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

REX CAPRI, WAKEFIELD FARMS, LLC,)	Case No. 17CV23360
)	
Plaintiffs,)	INTERVENOR-DEFENDANT’S
)	RESPONSE TO PLAINTIFFS’
v.)	MOTION FOR SUMMARY
)	JUDGMENT AND DEFENDANT’S
DANA W. JENKINS, LINCOLN COUNTY,)	CROSS MOTION FOR
)	SUMMARY JUDGMENT
Defendants,)	
)	
and)	
)	
LINCOLN COUNTY COMMUNITY RIGHTS,)	
)	
Intervenor-Defendant.)	
)	

I. Introduction

Intervenor-Defendant Lincoln County Community Rights maintains that the Freedom from Aerially Sprayed Pesticides Ordinance (“the Ordinance”) has been lawfully enacted by the voters of Lincoln County. Plaintiffs err in their assertions to the contrary.

First, under current election law and consistent with this court’s prior ruling, the Ordinance complies with the full-text requirement of Article IV, Section 1(2)(d). Plaintiffs fail to introduce new legal precedent that supports a reversal of this decision.

Second, the Ordinance in its entirety is lawfully authorized under Lincoln County voters’ right of local community self-government. As explained in Intervenor-Defendant’s Cross Motion

1 for Summary Judgment, this inherent and inalienable right is rooted in the history, culture,
2 politics, and laws of this state and nation, and as such, is an “unenumerated” right embedded in
3 Article I, Sections 1 and 33 of the Oregon Constitution. Under this constitutional authority,
4 Lincoln County voters have lawfully enacted the rights, prohibitions, and other provisions
5 necessary to secure Lincoln County to be free from the aerial spraying of pesticides. Neither the
6 limitations of county authority under ORS 203.035 nor state preemptive statutes constrain
7 Lincoln County voters’ authority – under their right of local community self-government – to
8 secure and protect the county’s health, safety, and welfare by enacting the Ordinance.

9 Even if this court declines to recognize Lincoln County voters’ inherent right of local
10 community self-government, Lincoln County voters nevertheless acted within the scope of
11 county authority under ORS 203.035 to enact the Ordinance. Consistent with this authority, the
12 aerial spraying of pesticides is a matter of county concern because current law *expressly*
13 authorizes the local regulation of pesticides to a limited extent. Therefore, Plaintiffs err in their
14 assertion that the Ordinance is void in its entirety because it was invalidly adopted under the
15 scope of county authority.¹

17 Furthermore, preemptive laws under ORS Chapters 30, 527, and 634 fail to support the
18 invalidation of any provisions of the Ordinance because the new law comports with exceptions to
19 the overly rigid preemption scheme advanced by Plaintiffs. Therefore, Plaintiffs err in their
20 assertion that Section 3(a)-(c), 4, 5, and 6 should be declared invalid and unenforceable. In the
21 alternative, if the court were to find that some provisions of the Ordinance are preempted under
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24 ¹ Defendants agree with Intervenor-Defendant that Lincoln County is not entirely preempted from the
25 regulation of pesticides under current law, and therefore, “the general subject matter, pesticides, is a
26 matter of county concern” under ORS 203.035. *See Defendants’ Cross Motion for Summary Judgment*, p.
6, lns. 9-10.

1 current law, statutory exceptions nevertheless authorize all of the challenged provisions – both
2 rights and prohibitions – to a limited extent expressly provided for by the preemptive laws.²

3 Therefore, Plaintiffs’ claims fail to invalidate any provisions in their entirety.

4 Notably, Plaintiffs have abandoned claims, alleged in their Amended Complaint,
5 concerning the single subject rule of Article IV, Section 1(2)(d), and all constitutional claims.³
6 As such, Intervenor-Defendant does not address them.

7 **II. Plaintiffs’ assertion that *Dolan v. Barnard* supports a reversal of this court’s prior**
8 **decision – that the text of the Freedom from Aerially Sprayed Pesticides Ordinance**
9 **complies with the full-text rule of Article I, Section 1(2)(d) of the Oregon Constitution – is**
10 **fatally flawed.**

11 This court should find that, consistent with its prior ruling in *Bregman v. Jenkins*, Lincoln
12 County Case No. 15CV19955, the Ordinance at issue complies with the full-text requirement
13 because “current law does not support a requirement that voters should be apprised of those
14 provisions of existing law that would be repealed if this measure were to be enacted.” *See*
15 *General Judgment, Bregman v. Jenkins, supra* at p. 3, lns. 9-11.

16 Plaintiffs ask this court to revisit its decision citing to *Dolan v. Barnard* to support their
17 assertion that Section 8 of the Ordinance⁴ violates the full-text rule of Article IV, Section 1(2)(d)
18 of the Oregon Constitution. However, their argument misstates the holding of *Dolan*, which
19 addresses an initiative that *amends* existing statutes and not one that *repeals* any provisions of
20 law. *Dolan v. Barnard*, 5 Or. 390 (1875). Notably, Section 8 provides for the repeal of contrary
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22 ² Defendants agree with Intervenor-Defendant that express statutory exceptions authorize the regulation
23 of aerially sprayed pesticides on county-owned property. *See Defendants’ Cross Motion for Summary*
Judgment, p. 11, lns. 20-22 – p. 12, lns. 1-4.

24 ³ See Plaintiffs’ *Amended Complaint*, ¶10(c) and ¶14(f) and (g).

25 ⁴ Section 8 of the Ordinance reads: “Repealer. All inconsistent provisions of prior Ordinances adopted by
Lincoln County are hereby repealed, but only to the extent necessary to remedy the inconsistency.”

1 laws, but does not amend any existing laws. Therefore, *Dolan* is inapplicable, and Plaintiffs’
2 argument fails.

3 In their Motion for Summary Judgment, Plaintiffs claim that the Supreme Court
4 addressed “a legislatively adopted law that repealed inconsistent provisions in the same manner
5 as the Ordinance does – ‘[A]ll Acts or parts of Acts inconsistent with this Act are hereby
6 repealed.’” *See Plaintiffs’ Motion for Summary Judgment*, p. 9, lns. 12-13. However, no such
7 language appears in the court’s opinion. In fact, the court never addressed repealed provisions,
8 only those amended by the legislation at issue. *Dolan, supra*.

9 The issue before the *Dolan* court was whether the “amendatory act of October 29, 1874,
10 relating to the duties of assessors [is] in violation of §22 of Art. 4 of the Constitution of this
11 State.” *Id.* at 391. In its ruling, the court explained the purpose of this constitutional provision:

[T]he evil in legislation, which §22 of Art. 4 of our Constitution is directed
13 against, is the practice of introducing into and intermingling with the provisions
14 of an act, changes or alterations in some of its provisions, in such a manner as to
15 render it difficult to ascertain, by an inspection of the act *amended*, to what extent
and in what respects the same has been modified by the amendatory act.

16 *Id.* at 392. (Emphasis added.)

17 Once again, it is clear that Article IV, Section 22, and thereby Article IV, Section 1(2)(d),⁵ apply
18 exclusively to proposed and adopted legislation that *amends* existing law, and not to measures
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22 ⁵ “It seems much more likely to us that, in adopting Article IV, section 1(2)(d), the voters intended the
23 require publication of the same information – that is, the full text of the statute as it would appear if
24 amended – regardless of whether the amendment is proposed by the legislature [as in Section 22] or by
initiative [as in Section 1(2)(d)].” *Kerr v. Bradbury*, 193 Or. App. 304, 89 P.3d 1227, 1238 (2004).

25 While Plaintiffs are correct that the *Kerr* court equated Sections 1(2)(d) and 22 of Article IV, it is
important to note that *Kerr* is otherwise inapplicable to the present case because the Court of Appeals
addressed an initiative that sought to amend existing law, and not one with a “repealer” provision.

1 that *repeal* provisions. While Plaintiffs are concerned about knowing specifically which sections
2 of the existing law are repealed by the initiative, Oregon courts to date are not.⁶

3 In all applicable cases, Oregon courts have been clear that the full-text provision applies
4 only to amended statutes for the purpose of clearly setting out the wording of the newly-written
5 law without the obsolete language stricken. When laws are repealed, there is no new language
6 being added to an existing law. To include any language of a repealed law would violate the
7 court’s principle that “[t]he petition must carry the exact language of the proposed
8 measure...nothing more.” *Schnell*, 395 at 205. Notably, in the *General Judgment in Bregman v.*
9 *Jenkins*, this court relied upon *Schnell v. Appling* to support its ruling.⁷ If the language of
10 repealed laws is not required to appear in the text of the ballot initiative, then it cannot be
11 required to be included in new law once adopted. Plaintiffs muddle a clear rule.⁸

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20 ⁶ In *Bregman v. Jenkins*, this court expressed concern about the lack of information available to voters
21 concerning repealed provisions finding that “a better approach is set forth in *Bird v. Wasco*, 3 Or 282, 285
22 (1871).” See *General Judgment*, Lincoln County Circuit Court Case No. 15CV19955, p. 3, Ins. 12-13.
23 However, this court found that: “consistent with *Schnell v. Appling*, if the proponents of the proposed
24 measure set forth the full text of the proposed measure, they have satisfied the full-text requirement of
25 section 1(2)(d), Article IV of the Oregon Constitution *notwithstanding the principle that voters should be
26 apprised of existing law that would essentially be rendered void should this measure be enacted.*” *Id.* at p.
3, Ins. 14-19. (Emphasis added.)

⁷ See FN. 6.

⁸ Plaintiffs attempt to distinguish *Schnell v. Appling* from *Dolan v. Barnard* to persuade this court to
reverse its previous ruling. However, the *Dolan* case neither pertains to repealed provisions of an
initiative or new law, nor stands for the rule Plaintiffs assert. Therefore, Plaintiffs’ analysis is misguided.

1 Significantly, after reviewing a proposed initiative⁹ that contained a nearly-identical
2 repealer provision as the Ordinance’s Section 8 and Respondent’s argument based on *Dolan v.*
3 *Barnard*,¹⁰ Judge Locke Williams of the Benton County Circuit Court likewise concluded:

4 I can find nothing in the constitution or case law to suggest that the full-text
5 requirement includes a requirement that Code provisions which would be repealed
6 be specifically identified in the measure. The constitution requires the proponents
7 of the measure to provide potential signers with the full text of the proposed
8 measure, nothing more. The measure as proposed by Petitioners in the matter now
9 before the Court satisfies this requirement.

10 See Exhibit 2: Opinion Letter of the Honorable Locke A. Williams in
11 *Allen, et al. v. Morales*, Benton County Circuit Court Case No. 13-10656,
12 February 24, 2014.)

13 Consistent with Judge Williams’s decision and this court’s prior ruling, this court should again
14 affirm that Section 8 of the Ordinance complies with the full-text rule.

15 Additionally, Plaintiffs cite to *State v. Norris* in support of their assertion; however,
16 Petitioner in *Bregman v. Jenkins* also cited to this case when he challenged the Ordinance pre-
17 enactment based on the full-text requirement of Article IV, Section 1(2)(d). Therefore, this court
18 has already considered the *Norris* case, and determined that it does not support an argument that
19 Section 8 of the Ordinance does not comply with the full-text rule. See *Petitioner Bregman’s*
20 *Reply, Bregman v. Jenkins, supra* at p. 2, Ins. 23-24.

