



MEMORANDUM

TO: Deschutes County Board of Commissioners

CC: David Doyle, Legal Counsel
Nicole Mardell, Senior Planner – Long Range
Tarik Rawlings, Senior Transportation Planner
Will Groves, Planning Manager

FROM: Stephanie Marshall, Assistant Legal Counsel

DATE: April 15, 2024

RE: **Deschutes County Comprehensive Plan Update 2040**
File No. 247-23-000644-PA
Applicability of Goalpost Rule

INTRODUCTION

On April 10, 2024, the Deschutes County Board of Commissioners (“Board”) held the first of three public hearings on the proposed Deschutes County Comprehensive Plan Update 2040. The public hearings are being held in hybrid format, allowing for in-person testimony, and testimony via Zoom. The Board will hold the next two public hearings as follows:

- Tuesday, April 23, 2024, 3 pm, Sunriver SHARC - Dillon Room, 57250 Overlook Rd, Sunriver.
- Tuesday, April 30, 2024, 3 pm, Sisters City Hall, 520 E Cascade Ave, Sisters.

Among other comments and testimony received to date, is a letter to the Board dated April 10, 2024 from Ken Katzaroff of Schwabe, Williamson & Wyatt, P.C. Page 1 of this letter¹ states, in relevant part:

[U]pdates to comprehensive plans generally become effective upon adoption. This creates a challenge to parties that have existing decisions that are on challenge before the Land Use Board of Appeals or the Court of Appeals. This means that it is foreseeable that a change to the Comp Plan could impact, complicate, or bar ultimate approval of a land use decision – such as a rezone or other approval – that the BOCC has previously approved. Therefore, we request that an addition to the Comp Plan is inserted to make it clear that updates to the Comp Plan are not effective against existing but not yet final land use applications.

¹ Mr. Katzaroff’s letter also expresses concern regarding certain specified policies proposed to be eliminated or amended in the Comprehensive Plan Update 2040 (e.g. Policy 2.2.3 (2011 Plan), new Policy 3.2.3, new Policy 3.3.6(a), Section 3.3 of the 2011 Plan), stating that it may be difficult or impossible for applicants to show compliance with Goal 14 when requesting a rezone of property). This memorandum does not address such arguments. If the Board desires further legal analysis on these issues, a subsequent memorandum may be prepared and submitted while the record is still open.

Mr. Kataroff's concerns on page 1 of the letter appear to be based on the "fixed goalposts rule." The goalposts rule provides that if an application for permit, limited land decision, or zone change was complete when first submitted, or the applicant submits the requested additional information within 180 days of the first submittal date, approval or denial shall be based upon the standards and criteria that were applicable at the date the application was first submitted. The fixed goal posts rule in ORS 215.427(3)(a) applies where the county's comprehensive plan and land use regulations are acknowledged at the time the permit application is submitted. *Niederhof v. Deschutes County*, 48 Or LUBA 626 (2004).

The general purpose of the goalposts rule is to prevent local governments from enacting and applying new legislation to development applications after those applications have been filed and timely completed. This keeps local governments from "moving the goal posts" in the middle of the game, the goal posts being the substantive criteria that govern approval or denial of permit applications. *DLCD v. Jefferson County*, 220 Or App 518, 523, 188 P3d 313 (2008). The goalposts rule has the legal effect of fixing or freezing the law as it existed on the date a complete permit application was received.

HOW WILL APPROVAL OF THE PROPOSED COMPREHENSIVE PLAN UPDATE 2040 IMPLICATE THE GOALPOSTS RULE WITH RESPECT TO LAND USE DECISIONS CURRENTLY ON APPEAL?

The fixed goalposts rule is found in ORS 215.427(3)(a), which states:

If the application was complete when first submitted or the applicant submits additional information, as described in subsection (2) of this section, within 180 days of the date the application was first submitted and the county has a comprehensive plan and land use regulations acknowledged under ORS 197.251, approval or denial of the application shall be based upon the standards and criteria that were applicable at the time the application was first submitted.

In Oregon, comprehensive plan policies serve as a guide for managing growth, development, services, and resource management. However, these policies are not inherently self-executing. While comprehensive plans set the policy framework, zoning and subdivision regulations are the tools used to implement and control future development. See ORS 215.130(1). The effectiveness of comprehensive plan policies depends on how they are translated into specific regulations and actions.

The 2040 Comprehensive Plan Update includes new and revised goals and policies. However, although comprehensive plans generally become effective upon adoption, comprehensive plan goals and policies can only be achieved via enforcement of existing land use regulations and/or enactment of new land use regulations. See ORS 215.130(1). Once the Comprehensive Plan Update 2040 is adopted, County code provisions and zoning maps may need to be updated to be consistent with the updated Comprehensive Plan.

An applicant that has already secured its "goalposts" via submission of a complete land use application that predates the Comprehensive Plan Update cannot be subject to any subsequently adopted land use regulations that are intended to implement the 2040 Comprehensive Plan Update under ORS 215.427(3)(a). This is so, regardless of whether the application has been approved but is now on appeal during the time that new land use regulations are adopted or amended.

Mr. Kataroff requests that the Board consider revising the draft Comprehensive Plan to include a statement that updates to the Plan are not effective against "existing but not yet final land use applications." While such a statement may not be necessary under existing law, the Board has discretion to consider such proposed revisions. Legal Counsel is available to answer any additional questions of the Board on this issue, or other issues, related to the Comp Plan Update.