



MEMORANDUM

TO: Deschutes County Board of Commissioners

FROM: Tanya Saltzman, AICP, Senior Planner
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Peter Gutowsky, AICP, Director

DATE: August 3, 2022

SUBJECT: Measure 109 / Psilocybin Concepts / Preferred Alternative

This memorandum provides an overview for Board of County Commissioners (Board) consideration on August 8, 2022 of three potential legislative time, place, and manner (TPM) concepts for the regulation of psilocybin. At the conclusion of the discussion, staff seeks direction for:

- A preferred alternative to develop TPM amendments for a first evidentiary hearing with the Planning Commission on September 29.

I. BACKGROUND

Measure 109, which legalized psilocybin in Oregon, automatically opts cities and counties into the psilocybin program, which is currently under development and is slated to begin statewide on January 2, 2023. However, Measure 109 offers the option for cities and counties to opt out via a ballot measure in the next general election—in this case, November 8, 2022. On July 13, 2022, the Board conducted an afternoon and evening hearing to consider Ordinance No. 2022-009, Referring a Measure to the Electors to Prohibit Product Manufacturers and Psilocybin Service Center Operators within Unincorporated Deschutes County.¹ The Board deliberated on the matter on July 20 and adopted a first reading of Ordinance No. 2022-009. Second reading will occur on August 8. Upon second reading, it will be subject to Deschutes County voters for the November 8, 2022 General Election.

During deliberation the Board expressed interest in developing TPM amendments in the event voters reject prohibiting psilocybin manufacturing and psilocybin service centers in the unincorporated county. Amendments could be adopted by the end of the calendar year, prior to the Oregon Health Authority (OHA) accepting applications for licensure on January 2, 2023. On July 27, the Board directed staff to begin the TPM process.²

¹ <https://www.deschutes.org/bcc/page/board-county-commissioners-meeting-63>

² <https://www.deschutes.org/bcc/page/board-county-commissioners-meeting-65>

Measure 109 does contain limited basic criteria pertaining to land use. For instance, psilocybin service centers may not be located within 1,000 feet of elementary or secondary schools (500 feet if there is a physical or geographic barrier), and manufacturing facilities may not be located outdoors. Service centers may not be located in single family dwellings. Staff continues to monitor the rulemaking process and is coordinating with Association of Oregon Counties (AOC) on any pertinent developments to the program. Staff is also coordinating with other counties, including Wasco and Jackson, which are undertaking TPM amendments on a similar schedule, while recognizing that ultimately each county will have its own set of opportunities and constraints.

II. REGULATORY CONCEPTS

Measure 109 provides no direction as to reasonable time, place, and manner restrictions. It is difficult for staff to estimate impacts from a transportation and land use standpoint without real world examples of psilocybin production, processing, and service centers that the Board can consider. Ultimately, in order for regulations to be “reasonable,” such regulations must be necessary to protect public health, safety and welfare. It may be that erring on the side of more restrictive TPM regulations is defensible because the range and extent of potential impacts of psilocybin production, processing and service centers cannot be defined at this early stage.

Nonetheless, staff prepared three regulatory concepts for TPM regulations ranging from restrictive (Option 1) to less restrictive (Option 3). An overview of those concepts is provided below. They are primarily targeted to psilocybin production and processing/manufacturing.

- **While ORS 475A.570 acknowledges that the operation of a psilocybin service center may be carried on in conjunction with a psilocybin-producing fungi crop, all three regulatory concepts prohibit psilocybin service centers outside those existing zones that permit medical clinics, medical centers, or retail or service businesses.³ In those existing zones, psilocybin service centers would be restricted to only daily operations.**

The limited timeframe to adopt TPM amendments into Deschutes County Code (DCC), prevents staff or the psilocybin industry from convening a work group, hiring consultants, and creating adequate findings that address the operational characteristics and land use impacts of a psilocybin service center. Factors warranting analysis include but are not limited to: minimum lot/parcel size, setbacks, lot coverage, number of employees and patients, overnight lodging, food preparation and service, compatibility with acknowledged wildlife inventories (Goal 5 – Wildlife), and trip generation analysis (Goal 12 – Transportation Planning Rule). In the Exclusive Farm Use (EFU) zones, one also must perform a farm impacts test.⁴

