



MEMORANDUM

TO: Deschutes County Board of Commissioners
FROM: Tanya Saltzman, AICP, Senior Planner
DATE: November 16, 2022
SUBJECT: Public Hearing – Psilocybin TPM Amendments

The Board of County Commissioners (Board) will hold a public hearing on November 21 from 3 to 5 p.m. and reconvening at 6 p.m. at the Deschutes Services Center, 1300 Wall Street, Barnes and Sawyer rooms. concerning time, place, and manner (TPM) text amendments for psilocybin.

Staff submitted a 35-day Post-Acknowledgement Plan Amendment (PAPA) notice to the Department of Land Conservation and Development (DLCD) on August 25, 2022. Staff presented the proposed amendments to the Planning Commission at a work session on September 8, 2022.¹ The initial public hearing was held on September 29, 2022,² at which time the Planning Commission voted to continue the hearing to October 13 in order to receive additional oral and written testimony.³ At the conclusion of the October 13 public hearing continuation, the oral record was closed and the written record was left open until October 14, 2022. The Planning Commission conducted deliberations on October 27, 2022⁴; the recommendations of the Planning Commission are outlined in this memorandum and reflected in the proposed text amendments. Staff presented the proposed amendments to the Board at a work session on November 14, 2022.⁵

The text amendments and findings are provided as attachments to this memorandum as exhibits to Ordinance No. 2022-014. The record, which contains all memoranda, notices, and written testimony received, is available at the following website: <https://www.deschutes.org/cd/page/247-22-000676-ta-psilocybin-time-place-and-manner-tpm-text-amendments>.

I. BACKGROUND

On June 1, 2022, staff provided the Board with an overview of Measure 109, which legalized psilocybin in Oregon subject to the criteria noted in the measure and subsequent rulemaking.⁶ The memorandum

¹ <https://www.deschutes.org/bc-pc/page/planning-commission-16>

² <https://www.deschutes.org/bc-pc/page/planning-commission-19>

³ <https://www.deschutes.org/bc-pc/page/planning-commission-20>

⁴ <https://www.deschutes.org/bc-pc/page/planning-commission-21>

⁵ <https://www.deschutes.org/bcc/page/board-county-commissioners-meeting-71>

⁶ <https://www.deschutes.org/bcc/page/board-commissioners-meeting>

introduced the origin of the measure, the types of licenses that will be available, the role of the Oregon Health Authority (OHA) and its committees, and the rulemaking process. During the discussion, staff noted the compressed timeline: OHA is currently in the process of rulemaking, which may not be complete until December 2022, yet OHA is due to begin accepting applications for licenses on January 2, 2023. As noted, OHA licenses will require a Land Use Compatibility Statement (LUCS) to be issued by the County.

Measure 109 automatically opts cities and counties into the psilocybin program. However, Measure 109 offers the option for cities and counties to opt out of the program 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.⁷ The Board deliberated on the matter on July 20 and adopted a first reading of Ordinance No. 2022-009. Second reading occurred on August 8. The ordinance was subject to Deschutes County voters for the November 8, 2022 General Election, at which time the electors voted to overturn the opt out.⁸

Measure 109—and the corresponding Oregon Revised Statute 475A.530—allows cities and counties to adopt “reasonable regulations” for time, place, and manner (TPM) concerning psilocybin businesses. During deliberation of Ordinance No. 2022-009 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 OHA accepting applications for licensure on January 2, 2023. On July 27, the Board directed staff to begin the TPM process.⁹

II. PROPOSAL

This is a legislative text amendment to Deschutes County Code (DCC), Title 18, County Zoning. The primary purpose of the amendments is to create time, place, and manner regulations concerning psilocybin manufacturing, service centers, and testing laboratories. A brief summary of the amendments are as follows, with further description following:

- DCC 18.04.030: Adds new definitions for terms relating to psilocybin.
- DCC 18.65 Rural Service Center, 18.66 Terrebonne Rural Community, 18.67 Tumalo Rural Community, 18.74 Rural Commercial, 18.108 Sunriver Urban Unincorporated Community: Adds psilocybin service centers as a conditional use with site plan review
- DCC 18.67 Tumalo Rural Community, 18.100 Rural Industrial: Adds psilocybin testing laboratories as a conditional use with site plan review

⁷ <https://www.deschutes.org/bcc/page/board-county-commissioners-meeting-63>

⁸ Unofficial results as of Wednesday, November 9 were 56.31% in favor of overturning the opt out versus 43.69% in favor of opting out.

