

Crook County Counsel's Office

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MEMO

TO: Crook County Court

FROM: Eric Blaine, County Counsel

DATE: July 25, 2022

RE: Ordinance # 331 and Ordinance # 332, referring to the voters the issue of local psilocybin manufacturing and service centers under ORS 475A.718
Our File No.: Ct. Ordinance 72

The County is scheduled to hold public hearings on two separate ordinances, 331 and 332, each of which address psilocybin businesses in the unincorporated areas of Crook County (that is, outside the jurisdiction of the City of Prineville.)

Each of these ordinances would refer to question to the voters of Crook County whether, pursuant to authority created by Measure 109, psilocybin manufacturing and service centers would be prohibited.

After receiving any public testimony, the County Court can decide which if any of these two ordinances to schedule for a second reading and public hearing. Only if one of the ordinances is approved by the County Court would the measure be transferred to the Clerk's office for processing for the November, 2022 ballot.

This memorandum proceeds as follows:

1. Overview of Measure 109.
2. Description of Ordinance # 331.
3. Description of Ordinance # 332.
4. Conclusion.

Please let me know if you have any questions.

1. Overview of Measure 109 (2020).

In the 2020 general election, Oregon voters approved Measure 109, creating an Oregon-specific legalization regime for certain businesses related to psilocybin. The Oregon Health Authority states in part that "Psilocybin is a naturally occurring psychedelic compound. It is found in over 200 species of fungi (mushrooms)." The chemical is listed as a Schedule 1 substance under the Federal Controlled Substances Act, which, in broad terms, renders manufacturing and use businesses illegal under Federal law.

Included within Measure 109 was section 128, which reads:

SECTION 128. Adoption of ordinances; referral to electors for approval.

(1) The governing body of a city or county may adopt ordinances to be referred to the electors of the city or county as described in subsection (2) of this section that prohibit or allow the establishment of any one or more of the following in the area subject to the jurisdiction of the city or in the unincorporated area subject to the jurisdiction of the county:

- (a) Psilocybin product manufacturers that hold a license issued under section 23 of this 2020 Act;
- (b) Psilocybin service center operators that hold a license issued under section 26 of this 2020 Act; or
- (c) Any combination of the entities described in this subsection.

(2) If the governing body of a city or county adopts an ordinance under this section, the governing body shall submit the measure of the ordinance to the electors of the city or county for approval at the next statewide general election.

(3) If the governing body of a city or county adopts an ordinance under this section, the governing body must provide the text of the ordinance to the Oregon Health Authority.

(4) Upon receiving notice of a prohibition under subsection (3) of this section, the authority shall discontinue licensing those premises to which the prohibition applies until the date of the next statewide general election.

(5) If an allowance is approved at the next statewide general election under subsection (2) of this section, the authority shall begin licensing the premises to which the allowance applies on the first business day of the January immediately following the date of the next statewide general election.

(6) Notwithstanding any other provisions of law, a city or county that adopts an ordinance under this section that prohibits the establishment of an entity described in subsection (1) of this section may not impose a tax or fee on the manufacturing or sale of psilocybin products.¹

Section 128 was later codified as ORS 475A.718.

While there are many similarities with Oregon’s recreational marijuana laws and Measure 109, there are a number of differences which merit mention.

First, unlike the recreational marijuana law which created six different types of marijuana businesses, Measure 109 creates only two types of businesses: manufacturers, and “service centers.” These service centers are intended to act as the administrator for psilocybin, with at least one licensed person to oversee the process. One of arguments

¹ Please note: other sections of Measure 109 prohibit the imposition of local taxes on psilocybin businesses. *See e.g.* Measure 109, Section 82(1)(a) and (b).

propounded by supporters of Measure 109 is that the chemical would only be administered by state-licensed personnel² in clinical settings, rather than being self-administered by the user him-or-herself.

Second, Measure 109 Section 88 grants to employees of certain specified State agencies legal liability immunity for acting, or for that matter failing to act, in accordance with the requirements of Measure 109. This grant of legal immunity has as of yet not been challenged as violating other aspects of Oregon law (for instance, Article I Section 10 of the Oregon Constitution), so its legality is perhaps open to dispute. Nevertheless, Section 88 does not purport to extend the same immunity to public officials of local governments for acting in accordance with the requirements of Measure 109.

