of Commissioners (Board) will conduct a public hearing on April 23, 2025, to reconsider Ordinance 2024-007, related to the adoption of the Deschutes County 2040 Comprehensive Plan (2040 Plan). The associated file number is 247-25-000145-PA. The record is available on the project website <https://bit.ly/Deschutes2040Reconsideration>.

The hearing will be *limited de novo*, meaning that only testimony related to the *Petitioner's Brief* submitted by Central Oregon Landwatch will be allowed. The *Petitioner's Brief* is included as Attachment A and found on the project website under "Application Materials".

### I. OVERVIEW OF PROCESS TO DATE

On October 2, 2024, the Board voted 2-1 to adopt Ordinance 2024-007, repealing and replacing the 2011 Deschutes County Comprehensive Plan ("2011 Plan") with the 2040 Plan (file no. 247-23-000644-PA). The decision was subsequently appealed by Central Oregon Landwatch (COLW) to the Land Use Board of Appeals (LUBA). The 2040 Plan is not in effect until the appeal process is resolved.

On February 20, 2025, the County received the *Petitioner's Brief* from COLW outlining areas of concern within the adopted 2040 Plan. Staff determined that new issues were raised in the *Petitioner's Brief* that were not previously discussed at the local level. Oregon Revised Statute (ORS) 197.835(3) and 197.797, also known as the "raise it or waive it" doctrine, do not apply to legislative proceedings, therefore, applicants are not required to raise all arguments during the local hearings process to preserve those issues for appeal.

ORS and Oregon Administrative Rule allow local governments to reconsider a legislative decision in response to new issues raised by LUBA appellants. The LUBA appeal process is paused for the Board to conduct a new hearing and to consider additional testimony, following which it will make a decision on reconsideration. The Board voted on March 5, 2025, to adopt Order No. 2025-004 initiating reconsideration of the 2040 Plan. LUBA confirmed this approach through LUBA Order No. 2024-080, on March 12, 2025. The county is required to complete the hearing process and file a reconsideration decision by September 8, 2025.

## **II. PETITIONER'S BRIEF AND KEY ISSUES FOR RECONSIDERATION**

The following is a summary of the key issues raised in the *Petitioner's Brief*.

### A. Repeal and Replacement of the 2011 Comprehensive Plan

Ordinance 2024-007 stated that the effect of the 2040 Plan was to "repeal and replace" the 2011 Plan. COLW characterizes the 2040 Plan as "newly adopted," rather than "amended," because the Ordinance recitals state that it repealed and replaced the 2011 Plan. Based on this language, COLW challenges certain acknowledged goals and policies in past versions of the Comprehensive Plan that were not revisited in the 2040 Plan. COLW argues that those goals and policies that were not revised in the 2040 Plan now need to demonstrate compliance with Oregon Statewide land use goals, including Goal 14, related to urbanization of rural lands.

Staff Response: This is a collateral attack on Comprehensive Plan goals and policies that have been acknowledged and in place for years.<sup>1</sup> The County did not intend to undermine or call into question existing acknowledged policies through the adoption of the 2040 Plan. Use of the phrase "repeal and replace" was employed to simplify the adoption of the 2040 Plan as the 2011 Plan was amended and reformatted to match the state land use goals.

A "redlined" copy of the 2040 Plan ("Redlined 2040 Plan"; Attachment B) is attached. This document shows the 2040 Plan content that was pre-existing and those introductory statements, policies and goals that were specifically addressed by adopted amendments. The Redlined 2040 Plan provides the following:

- Strikeout and underline comparison of 2011 and 2040 Goal and Policy Language
- References to Chapter, Section, Page, and highlights of chapter narrative content that was carried over from the 2011 Comprehensive Plan.

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<sup>1</sup> Oregon case law defines "collateral attack" as an attempt to challenge the validity of an earlier land use decision in a subsequent, unrelated proceeding. It is disallowed. When a decision is considered final, it cannot be reopened for review in a different context and/or at a later date.

Attachment C compares the 2011 and 2040 Plan language with respect to policies challenged in COLW's *Petitioner's Brief*. More information on the contested policies is found below.