21 As this court previously decided, Oregon jurisprudence solidly confirms that initiative
22 measures repealing existing law do not need to include the full text of the repealed provisions, or
23 cite to their section numbers. Therefore, the Freedom from Aerially Sprayed Pesticides
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25 ⁹ See the proposed *Local Food System Ordinance of Benton County, Oregon* which read “**Section 10.**
26 **Repealer.** All provisions within the county code of Benton County that are inconsistent with the
provisions of this Ordinance are hereby repealed, but only to the extent necessary to remedy the
inconsistency.” Attached herein at Exhibit 1, p. 6.

¹⁰ See *Respondent’s Brief, Allen, et al. v. Morales*, Benton County Circuit Court Case No. 13-10656, p. 3,
Ins. 10-12. Intervenor-Defendant asks this court to take judicial notice of this case and filing.

1 Ordinance – as both a proposed initiative and an enactment - does not violate the full-text rule of
2 Article IV, Section 1(2)(d) of the Oregon Constitution.

3 **III. Lincoln County voters lawfully enacted the Freedom from Aerially Sprayed**
4 **Pesticides Ordinance by exercising their right of local community self-government that**
5 **operates independently from statutory provisions for and limitations on county lawmaking**
6 **authority and state preemption.**

7 As explained in Intervenor-Defendant’s *Cross-Motion for Summary Judgment*,
8 Oregonian’s inherent and inalienable right of local community self-government is secured in the
9 “unenumerated” rights of Article I, Sections 1 and 33 of the Oregon Constitution and rooted in
10 the Declaration of Independence and U.S. Constitution. Through this right, Oregon voters may
11 exercise their constitutional lawmaking authority to enact and enforce law locals that are more
12 protective of the health, safety, and welfare of residents and their environment than state or
13 federal laws. Under this authority, Lincoln County voters enacted the Ordinance at issue to
14 recognize the rights and prohibitions necessary to secure Lincoln County to be free from aerially
15 sprayed pesticides. Because Lincoln County voters’ constitutional authority under their right of
16 local community self-government cannot be constrained by state statutes, Plaintiffs’ arguments
17 to invalidate the Ordinance based on limitations of county authority and statutory preemption fail
18 as explained more fully below.

19 **A. Under the right of local community self-government, Lincoln County voters**
20 **possess the lawmaking power to enact and enforce the Ordinance in its entirety**
21 **because their popular authority is greater than that allocated to the counties**
22 **through ORS 203.035.**

23 ORS 203.035¹¹ was enacted by the state legislature to recognize the scope of general law
24 counties’ authority to pass laws addressing “matters of county concern.” This statute is

25 ¹¹ ORS 203.035 reads: “**203.035 Power of county governing body or electors over matters of county**
26 **concern.** (1) Subject to subsection (3) of this section, the governing body or the electors of a county may
by ordinance exercise authority within the county over matters of county concern, to the fullest extent
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DEFENDANTS’ MOTIONS FOR SUMMARY JUDGMENT

1 irrelevant to the scope of Lincoln County voters’ lawmaking powers under the right of local
2 community self-government because the voters’ self-governing authority under this right is
3 superior to, and exceeds, the authority granted to Lincoln County by statutory law. Said another
4 way, the Oregon legislature lacks the authority to limit the people’s inherent and inalienable right
5 of local community self-government because all power is inherent in the people.¹² Consistent
6 with Intervenor-Defendant’s arguments in their *Cross Motion for Summary Judgment*, Article I,
7 Section 1 must be construed to scaffold Oregonians’ right of local community self-government
8 as an “unenumerated” right of Article I, Section 33 of the Oregon Constitution.

9 Further, the Ordinance specifically provides that the right of local community self-
10 government shall not be limited in any way by the people’s use of their local government to
11 exercise their right to enact this Ordinance. *See* Ordinance, Section 3(g).¹³ As such, the right of

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14 allowed by Constitutions and laws of the United States and of this state, as fully as if each particular
power comprised in that general authority were specifically listed in ORS 203.030 to 203.075.

15 (2) The power granted by this section is in addition to other grants of power to counties, shall not be
16 construed to limit or qualify any such grant and shall be liberally construed, to the end that counties have
17 all powers over matters of county concern that it is possible for them to have under the Constitutions and
laws of the United States and of this state.

18 (3) An ordinance adopted by a county governing body that changes the number or mode of selection
19 of elective county officers shall not take effect unless the ordinance is submitted to and approved by the
20 electors of the county at a primary election, general election or election held on the first Tuesday after the
first Monday in November of an odd-numbered year. However, an ordinance adopted under this section
may not change the mode of selection of a county assessor.

21 (4) Nothing in this section shall be construed to limit the rights of the electors of a county to propose
22 county ordinances through exercise of the initiative power.”

23 ¹² Article I, Section 1 of the Oregon Constitution reads: “**Natural rights inherent in people.** We declare
24 that all men, when they form a social compact are equal in right: that all power is inherent in the people,
and all free governments are founded on their authority, and instituted for their peace, safety, and
happiness; and they have at all times a right to alter, reform, or abolish the government in such manner as
they may think proper.”

25 ¹³ Notably, when arguing that Oregon preemptive statutes invalidate sections of the Ordinance, Plaintiffs
do not assert that Sections 3(e), (f), (g), and (h) are similarly preempted. Therefore, if the county has the

1 local community self-government provides an independent and greater lawmaking authority than
2 that extended to the County through Oregon statutes. Specifically, ORS 203.035 – that limits the
3 scope of county’s authority to address “matters of county concern” – does not apply to constrain
4 the lawmaking authority of Lincoln County voters to adopt the Ordinance in its entirety.

5 Therefore, in exercising their right of local community self-government, Lincoln County
6 voters lawfully enacted the Ordinance to protect Lincoln County from the negative effects of the
7 aerial spraying of pesticides for the health, safety, and welfare of the Lincoln County residents
8 and environment.¹⁴ Thus Plaintiffs err in their claim that the Ordinance is void in its entirety
9 because the Ordinance is beyond the power of the County to adopt.

10 **B. Under their inherent and inalienable right of local community self-government,**
11 **Lincoln County voters possess the lawful authority to enact the Freedom from**
12 **Aerially Sprayed Pesticides Ordinance free from the limitations of state statutory**
13 **preemption.**

14 As explained in Intervenor-Defendant’s *Cross-Motion for Summary Judgment*, Article I,
15 Sections 1 and 33 of the Oregon Constitution contain the constitutional authority for Oregonians’
16 right of local community self-government as an “unenumerated” or reserved right of the state
17 constitution. Recalling that Article I, Section 33 is virtually identical to the Ninth Amendment of
18 the U.S. Constitution, the hierarchy of government authority between the state and local
19 governments, therefore, mirrors the relationship between the federal and state governments under

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21 authority to enact the Ordinance in the first instance, these provisions are uncontested and should not be
22 declared void or unlawful. As such, the right of local community self-government “*for the limited*
23 *purpose of securing Lincoln County to be free from aerially sprayed pesticides*” (see Ordinance, Section
24 3(f)) is the law of Lincoln County. Therefore, Intervenor-Defendant again urges this court to adopt the
25 operation and application of this right as proposed in Intervenor-Defendant’s *Motion for Summary*
26 *Judgment* and this *Response*, and to grant their requested relief.

¹⁴ If this court declines to recognize the Lincoln County voters’ inherent and inalienable right of local
community self-government, Lincoln County voters nevertheless have the authority under ORS 203.035
to enact the Ordinance because the use of pesticides is a “matter of county concern.” See Section IV(A)(1)
of this *Response* below.

1 the Ninth Amendment. It is well-settled that the Ninth Amendment of the U.S. Constitution
2 limits federal power and insulates the state’s administration of reserved rights, including natural
3 rights, from federal interference.¹⁵ In the same way, therefore, Article I, Section 33 of the Oregon
4 Constitution, a so-called “baby Ninth,” shelters local jurisdictions to secure and exercise these
5 reserved rights free from state interference.¹⁶

6 As demonstrated in Intervenor-Defendant’s *Cross Motion for Summary Judgment*, the
7 right of local community self-government is one of the retained natural rights protected by
8 Article I, Section 33 of the Oregon Constitution. As such, this self-governing authority of local
9 jurisdictions operates to legalize local lawmaking beyond the limits of state power. In this way,
10 Oregon voters at large, and specifically those in Lincoln County, have the authority to enact local
11 laws that expand local rights protections free from state interference. Therefore, the doctrine of
12 “ceiling” preemption – the practice of state governments effectively establishing an upper limit
13 on legal protections by preventing local governments from adopting more protective standards in
14 their communities – violates Lincoln County voters’ right of local community self-government.

15 This framework for the application of preemptive laws – a framework that disallows
16 higher governments from setting an upper limit on the scope of rights-based protections enacted
17 by lower governments – is consistent with current federal and state jurisprudence. Federal courts
18 have applied the “floor preemption” versus “ceiling preemption” paradigm to affirm more
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21 ¹⁵ “The Ninth prevents a construction that denies or disparages other rights ‘retained by the people’ [see
22 U.S. CONST. amend. IX (emphasis added)].” Lash, Kurt T., *The Lost Meaning of the Ninth Amendment*,
Texas Law Review, Vol. 83, No. 2 (December 2004), p. 341.

23 ¹⁶ “The right of state courts to independently interpret state constitutional provisions which parallel
24 provisions of the United States Constitution is well established. (citing, *People v. Pettingill*, 21 Cal. 3d
25 231, 247-48, 578 P.2d 108, 118, 145 Cal. Rptr. 861, 871 (1978); *Diamond v. Bland*, 11 Cal. 3d 331, 338,
521 P.2d 460, 465, 113 Cal. Rptr. 468, 473 (1974).” Boman, James Marcus, *Robins v. Pruneyard*
26 *Shopping Center: Free Speech Access to Shopping Centers and the California Constitution*, 68 Cal. L.
Rev. 641 (1980).

1 protective state constitutional rights and regulations.¹⁷ In *Pruneyard Shopping Ctr. v. Robins*, the
2 U.S. Supreme Court found that a California law that expanded free speech protections under the
3 state constitution did not violate speech or property rights secured by the federal constitution.

4 447 U.S. 74 (1980). The court stated:

5 Appellants have failed to provide sufficient justification for concluding that this
6 [federal due process] test is not satisfied by the State's asserted interest in
7 promoting more expansive rights of free speech and petition than conferred by the
8 Federal Constitution.

Id. at 85.

8 And this:

9 We conclude that neither appellants' federally recognized property rights nor their
10 First Amendment rights have been infringed by the California Supreme Court's
11 decision recognizing a right of appellees to exercise state-protected rights of
12 expression and petition on appellants' property.

Id. at 88.

13 In *Pruneyard*, greater rights protections enacted by the state prevailed over the basic rights of the
14 federal constitution. *Id.* This framework – in which “states remain free to provide their citizens
15 with more protection than the minimum guaranteed by the Federal Constitution”¹⁸ – parallels the
16 Ninth Amendment’s deference to “unenumerated” state’s rights. As Justice Hugo Black
17 recognized in his *Griswold* dissent, the Ninth Amendment was “enacted to protect state powers
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22 ¹⁷ “Federal floors preclude less stringent state and local regulation, but allow for additional and more
23 stringent regulation, and typically are accompanied by savings clauses and cooperative regulatory
24 structures.” Buzbee, William W., *Asymmetrical Regulation: Risk, Preemption, and the Floor/Ceiling
Distinction*, Emory University School of Law, Public Law & Legal Theory Research Paper Series,
Research Paper No. 07-9, p. 8.

