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**IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF LINCOLN**

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REX CAPRI,)

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WAKEFIELD FARMS, LLC)

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Plaintiffs,)

Case # 17CV23360

11

v.)

**MEMORANDUM OF LAW
IN SUPPORT OF DEFENDANTS
DANA JENKINS' AND
LINCOLN COUNTY'S
CROSS MOTION FOR
SUMMARY JUDGMENT**

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DANA W. JENKINS, LINCOLN COUNTY)

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Defendants.)

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and)

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LINCOLN COUNTY COMMUNITY RIGHTS)

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Intervenor-Defendant.)

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Background

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This is not the first litigation surrounding Lincoln County Ballot Measure 21-177, a citizen initiated Ordinance entitled "Freedom of Lincoln County from Aerial Sprayed Pesticides". A pre-election challenge to placing the Measure on the Lincoln County Ballot in the May 2017 election was heard and decided by this Court previously. Lincoln County Circuit Court Case No. 15CV19555, General Judgment signed May 4, 2016. That case

1 involved a challenge under ORS 250.168(1) and the Oregon Constitution, section 1(2)(d),
2 Article IV that the measure violated the Single Subject Rule. A challenge was also made that
3 the Measure failed to include the full text of the proposed law as also required under section
4 1(2)(d), Article IV of the Oregon Constitution (Full Text Requirement).

5 Defendant County Clerk Dana Jenkins (hereafter both Defendants are referred to
6 collectively as County unless specifically noted) determined both the Single Subject and Full
7 Text requirements were met. ORS 250.168(1) and (2). This Court agreed and so ruled on a
8 pre-election challenge under ORS 250.168.¹ Plaintiffs now challenge those rulings post-
9 election citing ORS 246.910(1) as granting the Court jurisdiction to reconsider the rulings.
10 County argues the Court lacks subject matter jurisdiction under a line of cases distinguishing
11 pre-election from post-election challenges to ballot measures based on these constitutional
12 grounds.

13 Alternatively, this Court has already reviewed and decided these issues and County
14 asks the Court to reaffirm its decision, thereby denying the Plaintiffs' First Claim for Relief
15 and denying that the Measure was not validly adopted and is void in its entirety. County
16 asks the Court to take judicial notice of the record and decisions in Lincoln County Circuit
17 Court Case No. 15CV19555; however County will include its Memorandum of Law, the
18 Court's Decisional Letter and the General Judgment from that case with its materials in

¹ This challenge does not meet all the elements of a defense of claim or issue preclusion (we lack privity of parties), so the County will not raise those defenses.

1 support of its position.² County is not asserting an end around to an issue preclusion
2 defense. The Court will still need to reaffirm its earlier decision if County does not prevail
3 on its lack of subject matter jurisdiction defense.

4 This cross-motion for Summary Judgment does not address the position of Intervenor
5 – Defendant Siletz River Ecosystem (Siletz). A second Motion for Summary Judgment,
6 following County’s responsive pleading to Siletz’s pleading (if its motion to intervene is
7 granted), will be separately filed.

8 **LAW/ARGUMENT**

9 ORCP 47 requires that summary judgment be granted in favor of the moving party
10 “if the pleadings, depositions, affidavits, and admissions on file show that there is no
11 genuine issue as to any material fact and the moving party is entitled to judgment as a matter
12 of law.” *Jones v. General Motors Corp.*, 325 Or 404, 939 P2d 608 (1997). In determining
13 whether or not a material fact exists, ORCP 47 provides: “no genuine issue as to a material
14 fact exists if, based upon the record before the Court viewed in a manner most favorable to
15 the adverse party, no objectively reasonable juror could return a verdict for the adverse party
16 on the matter that is the subject of the motion.” The phrase “genuine issue as to material
17 fact” means a ‘triable’ issue; that is, evidence sufficient to get beyond a directed verdict, and
18 to present the case to a jury for consideration. *Seeborg v. General Motors Corp.*, 284 Or 695,
19 700, 588 P2d 1100 (1978); *Jones v. General Motors Corp.*, *supra*.

² The second action, Lincoln County Circuit Court Case N. 15CV19554, challenged the language of the Ballot Title itself. Although not directly applicable to this Motion for Summary Judgment, it does bear on our requested construction of the Measure. We therefore request the Court take Judicial Notice of the record in that case, and include the Court’s Decisional Letter and Judgment with our Memorandum in support of our position.

1 decisions of the Secretary of State on a voter initiated state ballot measure. As the Court in
2 *League of Oregon Cities* quoted from *Ellis*, 302 Or at 17:

3 “There is a season for each kind of challenge to the Secretary of State’s
4 administration of election laws, whether as to the ballot title, the signature
5 gathering process [,] or constitutional evaluation . . . The period of reasonable
6 time commences then.”³

7
8 Plaintiffs⁴ in *League of Oregon Cities* failed to establish jurisdiction under ORS
9 246.910(1) because they filed their action after the election, but based the challenges on the
10 pre-election determinations of the Secretary of State. The “season” for their challenge
11 occurred before the election. The same situation applies here. Plaintiffs are seeking to
12 overturn the pre-election determinations of defendant County Clerk in an untimely filed
13 post-election challenge. As pled by Plaintiffs, under ORS 246.910(1), the Court does not
14 have subject matter jurisdiction to hear these claims. The Plaintiffs’ challenge is to the
15 validity of the election, not to the validity of the measure after the election. That is a
16 distinction with a difference.

