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

REX CAPRI, WAKEFIELD FARMS, LLC,

Plaintiffs,

v.

DANA W. JENKINS, LINCOLN COUNTY,

Defendants.

Case No. 17CV23360

**PLAINTIFFS’ MOTION FOR
SUMMARY JUDGMENT**

ORAL ARGUMENT REQUESTED

**(Appeal under ORS 246.910, Declaratory
Judgment)**

UTCR 5.050 INFORMATION

Plaintiffs request 45 minutes for oral argument. Official court reporting services are requested.

MOTION

Pursuant to ORCP 47 A, Plaintiffs move this Court for summary judgment reversing Defendant Dana W. Jenkins’ certification of Ballot Measure 21-177 (“Ordinance”) as approved by electors and declaring that the Ordinance is void in its entirety because not validly adopted or, in the alternative, declaring that sections 3(a)–(c), 4, 5, and 6 of the Ordinance are invalid, and enjoining the County from enforcing the sections.

This Motion is supported by the Declarations of Rex Capri (“Capri Dec.”) and Nancy Hiatt (“Hiatt Dec.”), and the following Points and Authorities, which demonstrate there is no genuine issue of material fact and Plaintiffs are entitled to judgment as a matter of law.

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POINTS AND AUTHORITIES

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A. Introduction

The Ordinance is, as its supporters proclaim, the first of its kind in the nation.¹ The Ordinance however, draws its uniqueness from going far beyond the County’s power. As set forth more fully below, this Court should find the Ordinance void in its entirety or, in the alternative, find its provisions invalid to the extent they are preempted by well-established state law.

The Ordinance, a copy of which is attached as Exhibit 1, makes many changes to County law, including:

- “[M]ak[ing] it unlawful for any ‘corporation’ to ‘engage in [the] aerial spraying of pesticides’”;
- “[A]uthoriz[ing] direct action by [any] person if [the] county or courts fail to enforce [the Ordinance]”;
- “[E]stablishing strict liability for damages to residents and ecosystems caused by aerial spraying”;
- “[P]re-empt[ing] state and federal law inconsistent with rights or prohibition of [the Ordinance]”;
- “[P]roviding that state and federal laws apply only to extent they are not in violation of [the O]rdinance”;
- “[I]nvalidat[ing] any permits issued by a state or federal entity that violate enumerated rights”; and
- [P]rohibit[ing corporations] from asserting state or federal preemption [of the Ordinance]”.²

Oregon law does not authorize the County to adopt the Ordinance, and, even if the County had the authority to adopt the Ordinance, three different Oregon laws expressly

¹ <https://celdf.org/2017/05/press-release-lincoln-county-adopts-first-nation-ban-aerial-pesticide-spray/> (“First-in-Nation”).

² Ballot Title, Measure 21-177, Lincoln County Voters’ Pamphlet, p. 21-4 (May 16, 2017) (“Ballot Title”).

1 prohibit—preempt—the County from enforcing the Ordinance: the State Pesticide Control Act,
2 the Oregon Forest Practices Act, and the laws protecting the right to engage in farm and forest
3 practices, ORS 30.930 to 30.947.

4 In simplest terms, the Ordinance is an attack on the rule of law, an assertion that the
5 “right of local community self-government” trumps the rights of the broader system of
6 government of which the local government is a part. Section 1 of the Ordinance acknowledges
7 that “the state itself restricts the county’s lawmaking powers in ways that prevent the people of
8 the county from protecting the health, safety and welfare of the people and natural communities
9 from such harms as aerial spraying of pesticides.” Multiple avenues exist through which
10 government change can be effected. Declaring “[i]ndependence” from the broader government
11 structure—as the County has done through the Ordinance—is not among them.

12 **B. Plaintiffs’ Motion**

13 This Motion challenges the validity of both kinds of changes the Ordinance makes:
14 (1) the ban on any “corporation[s]’ engag[ing] in aerial spraying of pesticides,” and (2) the
15 provisions that make County’s laws superior to state and federal laws.

