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

REX CAPRI, **WAKEFIELD FARMS, LLC** Plaintiffs, v. **DANA W. JENKINS, LINCOLN COUNTY** Defendants. and **LINCOLN COUNTY COMMUNITY RIGHTS** Intervenor-Defendant.	Case # 17CV23360 **DEFENDANTS DANA JENKINS' AND LINCOLN COUNTY'S RESPONSE TO INTERVENOR-DEFENDANT LINCOLN COUNTY COMMUNITY RIGHTS' CROSS MOTION FOR SUMMARY JUDGMENT**

In response to Intervenor-Defendant Lincoln County Community Rights' Cross Motion for Summary Judgment, Defendants Dana Jenkins and Lincoln County (hereafter collectively County) offer the following arguments supported by points and authorities:

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1. County concurs with Intervenor-Defendant that Measure 21-177 was properly placed before the voters of Lincoln County and enacted by a majority of the voters in the County.

2. Intervenor-Defendant mischaracterizes the "unenumerated" rights of the people under the guise of rights of local community self-government. It misstates the authority to enact local legislation contrary to long established and recognized legal precedent addressing the relationship of state and local laws under the Oregon Constitution as interpreted by Oregon Courts. [1]

3. Contrary to Intervenor-Defendant's arguments, Article I, Sections 1 and 33, Oregon's Constitutional Bill of Rights, do not establish rights specifically to any local community. Intervenor – Defendant admits that it does not and cannot cite to any Oregon case that supports its position on local community rights. On the contrary, Oregon Courts have repeatedly interpreted the Oregon Constitution and Oregon laws to clearly articulate the boundaries of local enactments and the relationship of state and local laws.

4. While Intervenor-Defendant's exposition on the nature of the Declaration of Independence, Mayflower Compact, Articles of Confederation and early development of the US Constitution are instructive and historically interesting points of view, it nonetheless provides no support for its position that local enactments are immune from state or federal law preemption. [2]

Points and Authorities

Measure 21-177 was properly placed on the ballot and legally enacted by the voters of Lincoln County.

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[1] County will only address its arguments to Oregon laws, the Oregon Constitution, and Oregon Cases since they are dispositive of the issues raised by the parties. There is no need to resort to analysis of the federal constitution at this time, although there are similar issues and mischaracterizations about the federal / local law relationship, too.

[2] A very similar justification (especially use of the Declaration of Independence, quoting John Adams, asserting Second Amendment and Ninth Amendment "rights of the people", asserting Article 1, Section 33 of the Oregon Constitution prohibiting impairing or denying rights of the people and many other asserted local self-governance rights,) underpins the local measure *approved by over 60% of the voters* in Coos County Oregon that authorizes the Sheriff of Coos County to determine if any provision of state or federal law violates the enumerated firearms rights of Coos Citizens and is therefore enforceable. In short the Sheriff can nullify state and federal laws. 2015 Coos County Second Amendment Preservation Ordinance. It is our position that the Coos County Ordinance is not supported by the law either.
http://www.co.coos.or.us/Portals/0/County%20Clerk/Elections/Election%202015/November%20Election/secondamendmentpreservationordinance.pdf?ver=2015-10-20-111618-21

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County has addressed in County's own cross-motion for summary judgment and the response to Plaintiff's motion for summary judgment, the issue of whether or not the Measure 21-177 election should be invalidated based on Oregon constitutional and statutory questions raised by Plaintiffs in their motion for summary judgment. County therefore concurs with Intervenor - Defendant that the election was valid. That is the case even if the measure may be preempted. *LaGrande/Astoria v PERB*, 281 Or 137, 576 P2d 1204, *aff'd on reh* 284 Or 173, 586 P2d 765 (1978) holding that even if a matter is subject to state preemption, it may nonetheless be the proper subject of local initiative and referendum powers.