17 Other decisions support the concept that constitutional challenges, such as the one
18 presented in this claim must follow a series of decision points or discrete steps taken by an
19 election official after which the “clock of timeliness for review begins ticking.” *Boytano v.*
20 *Fritz*, 321 Or 498, 503, 901 P2d 835 (1995), citing with approval *State ex. rel. Findanque v.*
21 *Paulus*, 297 Or 711, 688 P2d 1303 (1984). The right to challenge is lost if not timely made.

³ Although the case law references are to challenges made to the Secretary of State, the County Clerk has the same obligations (albeit with different timing requirements) to make Single Subject and Full Text determinations for local measures. Therefore, the Court’s holdings as applied to state initiatives should be equally dispositive of local measure challenges.

⁴ Plaintiffs who lacked standing to challenge the state measure under ORS Chapter 28, the Uniform Declaratory Judgments Act, challenged under ORS 249.910. Note the Plaintiffs here are not basing their First Claim for Relief on ORS Chapter 28.

1 *Id.* Each step in the ballot measure process is a series of decisions susceptible to challenge if
2 timely made. *Id.* at 503. Here the challenge as presented is untimely. No justiciable
3 controversy exists; therefore there is no subject matter jurisdiction for the Court to consider
4 this challenge.

5 **Alternatively, the Measure includes matters of County Concern, was validly adopted,**
6 **and is not void under ORS 203.035, and section 10, Article VI of the Oregon**
7 **Constitution.**

8 The County is not entirely preempted from regulation of pesticides, although its
9 regulatory authority may be severely limited by the state. Therefore, the general subject
10 matter, pesticides, is a matter of county concern, ORS 203.035. This argument is further
11 elaborated below.

12 The reference to section 10 of Article VI of the Oregon Constitution is an erroneous
13 and inapplicable citation, as that section applies to home rule under county charters. Lincoln
14 County is a general law county, ORS 203.035 et. seq., and not a home rule county, section
15 10, Article VI, Oregon Constitution. Initiative and Referendum powers reserved to a
16 general law county are found in section 1(5) of Article IV of the Oregon Constitution.

17 There is no basis to assert the election was invalid based on ORS 203.035 and
18 section 10, Article VI of the Oregon Constitution.

19 **Alternatively, the Measure complies with the Single Subject and Full Text**
20 **requirements of the Oregon Constitution, section 1(2)(d), Article IV.**

21 As previously noted, the Court has already issued determinations in pre-election
22 challenges that the Measure complies with the Single Subject and Full Text requirements of

1 the Oregon Constitution. Those determinations were correctly made based on the case law
2 applicable to this Measure. Rather than set forth all the arguments made previously, the
3 County attaches to this Memorandum its previous Memorandum of Law in Lincoln County
4 Case No. 15CV19555, the Court’s decisional letter dated April 13, 2016, and the General
5 Judgment in that case entered May 4, 2016. The Court may take judicial notice of the record
6 of that proceeding as supplemental authority for its decision. The County relies on those
7 submissions in requesting the Court to reaffirm its earlier rulings.

8 **Plaintiffs’ Second Claim for Relief (Declaratory Judgment)**

9 County agrees the Court has jurisdiction over Plaintiffs’ second claims for relief
10 under Oregon’s Uniform Declaratory Judgments Act⁵, ORS 28.010, and authority to
11 determine the validity and construction of the Measure, ORS 28.020.⁶ County does not
12 agree with the entire basis for Plaintiffs’ assertions in its amended complaint that the
13 Measure is completely invalid, void and unenforceable.

14 **An analysis of preemption of local law by state law - - court precedents.**⁷

15 An in depth analysis of Oregon preemption jurisprudence is not required in this case
16 as will be shown below. Suffice it to say Oregon has not adopted Dillon’s Rule that
17 municipal governments can exercise only the powers explicitly granted to them by the state,
18 or which are necessarily or fairly implied in or incident to powers expressly granted, or
19 which are essential to the declared objects and purposes of the municipal government, not

⁵ ORS 28.160, Short Title. “Uniform Declaratory Judgments Act”

⁶ Measure 21-177 is an initiated County Ordinance.

⁷ Because there are no federal parties appearing in this case, the County recognizes that a whole set of federal law preemption principles and precedents setting forth the relationship of federal supremacy to state and local laws will be left undecided in this litigation. Those challenges will have to await a different challenge and likely different forum for resolution depending on the outcome of this action.

