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

REX CAPRI,)
WAKEFIELD FARMS, LLC)
)
Plaintiffs,)

Case # 17CV23360

v.)

DEFENDANTS
DANA JENKINS' AND
LINCOLN COUNTY'S
RESPONSE TO PLAINTIFFS
REX CAPRI'S AND WAKEFIELD
FARMS, LLC'S MOTION FOR
SUMMARY JUDGMENT

DANA W. JENKINS, LINCOLN COUNTY)
)
)
Defendants.)

and)

LINCOLN COUNTY COMMUNITY RIGHTS)
)
Intervenor-Defendant.)

In response to Plaintiffs Rex Capri's and Wakefield Farms, LLC's 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 **1. Plaintiffs’ arguments that the Ordinance enacted in Measure 21-177 is invalid**
2 **in its entirety are wrong. Although the Ordinance mischaracterizes the authority of**
3 **the County (via electors) to substantively preempt state and federal law, the Ordinance**
4 **properly addresses matters of county concern not beyond the power of the County to**
5 **regulate. The remedy is to strike portions of the Ordinance, or clarify its application**
6 **as requested by County.**

7
8 **2. The Court lacks jurisdiction to hear Plaintiffs’ post-election challenge to a pre-**
9 **election decision made by the Court finding Measure 21-177 does not violate the full**
10 **text requirements of the Oregon Constitution, Article IV, section 1(2)(d).**
11 **Alternatively, the Courts decision in 15CV19995 is not altered by Plaintiffs’ reference**
12 **to *Dolan v. Barnard*, 5 Or 390, 392 (1875).**

13
14 **Points and Authorities**

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16 At the outset of this response, County will note it has already provided extensive
17 arguments in its own cross-motion for summary judgment and in response to Intervenor –
18 Defendants’ cross-motion for summary judgment on the application of state preemption
19 laws and case law to Measure 21-177. While County’s position on the extent of that
20 preemption does not track directly with Plaintiffs’ position, both the County and Plaintiffs
21 agree there is some level of state preemption occurring. County will rely on its previous
22 submissions to address its arguments.

23 That leaves two major areas of County disagreement with Plaintiffs’ positions as
24 outlined above and explained below:

25 **Measure 21-177 is not invalid in its entirety.**

26
27 Plaintiffs appear to start out arguing that the Ordinance adopted in Measure 21-177 is
28 invalid in its entirety, citing *State v. Logsdon*, 165 Or App 28, 995 P2d 1178 (2000), *rev den*
29 330 Or 362, 6 P3d 1103 (2000). Plaintiffs propose that the Ordinance’s purported “pre-

1 emp[ti]on] of state and federal law” renders the Ordinance void in its entirety.¹ This is a
2 much too broad reading of *Logsdon* and *Allison v. Washington County* (cited in footnote 1).
3 Aerial spraying, the principle subject of the Ordinance, is a matter of county concern.² It is
4 admittedly an area of limited County authority to regulate, but nonetheless is an area the
5 County and its citizens can address. Therefore, the Ordinance passes the first prong of the
6 *Logsdon* (and *Allison*) analysis - - it involves a matter of county concern. In *Logsdon*, once
7 the prohibition (due process requirements for all public officials, including federal and state
8 officials) was stricken, no argument was made that anything was left of the Ordinance.

9 That being said, County concurs with Plaintiffs that several portions of the Ordinance
10 are unenforceable, some because the County cannot legislate in those areas and others
11 because the authority of the County is limited by state preemption. For that reason the
12 County joins with Plaintiffs in asserting that sections 2(a) and 4(b) as governing conduct of
13 state and federal governments, and (6)(a) denying power to assert state and federal
14 preemptive laws, are invalid and unenforceable. The same applies to sections 6(c) asserting
15 other laws adopted by state, federal or international agencies apply only to the extent they do
16 not violate the Ordinance and 4(d) concerning the invalidity of permits, licenses and similar
17 authorizations from state and federal entities that would violate rights in the Ordinance
18 Those are also invalid and unenforceable.³

19 **Post-Election Challenge to Validity of Election is not allowed.**

¹ See Plaintiffs’ Motion, pp. 5-8. Plaintiffs also rely on *Allison v. Washington County*, 24 Or App 571, 548 P2d 188 (1976) which supports the position that statutory authority for general law counties, while broad and sweeping, limits electors to exercise authority only over “matters of county concern.”