⁹ <https://www.deschutes.org/bcc/page/board-county-commissioners-meeting-65>

- DCC 18.113.030 Destination Resorts: Adds psilocybin service centers to allowable uses in destination resorts
- DCC 18.116.380: Adds a new chapter creating time, place, and manner criteria for psilocybin manufacture as farm use; psilocybin manufacture as a processing use; psilocybin service centers.

III. PLANNING COMMISSION PROCESS

As noted above, the Planning Commission held a public hearing on September 29 and October 13 and deliberated on October 27.

A. Public Testimony

A total of 32 individuals provided written testimony concerning the proposed amendments, spanning the timeframe between initial 35-day DLCD notice on August 25 to the conclusion of the open record period on October 14, 2022. Approximately one dozen individuals testified at the September 29 public hearing, and a dozen more testified on October 13. The majority of in-person testimony focused on similar themes as the written testimony, with the majority supporting psilocybin services and wanting to expand options.

Oral and written testimony topics were generally grouped as follows:

Twenty individuals in written testimony were in favor of psilocybin as a treatment option for conditions such as PTSD (particularly for veterans), trauma and addiction.

- General support of psilocybin as a treatment option.
- Many comments stated the proposed regulations are too restrictive. Specifically:
 - Service centers should be allowed to have overnight/multi-day stays owing to the nature of psilocybin treatment, which ideally involves an initial intake/consultation, a facilitated experience, and then follow-up integration.
 - Service centers should be placed in rural, nature-based settings owing to the sensitivity of clients either from the issues they are seeking to address (i.e. PTSD) and the heightened sensitivity to surroundings/sensations during the treatment itself. The proposed locations of commercial and retail/service zones therefore were not appropriate.
 - Increased access to psilocybin services in general is important, for reasons both financial and societal/cultural (for instance, some veterans prefer maximum privacy)
 - Proposed hours of service centers are too limited and should match OHA guidelines
 - The County should consider allowing service centers in destination resorts
 - The County should consider allowing psilocybin manufacturing in forest zones in addition to Exclusive Farm Use (EFU) zones.

Eight individuals in written testimony were against psilocybin in the rural county:

- Several comments directed the Planning Commission to vote yes to Measure 9-152 (prohibiting

psilocybin manufacturing and service centers). It was apparent that many citizens conflated this hearing—which is considering potential zoning if the opt out is overturned—with the opt-out ballot measure in November. During the hearing, staff attempted to clarify this distinction and noted that the voters of the county, not the Planning Commission, will determine if the county opts out of psilocybin altogether.

- Concerns about rural compatibility, orderly growth, safety, and water usage, and a subsequent desire to put psilocybin businesses in cities first.

Additional items from the open record period include:

- Questions and answers regarding the psilocybin program and rulemaking between the Oregon Health Authority (OHA) and the Association of Oregon Counties Planning Directors group (AOCPD).
- Correspondence between Planning Commissioner Altman and Senior Planner Tanya Saltzman concerning more detailed maps of the areas around service center zones as well as discussion regarding options for overnight stays.
- Central Oregon LandWatch (COLW) testified that the amendments should be subject to Goal 5.

In addition to comments from the general public, staff received two written comments from DLCD; both were responses to requests from staff concerning DLCD's interpretation of a component of ORS 475A.570, which addresses psilocybin service centers in relation to farmland.

B. Agency Testimony

DLCD provided written testimony concerning its interpretation along with that of the Department of Justice, of ORS 475A.570(3), which states "(3) The operation of a psilocybin service center may be carried on in conjunction with a psilocybin-producing fungi crop." In addition to the agency's written comments, Hilary Foote, Farm/Forest Specialist from DLCD, provided verbal testimony that further explained the legal mechanisms behind designated uses on EFU land.

Ultimately, DLCD's interpretation of the statute is that psilocybin service centers would not be permitted as a stand-alone use on EFU land. However, it is possible that a service center could be permitted as a part of another use that is allowed in EFU—namely, a home occupation or a commercial activity in conjunction with farm use. These avenues are not without their own criteria and restrictions, and DLCD noted in its follow-up written testimony that Deschutes County's current code is more restrictive than state law concerning commercial activity in conjunction with farm use (DCC 18.16.040(B) requires that the commercial activity be related to an on-property farm use).