³ Psilocybin service centers, if they are modeled in the zoning code after medical clinics or retail businesses will have lower transportation impacts since they do not serve a broader range of patients or customers under the age of 21. Medical clinics are allowed in Rural Service Centers (Brothers, Hampton, Millican, Whistlestop, Wildhunt, and Alfalfa), Rural Commercial Zones (Deschutes Junction, Deschutes River Store, Pine Forest and Rosland), Sunriver Commercial District, and Sunriver Town Center District. A medical center is allowed in the Terrebonne Commercial District. Retail or service businesses are allowed in the Tumalo Commercial District.

⁴ ORS 215.296(1) and (2). DCC 18.16.040(A)(1) and (2). LUBA has a well-established methodology for demonstrating compliance with the farm impacts test. See *Brown v. Union County*, 32 Or LUBA 168 (1996). Under that methodology, a proposal can be

Applicants interested in establishing a psilocybin service center with or without overnight opportunities on EFU property or any other rural zone where growing psilocybin production is permitted always have the option to submit an applicant-initiated legislative amendment that justifies service centers are consistent with state law and Deschutes County’s Comprehensive Plan. As noted above, applicants seeking to establish a psilocybin service center on EFU property will be required to perform a farm impacts test to evaluate the impacts to each individual farm on a “farm-by farm and farm practice basis” to determine whether the proposed use will force a significant change in accepted farming practices or the cost of the practices.

Table 1 - Psilocybin Regulatory Concepts

| Option 1 - Restrictive | | |
|--|---|---|
| Option | Description | Notes |
| Psilocybin Production | Allowed in: <ul style="list-style-type: none"> • EFU zone | <ul style="list-style-type: none"> • Psilocybin-producing fungi is recognized by Measure 109 as a farm use and is therefore permitted outright in EFU zones. • Psilocybin-producing fungi must be grown indoors. • Commercial activities in conjunction with farm use do not apply to growing psilocybin. |
| Psilocybin Processing/Manufacturing | Allowed in: <ul style="list-style-type: none"> • EFU zone.⁵ | <ul style="list-style-type: none"> • Manufacturing may be carried on in conjunction with a psilocybin producing fungi crop according to Measure 109. |
| Psilocybin Service Centers | Allowed subject to a conditional use permit and site plan review in: <ul style="list-style-type: none"> • Rural Commercial • Rural Service Centers • Sunriver Commercial District • Sunriver Town Center District • Terrebonne Commercial District • Tumalo Commercial District | <ul style="list-style-type: none"> • Hours of operation will be limited to daily treatments. • No option for larger retreat-style, overnight operations. • Service centers may not be located within 1,000 feet of elementary or secondary schools (500 feet if there is a physical or geographic barrier). • Setbacks from other uses like religious institutions? |

approved only if it: (1) describes farm practices on surrounding lands devoted to farm use; (2) explains why the proposed development will not force a significant change in those practices; and (3) explains why the proposed development will not significantly increase the cost of those practices. To begin that process, LUBA has held that “[i]n applying ORS 215.296(1), it is entirely appropriate for the applicant and county to begin by visually surveying surrounding lands to identify the farm and forest uses to which those lands are devoted.” *Dierking v. Clackamas County*, 38 Or LUBA 106, 120-21 (2000). Other parties are then free to dispute the initial findings, or to add to the record additional evidence of nearby farm uses that the applicant and county must respond to.

⁵ DCC 18.16.025 requires the facility uses less than 10,000 square feet for its processing area and complies with all applicable siting standards. Exception: A facility which uses less than 2,500 square feet for its processing area is exempt from any applicable siting standards.