25 ¹⁸ Schuman, David, *Using State Constitutions to Find and Enforce Civil Liberties*, 15 Lewis & Clark L.
26 Rev. 783, 786 (2001).

1 against federal invasion.”¹⁹ Therefore, state constitutional rights, both enumerated and
2 unenumerated, operated free from federal interference.

3 As at the federal level, state jurisprudence affirms that, in certain contexts, local
4 governments can adopt more protective laws than those enacted by the state. In Oregon, local
5 jurisdictions have broad constitutional authority to regulate local matters.²⁰ Despite state
6 legislative efforts to preempt local regulations, counties and cities often retain the authority to
7 enact local laws that are more protective than state law. In *Oregon Rest. Ass’n v. City of*
8 *Corvallis*, the Court of Appeals upheld Corvallis’s ban on smoking in enclosed public places
9 despite plaintiff’s claim that the ordinance was preempted by state law. 166 Or. App. 506, 999
10 P.2d 518 (2000). The court stated:

11 [W]e are reluctant to assume that the legislature, in adopting statewide standards,
12 intended to prohibit a locality from requiring more stringent limitations within its
13 particular jurisdiction.

Id., 999 P.2d at 521.

14 This case demonstrates that, in the absence of an express preemptive state law that creates a
15 “ceiling” for local regulations, local jurisdictions are authorized to enact more stringent standards
16 than those provided by state law.²¹ See also, *State ex rel. Haley v. City of Troutdate*, 281 Or. 203,
17 211, 576 P.2d 1238 (1978) (“We are reluctant to assume that the legislature meant to confine the
18 protection of Oregon residents exclusively to construction standards which it described as
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21 ¹⁹ *Griswold v. Connecticut*, 381 U.S. 479, 529 (1965) (Stewart, J., dissenting) (quoting *United*
States v. Darby, 312 U.S. 100, 124 (1941)).

22 ²⁰ This authority is constitutionally secured for counties, cities, and town through Article IV, Section 1(5),
23 Article VI, Section 10, and Article XI, Section 2 of the Oregon Constitution.

24 ²¹ Notably, outside the right of local community self-government, there are other exceptions to state
25 preemption that allow local jurisdictions to pass more protective laws even in the context of state
preemptive statutes. See Section IV(B) of this *Response* below for a discussion of how these exceptions to
state preemption apply to this case if this court declines to recognize Lincoln County voters’ right of local
community self-government.

1 "basic" and which the administering agency describes as "minimum," and to place these beyond
2 the power of local communities to provide additional safeguards for themselves"); and
3 *Springfield Utility Board v. Emerald PUD*, 191 Or. App. 536, 84 P.3d 167, 170 (2004), *aff'd in*
4 *part, rev'd in part on other grounds*, 339 Or. 631, 125 P.3d 740 (2005) ("A local ordinance is not
5 incompatible with state law simply because it imposes greater requirements than does the state".)
6 The local authority to enact more protective laws is essentially the *status quo* for local
7 lawmaking in the absence of strict state preemptive statutes.²² As with the Ninth Amendment
8 and federal jurisprudence, this same framework should apply to shield local jurisdiction's
9 exercise of their "unenumerated" rights found in Article I, Section 33 of the Oregon Constitution
10 – Oregon's "baby Ninth" – from interference from state law.²³ The right of local community self-
11 government is such an "unenumerated" right. Therefore, Intervenor-Defendant maintains that
12 because both express and implied state preemptive laws violate Lincoln County voters' right of
13 local community self-government, this court should analyze the Ordinance authorized by this
14 right without giving legal effect to the state preemptive laws cited by Plaintiffs; *i.e.*, this court
15 should disallow "ceiling" preemption.
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17 Notably in the present case, in addition to the operation of the right of local community
18 self-government as described above, the Ordinance at issue *expressly* authorizes local
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21 ²² Importantly, Intervenor-Defendant does not assert that the state and federal cases cited above in Section
22 III(B) are examples of the right of local community self-government in action, but rather that they
23 reinforce the legitimacy of the operation of that right to authorize greater local protections that state law
24 provides.

24 ²³ "[T]he "other rights" referred to in Baby Ninths are individual rights that the state cannot impair or
25 deny simply because they are not contained in the state constitution's bill of rights." Sanders, Anthony B.,
Baby Ninth Amendments and Unenumerated Individual Rights in State Constitutions before the Civil
War, ABSTRACT, Institute of Justice.

1 jurisdictions to adopt laws without interference from state and federal preemption.²⁴ Therefore,
2 Lincoln County voters – exercising their inherent and locally-codified lawmaking right – can
3 write and pass laws completely free from “ceiling” preemption under existing state statutes.
4 Consistent with Section 6(a), Plaintiffs seek to violate this Ordinance by asserting their interests
5 in aerially spraying pesticides on their properties in Lincoln County.²⁵ Plaintiffs, therefore, “do
6 not possess any other legal rights, privileges, powers, or protections that would interfere with the
7 rights or prohibitions enumerated by this Ordinance.” *See* Ordinance, Section 6(a) at FN 22.
8 Therefore, the preemptive laws cited by Plaintiffs are inapplicable to the present case, and do not
9 operate to invalidate the Ordinance.

10 In conclusion, Lincoln County voters’ right of local community self-government
11 authorizes the enactment and enforcement of the Ordinance in its entirety. Plaintiffs’ claims fail
12 to support the relief they seek.

13
14 **IV. In the alternative, even if the court declines to recognize Lincoln County voters’**
15 **right of local community self-government, the Ordinance still should be upheld in its**
16 **entirety.**

17 Even without regard to Lincoln County voters’ right of local community self-
18 government, the Freedom from Aerially Sprayed Pesticides Ordinance is lawfully enacted under
19 county authority and withstands challenges based on state statutory preemption.

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21 ²⁴ *See* Ordinance, Section 6(a) that reads: “Corporations that violate this Ordinance, or seek to violate this
22 Ordinance, shall not be deemed to be “persons” to the extent that such treatment would interfere with the
23 rights or prohibitions enumerated by this Ordinance, *nor shall corporations possess any other legal*
24 *rights, privileges, powers, or protections that would interfere with the rights or prohibitions enumerated*
by this Ordinance. “Rights, privileges, powers, or protections” shall include the power to assert state or
federal preemptive laws in an attempt to overturn this Ordinance, and the power to assert that the people
of this municipality lack the authority to adopt this Ordinance.” (Emphasis added.)

25 ²⁵ *See Declaration of Nancy Hiatt in Support of Plaintiffs’ Motion for Summary Judgment, and*
26 *Declaration of Rex Capri in Support of Plaintiffs’ Motion for Summary Judgment* filed in this case.

1 **A. Lincoln County has the authority to enact the Freedom from Aerial Spraying**
2 **Pesticides Ordinance to protect the County from the negative effects of aerially**
3 **sprayed pesticides because the Ordinance properly addresses a “matter of county**
4 **concern.”**

5 Under ORS 203.035, Lincoln County possesses the authority to enact the Ordinance at
6 issue because the regulation of pesticide use is a matter county of concern. Furthermore,
7 Plaintiffs misconstrue *State v. Logsdon* to invalidate the Ordinance for lack of county authority.
8 As such, *Logsdon* does not support their conclusion.

9 **1. Banning the aerial spraying of pesticides is clearly a “matter of county**
10 **concern” for the local government and voters of Lincoln County.**

11 Outside their right of local community self-government, voters of Lincoln County – a
12 general law county – hold the lawmaking powers found in Article IV, section 1(5)²⁶ and further
13 provided for by ORS 203.035 *et seq.* This statutory authority allows local governments and
14 electors to enact ordinances that address “matters of county concern.” ORS 203.035(2) further
15 explains this lawmaking authority as follows:

16 The power granted by this section is in addition to other grants of power to
17 counties, shall not be construed to limit or qualify any such grant and shall be
18 liberally construed, to the end that counties have all powers over matters of
19 county concern that it is possible for them to have under the Constitutions and
20 laws of the United States and of this state.

21 As Plaintiffs point out, the validity of a local law “depends first on whether the voters of the
22 county had the authority to enact it,” and is only secondarily subject to invalidation by
23 preemption. *State v. Logsdon*, 165 Or. App. 28, 31, 995 P.2d 1178 (2000). *See Plaintiffs’ Motion*

24

25 ²⁶ Article IV, section 1(5) reads (in part): “The initiative and referendum powers reserved to the people by
26 subsections (2) and (3) of this section are further reserved to the qualified voters of each municipality and
27 district as to all local, special and municipal legislation of every character in or for their municipality or
28 district.” *See State v. Mack*, 134 Or. 67, 69, 292 P. 306 (1930) (“We have uniformly held that a county is
29 a municipality or district, within the meaning of § 1a of Art IV [renumbered as Article IV, Section
30 1(5)]”); *see also, Kosydar v. Collins, County Clerk*, 201 Or. 271, 277, 270 P.2d 132 (1954); *Briggs v.*
31 *Stevens*, 119 Or. 138, 248 P. 169 (1926); and *Schubel v. Olcott*, 60 Or. 503, 120 P. 375 (1912).

1 *for Summary Judgment*, p. 3, lns. 16-20. Therefore, before reaching Plaintiffs’ arguments
2 concerning preemption, the first question before this court is whether Lincoln County and its
3 electors had the authority to enact the Ordinance in the first place. Under ORS 203.035, as stated
4 above, the scope of that authority is over “matters of county concern.” To decide the question of
5 the County’s authority then, this court must decide whether or not the aerial spraying of
6 pesticides is a “matter county concern.” Intervenor-Defendant contends that the answer is
7 decidedly clear that pesticides are a matter of county concern. Notably, the County agrees²⁷
8 while Plaintiffs fail to allege specifically that the use of pesticides is *not* a “matter of county
9 concern.”

10 In *GTE Northwest Inc. v. Oregon Public Utility Commission*, the Oregon Court of
11 Appeals recognized general law counties’ broad discretionary authority under ORS 203.035 –
12 commensurate with “home rule” counties under Article VI, section 10 – to address “matters of
13 county concern.” 179 Or. App. 46, 39 P.3d 201 (2002). As such, the court found that Lincoln
14 County properly exercised its statutory authority to construct and operate a fiber optic network to
15 provide telecommunication services. *Id.* In so finding, the court also stated:

17 To summarize, the county's authority is circumscribed by the constitution and by
18 ORS 203.035. From the statute comes a clear, express grant of authority that
19 requires only a demonstration of a concern that is peculiar to the county's
20 residents. Here, the record demonstrates that the county's concern is to provide a
telecommunication service that benefits its residents by facilitating
communications along the coast.

Id., 39 P.3d at 209.

21 Clearly, the court’s use of the term ‘peculiar’ did not mean that the “concern” had to be unique
22 or confined to the county, but rather that it had to be germane to county residents. Much like
23 telecommunications services, the aerial spraying of pesticides is an issue that is highly relevant
24

25 ²⁷ See *Defendants’ Cross Motion for Summary Judgment*, p. 6, lns. 9-10.

1 to the residents of Lincoln County, and therefore, a “matter of county concern,” even if it is
2 simultaneously relevant to other counties.