16 This Motion follows the analytic framework for deciding the validity of local laws
17 provided in *State v. Logsdon*, 165 Or App 28, 31 (2000):

18 The validity of a charter amendment depends first on whether the
19 voters of the county had the authority to enact it. If they did, we
20 then must determine whether the charter amendment nevertheless
is preempted by state law.³

21 This Motion involves no disputes of fact, but only comparison of the terms of the
22 Ordinance to state law. Regardless of whether the question is of authority to enact the Ordinance
23 or preemption by state law, summary judgment is the appropriate method of resolution. *E.g.*,
24 *Lane Transit Dist. v. Lane County*, 327 Or 161 (1998) (validity of measure decided on summary
25

26 ³ Although *Logsdon* referred to a county’s charter amendment, the same two-step analysis applies to
deciding the validity of ordinances. *E.g.*, *Kinney v. O’Connor*, 139 Or App 75 (1996) (county ordinance).

1 judgment); *Ashland Drilling, Inc. v. Jackson County*, 168 Or App 624 (2000) (preemption of
2 county ordinance decided on summary judgment).

3 Plaintiffs address first the Ordinance’s purported “pre-empt[ion of] state and federal
4 law[.]” That assertion of reverse “preempt[ion]” renders the Ordinance void in its entirety
5 because the County lacks the authority to so restrict state and federal law. If this Court agrees,
6 then this Court need not decide the remaining issues: whether state laws preempt (or otherwise
7 invalidate) individual substantive provisions of the Ordinance, such as the ban on aerial
8 spraying.⁴ If this Court does reach the preemption issues, however, this Court should find
9 preemption and declare that state law prohibits the County from enforcing the Ordinance.

10 **C. The Ordinance is Invalid in its Entirety**

11 The Ordinance is invalid in its entirety because the Ordinance contains subjects beyond
12 the power of the County to adopt and was presented to voters without the full text.

13 **1. Plaintiff Capri has standing to challenge the validity of the Ordinance**
14 **under ORS 246.910(1)**

15 Plaintiff Capri has standing to challenge the County Clerk’s certification of the adoption
16 of the Ordinance.

17 ORS 246.910 (1) provides:

18 A person adversely affected by any act or failure to act by * * * a
19 county clerk * * * under any election law, or by any order, rule,
20 directive or instruction made by * * * a county clerk * * * under
21 any election law, may appeal therefrom to the circuit court for the
22 county in which the act or failure to act occurred or in which the
23 order, rule, directive or instruction was made.

24 According to the Court of Appeals, “the standing requirements for an election law
25 challenge [under ORS 246.910(1)] are less stringent than challenges under ORS chapter 28[.]”

24 ⁴ Although Plaintiffs allege that provisions of the Ordinance violate rights protected by the state and
25 federal constitutions, Plaintiffs are following Oregon’s “first things first” doctrine, which admonishes
26 parties to present courts with statutory claims ahead of constitutional claims. *State v. Rodriguez-Moreno*,
273 Or App 627, 633 n. 6 (2015). Because Plaintiffs’ statutory claims are dispositive, there is no need to
raise the constitutional claims at this time.

1 *Lowe v. Keisling*, 130 Or App 1, 14 (1994), *rev. dismissed*, 320 Or 570 (1995). The only attribute
2 needed to obtain standing under ORS 246.910(1) is an allegation that the plaintiff is a registered
3 voter: “ORS 246.910(1) requires only that a person be ‘adversely affected’ before he can bring
4 an action challenging an election ruling of the Secretary of State. In effect, this means that any
5 registered voter—and probably others as well—can file an action.” *Ellis v. Roberts*, 302 Or 6, 11
6 (1986); *Lowe*, 130 Or App at 14 (same). ORS 246.910(1) applies to decisions of county clerks in
7 addition to decisions of the Secretary of State. *E.g.*, *City of Eugene v. Roberts*, 305 Or 641
8 (1988) (challenge to county clerk’s decision not to place question on ballot). Plaintiff Capri not
9 only alleges that he is a registered voter of Lincoln County, Amended Complaint, ¶8—Capri is a
10 registered voter of Lincoln County. Capri Dec., ¶2.