² As argued extensively in County’s own Motion for Summary Judgment.

³ County has already addressed the invalidity of sections 3 (e-h) (local community self-government rights) in its response to Intervenor-Defendant’s Cross-Motion for Summary Judgment and Section 5 (d) “direct action” in County’s own Motion for Summary Judgment.

1 Plaintiffs assert under ORS 249.910(1) their standing and authority to challenge - -
2 post- election - - the validity of the election itself by arguing that Article IV, section 1(2)(d)
3 of the Oregon Constitution (the full text requirement) was violated in a claim against
4 Defendant Lincoln County Clerk Dana Jenkins.⁴ County has already articulated its position
5 that under ORS 249.910(1) this is a post-election attempt to mount a pre-election challenge
6 that is no longer available to Plaintiffs.⁵

7 Since County alternatively asked the Court to reaffirm its decision that the Measure
8 does not violate the full text requirement, and Plaintiffs raise a new case law argument in
9 opposition to that determination, County will briefly address the applicability of that cited
10 case, *Dolan v. Barnard*, 5 Or 390 (1875). The *Dolan* case was available for the Court to
11 consider in *Schnell v. Appling*⁶ (1964) when the court ruled that the “full text requirement of
12 our constitution means exactly what it says. The petition must carry the exact language of
13 the proposed measure. It need include nothing more.” *Schnell* at 204. The focus is on the
14 text of what is created or amended, not what is repealed directly or by implication. *Bird v.*
15 *The County of Wasco*, 3 Or 282, 1871 WL 1145 (1871); *Warren v. Crosby*, 24 Or 558, 34 P
16 661 (1893); *Carey v. Lincoln Loan Co.*, 203 Or App 399, 125 P3d 814 (2005); *aff’d* 342 Or
17 530, 157 P3d 775 (2007). *Dolan* itself was aimed at the practice of amendment of state
18 statutes by reference, not to the other forms of decision making. *State v. Norris*, 188 Or App

⁴ It appears from this motion that Plaintiffs are seeking to use this argument to simply void the measure in its entirety. In their amended complaint Plaintiffs allege that the measure was not validly adopted in the first place. The challenge is to Defendant Lincoln County Clerk Dana Jenkins’ decision to certify the Measure as approved by the electors - - based on a pre-election decision made by the Clerk, upheld by this Court.

⁵ See County’s Memorandum of Law in Support of its Motion for Summary Judgment, pp. 1-5.

⁶ 238 Or 202, 395 P3d 113

1 318, 337-338, 72 P3d 103 (2003). Therefore, it adds nothing to the analysis and decision
2 this court has already made.

3

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Conclusion

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6 Plaintiffs' Motion for Summary Judgment parallels County's Motion in several
7 respects. Plaintiffs, however, go too far when they ask the Court to invalidate and void the
8 entire Ordinance as enacted in Measure 21-177 by the voters of Lincoln County. The subject
9 matter of that Ordinance - - regulation of aerial spraying of pesticides - - is a matter of
10 county concern, albeit with sideboards on the extent and manner in which the County, and
11 its voters, can exercise that regulation. Certain provisions of the Ordinance are invalid and
12 should be struck as argued by both Plaintiffs and the County. The nature of community
13 rights and local self-government as asserted by Intervenor – Defendant is not as broad or
14 pervasive as contemplated in the Ordinance and should also be clarified by the Court. But
15 the election was valid, it met all requirements of the Oregon Constitution and with the
16 Severability provisions of Section 7 of the Ordinance, and clarification of terms as requested
17 by County, portions of the Ordinance remain to be implemented. Therefore, the Court should
18 deny Plaintiffs Motion for Summary Judgment in part as noted above and grant County's
19 Cross Motion for Summary Judgment to salvage what remains of the Measure.

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DATED this 18th day of September, 2017

s/Wayne Belmont
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1 **CERTIFICATE OF SERVICE**

2 Pursuant to ORCP 9, I hereby certify that I served a true and accurate copy of the
3 foregoing DEFENDANTS DANA JENKINS' AND LINCOLN COUNTY'S RESPONSE TO
4 PLAINTIFFS REX CAPRI'S AND WAKEFIELD FARMS, LLC'S MOTION FOR
5 SUMMARY JUDGMENT upon the following by e-service:
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