3 Additionally, current state law expressly authorizes county laws regulating pesticides in
4 limited circumstances, further demonstrating that the aerial spraying of pesticides is by law a
5 “matter of county concern.” As Plaintiffs admit, the State Pesticide Control Act “authorizes a
6 county to limit use of pesticides on county land.” *See Plaintiffs’ Motion for Summary Judgment*,
7 p. 20, FN 10 (in part). The use of pesticides, therefore, must be a “matter of county concern” if a
8 county – either general law or home rule – is authorized to regulate them under the State
9 Pesticide Control Act. To find that the use of pesticides is *not* a “matter of county concern,” and
10 thereby beyond the lawmaking authority of a county, would eviscerate an express exception
11 recognized by one of the state’s preemptive laws concerning pesticides. This is would be an
12 absurd result.

13
14 Therefore, the use of pesticides in Lincoln County is clearly a “matter of county
15 concern.”

16 **2. *State v. Logsdon* is inapplicable because the Ordinance does not govern**
17 **the conduct of state law enforcement officials in their investigation of state**
18 **crimes.**

19 Plaintiffs are mistaken that *State v. Logsdon* renders the Ordinance void in its entirety.
20 They erroneously interpret that case to say, “the County cannot limit the reach of state and
21 federal government as this Ordinance purports to do.” *See Plaintiffs’ Motion for Summary*
22 *Judgment*, p. 5, lns. 12-13. The actual holding of *State v. Logsdon* was extremely narrow. It
23 concerned a county’s authority to control the conduct of state law enforcement officials in their
24 investigation of state crimes. 165 Or. App. 28, 995 P.2d 1178 (2000). In contrast, the Ordinance
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1 before the Court here is a health measure that bans aerial spraying. It has nothing to do with state
2 or federal investigation of state or federal crimes.

3 The *Logsdon* case concerned a Josephine County charter amendment that “forbid[s]
4 police to search private property without prior written consent or a search warrant.” *Id.*, 995 P.2d
5 at 1178. Detectives used an informant to set up a drug deal with defendant. Defendant said this
6 amounted to a search of his residence without his consent or a search warrant. At trial, defendant
7 sought to suppress the fruits of the search as invalid under the County charter amendment. Thus
8 the Court had to determine whether the amendment was valid.

9 The amendment’s validity hinged, as here, on whether it pertained to a matter of county
10 concern. In making that determination, the Oregon Court of Appeals expressly declined to
11 establish a broad rule interpreting the term “matters of county concern.” 165 Or. App. 28, 995
12 P.2d 1178 (2000). The *Logsdon* court said:

13
14 *Although the perimeters of city and county home rule authority may defy easy*
15 *delineation, certain qualifications of that authority may be stated with some*
16 *confidence. In particular, it is well established that, whatever else local*
government authority may entail, it does not include governing the conduct of
state and federal officials.

17 *Id.* at 32-33. (Emphasis added).

18 Because the court expressly declined to establish the perimeters of county authority, its narrow
19 holding is clear. In short, a county law that governs the conduct of state law enforcement
20 officials investigating state crimes falls outside matters of county concern. This is plain and
21 obvious. Investigation of state crimes by state law enforcement is a matter of state concern.

22 The *Logsdon* court cited four cases to support its decision. Three of them concerned
23 municipal efforts to alter the jurisdiction of state courts. *Multnomah County v. \$5,650 in US.*
24 *Currency*, 309 Or. 285, 289, 786 P.2d 729 (1990) (narrowly holding that state law determines
25

1 which cases will be adjudicated by state law); *La Grande v. Municipal Court et al.*, 120 Or. 109,
2 114-115, 251 P. 308 (1926) (narrowly holding that it is beyond a city’s authority to expand the
3 jurisdiction of state courts); *Lines v. City of Milwaukie*, 15 Or. App. 280, 286, 515 P.2d 938
4 (1973) (narrowly holding that a home rule city cannot alter the jurisdiction of state courts). The
5 fourth concerned a city’s effort to require a county to maintain a public bridge. *Kiernan v.*
6 *Portland*, 57 Or. 454, 463, 111 P. 379 (1910) (narrowly holding that it is beyond a city’s
7 authority to require a county to provide care and maintenance for a public bridge). *Logsdon* and
8 these four cases stand only for the proposition that a municipality cannot enact a law that governs
9 the conduct of state officials in their state business.

10 The Ordinance here does not govern the conduct of state officials in their state business
11 as it relates to jurisdiction, criminal investigation, or maintenance of state roads. In particular,
12 Sections 2(a), 4(b), 4(d), 6(a) and 6(c) of the Ordinance – specifically alleged by Plaintiffs to
13 contravene the *Logsdon* holding – neither expressly govern the conduct of state and federal
14 officials in their state business, nor alter the jurisdiction of state. Section 2(a) merely defines
15 corporations for the sake of the Ordinance.²⁸ Section 4(b) makes it unlawful for corporations to
16 spray pesticides aerially in the County. Section 4(d) says, “No permit, license, privilege, charter,
17 or other authority issued by any State or federal entity that would violate the rights of this
18 Ordinance, shall be deemed valid within Lincoln County.” Section 6(a) prevents corporations
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23 ²⁸ Section 2(a) of the Ordinance reads: “(a) “Corporations,” for purposes of this Ordinance, includes any
24 corporation, limited partnership, limited liability partnership, business trust, public benefit corporation,
25 business entity, or limited liability company organized under the laws of any state of the United States or
under the laws of any country. The term includes all public corporations, municipal corporations, state
and federal agencies, and any state and federal entity.”

1 from using the rights of people to defeat rights in the Ordinance.²⁹ And section 6(c) says federal
2 and state laws cannot apply in Lincoln County to defeat the rights protected by the Ordinance.³⁰

3 None of this strays into the type of municipal regulation of the conduct of state business
4 forbidden by *Logsdon* and the cases cited therein. The Ordinance does not tell state officials how
5 they may investigate state crimes. It does not alter the jurisdiction of state courts. And it does not
6 require the state to maintain a state road, nor even require the state to engage in aerially spraying
7 or any other conduct. It simply prevents aerial spraying of pesticides to protect public health, and
8 prevents the use of state laws by corporations to violate the rights protected in the Ordinance.
9 That the Ordinance also prevents state agencies, as corporations by definition, from engaging in
10 such aerial spraying does not render it invalid. Again, this does not interfere with state
11 investigation of state crimes, does not regulate the jurisdiction of state courts, and does not
12 require state maintenance of anything. Thus the cases cited by Plaintiffs are inapplicable.

13
14 Plaintiffs fail to provide any other legal authority that supports their contention that it is
15 beyond a county's authority as a 'matter of county concern' to elevate county law above state
16 and federal law. Therefore, Plaintiffs fail to substantiate any claims that the Ordinance is
17 unlawfully enacted based on this theory or other grounds.

18
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20 _____
21 ²⁹ Section 6(a) reads: "Corporations that violate this Ordinance, or seek to violate this Ordinance, shall not
22 be deemed to be "persons" to the extent that such treatment would interfere with the rights or prohibitions
23 enumerated by this Ordinance, nor shall corporations possess any other legal rights, privileges, powers, or
24 protections that would interfere with the rights or prohibitions enumerated by this Ordinance. "Rights,
25 privileges, powers, or protections" shall include the power to assert state or federal preemptive laws in an
26 attempt to overturn this Ordinance, and the power to assert that the people of this municipality lack the
authority to adopt this Ordinance."

³⁰ Section 6(c) reads: "All laws adopted by the legislature of the State of Oregon, rules adopted by any
State agency, laws adopted by the United States Congress, and rules adopted by any federal or
international agency, shall be the law of Lincoln County only to the extent that they do not violate the
rights or prohibitions of this Ordinance."

1 Finally, even if, *arguendo*, some provisions of the Ordinance were found to be unlawful
2 under *Logsdon*, the provisions that reference the state and federal governments are a subset of the
3 entire Ordinance. Therefore, the invalidation of these specific provisions would not support the
4 broad outcome Plaintiffs seek because the Ordinance contains a severability clause that rescues
5 all remaining provisions.³¹

6 **B. Plaintiffs fail to demonstrate that the three statutory laws – cited as preempting**
7 **the Ordinance – cannot be harmonized with the ban on the aerial spraying of**
8 **pesticides as state law requires whenever possible.**

9 The analysis of state preemption requires special attention. Under current Oregon law, the
10 starting point for the application of state preemptive statutes in the civil context is the
11 presumption that local laws are valid. *City of La Grande v. Public Employees Retirement Board*,
12 271 Or 137, 576 P2d 1204 (1978). The preemptive effect of a state law over local enactments
13 focuses primarily on the *inconsistency* between the two laws and the *exclusivity* intended by the
14 state law. *Id.* These legal concepts are elucidated largely in the home rule context, but the rules
15 apply equally to general law counties like Lincoln County.³² In the context of municipal home
16 rule, the Oregon Supreme Court in *City of La Grande v. Public Employees Retirement Board*,
17 described state preemption this way:

18 Outside the context of laws prescribing the modes of local government, both
19 municipalities and the state legislature in many cases have enacted laws in pursuit
20 of substantive objectives, each well within its respective authority, that were
21 *arguably inconsistent* with one another.

22 ³¹ See Ordinance, Section 8 that reads: “Severability. The provisions of this Ordinance are severable. If
23 any court decides that any section, clause, sentence, part, or provision of this Ordinance is illegal, invalid,
24 or unconstitutional, such decision shall not affect, impair, or invalidate any of the remaining sections,
25 clauses, sentences, parts, or provisions of the Ordinance.” See Section V below for a more complete
26 discussion of severability.

³² See *Allison v. Washington County*, 24 Or. App. 571, 581, 548 P.2d 188 (1976) (“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.”)

1 In such cases, the first inquiry must be whether the local rule *in truth* is
2 incompatible with the legislative policy, either because both cannot operate
3 concurrently or because the legislature meant its law to be exclusive.
4 *It is reasonable to interpret local enactments, if possible, to be intended to*
5 *function consistently with state laws, and equally reasonable to assume that the*
6 *legislature does not mean to displace local civil or administrative regulation of*
7 *local conditions by a statewide law unless that intention is apparent.* [Citations
8 omitted.] However, when a local enactment is found incompatible with a state law
9 in an area of substantive policy, the state law will displace the local rule.

6 271 Or at 148-9. (Emphasis added.)

7 As such, when the question of a state law’s preemptive effect on a local enactment arises,
8 Oregon courts must first attempt to find consistency between the regulations whenever possible.

9 *Id.*

10 Further, in *Thunderbird Mobile Club v. City of Wilsonville*, the Court of Appeals
11 subsequently clarified the court’s approach to preemption analysis stating: “[a] local ordinance is
12 not incompatible with state law simply because it imposes greater requirements than does the
13 state, nor because the ordinance and state law deal with different aspects of the same subject.”
14 234 Or. App. 457, 474 228 P.3d 640, *rev. den’d*, 348 Or. 524 (2010). *See also, Oregon*
15 *Restaurant Assn. v. Corvallis, supra*. Notably, as a rule, the County agrees that the total
16 preemption of a local law by a state statute is rare, stating: “The line of cases cited in
17 *Thunderbird, supra*, clearly show that the bar is set very high for a state law to have fully
18 preemptive effect on a local enactment.” *See Defendants’ Cross Motion for Summary Judgment*,
19 p. 9, lns. 5-7.