11 **2. The Ordinance is beyond the power of a county to adopt**

12 Simply put, the County cannot limit the reach of state and federal government as this
13 Ordinance purports to do. The County “derive[s its] legislative power from specific statutory
14 grants and the broad general statutory grant in ORS 203.035 of authority ‘over matters of county
15 concern.’” *Allison v. Washington County*, 24 Or App 571, 581 (1976). The pertinent part of
16 ORS 203.035(1) provides: “the electors of a county may by ordinance exercise authority within
17 the county over matters of county concern[.]” The key term is “county concern.” The
18 Ordinance is invalid because the Ordinance contains provisions that are, as a matter of law, not
19 “matters of county concern.”

20 This case is controlled by *Logsdon* in which the Court of Appeals held the voters of a
21 county may not adopt a measure that makes county laws superior to state or federal laws or that
22 controls the actions of state or federal officials. A measure that overrides state or federal laws or
23 controls state or federal officials is not “of county concern” and, therefore, not a measure that
24 ORS 203.035 permits the voters of a county to adopt: “it is well established that, whatever else
25 local government authority may entail, it does not include governing the conduct of state and
26 federal officials.” 165 Or App at 32.

1 The Ordinance, however, does exactly what *Logsdon* says a county may not. First,
2 section 6(c) provides:

3 All laws adopted by the legislature of the State of Oregon, rules
4 adopted by any State agency, laws adopted by the United States
5 Congress, and rules adopted by any federal or international agency,
6 shall be the law of Lincoln County only to the extent that they do
7 not violate the rights or prohibitions of this Ordinance.

8 Second, section 4(d) provides:

9 No permit, license, privilege, charter, or other authority issued by
10 any State or federal entity that would violate the rights of this
11 Ordinance, shall be deemed valid within Lincoln County.

12 Third, section 2(a) defines the “corporations” to which the Ordinance applies to include
13 “state or federal agencies, and state or federal entities.” Wherever the Ordinance limits the
14 authority of a “corporation,” the Ordinance limits the authority of “state or federal agencies” and
15 “state or federal entities.” Under the Ordinance, therefore, the state and federal governments
16 may not (among other proscriptions) “engage in aerial spraying of pesticides within Lincoln
17 County.” Ordinance, §4(b).

18 Fourth, the Ordinance prohibits the state and federal governments from asserting that
19 state and federal authorities are superior to the Ordinance. Section 6(a) expressly denies the state
20 and federal governments “the power to assert state or federal preemptive laws in an attempt to
21 overturn this ordinance, and the power to assert that the people of this municipality lack the
22 authority to adopt this ordinance.”

23 Any one of the quoted provisions renders the Ordinance invalid in its entirety. The
24 subject matter of the Josephine County measure in *Logsdon*—protection of privacy—was
25 different than the subject matter of the Ordinance but, like the Ordinance, the county measure in
26 *Logsdon* contained provisions that, in substantially identical terms, made the county measure
paramount to state and federal laws and required state and federal officials to comply with

1 county law rather than state or federal laws. Like the Ordinance, the Josephine County measure
2 provided substantive rules of law, and then, to protect those substantive provisions from state and
3 federal interference, added provisions that elevated county law above state and federal law:

4 Where any current law, ordinance, resolution, administrative rule,
5 or statute within or outside of Josephine County may be interpreted
6 to deny or erode any of the provisions of this Charter Amendment,
7 that interpretation is void and is not enforced within Josephine
8 County by any individual, group, or federal, state or local
9 governmental body or agency. Josephine County Charter,
10 §29.4(2).⁵

9 Like the Ordinance, the Josephine County measure required state and federal officials to
10 follow county—not state or federal—law. First, the Josephine County measure prohibited state
11 and federal officials from taking actions in violation of the county measure:

12 No * * * abridgments of any of the provisions of this Charter
13 Amendment shall be * * * enforced by any entity acting within
14 Josephine County. Josephine County Charter, §29.4(3).

14 Second, the Josephine County measure removed any immunity of state or federal
15 officials to criminal prosecution or civil liability for taking action in violation of the Josephine
16 County measure:

17 No person shall be immune from such citation regardless of any
18 personal or official capacity whatever. Josephine County Charter,
19 §29.4(4).