C. Planning Commission Deliberations and Recommendations

Based on the testimony received, the Planning Commission deliberated and formulated several recommendations. In general, the Planning Commission supported providing more/broader options for

psilocybin businesses where possible, while recognizing that there are regulatory limitations associated with the Oregon land use system and the rulemaking process, which is not yet finalized. To that end, Planning Commission recommendations are as follows, with staff notes where applicable:

- **Allow psilocybin manufacturing as farm use and manufacturing as processing use to occur on Forest zoned properties (F1, F2).**

Some testimony requested that areas permitting psilocybin manufacturing be expanded to forest uses, citing ORS 475A.571(1), which declares psilocybin-producing fungi as a crop for the purposes of “farm” use and “farming practice.” ORS 475A.570(4) states “A county may allow the manufacture of psilocybin products as a farm use on land zoned for farm or forest use in the same manner as the manufacture of psilocybin products is allowed in exclusive farm use zones under this section and ORS 215.213, 215.283 and 475C.053.” The original amendments only allowed manufacturing in EFU zones; the code provided today reflects the Planning Commission’s recommendation.

- **Amend the operating hours relating to psilocybin service centers to align with Oregon Health Authority (OHA) proposed rules, 6:00 a.m. to 11:59 p.m., with allowances beyond this for extenuating circumstances based on the determination of the facilitator.**

The original amendments allowed service center hours as 7:00 a.m. to 7:00 p.m. This was intended to be a placeholder until further information was received via testimony. A significant amount of testimony requested that service center hours match those of Oregon Health Authority’s: 6:00 a.m. to 11:59 p.m., with allowances beyond this for extenuating circumstances based on the determination of the facilitator. This provision currently exists in OHA’s proposed rules; staff will aim to match final OHA language. The code provided today reflects the Planning Commission’s recommendation.

- **Amend Deschutes County’s Destination Resort code to permit psilocybin service centers in destination resorts.**

The original amendments did not allow service centers in destination resorts. However, testimony from representatives from Pronghorn Resort (now called Juniper Preserve) (C. Celko/Emerge Law Group, 2022-10-13 and 2022-9-29 and several individuals providing verbal testimony) recommended that service centers are in fact suitable for destination resorts as promoting wellness opportunities. The testimony noted that siting service centers within destination resorts could potentially be an easier fit with respect to state and local land use law, given its natural setting without potential conflicts. The testimony cited DCC 18.113.010(B), which states the Destination Resort zone “will ensure resort development that complements the natural and cultural attractiveness of the area without significant adverse effect on commercial farming and forestry, environmental and natural features, cultural and historic resources and their settings and other significant resources.” The same testimony also noted the existing overnight accommodations and other ancillary uses in destination resorts.

Testimony against siting service centers in destination resorts (J. Guild, 2022-10-14) cited the requirement in a destination resort of CCRs requiring HOA Board approval. Concerning compatibility, Guild noted that “Pronghorn has a 3 mile Right of Way across Federal land and is surrounded by

Bureau of Land Management land where shooting and hunting is allowed.” Other concerns cited included compatibility, liability, and public safety.

The code provided today reflects the Planning Commission’s recommendation to allow service centers in destination resorts. Upon consultation with legal counsel, staff made changes to the language proposed in the testimony to more accurately reflect the approval process with respect to a resort’s master plan. If adopted, it is unclear whether a destination resort could immediately apply for a site plan review. Modifying the conceptual and/or final master plan may be required. This would be a matter of first impression and would be sent directly to a Hearings Officer.

- **Recognize that psilocybin service centers can be allowed as home occupations or commercial activities in conjunction with farm use.**

As noted above, DLCD provided written testimony that psilocybin service centers could not be a stand-alone use in EFU zones but could potentially be allowed on EFU land through two paths: home occupations and commercial activity in conjunction with farm use. Specifically:

- Commercial activities that are in conjunction with farm use are conditional uses subject to DCC 18.16.040, Limitations On Conditional Uses, and 18.128.015; and
- Home Occupations are conditional uses subject to DCC 18.16.0030(M), Limitations On Conditional Uses, and DCC 18.116.280, Home Occupations.

The Planning Commission recommended keeping these options available (as opposed to specifically prohibiting them). No code changes are required to support this interpretation, as the uses (commercial activity in conjunction with farm use and home occupation) already exist in DCC.