20
21 Under a careful analysis of the preemptive effect of the statutes cited by Plaintiffs, none
22 of these laws effectively preempt the Ordinance because the state and local laws at issue are not
23 mutually inconsistent, and the intended preemptive effect of the statutes is not absolute. In the
24 alternative, if this court finds that the preemptive statutes invalidate the provisions that ban the
25

1 aerial spraying of pesticides on certain Lincoln County properties, these provisions nevertheless
2 remain lawful pertaining to the other properties expressly exempted by the statutes.

3 **1. Plaintiffs err in their assertion that ORS 30.930 to 30.947 – the Right of**
4 **Farm and Forest laws – preempt any provisions of the Freedom from**
5 **Aerially Sprayed Pesticides Ordinance.**

6 Oregon Revised Statutes Chapter 30 pertains to Actions and Suits in Particular Cases. As
7 such, ORS 30.934 and 30.935 prohibit local laws that make forestry and farming practices a
8 nuisance or trespass. The scope of these provisions is clearly limited to claims or actions based
9 on nuisance or trespass. Plaintiffs’ editorialized presentation of ORS 30.934, and related statutes,
10 renders the statutes incomprehensible and misleading. *See Plaintiffs’ Motion for Summary*
11 *Judgment*, p. 21, lns. 16 – 20. Properly understood, none of the provisions of the Freedom from
12 Aerially Sprayed Pesticides makes the aerial application of pesticides a nuisance or trespass, or
13 provides for its abatement as a nuisance or trespass. Neither of the words “nuisance” or
14 “trespass” appears in the Ordinance at all.

15 Local laws may avoid the preemptive effect of state laws where they do not occupy the
16 same field and can thereby operate consistently with the applicable state law. In *Citizens for*
17 *Uniform Laws v. County of Contra Costa*, the California Court of Appeals rejected an argument
18 that the statewide Fair Employment and Housing Act (FEHA) – that addressed employment and
19 housing discrimination – preempted a county ordinance that prohibited discriminatory practices
20 against persons with AIDS or associated conditions in employment, housing, business
21 establishments, and county facilities and services because “the ordinance’s public health purpose
22 removes it from the field occupied by the state legislation.” 285 Cal. App. 1468, 1475 (1991).

23 The court stated:

24
25 The mere conclusion that the Legislature intended to occupy the field of
26 regulating employment and housing discrimination does not, however, resolve the

1 question whether the challenged ordinance is preempted. The pivotal issue is
2 whether the ordinance occupies the same "field" or "subject matter" as that
3 regulated by FEHA. If not, there is no preemption.

4 *Id.* at 1474.

5 The court found that the county ordinance was not preempted by the state law because the
6 ordinance's "underlying public health purpose removes it from the field of civil rights
7 protections [that the state law addresses]." *Id.* at 1471. Further, the court found that the ordinance
8 "applies to discrimination in other fields and protects persons in situations that fall short of
9 physical handicap [which is protected by the state law]." *Id.* at 1473.

10 Similarly, the state statutes under ORS Chapter 30 and the Ordinance at issue do not
11 occupy the same field. The Right to Farm and Forest (RFF) law is nested in Oregon Revised
12 Statutes Chapter 30 which addresses a diverse array of special interest litigation. The RFF law is
13 targeted on exempting farm and forestry practices from nuisance and trespass claims. To the
14 contrary, the Ordinance does not specifically authorize any such claims, but instead
15 fundamentally aims to protect county residents' health, safety, and welfare from the aerial
16 spraying of pesticides. To extent that there is overlap, as in *Citizens for Uniform Laws*, it is
17 insufficient to overcome the clear distinction between these laws' objectives or fields. Therefore,
18 the Right to Farm and Forest statutory scheme under Oregon Revised Statute Chapter 30 does
19 not have any preemptive effect on the Ordinance.

20 If Lincoln County or an aggrieved County resident hypothetically sought to enforce the
21 rights and prohibitions under Section 5(b) of the Ordinance³³ through a suit based on nuisance or
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24 ³³ Section 5(b) of the Ordinance provides: "(b) Lincoln County or any resident of Lincoln County, may
25 enforce the rights and prohibitions of this Ordinance through an action brought in any court possessing
26 jurisdiction over activities occurring within Lincoln County. In such an action, Lincoln County or the
resident shall be entitled to recover all costs of litigation, including, without limitation, expert and
attorney's fees." Notably, Section 5(b) does not specific or limit the causes of action.

1 trespass, defendants in that case might seek dismissal of the claims based on the statutory
2 immunity recognized in ORS 30.936.³⁴ Likewise, if an aggrieved party sought to enforce the
3 Ordinance through the Lincoln County Code provision that makes all code violations enforceable
4 through nuisance or trespass,³⁵ that lawsuit might be subject to dismissal based on ORS 30.936.
5 Defendants err is their speculation that the enforcement provisions of the Lincoln County Code
6 could collaterally render the Ordinance subject to preemption under ORS 30.934 or 30.395.

7 Therefore, Plaintiffs err that the Right to Farm and Forest laws preempt any portion of the
8 Freedom from Aerially Sprayed Pesticides Ordinance.

9 **2. Plaintiffs err in their assertion that the Forest Practices Act (ORS 527.610**
10 **et seq.) preempts the provisions of the Ordinance because the two laws do not**
11 **occupy the same field and are, therefore, not inconsistent.**

12 The Freedom from Aerially Sprayed Pesticide Ordinance is not preempted by ORS
13 527.722 because the purpose and subject matter of the Ordinance differ from that of the Forest
14 Practices Act (“FPA”). The FPA declares that it is:

15 the public policy of the State of Oregon to encourage economically efficient forest
16 practices that ensure the continuous growing and harvesting of forest tree species
17 and the maintenance of forestland for such purposes as the leading use on
18 privately owned land, consistent with sound management of soil, air, water, fish
19 and wildlife resources and scenic resources within visually sensitive corridors as
20 provided in ORS 527.755 and to ensure the continuous benefits of those resources
21 for future generations of Oregonians.

22 ORS 527.630(1) (in part).

23 ³⁴ ORS 30.936 provides: “Immunity from private action based on farming or forest practice on certain
24 lands; exceptions. (1) No farming or forest practice on lands zoned for farm or forest use shall give rise to
25 any private right of action or claim for relief based on nuisance or trespass.”

26 ³⁵ In *Defendant’s Cross Motion for Summary Judgment*, the County states: “the Lincoln County Code,
LCC Chapter 10, Enforcement, which would be the tool for implementation of the Ordinance adopted
through the Measure, [footnote omitted] does make all violations of the County Code enforceable as
nuisance actions. LCC 10.200 (“every act or thing done, or anything within the limits of Lincoln County,
that is in violation of provision of the Lincoln County Code is declared to be: (1) a nuisance . . . ; and (2)
a violation.”). See p. 17, Ins. 9-14.

1 The Ordinance does not address the economic efficiency of forest management practices or the
2 rate of growth and harvest of forest resources throughout Oregon as the FPA does. Rather, the
3 Ordinance seeks to secure Lincoln County residents’ “fundamental right to clean air, water, and
4 soil not contaminated by aerial spraying of pesticides.” See Ordinance, Section 1 (in part).

5 As demonstrated in *Citizens for Uniform Laws v. County of Contra Costa* above, the FPA
6 and the Ordinance at issue in this case do not occupy the same field; and therefore, the FPA does
7 not preempt the Ordinance. See *Citizens for Uniform Laws, supra*. Like the Contra Costa County
8 Ordinance, the Ordinance at issue in this case extends broader human and environmental
9 protections for a public health purpose that are applicable to both corporate farming and forestry
10 operations where the FPA applies exclusively to forestlands. Additionally, the FPA, which
11 serves production and economic goals, offers minimal human and environmental safety
12 protections in the context of statewide forest management practices. While the two laws overlap
13 to some extent (like the California laws at issue in *Citizens for Uniform Laws*), the Ordinance’s
14 focus on a county-based prohibition of *all* aerially sprayed pesticides to serve human and
15 environmental health objectives is distinguishable from the FPA’s statewide goals of achieving
16 efficiency and productivity in commercial forest management, including the use of both ground
17 and aerially applied pesticides. While the FPA includes “the application of chemicals” in the
18 specific list of forest practices,³⁶ this list of six forest practices evidences the narrowness of the
19 State Board of Forestry’s claimed “exclusive authority to develop and enforce statewide and
20 regional rules” to achieve statewide forest management objectives.³⁷ The Ordinance in contrast
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24 ³⁶ See ORS 527.620(5)(b).

25 ³⁷ Importantly, Plaintiffs err by exaggerating the authority of the State Board of Forestry when they assert
26 that ORS 527.630(3) “vest[s] exclusive lawmaking authority over forest environments with the State

1 addresses human and environmental health objective by securing clean water, air, and soil, and
2 rural preservation. Notably, the FPA does not *mandate* the use of chemical pesticides – aerially
3 applied or otherwise – to maximize forest resource extraction, nor does the Ordinance prohibit
4 the use of *all* pesticides to achieve public health goals. Therefore, like the Ordinance in *Citizens*
5 *for Uniform Laws*, the Ordinance at issue in this case does not occupy the same field as that
6 addressed by the FPA.

7 Intervenor-Defendant urges the court to decline to find that the two laws occupy the same
8 field or subject simply because both laws to different degrees pertain to the aerial application of
9 pesticides on forestlands. This commonality mirrors the overlap of the two California laws which
10 both addressed employment discrimination against individuals with AIDS. However, the
11 California Court of Appeals did not find this overlap to be determinative, and still found that the
12 two laws did not occupy the same field. As such, a preoccupation with the limited overlap
13 detracts from the proper conclusion that the Ordinance does not occupy the same field as that
14 regulated by the FPA.

15
16 Intervenor-Defendant’s argument – endorsed by the California County of Appeals in
17 *Citizens for Uniform Laws* – is consistent with the Oregon case law on preemption detailed in
18 Section III.B above. Because the Ordinance at issue does not occupy the same field as the FPA

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Board of Forestry.” See *Plaintiffs’ Motion for Summary Judgment*, p. 20, ln. 22 – p. 21, ln. 1. The statute
specifically reads:

21 To encourage forest practices implementing the policy of ORS 527.610 to 527.770 and
22 527.990 and 527.992, it is declared to be in the public interest *to vest in the State Board*
23 *of Forestry exclusive authority to develop and enforce statewide and regional rules*
24 *pursuant to ORS 527.710* and to coordinate with other state agencies and local
governments which are concerned with the forest environment. See ORS 527.630(3).
(Emphasis added.)

25 “Exclusive authority to develop and enforce statewide and regional rules pursuant to ORS 527.710” is a
substantially smaller realm of authority than Plaintiffs contend.

26 **Page 27 – INTERVENOR-DEFENDANT’S RESPONSE TO PLAINTIFFS’ AND
DEFENDANTS’ MOTIONS FOR SUMMARY JUDGMENT**

1 for the purposes of preemption, these two laws are nevertheless consistent under the rule of *La*
2 *Grande/Astoria, supra*.

