



Mailing Date:
Tuesday, April 2, 2024

COMMUNITY DEVELOPMENT

STAFF REPORT

FILE NUMBER: 247-23-000245-PS

**SUBJECT PROPERTY/
OWNER:**

Mailing Name: Allen Qualified Pers Residence Trust 2
Map And Taxlot: 171214CC00500
Account: 108791
Situs Address: 21230 Yeoman Rd, Bend, Or 97701

APPLICANT: Piper Lucas

PROPOSAL: Land Use review of an Oregon Health Authority Land Use Compatibility Statement (LUCS) to allow psilocybin manufacturing as an agricultural use on the subject property as a use permitted outright, and a psilocybin service center as an accessory use.

HEARING DATE: Tuesday, April 9, 2024

HEARING START: 6:00 pm

STAFF PLANNER: Jacob Ripper, Principal Planner
Phone: 541-385-1759
Email: Jacob.Ripper@deschutes.org

RECORD: Record items can be viewed and downloaded from:
www.buildingpermits.oregon.gov or <https://www.deschutes.org/cd/page/247-23-000245-ps-psilocybin-service-center>

I. APPLICABLE CRITERIA

Deschutes County Code (DCC)

- Title 19, Bend Urban Growth Boundary Zoning Ordinance
 - Chapter 19.04, Title, Compliance, Applicability, and Definitions
 - Chapter 19.20, Suburban Low Density Residential Zone SR-2 ½
 - Chapter 19.76, Site Plan Review
 - Chapter 19.96, Nonconforming Uses
- Title 22, Deschutes County Development Procedures Ordinance

Oregon Revised Statutes

ORS 215.427, Final action on permit or zone change application

ORS 475A.570, Psilocybin Regulation

II. **BASIC FINDINGS**

LOT OF RECORD: The subject property is a legal lot of record as it was created by deed in 1967. A Minor Partition (file no. MP-13-10) was approved in 2014, which also recognized the subject property as a lot of record, but this partition was not acted upon. It was subsequently reconfigured by a property line adjustment (file no. 247-21-000257-LL, County Survey 20678).

SITE DESCRIPTION: The subject 4.36-acre property is developed with a dwelling. The property is irregular in shape and fronts Yeoman Road to the south.

REVIEW PERIOD: The subject application is being processed as a land use action and was submitted on April 3, 2023, and deemed incomplete by the Planning Division on May 3, 2023. The applicant requested that the application be deemed complete on September 29, 2023. Due to requests to extend the 150th day on which the County must take final action on this application, by a total of 124 days, a final decision is required by June 29, 2024.

PROPOSAL: The applicant proposes to establish a psilocybin manufacturing use along with an associated accessory psilocybin service center in new structures located to the rear (north) of the property. The specific request is to grant County signature of an Oregon Health Authority Land Use Compatibility Statement (LUCS) to allow psilocybin manufacturing as an agricultural use on the subject property as a use permitted outright, and a psilocybin service center as an accessory use.

Staff notes again this application was submitted on April 3, 2023, which was the day before Ordinances 2022-014 and 2022-015 came into effect (April 4, 2023). These Ordinances regulate the time, place, and manner for psilocybin manufacturing, service centers, and test laboratories. Neither ordinance currently allows these uses within the zone of the subject property. As such, the Applicant argues, as discussed below, that these regulations do not apply to the proposal and the only standards and criteria that apply are those that were applicable on the date of submittal (ORS 215.427, the “goalpost rule” referenced below).

PUBLIC AGENCY COMMENTS: The Planning Division mailed notice of the public hearing on March 19, 2024, to several public agencies. The following agencies provided no comments as of the date of this staff report: Deschutes County Assessor, Deschutes County Building Safety, Deschutes County Onsite Wastewater, Deschutes County Senior Transportation Planner, and Oregon Health Authority.

PUBLIC COMMENTS: The Planning Division mailed notice of the public hearing to all property owners within 250 feet of the subject property on March 19, 2024. The applicant also complied with the posted notice requirements of Section 22.24.030(B) of Title 22. The applicant submitted a Land

Use Action Sign Affidavit indicating the applicant posted notice of the land use action on March 31, 2024. The County received a total of six comments from three individuals in opposition to the proposal, which are included in the record.

III. FINDINGS & CONCLUSIONS

Title 19 of the Deschutes County Code, Bend Urban Growth Boundary Zoning Ordinance

Chapter 19.20, Suburban Low Density Residential Zone SR-2 ½

Section 19.20020. Permitted Uses.

The following uses are permitted:

...

B. Agriculture, excluding the keeping of livestock.

...

D. Other accessory uses and accessory buildings and structures customarily appurtenant to a permitted use subject to DCC 19.92.020.