20 No person or body, public or private, shall be immune from
21 jurisdiction by the Courts of Josephine County over matters arising
22 from this Charter Amendment. Josephine County Charter,
23 §29.4(5).

22 The Court of Appeals did not just invalidate the individual provisions of the Josephine
23 County measure that elevated county law over state and federal law. As a result of the inclusion
24 of the unlawful provisions, the Court of Appeals held the entire Josephine County measure was
25 “invalid.” The Court of Appeals explained:

26 _____
⁵ A copy of section 29.4 is attached as Exhibit 2.

1 In this case, section 29.4 of the Josephine County Charter, by its
2 terms, purports to govern the conduct of any “public official,”
3 whether elected or appointed, and “any agent of the government.”
4 Indeed, it declares that no one—no “individual, group, or federal,
5 state or local governmental body or agency”—may enforce any
6 law that is contrary to section 29.4. No county has the authority to
do that. Section 29.4 goes well beyond any matter that
legitimately may be regarded as a “county concern.” It follows
that section 29.4 is invalid and that the trial court did not err in so
concluding[.] 165 Or App at 33.

7 The significance of provisions that go, as the Court of Appeals describes, “well beyond
8 any matter that may be regarded as a ‘county concern,’” is that the individual provisions are not
9 just unenforceable; instead, the provisions mean the entire Ordinance was not lawfully adopted.
10 *GTE Northwest Inc. v. Oregon Public Utility Com’n.*, 179 Or App 46, 60-61 (2002) (discussing
11 *Logsdon* as holding that the voters of Josephine County lacked the “authority to enact” the
12 “amendment to their charter”).⁶

13 The only distinction between the lawmaking power of Lincoln County and the
14 lawmaking power of Josephine County is that Lincoln County’s power derives from the
15 Legislative Assembly and Josephine County’s power derives from the Constitution. That
16 distinction is, however, without a difference: “home rule and general law counties have the same
17 legislative authority.” *Allison*, 24 Or App at 581. Thus, if the voters of Josephine County could
18 not adopt their measure, the voters of Lincoln County could not adopt the Ordinance.

19 **3. The Ordinance violates Article IV, section 1(2)(d) by not including the**
20 **full text of the proposed law**

21 The Ordinance violates the first requirement of Article IV, section 1(2)(d) of the Oregon
22 Constitution by failing to identify for voters in any fashion the provisions of current county law
23 the Ordinance repeals.

24 Article IV, section 1(2)(d) provides: “An initiative petition shall include the full text of

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26 ⁶ That the court in *Logsdon* invalidated the entire county measure can also be seen by the court’s not
moving on to the second step in the court’s analysis, which would have called for determining whether
any state laws preempted specific provisions of the measure.

1 the proposed law or amendment to the Constitution.” Section 8 of the Ordinance provides:

2 All inconsistent provisions of prior Ordinances adopted by Lincoln
3 County are hereby repealed, but only to the extent necessary to
remedy the inconsistency.

4 Section 8 renders the Ordinance invalid because, under Article IV, section 1(2)(d), a measure
5 may not repeal existing provisions of law without specifying a repealed provision by number or
6 stating the repealed provision’s text.

7 Plaintiffs acknowledge that this Court rejected a full-text challenge in *Bregman v.*
8 *Jenkins*, Lincoln County Circuit Court Case No. 15CV19955; however, the petitioner in that case
9 did not assert *Dolan v. Barnard*, 5 Or 390, 392 (1875), as a basis for why the Ordinance violates
10 the full-text requirement, and the addition of that omission should change the result.

11 In *Dolan*, the Supreme Court held that a provision like section 8 was unconstitutional: a
12 legislatively adopted law that repealed inconsistent provisions in the same manner as the
13 Ordinance does— “[A]ll Acts or parts of Acts inconsistent with this Act are hereby repealed”—
14 violated Article IV, section 22, which requires that, when the Legislative Assembly amends an
15 existing statute, “the act revised, or section amended shall be set forth, and published at full
16 length.”