As described in Section 128, a local government may by ordinance refer to the voters a measure to prohibit psilocybin businesses at a statewide general election. The next general election is November 2022, and there will not be another such election until November 2024.

Meanwhile, Measure 109 tasks the Oregon Health Authority with adopting administrative rules for the implementation of the measure. The two-year period is defined as running from January 1, 2021 to December 31, 2022.³ The measure requires State entities to complete specified tasks by enumerated dates, including:

- The Governor must empanel a Psilocybin Advisory Board not later than February 28, 2021, according to specified eligibility criteria.
- The Psilocybin Advisory Board must adopt and submit findings and recommendations to the Oregon Health Authority, for guidance in the adoption of administrative rules, by June 30, 2022.
- The Oregon Health Authority must publish their administrative rules by December 31, 2022.

Certain of those administrative rules, codified as OAR Chapter 333-333, have been published. These rules address manufacturing and adulterating psilocybin products.

OHA, however, does not anticipate issuing draft administrative rules for the remaining portions of Measure 109 until after the deadline to refer a local measure to the voters. These remaining issues include how individuals will qualify for licenses to administer psilocybin, what training and continuing education requirements will licensees be held to, and in particular, who is responsible for ensuring that psilocybin activities are operated according to law. This means that in the absence of a local referral under Section 128, a community will be preemptively bound by administrative rules which it will not have had the opportunity to review before the November 2022 statewide general election, and the next opportunity to opt out of those administrative rules will not occur for another two years. This may be especially important if the administrative rule seek to place the responsibility for regulatory actions on local public health agencies, rather than requiring OHA administer its own regulations.

² As discussed further below, the State has not defined what the requirements would be imposed before someone is issued a license from the Oregon Health Authority.

³ See Measure 109, Section 5(17).

In late June of this year, the Oregon Psilocybin Advisory Board issued their recommendations to the Oregon Health Authority.⁴ These recommendations include 49 pages of text, ranging over a variety of topics from practitioner ethics to informed consent to a recommendation that OHA require applicants submit a social equity plan as a condition of licensure, with OHA periodically determining whether a licensee has shown insufficient commitment to such social equity principles and should lose his or her license. It is likely that the Oregon Health Authority will adopt many, perhaps all, of these recommendations, though the form thereof is far from certain.

2. Description of Ordinance # 331.

The first ordinance for your review is based on a model referral ordinance published by the League of Oregon Cities. LOC is a “trade group,” where the trade is the administration of municipal government in Oregon. LOC facilitates the discussion of topics of general concern on how cities in Oregon operate, lobbies on behalf of municipal government before the state legislature, and offers model documents for the use and consideration of its members. A comparable agency is the Association of Oregon Counties.

While LOC has not taken a position on the wisdom of referring a Measure 109 ordinance to the voters, they have published a model referral ordinance. Ordinance # 331 closely follows that model ordinance, with some modifications to reflect that it would apply to the unincorporated areas of Crook County rather than the areas under the jurisdiction of a city.

The ordinance includes the caption, question, summary, and explanatory statement required by ORS 250.035(1) and ORS 251.345. These submissions are meant to be impartial, simple, and understandable statements explaining the measure and its effect, leaving to the voting public to decide whether the measure should be adopted. Under ORS 250.185(1), preparing the ballot title the responsibility of the county governing body which refers the measure to the voters.

I have added a new section four, which states that if a court of competent authority should invalidate any portion of the ordinance, the remaining portions will continue in full force. That small deviation does not alter the substance of the model ordinance.

3. Description of Ordinance # 332.

At the Tuesday, July 19 County work session, the County Court discussed whether it would be useful to the voters to also include in the body of the ordinance itself (as opposed to the recitals) a statement that in the November 2020 election, local electors voted 64.53% against Measure 109 and 35.47% in favor of it. This statement, of course, is accurate, as shown by the 2020 election results.⁵ The County can include information that it believes is accurate and worthy of the attention of the voters, but the measure must still be impartial.