FINDING: The applicant's burden of proof states that the proposed psilocybin manufacturing on the subject property constitutes agricultural use and is therefore permitted outright. While Title 19 of the Deschutes County code does not have a definition of agricultural use, staff refers to the definition found in DCC 18.04.030 which reads:

"Agricultural use" means any use of land, whether for profit or not, related to raising, harvesting and selling crops or by the feeding, breeding, management and sale of, or the produce of, livestock, poultry, fur-bearing animals or honeybees or for dairying and the sale of dairy products or any other agricultural or horticultural use or animal husbandry or any combination thereof not specifically covered elsewhere in the applicable zone. Agricultural use includes the preparation and storage of the products raised on such land for human and animal use and disposal by marketing or otherwise. Agricultural use also includes the propagation, cultivation, maintenance and harvesting of aquatic species. Agricultural use does not include the use of land subject to the provisions of ORS chapter 321, except land used exclusively for growing cultured Christmas trees.

Staff notes that ORS 475A.570 specifies:

475A.570 Psilocybin-producing fungi as crop; exceptions to permitted uses.

(1) Psilocybin-producing fungi is:

- (a) A crop for the purposes of farm use as defined in ORS 215.203;**
- (b) A crop for purposes of a farm and farming practice, both as defined in ORS 30.930;**
- (c) A product of farm use as described in ORS 308A.062; and**
- (d) The product of an agricultural activity for purposes of ORS 568.909.**

- (2) ***Notwithstanding ORS chapters 195, 196, 197, 197A, 215 and 227, the following are not permitted uses on land designated for exclusive farm use:***
- (a) ***A new dwelling used in conjunction with a psilocybin-producing fungi crop;***
 - (b) ***A farm stand, as described in ORS 215.213 (1)(r) or 215.283 (1)(o), used in conjunction with a psilocybin-producing fungi crop; and***
 - (c) ***Subject to subsection (3) of this section, a commercial activity, as described in ORS 215.213 (2)(c) or 215.283 (2)(a), carried on in conjunction with a psilocybin-producing fungi crop.***
- (3) ***The operation of a psilocybin service center may be carried on in conjunction with a psilocybin-producing fungi crop.***
- (4) ***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.***
- (5) ***This section applies to psilocybin product manufacturers that hold a license under ORS 475A.290. [2021 c.1 §91]***

The Hearings Officer will need to determine if the intersection between ORS 475A.570(1) and the Title 19 allowance for "Agricultural use" allows outright the production of "Psilocybin-producing fungi as crop".

Regarding the proposed service center, the Hearing Officer will likely need to engage in a careful reading of ORS 475A.570(3). It is unclear to staff if the permissive "may", particularly when contrasted with the "a county may allow" in ORS 475A.570(4), suggests an affirmative right to a service center when "carried on in conjunction with a psilocybin-producing fungi crop". An alternative reading of ORS 475A.570(3) could suggest that production and service centers are simply not precluded from co-locating, without establishing an affirmative right to a service center or constraining a local government's ability to regulate a co-located service center.

Regarding how a service center might be situated in Title 19, the Applicant states in their burden of proof that the proposed service center will be accessory to the proposed agricultural use on the property. DCC 19.04.040 provides the following definition for accessory structure or use:

"Accessory structure or use" means a structure or use incidental, appropriate and subordinate to the main structure or use on the same lot.

The Applicant goes on to state:

The DCC permits the Primary Use because it qualifies as "agriculture." The Primary Use consists of an Oregon Health Authority ("OHA") licensed psilocybin product manufacturer, or psilocybin mushroom farm, and a functional (non-psilocybin) mushroom farm. The psilocybin mushroom farm will cultivate, harvest, and sell psilocybin-producing fungi, which is a "crop" per state law.³ The functional mushroom farm comprises the raising, harvesting and selling of a "crop."⁴ The Primary Use therefore qualifies as an outright permitted use at the Property.

...

The Accessory Use – the proposed psilocybin service center – is an outright permitted use in the SR 2.5 zone because it is an “accessory use . . . customarily appurtenant” to the agricultural Primary Use. Under the DCC, an “accessory use” is a “use incidental, appropriate and subordinate to the main . . . use on the same lot.”⁵ The DCC does not further define “incidental, appropriate, and subordinate,” but an accessory use determination generally turns on whether the primary use predominates over the accessory use “in light of many relevant factors, including the nature, intensity, and economic value of the respective uses.”⁶ Here, the nature, intensity, and economic value of the Accessory Use relative to the Primary Use clearly establishes that the proposed Accessory Use is “incidental, appropriate and subordinate” to the Primary Use, and therefore, constitutes an outright permitted accessory use. [Citations and footnotes omitted]

Staff request the Hearings Officer to determine first if the proposed primary use and accessory use are permissible under Title 19 of the Deschutes County Code as it existed on April 3, 2024, in consideration of ORS 215.427(3)(a)¹ and ORS 475A.570. This is the primary determinant of any future approvals. Not all DCC criteria have been reviewed as part of this proposal, as it is noted below, if the Hearings Officer finds that the uses are allowed, further land use review will be required such as Site Plan Review.

Chapter 19.76, Site Plan Review

Section 19.76. Site Plan Requirements.