1 simply convenient but indispensable.⁸ Rather, Oregon is a state whose constitution and laws
2 vest extensive governmental power in the governing body of a municipal government⁹
3 subject, however, to state law supremacy. The Courts have analyzed that state law / local
4 law interplay in a number of cases over the years. Oregon's preemption analysis can be
5 distilled as follows:

- 6 • Under *City of Portland v. Dollarhide*, 300 Or 490, 714 P2d 220 (1986),
7 Oregon municipal laws (charters, ordinances, codes or other municipal
8 enactments) are assumed to be displaced by state criminal laws which
9 prohibit and punish the same conduct, making a rebuttable presumption that
10 inconsistent local criminal enactments are invalid. *Id.* at 501. In other words,
11 a local criminal act ordinance cannot prohibit what the state law permits, or
12 permit what the state law prohibits. *Id.* at 502.
- 13 • The converse of that corollary is that local civil or administrative enactments
14 are presumed valid unless the intention of the legislature is apparent to
15 displace the local ordinances. *Id.* at 501, *citing LaGrande/Astoria v. PERB*,
16 281 Or 137, 148, 576 P2d 1204 *adhered to on rehearing*, 284 Or 173, 586
17 P2d 765 (1978).
- 18 • Through a series of further case law developments, the standards for
19 preemption of local civil or administrative enactments by state law has been

⁸ 1 John F. Dillon, THE LAW OF MUNICIPAL CORPORATIONS, Section 9b, at 93 (2d. ed. 1873).

⁹ For Counties that extensive authority is found in the home rule authority granted under Article VI, Section 10 of the Oregon Constitution and the concomitant autonomy and authority granted to general law counties, ORS 203.035. See *GTE Northwest Inc. v. Oregon PUC et.al.* 179 Or App 46, 39 P3d 201 (2002). Initiative and Referendum authority extends to place the citizens within the same ambit of the governing body's authority, Section 1(5), Article IV of the Oregon Constitution.

1 refined to require that the state law must be shown to either “**expressly**” or
2 “**clearly**” preempt local regulation. Additionally preemption by the state can
3 occur where “**both [state law and local law] cannot operate concurrently.**”
4 (emphasis added). *Thunderbird Mobile Club, LLC v. City of Wilsonville*, 234
5 Or App 457, 228 P3d 650 (2010) and the cases cited therein. The line of
6 cases cited in *Thunderbird, supra*, clearly show that the bar is set very high
7 for a state law to have fully preemptive effect on a local enactment.

8 **Application of that case law to Plaintiffs’ claims - - Preemption under ORS Chapter 634**

9 **Pesticide Control.**

10 That brings us to the Plaintiffs’ challenges. ORS Chapter 634, and specifically
11 “Statewide Regulation of Pesticides”, ORS 634.055 through ORS 634.065, sets forth the
12 State’s expression of intent to regulate pesticides:

13 **STATEWIDE REGULATION OF PESTICIDES**

14
15 **634.055 Legislative findings.** The Legislative Assembly hereby determines that
16 the citizens of this state benefit from a system of safe, effective and scientifically
17 sound pesticide regulation. The Legislative Assembly further finds that a uniform,
18 statewide system of pesticide regulation that is consistent, coordinated and comports
19 with both federal and state technical expertise is essential to the public health, safety
20 and welfare and that local regulation of pesticides does not materially assist in
21 achieving these benefits. [1996 c.10 §4 (enacted in lieu of 634.007)]

22 **634.057 State preemption of local pesticide regulation.** No city, town, county
23 or other political subdivision of this state shall adopt or enforce any ordinance, rule
24 or regulation regarding pesticide sale or use, including but not limited to:

- 25 (1) Labeling;
26 (2) Registration;
27 (3) Notification of use;
28 (4) Advertising and marketing;
29 (5) Distribution;
30 (6) Applicator training and certification;
31 (7) Licensing;
32 (8) Transportation;

- 1 (9) Packaging;
- 2 (10) Storage;
- 3 (11) Disclosure of confidential information; or
- 4 (12) Product composition. [1996 c.10 §6 (enacted in lieu of 634.009)]

5
6 **634.060 Actions allowed by city, town, county or other political**
7 **subdivision.** Notwithstanding ORS 634.057, a city, town, county or other political
8 subdivision of this state may adopt a policy regarding the use of pesticides on
9 property owned by the city, town, county or other political subdivision adopting the
10 policy. [1996 c.10 §8 (enacted in lieu of 634.011)]

11
12 **634.063 Exceptions to state preemption of pesticide regulation.** Nothing in
13 ORS 634.057 shall limit the authority of a city, town, county or other political
14 subdivision of this state to adopt or enforce a local ordinance, rule or regulation
15 strictly necessary to comply with:

16 (1) The Uniform Building Code published by the International Conference of
17 Building Officials, as amended and adopted by the Director of the Department of
18 Consumer and Business Services;

19 (2) A uniform fire code; or

20 (3) Any requirement of a state or federal statute or regulation pertaining to
21 pesticides. [1996 c.10 §10 (enacted in lieu of 634.013)]

22
23 **634.065 Department consideration of concerns raised by city, town, county**
24 **or political subdivision.** In administering this chapter, the State Department of
25 Agriculture shall consider any concern raised by a city, town, county or other
26 political subdivision of the state regarding the regulation of pesticides. [1996 c.10
27 §12 (enacted in lieu of 634.015)]

28
29 The remainder of ORS Chapter 634 sets forth the range of uniform regulations the
30 state had adopted for statewide implementation, including but not limited to registration of
31 pesticides and application devices and restrictions on pesticide distribution and use, ORS
32 634.016; and aerial pesticide applicator certification and regulation, ORS 634.128.