⁴ The recommendations can be found here: <https://www.oregon.gov/oha/PH/PREVENTIONWELLNESS/Documents/Approved-OPAB-Recommendations.pdf> (last visited July 21, 2022.)

⁵ These may be reviewed at: https://co.crook.or.us/sites/default/files/fileattachments/county_clerk/page/8486/november_3_2020_general_election_all_results.pdf (last visited July 21, 2022)

While it would be possible to include accurate information which is nevertheless misleading,⁶ it is my legal advice that the inclusion of this information would not violate the responsibility to present the voters with an impartial, unbiased explanatory statement.

4. Conclusion.

As with any ordinance, the County will conduct two readings and two public hearings for each ordinance before either would be adopted. This will afford members of the general public multiple opportunities to share their views, both for and against the question of whether local voters should have the choice to decide whether to opt out of the state's psilocybin regime.

After receiving public testimony, the County will have the obligation to determine whether a referral to the voters is unnecessary, whether to modify any of the language contained in the ordinances, or whether Ordinance # 331 or # 332 should be referred to the general public for the November 8 election.

Finally, if the County decides to refer either ordinance to the voters, it will thereafter need to avoid acting in a partisan manner. State law places restrictions on public employee engaging in political activity. The Oregon Secretary of State's office has published a booklet entitled *Restrictions on Political Campaigning by Public Employees*⁷ that contains some good advice on how County employees can avoid inadvertently running afoul of public ethics responsibilities.

Please place this memo and the attached document(s) on the Wednesday, August 3, 2022 County Court Agenda for two separate public hearings (one for each ordinance).

⁶ Imagine an ordinance which states that, if approved by the voters, would prohibit psilocybin businesses operated by convicted felons. This statement would be true, but leaves out the rather important detail that it would prohibit such businesses by everyone, whether or not convicted of a felony. Such an ordinance would be vulnerable to legal challenge under ORS Chapter 250.

⁷ This may be found at: <https://sos.oregon.gov/elections/Documents/restrictions.pdf> (last visited July 21, 2022).

**IN THE COUNTY COURT OF THE STATE OF OREGON
FOR THE COUNTY OF CROOK**

**AN ORDINANCE DECLARING A BAN
ON PSILOCYBIN SERVICE CENTERS
AND THE MANUFACTURE OF
PSILOCYBIN PRODUCTS**

ORDINANCE 331

WHEREAS, in November 2020, Oregon voters approved Ballot Measure 109, known as the Oregon Psilocybin Service Act (codified at ORS 475A), which allows for the manufacture, delivery and administration of psilocybin at licensed facilities. In Crook County, the general public voted against Measure 109 by a margin of 64.5% against and 35.5% in favor; and

WHEREAS, ORS 475A.235 provides that the Oregon Health Authority will regulate the manufacturing, transportation, delivery, sale and purchase of psilocybin products and the provision of psilocybin services in the state; and

WHEREAS, the Oregon Health Authority has initiated a rulemaking process to implement the state's psilocybin regulatory program and intends to begin accepting applications for psilocybin-related licenses on January 2, 2023; and

WHEREAS, as of July 31, 2022, the Oregon Health Authority has not completed the rulemaking process for implementing the state's psilocybin regulatory program, and the Crook County is uncertain how the manufacture, delivery and administration of psilocybin at licensed psilocybin facilities will operate within the unincorporated portions of Crook County (i.e. beyond the city limits of the City of Prineville); and

WHEREAS, ORS 475A.718 provides that a county may adopt an ordinance to be referred to the electors of the county prohibiting the establishment of state licensed psilocybin product manufacturers and/or psilocybin service centers in the area subject to the jurisdiction of the county; and

WHEREAS, the County Court seeks to refer to the voters of Crook County the question of whether to establish a ban on state-licensed psilocybin product manufacturers and psilocybin service centers within the County's jurisdictional boundaries.