17 In reaching its decision, the Supreme Court in *Dolan* explained:

18 [T]he evil in legislation, which § 22 of Art. 4 of our Constitution is
19 directed against, is the practice of introducing into and
20 intermingling with the provisions of an act, changes or alterations
21 in some of its provisions, in such a manner as to render it difficult
22 to ascertain, by an inspection of the act amended, to what extent
23 and in what respects the same has been modified by the
24 amendatory act. Hence the legislator is required, by our
25 Constitution, to set out and incorporate in the amendatory act, not
26 only the changes made in the act amended, but the portions thereof
not affected by the amendment, in such manner that the syntax and
meaning of the law, as amended, will be complete within itself.
This is required, in order that those who are interested in knowing
what the law is may find it out, without prospecting through a
labyrinth of words * * *. 5 Or at 392.

1 In *Dolan*, the Supreme Court identified the impossible situation in which the Ordinance
2 placed voters: having to “prospect” through the Lincoln County Code to guess at which
3 provisions the Ordinance repeals. For example, Lincoln County Code §1.0045(2) requires the
4 County to “work with state and federal agencies to assure that pesticides and herbicides are not
5 dispersed in quantities and in a manner so as to adversely affect human health and property of its
6 citizens.” Is the section repealed? Lincoln County Code §1.0005(2) provides that “air, land and
7 water quality problems in the County are * * * currently adequately regulated by existing state
8 and federal pollution control programs.” Is the section repealed? Under *Dolan*, voters’ inability
9 to answer these questions from the text of the Ordinance means the Ordinance is invalid.

10 *Dolan* remains good law. The Court of Appeals relied on *Dolan* as recently as 2003:

11 The session law [at issue in *Dolan*] simply dictated, “That all Acts
12 or parts of Acts inconsistent with this Act are hereby repealed.”

13 * * * In *Dolan v. Barnard*, 5 Or 390 (1875), the Supreme Court
14 not surprisingly concluded that the 1874 act ran afoul of Article
15 IV, section 22[.]”

16 *State v. Norris*, 188 Or App 318, 334 (2003).

17 *Dolan* controls because Article IV, section 1(2)(d) applies the “full text” rule of Article
18 IV, section 22, to initiative measures. *Kerr v. Bradbury*, 193 Or App 304, 314 (2004), *rev*
19 *dism’d*, 340 Or 241, *adh’d to on recons*, 341 Or 200 (2006) (holding proposed initiative violated
20 “full text” requirement of Article IV, section 1(2)(d)). Despite the language of Article IV,
21 Section 22’s being “slightly different from that of Article IV, Section 1(2)(d)[,]” the two sections
22 carry the same meaning, with section 22 applicable to the Legislative Assembly, and section
23 1(2)(d) applicable to the people when they initiate measures:

24 [T]o conclude that Sections 1(2)(d) and 22 of Article IV have
25 different meanings * * * would require us to conclude that the
26 framers of the original constitution intended that legislators be
provided with the full text of statutes to be amended when voting
on proposed amendments, while the framers of the 1968
amendment [that added Article IV, section 1(2)(d)] intended that
voters not be entitled to the same information. The secretary
has suggested no reason why the voters in 1968 would have

intended that difference, and we can imagine none.

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2 *Kerr*, 193 Or App at 314-15. If the provision under review in *Dolan* violated Article IV, section
3 22, then section 8 of the Ordinance violates Article IV, section 1(2)(d). By repealing provisions
4 of the Lincoln County Code without specifying which provisions are repealed, the proposed
5 measure violates Article IV, section 1(2)(d).

6 Based on this Court’s decision in *Bregman*, what stands in the way of Plaintiffs’ analysis
7 is *Schnell v. Appling*, 238 Or 202, 204 (1964), which provides:

8

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.