33 The legislative findings, ORS 634.055, calling for a uniform, statewide pesticide
34 regulation system that is consistent and coordinated for public health, safety and welfare and
35 where “local regulation of pesticides does not materially assist in achieving these benefits”
36 express intent to both occupy the field of pesticide regulation and preclude or preempt local

1 regulation except under express exceptions. ORS 634.057, entitled “State Preemption of
2 local pesticide regulation”, clearly articulates the preemption: “No city, town, county, or
3 other political subdivision of this state shall adopt or enforce any ordinance, rule or
4 regulation regarding pesticide sale or use, including but not limited to: (listed prohibitions).”
5 It is not necessary that the word preemption be stated directly in the statutory language. In
6 fact, that specific provision of law, ORS 634.057, is cited favorably by the Oregon Court of
7 Appeals as a clear example of the state’s intention to preempt local control. *AT and T*
8 *Communications of the Pacific Northwest, Inc. v. City of Eugene*, 177 Or App 379, 395, 35
9 P3d 1029 (2001). Preemption is further supported by the decision in *Advocates for*
10 *Effective Regulation v. City of Eugene*, 160 Or App 292, 981 P2d 368 (1999) which held that
11 ORS Chapter 634’s preclusive effect applied to local regulations (including ordinances)
12 regarding pesticide use, which is broader in scope than just regulating use, and includes
13 matters beyond those listed in ORS 634.057. (*Id.* at 307, emphasis in original).

14 County concedes it is expressly preempted from adopting an ordinance regulating
15 “pesticide use” on Plaintiffs’ properties and similarly situated properties. Aerial spraying is
16 regulated and licensed by the State. ORS 634.128. The Measure’s ban on aerial spraying of
17 pesticides falls within that preemption proscription under ORS Chapter 634.057 for those
18 properties.

19 The inquiry does not end there, however. It is incumbent on the Court to determine
20 the extent of the preclusive effect of this language. *Id.* at 299. County defendants contend
21 that the preemption does not completely preclude County regulations; the legislature
22 provided for an exception to the prohibitions allowing a county to regulate use of pesticides

1 on property owned by the County. ORS 634.060. Therefore the County is (and by extension
2 through the initiative and referendum process, the citizens of Lincoln County are) not
3 preempted under this statutory scheme from regulating aerial spraying on County owned
4 property. That could include tax foreclosed property outside of incorporated cities.
5 Declaration of Wayne Belmont page 2, ¶ 2 and 3. Therefore, the Court cannot completely
6 invalidate the Measure based on preemption under ORS Chapter 634.

7 **Application of that case law to Plaintiffs' claims - - Preemption under ORS Chapter 527**
8 **Forest Practices Act.**

9 ORS Chapter 527 includes (but is not limited to) the Oregon Forest Practices Act.
10 The Act defines “forest practices” to include any operation conducted on or pertaining to
11 forestland, including application of chemicals. ORS 527.620(5)(d). “Chemicals” includes
12 all classes of pesticides. OAR 629-600-0100 (11) (defining chemicals for the forest
13 practices rules implementing the Act). Forest practices must be conducted in accordance
14 with the Act (ORS 527.610 to ORS 527.770, ORS 527.990(1), and ORS 527.992) and
15 administrative rules promulgated by the State Board of Forestry, ORS 527.630 and ORS
16 527.710. Amongst those administrative rules are Divisions devoted solely to chemical
17 applications, including regulation of aerial spraying of pesticides, in commercial forest
18 operations. OAR Chapter 629, Division 620. Under the Act itself, aerial spraying by
19 aircraft of pesticides incorporates responsibilities and certifications of an “aerial pesticide
20 applicator” under ORS Chapter 634 with additional restrictions around applications adjacent
21 to a dwelling or school. ORS 527.672.

1 The legislature again sought to both provide a uniform statewide regulatory scheme
2 for forest practices and to limit local governments' ability to alter that scheme. The
3 limitation on local authority, applicable to all forestlands outside of acknowledged urban
4 growth boundaries,¹⁰ is found in ORS 527.722:

5 **527.722 Restrictions on local government adoption of rules regulating**
6 **forest operations; exceptions.** (1) Notwithstanding any provisions of ORS chapters
7 195, 196, 197, 215 and 227, and except as provided in subsections (2), (3) and (4)
8 of this section, no unit of local government shall adopt any rules, regulations or
9 ordinances or take any other actions that prohibit, limit, regulate, subject to approval
10 or in any other way affect forest practices on forestlands located outside of an
11 acknowledged urban growth boundary.

12 (2) Nothing in subsection (1) of this section prohibits local governments from
13 adopting and applying a comprehensive plan or land use regulation to forestland to
14 allow, prohibit or regulate:

15 (a) Forest practices on lands located within an acknowledged urban growth
16 boundary;

17 (b) Forest practices on lands located outside of an acknowledged urban growth
18 boundary, and within the city limits as they exist on July 1, 1991, of a city with a
19 population of 100,000 or more, for which an acknowledged exception to an
20 agriculture or forestland goal has been taken;

21 (c) The establishment or alteration of structures other than temporary on-site
22 structures which are auxiliary to and used during the term of a particular forest
23 operation;

24 (d) The siting or alteration of dwellings;

25 (e) Physical alterations of the land, including but not limited to those made for
26 purposes of exploration, mining, commercial gravel extraction and processing,
27 landfills, dams, reservoirs, road construction or recreational facilities, when such
28 uses are not auxiliary to forest practices; or

29 (f) Partitions and subdivisions of the land.