NOW, THEREFORE, the Crook County Court ordains as follows:

Section One: Prohibition. The establishment of psilocybin product manufacturers licensed under ORS 475A.290 and psilocybin service centers licensed under ORS 475A.305 is prohibited in the unincorporated portions of Crook County.

Section Two: Referral. This ordinance is referred to the electors of the County of Crook for approval at the next statewide general election on November 8, 2022.

Section Three: Effective Date. This ordinance takes effect and becomes operative 30 days after the day on which it is approved by a majority of the voters.

Section Four: If any court of competent authority invalidates a portion of this Ordinance, the remaining portions will continue in full force and effect.

First Reading: _____

Second Reading: _____

Dated this _____ day of _____, 2022

Judge Seth Crawford

Commissioner Jerry Brummer

Commissioner Brian Barney

Vote:	Aye	Nay	Excused
Seth Crawford	_____	_____	_____
Jerry Brummer	_____	_____	_____
Brian Barney	_____	_____	_____

BALLOT TITLE

A caption which reasonably identifies the subject of the measure. 10-word limit under ORS 250.035(1)(a)

Prohibits psilocybin-related businesses within Crook County.

QUESTION

A question which plainly phrases the chief purpose of the measure so that an affirmative response to the question corresponds to an affirmative vote on the measure. 20-word limit under ORS 250.035(1)(b)

Shall Crook County prohibit psilocybin-related businesses in the unincorporated areas of Crook County?

SUMMARY

A concise and impartial statement summarizing the measure and its major effect. 175-word limit under ORS 250.035(1)(c)

State law allows operation manufacturer, distribution and possession of psilocybin and psilocin. State law provides that a County may adopt an ordinance to be referred to the voters to prohibit the establishment of any of those registered or licensed activities.

Approval of this measure would prohibit the establishment of psilocybin product manufacturers and psilocybin service center operators within the unincorporated area subject to the jurisdiction of the County.

EXPLANATORY STATEMENT

An impartial, simple and understandable statement explaining the measure and its effect for use in the county voters' pamphlet. 500-word limit under ORS 251.345 and OAR 165-022-0040(3)

Approval of this measure would prohibit the establishment and operation of psilocybin-related businesses within the County.

A County may adopt an ordinance prohibiting the establishment of psilocybin related businesses within the unincorporated area of the county, but must refer the ordinance to the voters at a statewide general election. The County Court of Crook County has adopted an ordinance which, if approved by the voters at the November 2022 general election, prohibits the establishment of psilocybin-related businesses within the County and has referred this measure to the voters.

If approved, this measure would prohibit psilocybin-related businesses within the unincorporated areas of Crook County.

**IN THE COUNTY COURT OF THE STATE OF OREGON
FOR THE COUNTY OF CROOK**

**AN ORDINANCE DECLARING A BAN
ON PSILOCYBIN SERVICE CENTERS
AND THE MANUFACTURE OF
PSILOCYBIN PRODUCTS**

ORDINANCE 332

WHEREAS, in November 2020, Oregon voters approved Ballot Measure 109, known as the Oregon Psilocybin Service Act (codified at ORS 475A), which allows for the manufacture, delivery and administration of psilocybin at licensed facilities. In Crook County, the general public voted against Measure 109 by a margin of 64.5% against and 35.5% in favor; and

WHEREAS, ORS 475A.235 provides that the Oregon Health Authority will regulate the manufacturing, transportation, delivery, sale and purchase of psilocybin products and the provision of psilocybin services in the state; and

WHEREAS, the Oregon Health Authority has initiated a rulemaking process to implement the state's psilocybin regulatory program and intends to begin accepting applications for psilocybin-related licenses on January 2, 2023; and

WHEREAS, as of July 31, 2022, the Oregon Health Authority has not completed the rulemaking process for implementing the state's psilocybin regulatory program, and the Crook County is uncertain how the manufacture, delivery and administration of psilocybin at licensed psilocybin facilities will operate within the unincorporated portions of Crook County (i.e. beyond the city limits of the City of Prineville); and

WHEREAS, ORS 475A.718 provides that a county may adopt an ordinance to be referred to the electors of the county prohibiting the establishment of state licensed psilocybin product manufacturers and/or psilocybin service centers in the area subject to the jurisdiction of the county; and

WHEREAS, the County Court seeks to refer to the voters of Crook County the question of whether to establish a ban on state-licensed psilocybin product manufacturers and psilocybin service centers within the County's jurisdictional boundaries.