Subsequent substantive challenges to the Measure occur once it is enacted. *See e.g. Foster v. Clark*, 309 Or 464, 469, 790 P2d (1990), which held that a:

> " . . .court will not inquire into the substantive validity of a measure - i.e. into the constitutionality, legality or effect of the measure's language – unless and until the measure is passed. To do so otherwise would mean that the courts would on occasion be issuing an advisory opinion"

"Unenumerated" rights of community local self-government are mischaracterized by Intervenor-Defendant.[3]

Intervenor – Defendant at length describes what it characterizes as "unenumerated" constitutional rights to "safety" as inalienable, fundamental and inherent in Oregon in support of its claim to a "right" of local self-government under Measure 21-177. It seeks to assert, contrary to established law, new contexts of authority sharing and rights for

[3] Lincoln County is not asserting an argument pro or con to the central question of whether or not current laws and practices around aerial spraying should or should not be reexamined. Those are ultimately political questions in the right political arena. County's concerns are focused not with the ultimate ends of the Measure 21-177, but the means in which this Measure attempts to accomplish those ends.

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governmental legitimacy, community self-government and assertion of that self-government. Measure 21-177 Section 1 Purpose, and Section 3 Statements of Law. It arguably seeks to nullify any state or federal law to the extent it violates the rights of the Measure. Measure 21-177 Section 4(d).[4]

The fact that Measure 21-177 is a voter initiated Ordinance does not expand the scope of authority to enact a law beyond that which the County holds itself. Put more eloquently, the Oregon Supreme Court has stated:

> "Initiative and referendum are a sharing of legislative power between the people and their representatives, not a grant of additional legislative power to either." *City of Roseburg v. Roseburg City Firefighters*, 292 OR 266, 287, 639 P2d 90 (1981).

That principle applies to general law counties, as well as home rule counties and cities. *AFSCME Council 75, Local 350 v. Clackamas County*, 69 Or App 488 (1984). The authority cannot be made any greater because it involves voters.

Lincoln County is a general law county; that is it has not adopted a home rule charter. Lincoln County's authority over "matters of county concern" is broad and sweeping. It can generally be described as allowing the governing body **or electors** by ordinance to exercise authority over "matters of county concern" to the fullest **extent allowed by the Constitutions and laws of the United States and of the state of Oregon**. ORS 203.035(1)

[4] The County also recognizes there are very specific and targeted prohibitions and references to "corporations" in the Measure that may be of questionable legality. Except as to County's own request to interpret the Measure to clarify application of the prohibitions against corporations (versus individuals), the County will not address the corporation question. County does note for the record, that each of the parties (except Plaintiff Capri) is a corporation - - Lincoln County is a municipal corporation (ORS 33.719(1)(b); Intervenor-Defendant Lincoln County Community Rights is a nonprofit corporation (organized under ORS Chapter 65); and Plaintiff Wakefield Farms is a limited liability company (LLC) (organized ORS Chapter 63) but is a corporation for purposes of Measure 21-177 by definition in Section 2(a) of the Measure.

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(Emphasis added). The powers are to be liberally construed and as extensive as possible **under the laws and constitution**. ORS 203.035(2) (Emphasis added). The authority granted counties under ORS 203.035 is the same as the authority granted home rule counties under the Oregon Constitution, Article IV, Section 10. *Allison v. Washington County*, 24 Or App 571, 548 P2d 188 (1976). The Court in Allison held that:

> "ORS 203.035 (which became law via Oregon Laws 1973, ch. 282) obliterates most distinctions between the powers of general law counties and home rule counties." *Id* at 581

The Court, however, went on to hold that the power is not without limitations:

> "General grants of power to counties convey exactly that broad grant articulated therein (under Art. VI, section 10 grants of home rule authority to counties over "matters of county concern), **except that which is preempted by state law**. *Schmidt v. Masters*, 7 Or App 421, 429, 490 P2d 1029 (1971), [rev den] (1972). Therefore, **in the absence of state preemption or limiting charter provision,** home rule and general law counties have the same legislative authority. *Allison,* 23 Or App at 581, 548 P2d 188. (Emphasis added).

That authority of the County, and by extension to the voters of the County using the initiative and referendum process, is clearly articulated in the Oregon Constitution (Article IV, Section 10), state law (ORS 203.035 for the general grant of authority) and as interpreted by the Courts. See also *GTE Northwest, Inc. v. Oregon Public Utility Comm'n*, 179 Or App 46, 39 P3d 201 (2002), *rev den*, 334 Or 492, 52 P3d 1057 (2002) a Lincoln County case in which the extent of county authority was measured against the absence of any state preemptory laws.