30 (3) Nothing in subsection (2) of this section shall prohibit a local government
31 from enforcing the provisions of ORS 455.310 to 455.715 and the rules adopted
32 thereunder.

33 (4) Counties may prohibit, but in no other manner regulate, forest practices on
34 forestlands:

35 (a) Located outside an acknowledged urban growth boundary; and

36 (b) For which an acknowledged exception to an agricultural or forest land goal
37 has been taken.

¹⁰ Lincoln County has urban growth boundaries acknowledged under Oregon law for each of its incorporated cities, ORS Chapters 197 and 215 and Lincoln County Code Chapter 1.

1 (5) To ensure that all forest operations in this state are regulated to achieve
2 protection of soil, air, water, fish and wildlife resources, in addition to all other
3 forestlands, the Oregon Forest Practices Act applies to forest operations inside any
4 urban growth boundary except in areas where a local government has adopted land
5 use regulations for forest practices. For purposes of this subsection, “land use
6 regulations for forest practices” means local government regulations that are
7 adopted for the specific purpose of directing how forest operations and practices
8 may be conducted. These local regulations shall:

9 (a) Protect soil, air, water, fish and wildlife resources;

10 (b) Be acknowledged as in compliance with land use planning goals;

11 (c) Be developed through a public process;

12 (d) Be developed for the specific purpose of regulating forest practices; and

13 (e) Be developed in coordination with the State Forestry Department and with
14 notice to the Department of Land Conservation and Development.

15 (6) To coordinate with local governments in the protection of soil, air, water,
16 fish and wildlife resources, the State Forester shall provide local governments with
17 a copy of the notice or written plan for a forest operation within any urban growth
18 boundary. Local governments may review and comment on an individual forest
19 operation and inform the landowner or operator of all other regulations that apply
20 but that do not pertain to activities regulated under the Oregon Forest Practices Act.

21 (7) The existence or adoption by local governments of a comprehensive plan
22 policy or land use regulation regulating forest practices consistent with subsections
23 (1) to (5) of this section shall relieve the State Forester of responsibility to
24 administer the Oregon Forest Practices Act within the affected area.

25 (8) The Director of the Department of Land Conservation and Development
26 shall provide the State Forester copies of notices submitted pursuant to ORS
27 197.615, whenever such notices concern the adoption, amendment or repeal of a
28 comprehensive land use regulation allowing, prohibiting or regulating forest
29 practices. [1979 c.400 §2; 1987 c.919 §17; 1991 c.919 §29; 2001 c.268 §1]

30
31 Use of the term “notwithstanding” in reference to state and local government authority
32 and procedures governing land use planning means that to the extent any local authority
33 under the cited laws conflicts with state authority, state authority prevails.¹¹ *See Severy v.*
34 *Board of Parole*, 318 Or 172, 178, 864 P2d 368 (1993) (“The function of the
35 ‘notwithstanding’ clause [here ORS 163.105] was to make the statute an exception to the

¹¹ ORS Chapter 195 [Local Government Planning Coordination]; Chapter 196 [Columbia River Gorge, Ocean Resource Planning; Wetlands; Removal and Fill]; Chapter 197 [Comprehensive Land Use Planning I]; Chapter 215 [County Planning; Zoning; Housing Codes]; and Chapter 227 [City Planning and Zoning].

1 provisions of law referenced in the clause.”) *cited with approval in Janowski/Fleming v.*
2 *Board of Parole*, 349 Or 432, 446-47, 245 P3d 1270 (2010). The term does not, by itself,
3 establish preemption. Nothing in any of the cited planning authority chapters of Oregon Law
4 regulates pesticide application directly.

5 County does note that the only case law on the preemptive effects of ORS 527.722
6 analyzed the section in the context of attempting to harmonize its terms with former ORS
7 527.726 (repealed in 1987), asking whether counties had certain land use planning
8 responsibilities that manifestly required them to adopt land use regulations for forest
9 operations in certain ways, notwithstanding the prohibitions in ORS 527.722. *1000 Friends*
10 *of Oregon v. Land Conservation and Development Commission*, 303 Or 430, 737 P2d 607
11 (1987). The Court discusses at length the preemptive effect of ORS 527.722 over local
12 rules, regulations or ordinance regulating the conduct of operations on forest lands governed
13 by the Oregon Forest Practices Act. *Id.* at 441-443. Further strengthening this position the
14 Legislature subsequently repealed ORS 527.726, and did not replace it. 1987 Oregon Laws
15 chapter 919, section 29.