3 Therefore, this court should find that the Ordinance is not preempted by the Forest
4 Protection Act.

5 **3. Plaintiffs err that ORS 634.057 of the State Pesticide Control Act**
6 **preempts the Ordinance at issue.**

7 The Freedom from Aerially Sprayed Pesticide Ordinance is not preempted by ORS
8 634.057 because the Ordinance is *consistent* with the stated legislative objectives of the
9 preemptive law, and the legislative intent is restrictive but not wholly exclusive. Furthermore,
10 while ORS 634.055 *et seq.* clearly intends to preempt *inconsistent* regulations pertaining to
11 numerous aspects of the *use* of pesticides, *e.g.*, pertaining to labeling, registration, notification of
12 use, advertising/marketing, distribution, application, licensing, transportation, packing, store, and
13 disclosure of information,³⁸ this statute does not exclude local laws *prohibiting* pesticide use that
14 is consistent with the stated public health goals of the statute.

15 In the present case, the legislative findings of ORS 634.055 state several objectives: 1) to
16 promote “safe, effective and scientifically sound pesticide regulation;” and 2) to achieve a
17 consistent [and] coordinated [system that]. . .is essential to public health, safety and welfare.”
18 Likewise, the stated purpose of the Ordinance is to protect the health, safety, and welfare of
19 Lincoln County.³⁹ The preemptive law seeks to achieve its goals by requiring general uniformity
20 in the regulations concerning the use and handling of pesticides. Through a different strategy to
21 achieve the same goal, the Ordinance bans the aerial spraying of pesticides. Where public health
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25 ³⁸ See ORS 634.055(1) – (12).

26 ³⁹ See Ordinance, Section 1.

1 is central to the objective, there is no safer practice than a prohibition.⁴⁰ Therefore, these two
2 laws can be easily harmonized by recognizing that they seek to achieve the same public health
3 objectives in different ways that are not inconsistent, even though the local law provides more
4 stringent protections than those provided by state law. Oregon law has consistently recognized a
5 more stringent law is not necessarily preempted. *See Oregon Restaurant Assn. v. Corvallis*,
6 *supra*; *see also, State ex rel. Haley v. City of Troutdale, supra*; and *Springfield Utility Board v.*
7 *Emerald PUD, supra*.

8 Importantly, ORS 634.055 is not exclusive without exception. While ORS 634.055 states
9 that “local regulation of pesticides does not materially assist in achieving these benefits,” this
10 clause is part of the larger provision that addresses the need for uniformity of pesticide regulation
11 and advancing “public health, safety and welfare.”⁴¹ This is significant for two reasons. First, the
12 Ordinance at issue provides for the *absence* of regulations of pesticides, not for *inconsistent*
13 regulation of pesticide use that the preemptive law seeks to prevent. Therefore, in keeping with
14 state law’s directive to find consistency between state and local laws when possible, this ban is
15 not preempted by state law because it is not a regulation that authorizes the use of pesticides in a
16 manner that is inconsistent with the state law. Notably, a ban on aerially sprayed pesticides
17 would *only* be inconsistent if state law *required* the aerial application of pesticides. ORS 634.055
18 *et seq.* does not. *See La Grande/Astoria, supra* at 474 (“[A] local law is preempted only to the
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21 ⁴⁰ Notably, the aerial spraying of pesticides is not the only method of pesticide use in forest management.
22 The Ordinance does not apply to manually-applied pesticides which is an effective management strategy
that will continue unabated by the local law at issue.

23 ⁴¹ ORS 634.055 in its entirety states: “634.055 Legislative findings. The Legislative Assembly hereby
24 determines that the citizens of this state benefit from a system of safe, effective and scientifically sound
pesticide regulation. The Legislative Assembly further finds that a uniform, statewide system of pesticide
25 regulation that is consistent, coordinated and comports with both federal and state technical expertise is
essential to the public health, safety and welfare and that local regulation of pesticides does not materially
assist in achieving these benefits.” (Emphasis added.)

1 extent that it ‘cannot operate concurrently’ with state law, *i.e.*, the operation of local law makes it
2 impossible to comply with a state statute.”). Additionally, under the Ordinance, Lincoln
3 County’s prohibition on the aerially spraying of pesticides effectuates the same situation found in
4 counties where there are no commercial timber stands to be managed. In this respect, there is still
5 uniformity at a statewide level consistent with the legislative findings stated in ORS 634.055.

6 Second, ORS 634.055 *et seq.* allows for exceptions to the prohibition of local regulation.
7 The legislative finding – asserting that local regulations do “not materially assist” in achieving
8 the targeted benefits of the law – is not an absolute prohibition on all local regulations because,
9 under ORS 634.060 and 634.063, state law legalizes certain local regulations, *e.g.*, on county
10 property⁴², and to comply with the fire and building codes⁴³. Therefore, it is reasonable to
11 conclude that local regulations that create *inconsistent* rules for pesticide use and management *do*
12 *not assist in achieving uniformity* across the state. However, local laws, such as the Ordinance at
13 issue, that are *consistent* with the state law do in fact assist in achieving a uniform approach to
14 advancing public health and safety.
15

16 Both Plaintiffs and Defendants point to *Advocates for Effective Regulation v. City of*
17 *Eugene*, 160 Or. App. 292, 295, 981 P.2d 368 (1999), to support their assertions that ORS
18 634.057 preempts the Ordinance at issues. However, this case is distinguishable from the present
19 case. The proposed local legislation at issue in *Advocates for Effective Regulation* required
20

21 ⁴² ORS 634.060 states: “**Actions allowed by city, town, county or other political subdivision.**
22 Notwithstanding ORS 634.057, a city, town, county or other political subdivision of this state may adopt
23 a policy regarding the use of pesticides on property owned by the city, town, county or other political
24 subdivision adopting the policy.”

25 ⁴³ ORS 634.063 states: “**Exceptions to state preemption of pesticide regulation.** Nothing in ORS
26 634.057 shall limit the authority of a city, town, county or other political subdivision of this state to adopt
or enforce a local ordinance, rule or regulation strictly necessary to comply with: (1) The Uniform
Building Code published by the International Conference of Building Officials, as amended and adopted
by the Director of the Department of Consumer and Business Services; (2) A uniform fire code; or (3)
Any requirement of a state or federal statute or regulation pertaining to pesticides.”

1 periodic reporting of pesticide use and associated fees for non-compliance. As such, that local
2 law clearly attempted to introduce a unique local requirement into the statewide scheme for the
3 use and management of pesticides. As such, the court found:

4 By any reasonable definition of the terms, what the Initiative imposes is
5 regulation "regarding" the "use" of hazardous substances. We conclude that the
6 inclusion of pesticides, as listed in Article III.E.1(d) and (e) of the Initiative,
7 *cannot be reconciled with the preemptive provisions of ORS 634.055, ORS*
8 *634.057, and ORS 634.063.*

9 *Id.* at 309. (Emphasis added.)

10 In contrast to the present case, the reporting and fee requirements for pesticide use imposed by
11 the proposed initiative in *Advocates for Effective Regulation* were inconsistent with the
12 provisions of ORS 634.010 *et seq.* As explained above, the Ordinance at issue in this case
13 prohibits the aerially spraying of pesticides, which does not regulate their use in a manner that is
14 inconsistent with the state statute. Plaintiffs make a false comparison when they suggest that the
15 preemption of a mere "reporting" requirement means that the "banning" pesticides should
16 likewise be preempted. *See Plaintiffs' Motion for Summary Judgment*, p. 16, lns. 22-24. Rather,
17 the pertinent question is: is the local regulation inconsistent with state law such that one cannot
18 comply with both? When applied properly, the proposed reporting and fee requirements were
19 found to be inconsistent; the Ordinance's provisions are not.

20 Therefore, under Oregon law, the Freedom from Aerially Sprayed Pesticides Ordinance
21 functions consistently with state law, and is not expressly precluded by it. Plaintiffs' argument
22 that the Ordinance is preempted by ORS 634.057 fails.

23 ///

24 ///

1 **4. Even if this court finds that ORS Chapter 537 and/or 634 preempts some**
2 **provisions of the Freedom from Aerially Sprayed Pesticides Ordinance, the**
3 **preemptive effect is not complete.**

4 Even if this court finds that ORS 537.722 and/or ORS 634.057 preempts some provisions
5 of the Ordinance which regulate the aerial spraying of pesticides, express provisions of these
6 laws permit local regulations on certain properties. Under ORS 527.722, the Forest Practices Act
7 authorizes local regulation of certain properties including land local within the urban growth
8 boundaries of Lincoln County, and other properties outside urban growth boundaries. *See* ORS
9 527.722(2), (3), and (4). Similarly, the statewide scheme under ORS Chapter 634 authorizes the
10 local regulation of certain properties under ORS 634.060 and ORS 634.063.⁴⁴

11 Therefore, Sections 3(a) – (c), and 4(b) – (c) of the Ordinance should be modified to
12 retain the Ordinance’s validity subject to these statutory exceptions. Importantly, neither of these
13 statutory laws have any preemptive effect on the Ordinance’s Sections 4(a) and (d), 5 and 6.
14 Sections 4(a) and (d) operate only to the extent necessary to secure the rights stated in Section
15 3(a) – (c), therefore, modifications to the Section 3 provisions necessarily exact the required
16 limitations on Sections 4(a) and (d). Further, Sections 5 and 6 are enforcement provisions that
17 independently operate and only authorize the enforcement of whatever rights or prohibitions
18 remain in Sections 3 and 4. Neither ORS 527.722 nor 634.057 has any preemptive effect on
19 these provisions; therefore, these provisions should remain enacted.

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21
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23
24 ⁴⁴ Defendants agree when they assert: “County defendants contend that the preemption does not
25 completely preclude County regulations; the legislature provided an exception to the prohibitions
26 allowing a county to regulate use of pesticides on property owned by the County. ORS 634.060.” *See*
Defendants’ Cross Motion for Summary Judgment, pgs. 12, lns. 20-22 – 13, ln. 1.

1 The provisions of the Ordinance that should be modified and retained to reflect the
2 exceptions to the Forest Practices Act and State Pesticide Control Act are detailed in a section-
3 by-section summary of the provisions in Section V below.

4 **V. If this court were to find some provisions of the Ordinance invalid under the**
5 **preemptive laws cited by Plaintiffs, the severability clause in Section 7 of the Ordinance**
6 **operates to allow the offending provisions to be modified to comply with the preemptive**
7 **law while the remaining sections of the Ordinance remain in full force and effect.**

8 If this court were to find that the one or more of the preemptive laws asserted by
9 Plaintiffs operate to invalidate some applications of the provisions of the Ordinance that ban the
10 aerial spraying of pesticides in Lincoln County forest operations, that finding should not
11 invalidate those provisions in their entirety or the remainder of the Ordinance that was lawfully
12 enacted.

13 Current Oregon jurisprudence affirms that an unlawful provision of an initiative may be
14 severed from the remaining provisions where the law contains a severability clause evidencing
15 the drafters' intent to allow severability. In such case, Oregon courts have found that proposed
16 legislation – either by the people or legislators – that is found in part to violate pre-election
17 requirements, can be severed to allow the qualifying parts of the measure to remain. In
18 *Advocates for Eff. Reg. v. City of Eugene*, the Oregon Court of Appeals upheld a decision that
19 found that an unlawful provision of the initiative at issue could be severed; the court stated:

20 Whether an invalid provision is severable from the enactment of which it is a part
21 is a question of legislative intent. *Fullerton v. Lamm*, 177 Or. 655, 697, 165 P.2d
22 63 (1946). Thus, if there is an explicit severability clause, our role is to construe it
23 as we would any other enactment, that is to say, in a manner that best reflects the
24 intentions of the voters or the legislative entity that enacted it. *PGE v. Bureau of*
25 *Labor and Industries*, 317 Or. 606, 610-12, 859 P.2d 1143 (1993).