- **The proposed amendments are not subject to a Goal 5 analysis.**

Testimony received from Central Oregon LandWatch (R. Isbell, 2022-9-29) suggested that the proposed amendments must demonstrate compliance with Goal 5. Given the proposed uses and their locations, staff currently maintains that the proposed uses for psilocybin will not be subject to Goal 5:

- Psilocybin manufacturing is considered a farm crop/farm/use/farming practice per ORS 475A.570
- The areas in which service centers are currently proposed (retail/commercial zones) are not subject to the current WA combining zone
- Service centers on EFU may be allowed not as new conflicting, stand-alone uses but under existing uses within EFU (home occupations/commercial activity in conjunction with farm use)

This does not require a change to any code language, but staff has updated the findings to reflect the above statements more specifically.

- **Allow overnight accommodations and ancillary uses (meditation, yoga, etc.) as accessory uses to psilocybin service centers.**

A significant amount of testimony—as well as Planning Commissioners’ clarifying questions—focused on the possibility of allowing psilocybin service centers to allow overnight/multi-day stays due to reasons ranging from safety concerns to promoting a better, more complete therapeutic experience. At the conclusion of deliberations, the Planning Commission recommended that overnight accommodations and ancillary uses be permitted, while recognizing that the regulatory path to do so is currently unclear.

Staff has shared the following remarks to psilocybin advocates, Planning Commission, and the Board throughout the TPM process. OHA’s proposed rules and the testimony submitted to date by psilocybin advocates have not defined the operational characteristics of service centers, whether they contain overnight accommodations or not. While we know that OHA’s proposed rules allow up to 25 clients in one group psilocybin session at a service center, staff are unable to develop findings that evaluate the cumulative impacts associated with that number of participants, not to mention “ancillary services” (currently undefined) or overnight accommodations. Legislative amendments to DCC require staff to analyze service centers to demonstrate compliance with the Comprehensive Plan, Statewide Planning Goals, Oregon Administrative Rules (OARs), and Oregon Revised Statutes (ORS). Without more detailed information, staff are unable to evaluate their impacts on farm and forest lands (Goals 3 and 4), wildlife (Goal 5), and county and state transportation facilities (Goal 12).

More specifically, staff are unable to:

- Perform a farm (or forest) impacts test to determine whether service centers disrupt agricultural (or forest) activities.
- Determine if this new conflicting use should be permitted, limited, or prohibited in Deschutes County’s wildlife area, sensitive bird and mammal, and sage grouse combining zones based on an Economic, Social, Environmental, and Energy (ESEE) analysis.
- Analyze whether county or state transportation facilities are affected by service centers as required under the Transportation Planning Rule (TPR).

IV. AMENDMENT SUMMARY

Measure 109 and the subsequent ORS 475A statute provides no direction as to reasonable time, place, and manner restrictions. The measure contains 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.

Table 1 outlines the psilocybin uses in the proposed amendments, including Planning Commission recommendations where applicable, as discussed above.

Table 1 – Summary of Proposed TPM Amendments

Use	Description	Notes
Psilocybin Manufacturing as a Farm Use	Allowed in: <ul style="list-style-type: none"> • EFU zone • F-1 and F-2 zones 	<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.
Psilocybin Manufacturing as a Processing Use	Allowed in: <ul style="list-style-type: none"> • EFU zone.¹⁰ • F-1 and F-2 zones 	<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 <p>Allowed as a commercial service in Destination Resort Overlay Zone</p>	<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). • According to DLCD interpretation, service centers could not be a stand-alone use on EFU land but could be allowed on EFU land through two paths: home occupations and commercial activity in conjunction with farm use
Psilocybin Testing Laboratories	Allowed subject to a conditional use permit and site plan review in: <ul style="list-style-type: none"> • Rural Industrial • Tumalo Industrial 	<ul style="list-style-type: none"> • OHA rulemaking concerning testing requirements thus far appear in OAR 333-333-7010 through 333-333-7150

IV. 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; or
- Close the hearing and commence deliberations.

Given the need to adopt regulations by the end of the calendar year so that they will be in place when OHA begins accepting license applications, staff notes that emergency adoption will be required.

Attachments

1. Ordinance No. 2022-014 (Emergency) with Corresponding Exhibits:

¹⁰ 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.

Exhibit A: DCC 18.04
Exhibit B: DCC 18.65
Exhibit C: DCC 18.66
Exhibit D: DCC 18.67
Exhibit E: DCC 18.74
Exhibit F: DCC 18.100
Exhibit G: DCC 18.108
Exhibit H: DCC 18.113
Exhibit I: DCC 18.116
Exhibit J: Findings