16 This preemptive intent is clearly articulated after the “notwithstanding” clause in ORS
17 527.722:

18 “ . . . no unit of local government shall adopt any rules, regulations or ordinances
19 or take any other actions that prohibit, limit, regulate, subject to approval or in any
20 other way affect forest practices on forestlands located outside of an
21 acknowledged urban growth boundary.”
22

23 The Court noted the language in ORS 527.722 “follows a logical preemption
24 pattern”, and sets an overriding legislative purpose and intent to “achieve a uniform
25 regulation of commercial forest operations” *Id.* Although Measure 21-177 is not a “land use

1 regulation”, it is an attempt to regulate a forest practice (pesticide application) already
2 regulated in commercial forest operations subject to the Forest Practices Act. The reasoning
3 for preemption found in *1000 Friends v. LCDC* extends to the proscriptions contained in
4 Measure 21-177 as applied to properties subject to the Forest Practices Act, ORS Chapter
5 527. Therefore, the County asks the Court to determine if it is preempted from applying the
6 provisions of Measure 21-177 to property, including Plaintiffs’ property, otherwise regulated
7 by the Forest Practices Act. ¹²

8 **Application of that case law to Plaintiffs’ claims - - Preemption under ORS 30.930 to**
9 **30.947 Farming and Forest Practices (“Right to Farm and Right to Forest Act”)**¹³

10 The manner in which the so-called “right to farm practices” and “right to forest
11 practices” are insulated from either local government ordinance or regulation is the most
12 difficult to gauge of Plaintiffs’ articulated state laws preempting this measure. These
13 provisions of law contain none of the broad sweeping pronouncements of the regulation of
14 pesticides in ORS Chapter 634 or lands subject to the Forest Practices Act in ORS Chapter
15 527. Instead it specifically targets limits in two areas:

- 16 (1) A prohibition on local laws (ordinance or regulation) that makes “generally
17 accepted, reasonable and prudent (forest and farm) operations” in conjunction
18 with farm use, or forestry in compliance with the Forest Practices Act, ORS
19 30.930, a nuisance or trespass. ORS 30.934 and ORS 30.935; and

¹² County would again point out that the preemptive effect of Measure 21-177 would not apply to County owned property, even that property is subject to the Forest Practices Act, ORS Chapter 527. While the Act regulates the use of aerially applied pesticides in forest operations, it does not **require** the use of aerial application on forest operations. This initiative would still prohibit the County from aerially spraying on its own properties, which is not in conflict with (or preempted by) the FPA.

¹³ See *Hale v. State*, 259 Or App 379, 314 P3d 345 (2013).

1 (2) Immunity from any private right of action or claim for relief “based on nuisance
2 or trespass” for engaging in allowed farming and forest practices. ORS 30.936
3 and 30.937.

4 ORS 30.939 further identifies when use of pesticides is considered a farming practice and
5 forest practice. Aerial spraying of pesticides clearly is one of those practices in both farming
6 and forestry.

7 There are no cases addressing the Act’s preemptive effect.¹⁴ By itself, this Act does
8 not appear to preclude a ban on aerial spraying since the Measure does not on its face create
9 or implicate a nuisance or trespass claim. However, the Lincoln County Code, LCC Chapter
10 10, Enforcement, which would be the tool for implementation of the Ordinance adopted
11 through the Measure,¹⁵ does make all violations of the County Code enforceable as nuisance
12 actions. LCC 10.200 (“every act or thing done, or anything within the limits of Lincoln
13 County, that is in violation of provision of the Lincoln County Code is declared to be: (1) a
14 nuisance . . . ; and (2) a violation.”) Therefore there is a possible conflict between the
15 immunity provisions of the State law and the local enactment, which could be read to
16 preempt the portions of the Measure which conflict with and eliminate that immunity.¹⁶

17

¹⁴ Two cases involving the Act have been before the courts. One was dismissed because the sought for remedy (declaring that the statute by depriving plaintiffs’ of a remedy, was unconstitutional under Article I, Section 10 of the Oregon Constitution) was too speculative under the facts of the case, and therefore there was no justiciable controversy for the Court to decide. *Hale* at 386-388. The other determined an excessively barking dog was a “farm practice” under the facts as presented immune from prosecution via county ordinance as a nuisance violation. *Hood River County v. Mazzara*, 193 Or App 272, 89 P3e 1195 (2004).

¹⁵ All Ordinances of this nature are eventually codified into the Lincoln County Code. *See Codification Note*, Lincoln County Code at <http://www.co.lincoln.or.us/county counsel/page/lincoln-county-code>

1 **Other preemption arguments in Plaintiffs’ Second Claim.**

2 County will defer to its reply to Plaintiffs’ motion for summary judgment other
3 arguments raised by Plaintiffs’ supporting their declaratory action claim that the Measure is
4 invalid, including but not limited to vesting of exclusive lawmaking authority of the State
5 Board of Forestry. Likewise, Plaintiffs have raised a number of challenges and claims under
6 the Oregon Constitution.¹⁷ Because Oregon Courts have adopted the principle that
7 constitutional issues will not be decided where there is an adequate statutory basis for a
8 decision, *See Planned Parenthood Association, Inc. v Department of Human Resources of*
9 *State of Oregon*, 297 Or 562, 564, 687 P2d 785 (1984) (and cases cited therein), the County
10 will await rulings by the Court on the statutory and case law challenges before addressing
11 the Constitutional issues.¹⁸

12 **Intervenor-Defendant’s First Affirmative Defense and First Counterclaim**

13 As the parties are filing motions and cross motions for summary judgment and have
14 agreed to a schedule to file a reply to those motions, County will address the Intervenor-
15 Defendant’s arguments in its reply.¹⁹ Suffice it to say at this juncture the County does not
16 agree with Intervenor’s characterization of the relationship of federal, state and local laws
17 and authority as articulated in their pleadings and incorporated into the Measure as drafted.