Option 2 – Moderate

| Option | Description | Notes |
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| Psilocybin Production | Allowed in: <ul style="list-style-type: none"> • EFU • Forest Use Zones (F1, F2) • Multiple Use Agriculture (MUA-10) | <ul style="list-style-type: none"> • Psilocybin-producing fungi is recognized by Measure 109 as a farm use and is therefore permitted outright in EFU zones. • If a county chooses, it can also be recognized in other zones where farm or forest uses are allowed. Limited to MUA-10, F1 and F2 zones. • Psilocybin-producing fungi must be grown indoors. • Commercial activities in conjunction with farm use do not apply to growing psilocybin. |
| Psilocybin Processing/Manufacturing | Allowed in: <ul style="list-style-type: none"> • EFU • F1 and F2 • MUA-10 | <ul style="list-style-type: none"> • Manufacturing may be carried on in conjunction with a psilocybin producing fungi crop |
| Psilocybin Service Centers | Allowed subject to a conditional use permit and site plan review in: <ul style="list-style-type: none"> • Rural Commercial • Rural Service Centers • Sunriver Commercial District • Sunriver Town Center District • Terrebonne Commercial District • Tumalo Commercial District | <ul style="list-style-type: none"> • Hours of operation will be limited to daily treatments. • No options for permitting larger retreat-style, overnight operations. • Service centers may not be located within 1,000 feet of elementary or secondary schools (500 feet if there is a physical or geographic barrier). • Setbacks from other uses like religious institutions? |

Option 3 – Least Restrictive

| Option | Description | Notes |
|------------------------------|--|---|
| Psilocybin Production | Allowed in: <ul style="list-style-type: none"> • EFU • F1 and F2 • MUA-10 • Open Space and Conservation • Rural Commercial • Rural Industrial • Rural Residential • Rural Service Centers • Suburban Low Density Residential • Surface Mining Zone • Urban Area Reserve | <ul style="list-style-type: none"> • Psilocybin-producing fungi is recognized by Measure 109 as a farm use and is therefore permitted outright in EFU zones. • If a county chooses, it can also be recognized in other zones where farm or forest uses are allowed. • Psilocybin-producing fungi must be grown indoors. • Commercial activities in conjunction with farm use do not apply to growing psilocybin. However, the operation of a psilocybin service center may be carried on in conjunction with a psilocybin-producing fungi crop on EFU land. |

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|---|---|--|
| <p>Psilocybin Processing/Manufacturing</p> | <p>Allowed in:</p> <ul style="list-style-type: none"> • EFU • F1 and F2 • MUA-10 • Open Space and Conservation • Rural Commercial • Rural Industrial (permitted; requires site plan review if located within 600 feet from a residential dwelling, a lot within a platted subdivision, or a residential zone) • Rural Residential • Rural Service Centers • Suburban Low Density Residential • Surface Mining Zone • Tumalo Industrial District (site plan review) • Urban Area Reserve | <ul style="list-style-type: none"> • Manufacturing may be carried on in conjunction with a psilocybin producing fungi crop |
| <p>Psilocybin Service Centers</p> | <p>Allowed subject to a conditional use permit and site plan review in:</p> <ul style="list-style-type: none"> • Rural Commercial • Rural Service Centers • Sunriver Commercial District • Sunriver Town Center District • Terrebonne Commercial District • Tumalo Commercial District | <ul style="list-style-type: none"> • Hours of operation will be limited to daily treatments. • No options for permitting larger retreat-style, overnight operations. • Service centers may not be located within 1,000 feet of elementary or secondary schools (500 feet if there is a physical or geographic barrier. • Setbacks from other uses like religious institutions? |

III. TIMELINE

As noted in the July 27 Board meeting, a tentative timeline for the development and adoption of TPM amendments is as follows:

Table 2 - Psilocybin TPM Schedule

| Task | Timeline |
|---|-----------------------------|
| 1. Draft amendments and findings | August 9 to 24 |
| 2. 35-day DLCD Post Acknowledgement Plan Amendment Notice | August 25 |
| 3. Planning Commission Work Session | September 8 |
| 4. Planning Commission Public Hearing | September 29 |
| 5. Planning Commission Deliberation | October 13 and 27 if needed |
| 6. Board Work Session | November 14 |
| 7. Board Hearing | November 28 |
| 8. Board Deliberation | December 5 |
| 9. Consideration of First Reading | December 14 |
| 10. Consideration of Second Reading | December 28 |

IV. NEXT STEPS

Staff seeks Board direction on a preferred alternative. Once it is determined, staff draft text amendments and corresponding findings in preparation for the first evidentiary hearing with the Planning Commission on September 29.