26 176 Or. App. 370, 32 P.3d 228, 231 (2001).

The court went on to state:

**Page 33 – INTERVENOR-DEFENDANT'S RESPONSE TO PLAINTIFFS' AND
DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT**

1 In this case, the Initiative contains an express, broadly worded severability clause,
2 which provides that, if any portion of the Initiative is declared to be invalid, it is
3 the intention of the voters that it be severed from the remainder. There is nothing
4 ambiguous about the intentions of the voters regarding the issue of severability.

5 *Id.*

6 Similarly, in the present case, the Ordinance at issue contains an explicit severability clause.⁴⁵

7 Therefore, if this court were to find any of the challenged sections invalid, these provisions can
8 be modified to comply with existing law while remaining true to the law’s intent. Unchallenged
9 and otherwise lawful provisions should remain in full force and effect.

10 If this court finds that the Ordinance unlawfully regulates the aerial spraying of
11 pesticides, the Ordinance’s provisions which operate to prohibit or punish the aerially spraying
12 of pesticides (not otherwise excepted) should be modified. This preemptive effect pertains only
13 to the stated rights of Sections 3(a), (b), and (c), and the prohibition of Section 4(b). Therefore,
14 these specific provisions can be modified to authorize the banning of aerially sprayed pesticides
15 *only* on the property authorized by the applicable preemptive laws.

16 The lawful provisions of the Ordinance would remain at follows:

- 17 • Section 1 would remain in its entirety.
- 18 • Section 2 would remain in its entirety.
- 19 • Section 3(a), (b), and (c) would be modified to reflect their limited application to County
20 properties excepted by the preemptive laws. As modified, these sections would read as
21 follows (*italics* indicate new language; strike out line indicates deleted text):

22
23
24 ⁴⁵ See Ordinance, Section 7 reads: “Severability. The provisions of this ordinance are severable. If any
25 court decides that any section, clause, sentence, part, or provision of this ordinance is illegal, invalid, or
26 unconstitutional, such decision shall not affect, impair, or invalidate any of the remaining sections,
clauses, sentence, parts, or provisions of the Ordinance.”

1 (a) Right to be Free from Toxic Trespass. All people of Lincoln County, along
2 with natural communities and ecosystems within the County, possess the right to
be free of aerially sprayed pesticides *on properties authorized under ORS 527.610*
– *527.785 and ORS 634.055 – 634.065.*

3 (b) Right to Clean Air, Water, and Soil. All people of Lincoln County possess the
4 right to clean air, water, and soil free of aerially sprayed pesticides; and that right
shall include the right to be free from potential risks to the air, water, and soil
5 ~~within the County~~ from aerially sprayed pesticides *on properties authorized under*
ORS 527.610 – 527.785 and ORS 634.055 – 634.065.

6 (c) Right to Rural Preservation. All people of Lincoln County possess a right to an
7 unspoiled rural quality of life free of aerially sprayed pesticides *on properties*
authorized under ORS 527.610 – 527.785 and ORS 634.055 – 634.065. The right
8 to an unspoiled rural quality of life free of aerially sprayed pesticides includes,
but is not limited to, outdoor recreational activities such as hunting, fishing, and
foraging.

- 9 • Section 3(e), (f), (g), and (h) would remain in their entirety.
- 10 • Section 4(a) would remain in its entirety.
- 11 • Section 4(b) would be modified as follows:

12 (b) It shall be unlawful for any corporation to engage in aerial spraying of
13 pesticides ~~within Lincoln County~~ *on properties authorized under ORS 527.610 –*
14 *527.785 and ORS 634.055 – 634.065.*

- 15 • Section 4(c) would be modified as follows:

16 (c) Corporations engaged in aerial spraying of pesticides *on properties authorized*
17 *under ORS 527.610 – 527.785 and ORS 634.055 – 634.065* in any municipality or
18 designated jurisdiction adjacent to Lincoln County shall be strictly liable for
damages caused by those pesticides to the residents and ecosystems within
19 Lincoln County.

- 20 • Section 4(d) would remain in its entirety.
- 21 • Sections 5 would remain in their entirety.
- 22 • Sections 6 (a), (b), and (c) would remain in their entirety.
- 23 • Section 7 would remain in its entirety.
- 24 • Section 8 would remain in its entirety.
- 25 • Section 9 would remain in its entirety.

1 **VI. Intervenor-Defendant agrees with the definitions of the terms “aerial spraying” and**
2 **“corporations” are proposed by Defendants.**

3 Defendants correctly propose the definition of “aerial spraying” to be limited to “aircraft
4 application technologies.” *See Defendants’ Cross Motion for Summary Judgment*, p.22, lns. 7-8.
5 Again, Defendants properly defer to the meaning of “corporation” as provided expressly in
6 Section 2(a) of the Ordinance. Therefore, Intervenor-Defendant endorses Defendants’ request for
7 this court’s confirmation of these terms’ definitions as proposed.

8 **VII. Conclusion**

9 Intervenor-Defendant asks this court to enter a judgment in their favor dismissing
10 Plaintiffs’ claims with prejudice, declaring that the right of local community self-government is
11 fundamental, inherent, inalienable, and constitutional, declaring that Lincoln County voters’ right
12 of local community self-government lawfully authorizes the enactment and enforcement of the
13 Freedom from Aerially Sprayed Pesticides Ordinance of Lincoln County, and declaring that
14 Plaintiffs’ assertions of preemptive Oregon laws to support claims that the Ordinance is
15 unlawfully-enacted violates the Lincoln County voters’ right of local community self-
16 government.

17
18 In the alternative, if this court rejects Intervenor-Defendant’s claimed right of local
19 community self-government and attendant declaratory relief, Intervenor-Defendant asks this
20 court to enter a judgment in their favor dismissing Plaintiffs’ claims with prejudice because the
21 Ordinance is lawfully enacted, consistent with Oregon statutes, and therefore, not preempted by
22 them.

23 As a secondary alternative, if the court finds that the operation of some provisions of the
24 Ordinance are preempted in part, Intervenor-Defendant asks this court to find that the Ordinance
25

1 was lawfully enacted, to modify offending provisions, and to order the remainder of the
2 Ordinance to remain in full force and effect.

3 Finally, Intervenor-Defendant asks this court to award them their costs and
4 disbursements, and any other relief the court considers just and equitable.

5 DATED this 18th day of September, 2017.

6
7 s/ Ann B. Kneeland
8 Ann B. Kneeland, OSB #992977
9 Community Environmental Legal Defense Fund
10 P.O. Box 10294
11 Eugene, OR 97440
12 Tel: (541) 514-9720
13 Email: ann@kneelandlaw.net

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26 Attorney for Intervenor-Defendant
Lincoln County Community Rights

OCT 23 2011
3:50
C. J. Small

**Local Food System Ordinance
of Benton County, Oregon**

Section 1. Findings and Intent

We the people of Benton County have the inalienable right to grow, raise, rear, access, harvest, preserve, process, exchange, and consume - both individually and collectively - whole food and food products from a local food system.

We the people of Benton County find that our right to a local food system is essential to the well-being of the County's residents and natural communities, as well as the health, resilience, and flourishing of the local economy, of which local agriculture plays a vital role.

We the people of Benton County have the right to a local food system and seed heritage that does not harm the right of natural communities to exist, persist, and flourish; adapts to local growing conditions; promotes biodiversity, resilience, and productivity; and provides for the social, equitable, nutritional, economic, and cultural enhancement of the quality of life for all residents of Benton County.

We the people of Benton County find that the civil right to grow, save, preserve, protect, harvest, adapt, and distribute open pollinated seeds, which is the foundation of all agriculture, is required - both individually and collectively - to secure the peoples' commonly held seed heritage and right to a local food system.

We the people of Benton County find that the patenting and ownership of seeds and other self-replicating life forms used for the growing, rearing, or raising of food is a direct threat to our inalienable right - both individually and collectively - to grow, save, preserve, protect, harvest, adapt, and distribute seed to grow food and produce food products from one generation to another within Benton County.

We the people of Benton County find that the patenting and privatization of seeds that have been genetically modified interferes with the diversity of and access to the people's seed heritage, reduces the people's ability to save, replant, and adapt open pollinated seeds free of contamination, limits research and development of seeds and other life forms adapted to local growing conditions and soils that meet the economic and nutritional needs of the community, and encourages the use of genetically modified or altered life forms which pose significant risks to natural communities and farmer livelihoods through irreversible contamination of crops and related species.

We the people of Benton County understand that any attempt to prohibit the privatization and use of patented seed may run afoul of claimed corporate "rights" to engage in those practices, as well as State or federal laws. We understand that failure to legislatively challenge those "rights" and laws guarantees that a local food system will never exist.

We the people of Benton County therefore enact this local law pursuant to the inherent and inalienable right of the residents of Benton County to govern their own county for their own health, safety, and welfare. That authority is also secured by the Declaration of Independence's assertion that governments are instituted to secure the rights of people, in the State Constitution of Oregon's recognition that all power is inherent in the people, and in the Benton County Charter, which delegates the authority to the people and their representatives to enact local legislation on matters of county concern;

Therefore, through this Ordinance, which shall be known and cited as the "Local Food System Ordinance of Benton County, Oregon", *the people of Benton County ordain as follows*:

Section 2. Statements of Law – Food Bill of Rights

a) ***Right to a Local Food System***: All residents of Benton County possess the right to a local food system. This right shall include, but is not limited to, the right to access, use, consume, produce, harvest, collect, process, and distribute foods generated from sustainable agricultural systems within Benton County.

b) ***Right to Seed Heritage***: All residents of Benton County possess the right to grow, adapt, save, preserve, protect, collect, harvest, and distribute all seeds grown within Benton County. This right shall include, but is not limited to, the right to be free from infection, infestation, or drift by any means from genetically engineered organisms, trans-genetic risk seed, or other seeds that have been developed using methods other than traditional plant breeding.

c) ***Rights of Natural Communities***: Natural communities, such as soils and other terrestrial systems, and aquatic systems such as aquifers, streams, rivers, and wetlands, shall possess the right to exist, persist, maintain themselves and regenerate their own vital cycles, structures, functions and evolutionary processes to the extent necessary to further the creation and protection of Benton County's local food system. That right shall include the right to be free from genetically engineered organisms and the right to be free from the patenting, licensing, or ownership of their genes within Benton County.

d) ***Right to Self-Government***: All residents of Benton County possess the right to a form of governance where they live which recognizes that all power is inherent in the people and that all free governments are founded on the people's consent, to the extent necessary to further the creation and protection of Benton County's local food system. Use of the "Benton County" municipal corporation by the people of Benton County shall not be deemed, by any authority, to eliminate or reduce that self-governing authority.

e) ***Rights are Fundamental and Self-Executing***: All rights delineated and secured by this Ordinance are fundamental and inalienable, shall not need additional legislation to be enforceable, and shall be enforceable against both public and private actors.