¹⁶ Specifically Section 5 – Enforcement (a) violations, (c) damages, and (d) filing of private actions prohibition, and Section 6-Enforcement - Corporate Powers (a) corporation rights and (b) corporate “future lost profits” . Measure 21-177.

¹⁷ *See* Plaintiffs’ Amended Complaint , paragraphs 14 (f) equal privileges and immunities challenge under Article I, section 20, of the Oregon Constitution; and 14 (g) containing multiple challenges for - rights to remedies, Article I, section 10, - takings without just compensation, Article I, section 18, - and equal privileges and immunities claims, Article I, section 20.

¹⁸ The County stands ready to brief those issues if requested by the Court, and by this action does not waive its own concerns and claims regarding the constitutionality of the Measure.

¹⁹ As also noted previously, County will provide a responsive pleading and second motion for summary judgment if Intervenor-Defendant Siletz River’s motion to intervene is granted.

1 County will also address its additional arguments concerning the invalidity of Sections 3(f),
2 (g) and (h) in its reply, but will address non-constitutional arguments that Section 5(d) is
3 invalid in this Memorandum.

4 **Section 5(d) of the Measure**

5 Section 5(d) of Measure 21-177, the so called “direct action” provision of the
6 Ordinance, provides:

7 If the County Government fails to enforce or defend this law, or a court fails
8 to uphold this law’s limitations on corporate power, this law shall not be
9 affected by the failure to enforce or defend, or by the failure to uphold the
10 limitations on corporate power, and any person may then enforce the rights
11 and prohibitions of this law through direct action. If enforcement through
12 direct action is commenced, this law shall prohibit any private or public actor
13 from filing a civil or criminal action against those participating in direct
14 action. If filed in violation of this provision, the applicable court must
15 dismiss the action promptly, without further filings being required of direct
16 action participants. “Direct action” as used by this provision shall mean any
17 activities or actions carried out to directly enforce the rights and prohibition
18 contained with this law.” (sic)

19
20 This provision fails on many levels. First, on its face, it attempts to proscribe the
21 authority of the courts (“If . . . a court fails to uphold this law’s limitations . . . any person
22 may enforce . . . through direct action”). The Courts have jurisdiction to review and
23 invalidate county ordinances. ORS 203.060.²⁰ That includes the authority to invalidate
24 ordinances “on account of unreasonableness, procedural error in adoption, or conflict with
25 paramount state law or constitutional provision.” *Id.* The Courts also have the
26 constitutional and statutory authority to review governmental actions and ordinance
27 violations (including but not limited to ORS Chapter 34, Writs of Review, Mandamus and
28 Habeas Corpus; ORS Chapter 28 Uniform Declaratory Judgment Act; ORS Chapter 153

1 Violations and Fines). The Lincoln County Code vests jurisdiction and venue over code
2 violations in the state courts. LCC 10.330.²¹ This provision violates the judicial authority to
3 determine violations, by authorizing an individual to determine if a court “fails to uphold the
4 law”, then insulating the person from civil or criminal action for any direct action he or she
5 takes. That is both unreasonable and unlawful.

6 Secondly, the provision insulates the person taking direct action from criminal
7 liability. In that sense, this is an attempt at local criminal law displacing state criminal
8 law.²² It is presumptively invalid, *Dollarhide, supra*, at 501-502. The presumption is
9 nowhere overcome in any arguments proffered in support of the Measure.

10 There are other arguments, constitutionally based and otherwise, supporting the
11 unreasonableness of this provision. This should be sufficient support to invalidate this
12 Section of the Measure without further analysis.

13 **County’s First Counterclaim**

14 County is a “person”, ORS 28.130, entitled to a determination by the Court of the
15 construction or validity of Measure 21-177 as an ordinance of the County and is entitled to a
16 declaration of rights, status or other legal relations under the ordinance under the Uniform
17 Declaratory Judgments Act, ORS 28.010 through 28.160 (the Act).

18 County’s position, articulated above, is that it is not fully preempted from regulating
19 pesticides within its jurisdiction. It may regulate its own property under both ORS Chapter
20 634 and ORS Chapter 527 consistently with those laws. It may also regulate pesticide

²⁰ This includes ordinances adopted or ratified by the electors of the County, ORS 203.045.

²¹ County notes the jurisdiction of the former district courts has been assumed by circuit courts when the district court was abolished.

1 application for properties subject to the Forest Practices Act within Urban Growth
2 Boundaries if it follows the statutory scheme established to assume responsibility for those
3 areas.²³ Because the County is not fully preempted, we request the Court declare its rights
4 under the Measure as follows:

5 **Defining “aerial spraying” as used in Sections Sections 2(c) and 4(b) of the Measure.**

6 Courts use the same methodology to construe local ordinances as are used to
7 construe state statutes. *City of Eugene v. Comcast of Oregon II, Inc.* 359 Or 528, 540, 375
8 P3d 446 (2016). That requires looking primarily to the ordinance’s text, context and
9 legislative history, and if helpful general rules of statutory construction. *State v. Gaines*, 346
10 Or 160, 171-72, 206 P3d 1042 (2009) (setting forth methodology); *Alfieri v. Solomon*, 358
11 Or 383, 392, 365 P3d 88 (2015); *Lincoln Loan v. City of Portland*, 317 Or 192, 199, 855
12 P2d 151 (1993) (applying methodology to local enactment).