Local self-governmental authority, therefore, is not plenary, preemptory of state and federal laws, self-executing or an inalienable or fundamental right under the Oregon

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Constitution or laws of the state. Rather the exercise of local authority, though broad, is both established, and constrained, by the Oregon Constitution and state law.[5]

Article I, sections 1 and 33 of the Oregon Constitution do not constitute a separate grant of rights to local communities.

No existing Oregon jurisprudence supports Intervenor-Defendant's assertion that Article 1, sections 1 and 33 independently or together support an inalienable and inherent right to self-government. While the *Priest*[6] case cited by Intervenor – Defendant sets forth an analytical framework for constitutional analysis of provisions of the Oregon Constitution, it has never been applied in this context. Intervenor – Defendant notes only dissenting opinions support for a possible analytical process for Article 1, section 33 and no applicability to Article 1, section 1. And in no case is there support for the introduction of new local community rights. County would also note that the enumerated sections are contained in Oregon's Bill of Rights, which preserve and protect the rights of individuals against government action, not authorize the government to act (whether on a state or local level). *See Does 1,2,3,4,5,6 and 7 v. State*, 164 Or App 543, 993 P2d 822 (1999), *rev den*, 330 Or 138, 6 P3d 1098 (2000). Additionally, what little case law does exist holds that

[5] The most comprehensive judicial analysis of this question is found in the following cases, listed below with summaries of the holdings of court:

LaGrande/Astoria v. PERB, 281 Or 135, 576 P2d 1204, aff'd on reh'g 284 Or 173, 586 P2d 765 (1978) local enactments of substantive law in areas of state regulation are permissible so long as the enactments are not incompatible with state law, because "both cannot operate concurrently or because the Legislature meant its law to be exclusive" Id at 148-149.

State ex rel Haley v. City of Troutdale, 281 Or 203, 576 P2d 1238 (1978); *AT and T Commnications v. City of Eugene*, 177 Or App 379. 35 P3d 1029 (2001, rev den 334 Or 491, 52 P3d 1056 (2002); and *Thunderbird Mobile Club v. City of Wilsonville*, 234 Or App 457, 228 P3d 650, rev den 348 Or 524, 236 P3d 153 (2010) holding respectively: example of no manifest intent to exclude local provisions from state building code; intent to displace local regulation must be apparent (not implied); and when the legislature wishes to preempt local authority it knows how to clearly do so (see cases and statutes cited therein)

[6] *Priest v. Pearce*, 314 Or 411, 416, 840 P2d 65 (1992).

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Article 1, Section 1 does not create any individual fundamental or inalienable natural rights. *Martinez v. Kulongoski*, 220 Or App 142, 159, 185 P3d 498 (2008). Intervenor - Defendant cites *Schubel v. Olcott*, 60 Or 503, 513 (1912) as supporting local self-government. That case predates the specific constitutional and statutory grants of authority to counties found in Article IV, section 10 of the Oregon Constitution (adopted in 1958) and the most current version of ORS 203.035 adopted in 1973. As admitted by Intervenor – Defendant, no Oregon Court has recognized an actionable right of local community self-government. Intervenor – Defendant's Cross-Motion for Summary Judgment, page 15.

Intervenor – Defendant's historical background does not provide support for finding inherent, inalienable and fundamental rights of local community self-government.

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Unfortunately, Intervenor – Defendant limits its analysis of historical antecedents to support its position of inherent local self-government rights.[7] There is no context for, or any reference to, the longstanding political, constitutional and judicial examination of issues of federalism; federal, state and local preemption; the Supremacy Clause of the \United States Constitution (Article VI); jurisprudence and debate concerning the 14th Amendment and "states" rights; the Guarantee Clause of the 4th Amendment[8] and numerous other applicable legal and historical criteria which support existing understandings and legal determinations concerning preemption and federal/state/local law relationships as currently exist in Oregon and the United States. While Intervenor – Defendant introduces interesting