Section 3. Statements of Law – Prohibitions Necessary to Secure the Bill of Rights

(a) It shall be unlawful for any corporation or governmental entity to violate any right secured by this Ordinance.

(b) It shall be unlawful for any corporation or governmental entity to engage in the use of genetically engineered organisms within Benton County.

(c) It shall be unlawful for any corporation or governmental entity to plant trans-genetic risk seed in Benton County unless such seed has been proven to be free of any traces of genetic modification, and such proof has been submitted to the Benton County Commissioners and the report released to the public without charge.

(d) It shall be unlawful for any corporation or governmental entity to require registration or patenting of open pollinated or traditionally-bred seed within Benton County.

(e) No person or business in Benton County shall be liable to any corporation claiming seed patent or ownership rights or claiming loss of income or commercial infringement resulting from the inadvertent infection of agricultural crops by genetically engineered organisms or other patented traits.

(f) No permit, license, privilege, charter, or other authority issued by any State or federal entity which would violate the rights or prohibitions of this Ordinance shall be deemed valid within Benton County.

Section 4. Implementation

(a) Existing, non-perennial and perennial genetically engineered organisms within Benton County must be harvested, removed, or destroyed within ninety (90) days after the adoption of this Ordinance.

(b) It shall be unlawful to allow re-growth of genetically engineered seedlings, forage sod, stump sprouting, or perennials (including, but not limited to, alfalfa) in any location where those organisms have previously been intentionally grown, processed, or stored. The Benton County Commissioners shall establish fines and shall impose those fines on landowners violating this sub-section.

(c) Ninety (90) days after the effective date of this Ordinance, corporations that either hold patents on, licenses for, or own genetically engineered organisms shall be strictly liable for the removal of any and all genetically engineered organisms found in Benton County where the genetically engineered organism was not intentionally put there by the property owner or tenant. Those removal costs shall include, but not be limited to, clean-up, testing, lost income, attorney fees, and any other costs related to the contamination.

(d) Testing costs and contamination of seeds before planting – Ninety (90) days after the effective date of this Ordinance, owners of patents of genetically engineered organisms which are discovered by testing of trans-genetic risk seed within the County, shall be strictly liable for the costs of clean-up and removal, testing, lost income, attorney fees, and any other costs related to the contamination.

Section 5. Enforcement

(a) Any resident or group of residents within Benton County shall have legal standing and the authority to enforce the provisions of this Ordinance in any court possessing jurisdiction over events occurring within Benton County. In such an action, the resident or group of residents shall be entitled to recover damages and all costs of litigation, including, without limitation, expert and attorney's fees.

(b) Benton County may enforce this Ordinance through an action brought in a court of competent jurisdiction. In such an action, Benton County shall be entitled to recover all costs of litigation, including, without limitation, expert and attorney's fees. Violation of the prohibitions established by this Ordinance shall also be a criminal offense, and action against the violator shall be brought by the County in a court of competent jurisdiction.

(c) Any action brought to remedy the violation of the rights of natural communities shall list the natural community as a plaintiff in the action; damages sought must bear a relationship to the damage inflicted upon the natural community, and awarded damages must be payable to the municipality for the restricted use of repairing the natural community to its condition prior to the violation.

Section 6. Enforcement – Corporate Powers

(a) Corporations which violate this Ordinance shall not be deemed to be "persons," nor possess any other legal rights, privileges, powers, or protections which would interfere with the enforcement of rights or prohibitions enumerated by this Ordinance. Such powers shall include the authority to assert state or federal preemptive laws in an attempt to overturn this Ordinance, and the authority to assert that the people of the County lack the authority to adopt this Ordinance.

(b) All laws adopted by the legislature of the State of Oregon, and rules adopted by any State agency, shall be the law of Benton County only to the extent that they do not violate the rights or prohibitions of this Ordinance.

Section 7. People's Right to Self-Government

Any attempts to use other units and levels of government to preempt, amend, alter, or overturn this Ordinance, or parts of this Ordinance, shall require Benton County to hold public hearings that explore the timely adoption of other measures that expand the ability of residents to protect their fundamental and inalienable right to self- government, including without limitation, the amendment of the Benton County Charter to secure the peoples' rights as enumerated in this Ordinance to a local food system.

Section 8. Definitions

(a) "Corporation": Shall refer to any corporation, limited partnership, limited liability partnership, business trust, other business entity, or limited liability corporation organized under the laws of any State of the United States, or under the laws of any country.

(b) "Engaged in the Use of": Shall include, but not be limited to, the use, provision, sale, or patenting of genetically modified organisms which are then used, planted, grown, cultivated, raised, reared, propagated, or harvested.

(c) "Genetically Engineered Organism": Any organism, organisms, or life forms, in which the genetic or self replicating material has been changed, engineered, modified or altered using techniques such as, but not limited to:

- 1) In vitro nucleic acid techniques, including recombinant deoxyribonucleic acid (DNA) techniques and the direct injection of nucleic acid into cells or organelles, or
- 2) Fusion of cells (including protoplast fusion) or hybridization techniques that overcome natural physiological, reproductive, or recombination barriers, where the donor cells/protoplasts do not fall within the same taxonomic family, in a way that does not occur by natural multiplication or natural recombination.

The phrase shall not include traditional selective breeding, conjugation, fermentation, hybridization, in vitro fertilization, or tissue culture.

(d) "Seed Heritage": All open pollinated seeds developed and adapted over millennia, handed down from generation to generation, held in common by all peoples, which serve as the inalienable, inherited, life-giving wealth of all future generations of all the people.

(e) "Sustainable Agriculture": Agriculture conducted pursuant to the provisions of U.S. Code Title 7, Section 3103.19 which does not violate the rights of natural communities and ecosystems as recognized by this Ordinance; which respects the rights enumerated in section two of this Ordinance; which provides a viable income for farming and harvesting families; which maintains plants, soil, air, water, and animals free from genetic modifications or patenting; which is free from the application of sewage sludge as well as urban and industrial waste not properly composted; and that provides for the humane treatment of livestock.

(f) "Local Food System": A food system based on sustainable agriculture that does not violate the rights of natural communities and ecosystems to exist, persist, and flourish, and which promotes biodiversity, living soils, resilience, and nutrient density while providing for the social, equitable, economic, nutritional and cultural enhancements of the quality of life in Benton County.

(g) "Trans-genetic risk seed": Any seed, or crop produced from that seed, including, but not limited to, corn, soy, flax, canola, wheat, beets, alfalfa, and bent grass that has been genetically modified or patented and is widely grown, spread, and distributed, making all seeds of those crops and related crops subject to contamination with traces of the alteration.

Section 9. Severability

The provisions of this Ordinance are severable. If any court of competent jurisdiction decides that any section, clause, sentence, part, or provision of this Ordinance is illegal, invalid, or unconstitutional, such decision shall not affect, impair, or invalidate any of the remaining sections, clauses, sentences, parts, or provisions of this Ordinance. The people of Benton County hereby declare that in the event of such a decision, and the determination that the court's ruling is legitimate, it would have enacted this Ordinance even without the section, clause, sentence, part, or provision that the court decides is illegal, invalid, or unconstitutional.

Section 10. Repealer

All provisions within the county code of Benton County that are inconsistent with the provisions of this Ordinance are hereby repealed, but only to the extent necessary to remedy the inconsistency.

Section 11. Effect

This Ordinance shall take effect on the date of adoption.



CIRCUIT COURT OF OREGON
FOR BENTON COUNTY

BENTON COUNTY COURTHOUSE
POST OFFICE BOX 1870
CORVALLIS, OREGON 97339

LOCKE A. WILLIAMS
CIRCUIT JUDGE

(541) 766-6827

February 24, 2014

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Vance M. Croney
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Re: Allen, et al v Morales; Case No. 13-10656

Dear Counsel:

The above-referenced matter came before the Court on January 31, 2014, for hearing upon Petitioners' *Petition for Determination of Initiative Measure Compliance with Constitutional Provision under ORS 250.168*. Petitioners appeared in person by and through their attorney Ann B. Kneeland. Respondent appeared by and through his attorney Vance M. Croney. The Court heard arguments of Counsel, ruled from the bench that the proposed measure contains only one subject and that the matters contained within the proposed measure are properly related. The Court took under advisement the issue whether section 1(2)(d), Article IV of the Oregon Constitution requires an initiative measure to include the full text of provisions repealed by the proposed measure.

The Court finds that Section 10 of the proposed measure acts, as it states, to repeal certain provisions of the Benton County Code that are inconsistent with the provisions of the proposed ordinance to the extent necessary to remedy the inconsistency and that under Oregon law the repeal of all or a part of some provisions is not an amendment of the remainder. The holding in *Schnell v. Appling*, 238 Or 202, 395 P2d 113 (1964) makes it clear that the full-text requirement of the Oregon Constitution requires only that the petition carry the exact language of the proposed measure, nothing more, and should not include the text of repealed statutes or provisions. The Court recognized that:

“As a practical matter, the inclusion of the text of repealed statutes in the new enactment would create a substantial volume of surplus verbiage, and could produce confusion. The text of repealed statutes, like that of statutes referred to in the proposed measure, would be no part of the enacted statute should it pass, and some means would have to be found for eliminating the surplusage after enactment” *Id* at 204.

The facts in *Schnell v. Appling* are distinguishable from those present before the Court in this case because the initiative petition at issue in *Schnell* at least designated those certain sections of existing law

to be repealed by section number. Section 10 of the proposed measure does not specifically identify which Code provisions would be repealed. Section 10 simply repeals those “provisions of the Benton County Code that are inconsistent with the provisions of the proposed ordinance”.

The failure of Section 10 to clearly identify for the voter which provisions of the Benton County Code will be repealed by the passage of the proposed measure is worrisome to the Court. However, I can find nothing in the constitution or case law to suggest that the full-text requirement includes a requirement that Code provisions which would be repealed be specifically identified in the measure. The constitution requires the proponents of the measure to provide potential signers with the full text of the proposed measure, nothing more. The measure as proposed by Petitioners in the matter now before the Court satisfies this requirement.

Although I find the vagueness of Section 10 concerning, as stated by the Court of Appeals in *Carey v. Lincoln Loan Co.*, 203 Or App 399, 125 P. 3d 814 (2005):

“The potential legal effect of the amendment on other provisions of the constitution could well provide reasons to support or oppose the proposal, but it was not something the petition itself had to describe. Indeed, the effect of a constitutional amendment might be sufficiently uncertain that it would be an issue in the debate over the measure.” *Id* at 406.

For the reasons stated on the record following oral argument and those stated herein, the Court finds that the Local Food System Ordinance of Benton County, Oregon, as proposed by Petitioners meets the requirements of section 1(2)(d), Article IV of the Oregon Constitution and hereby directs Respondent to enter a determination consistent with the Court’s findings. Ms. Kneeland will kindly include Petitioners’ proposed findings of fact and conclusions of law in her proposed form of general judgment.

Respectfully,

Locke A. Williams

Locke A. Williams
Circuit Court Judge

CERTIFICATE OF SERVICE

I certify that on September 18, 2017, I served the foregoing INTERVENOR-
DEFENDANT’S RESPONSE TO PLAINTIFFS’ MOTION FOR SUMMARY JUDGMENT
AND DEFENDANTS’ CROSS MOTION FOR SUMMARY JUDGMENT upon:

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by E-serve.

DATED this 18th day of September, 2017.

s/ Ann B. Kneeland
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