13 “Aerial spraying” is found throughout the Measure. In Section 1 – Purpose,
14 reference is made in several paragraphs to aerial spraying. For our purposes of determining
15 its meaning, the term is most clearly associated with:

16 “. . .clear-cut logging operations and the aerial spraying of pesticides before
17 and after replanting . . . “(5th paragraph of Section 1)

18
19 “ Current law and regulations permit and protect the practice of aerial spraying
20 of pesticides, . . .” (6th paragraph of Section 1)

21
22 In Section 2-Definitions, subsection (c) provides:

23 “ ‘Engage in aerial spraying of pesticides’ means the physical deposition of
24 pesticides into the land, water, and air by any aerial method, including, but not
25 limited to, all actions taken to prepare for that physical deposition.”

²² This does much more than provide a possible defense to a criminal action. It prohibits the prosecution of any crime by requiring the court to *dismiss* the criminal action.

²³ Consistent with ORS Chapter 634.

1

2 Thereafter the term is used to assert enumerated rights to be free from, and
3 prohibitions against, aerial spraying's effects. *See* Sections 3 (a), (b), (c) and (g); and
4 Section 4 (b) and (c).

5 Merriam Webster's most relevant definition of "aerial" is "effected by means of
6 aircraft".²⁴ Examples of the term used in this version include, *aerial* transportation, *aerial*
7 views, and *aerial* spraying. *Id.* The term is clearly intended to apply to aircraft application
8 technologies.

9 As used in the context of other provisions of the Measure the "current law and
10 regulations" which regulate aerial spraying also regulate and permit aerial pesticide
11 application through a certification process involving aircraft. ORS 634.128. This requires
12 not only an applicator's certification to apply pesticides by aircraft, but a valid pilot
13 certification for the type of aircraft being used. ORS 634.128(1) and (2)(b). It also requires a
14 specified number of hours in "flight". ORS 634.128(2)(c).

15 This construction is consistent with the requirements under ORS Chapter 527 for
16 forest operations. ORS 527.672. Aerial application in forest operations must comply with
17 ORS Chapter 634 (compliance with aerial pesticide applicator responsibilities) as well as
18 additional restrictions on aircraft operators. *Id.*

²⁴ Found online at: <https://www.merriam-webster.com/dictionary/aerial> ; "Aerial." Merriam-Webster.com, Merriam-Webster, www.merriam-webster.com/dictionary/aerial. Accessed 2017. Merriam Websters Third New International Dictionary also defines aerial to include "of or relating to aircraft", with the example "aerial navigation" (unabridged version 2002).

1 Nothing in the legislative history of this Measure contravenes this interpretation or
2 adds to the plain meaning in the text and context described above.²⁵ Arguments in favor of
3 the Measure contained in the Lincoln County Clerk’s Voter’s Pamphlet use references to
4 airplanes and helicopters in defining aerial spraying but also identify other methods of
5 application, such as backpack sprayers, as alternatives to aerial spraying. *See* Declaration of
6 Wayne Belmont, page 2, ¶ 5 ((passages highlighted in yellow to the side).

7 There is no other plausible definition of “aerial spraying” for this Measure. County
8 requests the Court construe this term to only apply to certified aerial pesticide applicators
9 under Oregon law and to no other pesticide application methodology.

10 **Defining “corporations” to not include individuals and natural persons.**

11 County requests this determination because of the possibility that the preemption
12 under ORS Chapter 527 would not extend to the County regulation of aerial pesticide
13 applications within Urban Growth Boundaries.²⁶ “Corporations” are fairly broadly defined
14 in the Measure:

15 Section 2 – Definitions

16 (a) “Corporations,” for purposes of this Ordinance, includes any corporation; limited
17 partnership, limited liability partnership, business trust, public benefit
18 corporation, business entity, or limited liability company organized under the
19 laws of any state of the United States or under the laws of any country. The term
20 includes all public corporations, state and federal agencies, and any state and
21 federal entity.
22

²⁵ Legislative history for a ballot measure can include the ballot title and explanatory statement, *Papworth v. Oregon Department of Land Conservation and Development*, 255 Or App 258, 267-8, 296 P3d 632 (2013). This ballot measure title was modified and certified by the Court in 15CV19954. The modified Ballot Title simply repeats the measure language with no clarification.

²⁶ This would require further action with the Departments of Land Conservation and Development, State Forestry, and cities in the County to comply with requirements of ORS Chapter 527.

1 **CERTIFICATE OF SERVICE**

2 Pursuant to ORCP 9, I hereby certify that I served a true and accurate copy of the
3 foregoing MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS DANA JENKINS'
4 AND LINCOLN COUNTY'S CROSS MOTION FOR SUMMARY JUDGMENT upon the
5 following by e-service:
6

7 Gregory A. Chaimov, OSB #822180
8 Davis Wright Tremaine LLP
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11 Attorney for Plaintiffs

12 and

13 Ann. B Kneeland, OSB #992977
14 Community Environmental Legal Defense Fund
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17 Attorney for Intervenor-Defendants
18 Lincoln County Community Rights
19
20
21

22
23 DATED 11TH day of August, 2017
24
25

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