[7] County notes there are numerous significant scholarly legal discussions on the inapplicability of the Declaration of Independence as law. *See e.g.* "Why the Declaration of Independence is Not Law - - And Why It Could Be", Fredrick Schauer, University of Virginia Law School, David and Mary Harrison Distinguished Professor of Law, in Southern California Law Review, Volume 89, Number 3 (March,, 2016). Professor Schauer begins his analysis with the statement . . "the constitution is universally understood to be law, and the Declaration of Independence is widely (even if not universally) understood not to be". In that same volume of scholarly articles, Darrell A.H. Miller, Professor of Law, Duke University School of Law, argues that the "revolutionary aspect" ("right to abolish and alter") in the Declaration, unlike the concepts of the Declaration of "equality" and "liberty" which are capable of being enforced as positive law (and were incorporated in the 13th and 14th Amendments), cannot be "expressed in anything resembling law". For him, that is why advocates who try to use that revolutionary value as judicially enforceable law in the same way as the freedom and equality values of the Declaration are mistaken. He cites the example of Second Amendment advocates as how this is mistakenly used. Southern California Law Review, Volume 89, Number 3, pp 601 – 619 (March 2016). Refer especially to pages 602, and 616 -619. There are many other scholarly articles on the Declaration in this symposium. One of the more interesting, "To Alter or Abolish", co-written by Jack M. Balkin, Knight Professor of Constitutional Law and the First Amendment at Yale Law School and Sanford Levinson, Centennial Chair of Law at the University of Texas Law School, concludes a lengthy analysis of the "Right of the People to Alter or Abolish" with the position that the Declaration offers little help in explaining the contours of the right to change governments, and its value is not as "clear guidelines or justifications for action", but rather as a source "posing questions that others will have to answer- and answer for- in the crucible of practical politics." Southern California Law Review, Volume 89, Number 3, pp. 389- 426, page 426 (March, 2016)

[8] A very interesting exposition on public lawyers' and judges' "responsibility" to insure a republican form of government required in the 4th amendment as it relates to the initiative and referendum process is found in the scholarly law review article "What Is a Constitution, What is Not, and Why Does it Matter?" by former Oregon Supreme Court Justice Hans A. Linde, Oregon Law Review, Volume 87, Number 3, pp 711-730, 2008.

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arguments for a reexamination, politically, of these relationships, they do not offer legal support for Intervenor – Defendant's position on community rights.[9]

Conclusion

Intervenor – Defendant's interpretations of the status of the existing law in the State of Oregon and its implications for Measure 21-177 are wrong. Oregon does not recognize an extra-legal, independent right of local community self-government that is fundamental, inherent, inalienable and constitutional as Intervenor - Defendant has argued. The concept of "ceiling" preemption has no basis under law. Therefore, the Court should deny Intervenor – Defendant's Cross Motion for Summary Judgment in all particulars and grant County's Cross Motion for Summary Judgment.

DATED this 18th day of September, 2017

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[9] In its answers to Plaintiffs' Amended Complaint and the Cross-Claim of Intervenor – Defendant, County raised the defense of void for vagueness against several of the provisions of the Ordinance as adopted in Measure 21-177. County recognizes that the standard for finding an enactment void for vagueness sets a high bar itself. *See e.g. Oregon Restaurant Association v. City of Corvallis*, 166 Or App 506, 999 P2d 518 (2000) and *State v. Chakerian*, 325 Or 370, 381-82, 938 P2d 756 (1997). County does not waive its position that provisions of Ordinance are void for vagueness as it has pled and will preserve that position as necessary for appeal purposes, but will not further expand on its arguments at this time. If the Court rejects Intervenor – Defendants premise of self-executing and expanded community rights, that should provide County the necessary guidance to amend the Ordinance once all appeals are exhausted to clarify the Ordinance in accordance with law.

CERTIFICATE OF SERVICE

Pursuant to ORCP 9, I hereby certify that I served a true and accurate copy of the foregoing DEFENDANTS DANA JENKINS' AND LINCOLN COUNTY'S RESPONSE TO INTERVENOR-DEFENDANT LINCOLN COUNTY COMMUNITY RIGHTS' CROSS-MOTION FOR SUMMARY JUDGMENT upon the following by e-service:

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