#### B. Goal 14 Compliance - Urbanization of Rural Land

COLW alleges that certain provisions of the 2040 Plan violate Goal 14 because they allow "unlimited conversion" of resource-zoned properties to residential, industrial, and commercial uses. The specific goals and policies that COLW challenges are:

- a. *Policy 3.3.6.a. Allow comprehensive plan and zoning map amendments, including for those that qualify as non-resource land, for individual EFU parcels as allowed by State Statute, Oregon Administrative Rule, and this Comprehensive Plan.*
- b. *Goals 9.2 and 9.3 and Policies 9.2.1-9.3.15: Rural Commercial and Rural Industrial goals and policies (see full language in Attachments B and C).*

COLW alleges that the policy language does not require that plan amendments apply adequate Goal 14 analysis, including site-specific application of the *Curry County* factors<sup>2</sup>. LUBA has issued several decisions on plan amendment and zone change applications and held that the language in the above policies is sufficient to demonstrate compliance with Goal 14. COLW asserts that, because the 2040 Plan repealed and replaced the 2011 Plan, the County should include policy language that specifically requires Goal 14 analysis for plan amendment and zone change applications, regardless of whether the land will remain rural or contain potentially urban levels of development.

Additionally, COLW alleges that the effect of Policy 3.3.6.a. would be to allow extension of the County's rural residential exception areas (Multiple Use Agricultural – MUA 10 and Rural Residential – RR10), Rural Industrial, and Rural Commercial areas without requiring a new Goal 14 exception.

Staff Response: As noted in the first issue area, this argument is a collateral attack on previously adopted and acknowledged policies. Policy 3.3.6.a was not addressed in the County's review and adoption of the 2040 Plan but was simply carried over from the 2011 Plan verbatim, in addition to many policies within 9.2.1-9.3.15. Goals 9.2 and 9.3 were added in the 2040 Plan because those sections previously did not contain goals. The County determined that the inclusion of Goals, under which previously existing policies are now listed, is a best practice. These two goals could simply be removed by

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<sup>2</sup> *1000 Friends of Oregon v. Land Conservation & Development Commission and Curry County*, 301 Or 447, 456, 724 P2d 268 (1986). The Supreme Court held that the county and the Land Conservation and Development Commission had to determine whether the plan allowed no "urban uses" outside of urban growth boundaries unless those "urban uses" were supported by exceptions to land use planning Goal 14 prior to acknowledgement that the plan complied with the goals.

the Board on reconsideration to resolve the issues raised by COLW in its appeal. Revisions made to policies 9.2.1-9.3.15 were for purposes of simplification. The Board may decide to revert to the original language from the 2011 Plan to resolve these appeal issues.

Individual plan amendment and zone change applications are required to demonstrate compliance with applicable ORS, administrative rule, and Oregon Statewide land use goals. Compliance with Goal 14 and other state requirements will be addressed during the application review process. As noted above, LUBA has not found the 2011 plan policy language is contrary to Goal 14, to date.

### C. Comprehensive Plan and Deschutes County Code and Comprehensive Plan

COLW argues that the MUA-10 and RR-10 zones allow for urban levels of density through cluster and planned developments (PUD).<sup>3</sup> Each zone, respectively, allows for cluster or planned developments as conditional uses. The standards for these types of developments either do not include a required minimum lot size (PUDs) or allow smaller than 10-acre minimum lot sizes (cluster developments), which COLW argues violates Goal 14 and could lead to urban levels of density if resource-zoned land is rezoned to MUA-10 or RR-10.

Staff Response: DCC 18.32.040 and 18.60.060(C) are acknowledged zoning regulations that have been in effect since 1992.<sup>4</sup> This argument is an impermissible collateral attack.

## **III. FORMAT OF THE PUBLIC HEARING**

The hearing will be held *limited de novo*. Only testimony related to the *Petitioner's Brief* submitted by Central Oregon Landwatch to the Oregon Land Use Board Appeals will be allowed. Any interested person may participate in the *limited de novo* hearing, but issues for discussion are limited as noted.

The Board has set the following time limits, which can be modified or eliminated at any time:

- Public Agencies: 10 min
- General Public: 3 min

## **IV. PUBLIC COMMENT**

Notice of the public hearing was mailed to prior hearing participants on April 3, 2025, and posted in the *Bend Bulletin* on April 4, 2025. Staff also sent a courtesy notice via the constant

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<sup>3</sup> Deschutes County Code (DCC) 18.32.040(A) and 18.60.060(C).

<sup>4</sup> Ordinance 92-055.

contact mailing list. The County's Public Information Officer issued a press release on April 9, 2025, and posted on the County's social media on April 16.

As of the date of this memo, 34 public comments have been received. The comments primarily express concern regarding Goal 14 compliance related to the rezoning of farm and forest lands to residential and industrial zones.

## **V. NEXT STEPS**

At the conclusion of the public hearing, the Board may:

- Continue the hearing to a date certain;
- Close the hearing and leave the written record open to a date certain;
- Close the hearing and set a date for deliberations; or
- Close the hearing and commence deliberations.

### Attachments:

A. Central Oregon Landwatch *Petitioner's Brief*

B. Redlined 2040 Plan

C. Comparison Table of Contested Policies - 2011 and 2040 Comprehensive Plan Language