NOW, THEREFORE, the Crook County Court ordains as follows:

Section One: The above Recitals are incorporated into this Ordinance as Findings of Fact, including but not limited to the following: that Crook County voters voted against Measure 109 by a margin of 64.53% against and 35.47% in favor; that Measure 109 Section 128 created the process whereby a measure may be referred to local voters to consider whether to enact a local ban on psilocybin manufacturers or centers; and that the administrative rules governing such activities, including how they might impact local government or local public health administration, have not been issued for public review.

Section Two: Prohibition. The establishment of psilocybin product manufacturers licensed under ORS 475A.290 and psilocybin service centers licensed under ORS 475A.305 is prohibited in the unincorporated portions of Crook County.

Section Three: Referral. This ordinance is referred to the electors of the County of Crook for approval at the next statewide general election on November 8, 2022.

Section Four: Effective Date. This ordinance takes effect and becomes operative 30 days after the day on which it is approved by a majority of the voters.

Section Five: If any court of competent authority invalidates a portion of this Ordinance, the remaining portions will continue in full force and effect.

First Reading: _____

Second Reading: _____

Dated this _____ day of _____, 2022

Judge Seth Crawford

Commissioner Jerry Brummer

Commissioner Brian Barney

Vote:	Aye	Nay	Excused
Seth Crawford	_____	_____	_____
Jerry Brummer	_____	_____	_____
Brian Barney	_____	_____	_____

BALLOT TITLE

A caption which reasonably identifies the subject of the measure. 10-word limit under ORS 250.035(1)(a).

Prohibits psilocybin-related businesses within Crook County.

QUESTION

A question which plainly phrases the chief purpose of the measure so that an affirmative response to the question corresponds to an affirmative vote on the measure. 20-word limit under ORS 250.035(1)(b).

Shall Crook County prohibit psilocybin-related businesses in the unincorporated areas of Crook County, as permitted by Measure 109?

SUMMARY

A concise and impartial statement summarizing the measure and its major effect. 175-word limit under ORS 250.035(1)(c).

Measure 109 was approved by Oregon voters and allows operation manufacturer, distribution and possession of psilocybin and psilocin. Crook County voters voted 64.53% against Measure 109, with 35.47% in favor. State law provides that a County may adopt an ordinance to be referred to the voters to prohibit the establishment of any of those Oregon Health Authority-registered or -licensed activities.

Approval of this measure by the voters would prohibit the establishment of psilocybin product manufacturers and psilocybin service center operators within the unincorporated area subject to the jurisdiction of the County (that is, outside the jurisdiction of the City of Prineville).

EXPLANATORY STATEMENT

An impartial, simple and understandable statement explaining the measure and its effect for use in the county voters' pamphlet. 500-word limit under ORS 251.345 and OAR 165-022-0040(3).

Approval of this measure would prohibit the establishment and operation of psilocybin-related businesses within the unincorporated area of Crook County (that is, outside the jurisdiction of the City of Prineville). Ballot Measure 109 was approved by Oregon voters in 2020. Crook County voters voted 64.53% against Measure 109, with 35.47% in favor.

Measure 109 included a procedure (codified at ORS 475A.715) allowing local jurisdictions to prohibit psilocybin-related manufacturing and service centers. The process for this would be for the County Court of a County to adopt an

ordinance referring the matter to the voters of Crook County, to consider adopting such a prohibition for the areas of Crook County located outside the jurisdiction of the City of Prineville.

A “yes” vote will prohibit the establishment and operation of psilocybin product manufacturing and service centers within the unincorporated areas (areas outside the jurisdiction of the City of Prineville) of Crook County.

A “no” vote will allow the establishment and operation of psilocybin product manufacturing and service centers within the unincorporated areas (areas outside the jurisdiction of the City of Prineville) of Crook County.