In all zones, except for a single-family, duplex or triplex unit, or an accessory dwelling unit, on one lot, all new uses, buildings, outdoor storage or sales areas and parking lots or alterations thereof shall be subject to the provisions of DCC 19.76.020. Site plan approval shall not be required where a proposed alteration of an existing building does not exceed 25 percent of the size of the original structure unless the Planning Director finds the original structure or proposed alteration does not meet the requirements of DCC Title 19 or other ordinances of the County.

FINDING: Although not proposed at this time, should the uses be deemed allowable then Staff would request a condition of approval to require a subsequent Site Plan Review application in compliance with DCC Chapter 19.76.

Chapter 19.96, Nonconforming Uses

Section 19.96.010. Verification of Nonconforming Uses.

¹ *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.*

Subject to the procedures set forth in DCC 22.40, upon application the Planning Division will verify whether or not a use constitutes a valid nonconforming use in accordance with the provisions of DCC 19.96.010 and applicable state law. Verification of the existence of a nonconforming use shall be required prior to or concurrently with any application to alter or restore the use. The burden shall be upon the applicant for alteration or restoration of a nonconforming use to demonstrate its lawful existence. The applicant shall demonstrate all of the following:

- A. The nonconforming use was lawful on the effective date of the provisions of DCC Title 19 prohibiting the use.***
- B. The nonconforming use was actually in existence on the effective date of the provisions of DCC Title 19 prohibiting its use, or had proceeded so far toward completion that a right to complete and maintain the use would be deemed to have vested.***
- C. The nonconforming use has existed continuously, or if it has not existed continuously, has not been abandoned, or has not been interrupted for a period in excess of one year. The decision verifying the nonconforming use shall be made pursuant to the provisions of the County land use procedures ordinance.***

FINDING: Should the uses be deemed allowable in compliance with subsection (A) above, Staff requests the Hearings Officer to determine if the Applicant has a vested right to complete and maintain the use under subsection (B) above.

Title 22 of the Deschutes County Code, Deschutes County Procedures Ordinance

Chapter 22.16, Development Action Procedures

Section 22.16.010. Review of Development Action Applications

- A. A development action application may be handled administratively by the Planning Director without public notice or hearing.***
- B. The Planning Director has the discretion to determine that for the purposes of DCC Title 22 a development action application should be treated as if it were a land use action application.***

FINDING: In accordance with this provision, the Planning Director has determined that this Land Use Compatibility Statement, that would typically be processed as a development action, should be treated as if it were a land use action application due to the seeming presence of discretion in the decision making process.

IV. CONCLUSION

Staff requests the Hearings Officer to determine:

- If the Applicant has met the burden of proof necessary to show the proposed uses are allowed or prohibited within the subject zone, in consideration of DCC Title 19, ORS 215.427 and ORS 475A.570, as well as how to complete the requested Land Use Compatibility from.
- The extent of any vested right to implement the use in consideration of nonconforming use criteria (DCC 19.96), should it be determined the uses are allowed.
- Any additional conditions of approval, should this be an approval (see below).

V. CONDITIONS OF APPROVAL

- A.** This approval is based upon the application, site plan, specifications, and supporting documentation submitted by the applicant. Any substantial change in this approved use will require review through a new land use application.
- B.** The property owner shall obtain any necessary permits from the Deschutes County Building Division and Onsite Wastewater Division.
- C.** **Prior to the issuance of any building or septic permits, and prior to the initiation of either use,** the applicant must apply for and be approved for Site Plan Review in accordance with DCC 19.76.

VI. NOTICE AND APPEALS

Staff recommends the Hearings Officer include the following statement as part of any approval:

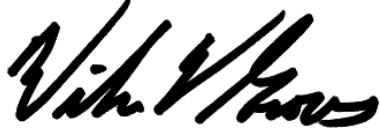
This decision becomes final twelve (12) days after the date mailed, unless appealed by a party of interest. To appeal, it is necessary to submit a Notice of Appeal, the appeal fee of \$250.00 and a statement raising any issue relied upon for appeal with sufficient specificity to afford the Hearings Body an adequate opportunity to respond to and resolve each issue.

NOTICE TO MORTGAGEE, LIEN HOLDER, VENDOR OR SELLER: ORS CHAPTER 215 REQUIRES THAT IF YOU RECEIVE THIS NOTICE, IT MUST BE PROMPTLY FORWARDED TO THE PURCHASER.

DESCHUTES COUNTY PLANNING DIVISION

A handwritten signature in black ink that reads "Jacob Ripper". The signature is written in a cursive, flowing style.

Written by: Jacob Ripper, Principal Planner

A handwritten signature in black ink that reads "William Groves". The signature is written in a bold, cursive style.

Reviewed by: William Groves, Planning Manager

owner	agent	inCareOf	address	cityStZip	type	cdd id	email
Piper Lucas			65729 Old Bend Redmond Hwy	Bend, OR 97701	SR	23-245-PS	
Emerge Law Group	Corinne Celko		108 NW 9th Ave., Suite 300	Portland, OR 97209	SR	23-245-PS	