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13 There is a key difference, however, between the law approved in *Schnell* and the law
14 struck down in *Dolan*: the state measure approved in *Schnell* informed voters by statute number
15 of the laws being repealed; the Ordinance does not. Under the state law approved in *Schnell*,
16 voters could find the laws the measure proposed to repeal; under the Ordinance, voters could not.
17 The same Supreme Court that rejected the measure in *Dolan* held that, unlike with the law at
18 issue in *Dolan* and section 8 of the Ordinance, “[t]he repeal of a statute can be legally effected by
19 an act properly referring to the one sought to be repealed[.]” *Bird v. The County of Wasco*,
20 3 Or 282, 285 (1871). The Supreme Court, therefore, recognizes a fundamental difference
21 between (1) listing the laws to be repealed, and (2) leaving voters to their own devices to
22 determine to what extent unspecified existing laws are repealed because “inconsistent” with a
23 measure.

24 This Court should follow *Dolan* and not follow *Schnell* and, as a consequence, determine
25 that the Ordinance’s failure to specifically articulate the County laws the Ordinance repeals
26 renders the Ordinance void.

1 **D. State law preempts the Ordinance’s provisions on pesticides**

2 Even if this Court were to find that the County was authorized to enact the Ordinance,
3 three state laws expressly prohibit the County from enforcing the Ordinance. First, the State
4 Pesticide Control Act, ORS 634.057, provides, among other provisions, that “[n]o * * * county
5 * * * shall adopt or enforce any ordinance * * * regarding pesticide * * * use[.]”

6 Second, the Oregon Forest Practices Act provides, among other provisions, that “no unit
7 of local government shall adopt any * * * ordinances * * * that prohibit, limit, regulate, subject
8 to approval or in any other way affect forest practices on forestlands located outside of an
9 acknowledged urban growth boundary, ORS 527.722(1), with the “[a]pplication of chemicals”
10 designated as a covered forest practice. ORS 527.620(5)(d).

11 Third, state laws protecting farm and forest practices, ORS 30.930 to 30.947, prohibit
12 local governments from regulating whether and how individuals may spray “pesticides” on forest
13 lands so long as the pesticide use complies with the Oregon Forest Practices Act.

14 **1. Plaintiffs have standing to pursue declarations of rights**

15 Plaintiffs have standing to obtain declarations on the validity of the Ordinance and
16 individual provisions of the Ordinance. ORS 28.020 provides:

17 Any person * * * whose rights, status or other legal relations are
18 affected by * * * [an] ordinance * * * may have determined any
19 question of construction or validity arising under any such * * *
20 ordinance * * * and obtain a declaration of rights, status or other
legal relations thereunder.

21 Whether a plaintiff’s “rights, status or other legal relations” are “affected” within the
22 meaning of ORS 28.020 “implicates three related but separate considerations.” *Doyle v. City of*
23 *Medford*, 356 Or 336, 372 (2014). First, there must be “some injury or other impact upon a
24 legally recognized interest beyond an abstract interest in the correct application of the validity of
25 a law.” This means “the challenged law must affect *that party’s* rights, status, or legal relations.”
26 *Morgan v. Sisters School District #6*, 353 Or 189, 195 (2013) (emphasis in original).

1 Second, the “controversy must involve a dispute based on present facts rather than on
2 contingent or hypothetical events.” 353 Or at 196. Finally, the “court’s decision must have a
3 practical effect on the rights that the plaintiff is seeking to vindicate.” 353 Or at 197. In other
4 words, the relief that a party seeks, if granted, “must redress the injury that is the subject of the
5 declaratory judgment action.” 353 Or at 197.

6 The Ordinance affects Plaintiffs’ “rights, status, or legal relations” and declarations by
7 this Court will have a practical effect on Plaintiffs today—redressing the injuries the Ordinance
8 causes them now. Among other sections, section 4(b) of the Ordinance prohibits corporations
9 from “engag[ing] in aerial spraying of pesticides within Lincoln County.” Plaintiffs own
10 woodlands in Lincoln County that are located outside of an acknowledged urban growth
11 boundary and, because Plaintiffs are growing timber on their lands as a crop, the land is and
12 Plaintiffs’ activities are subject the Oregon Forest Practices Act. Capri Dec., ¶3; Hiatt Dec., ¶3.

13 Plaintiffs have controlled competing vegetation, including invasive plant species, in their
14 woodlands, such as Himalayan blackberry and Scotch broom, by arranging for aerial spraying of
15 pesticides by businesses that are defined as “corporations” by the Ordinance. Plaintiffs want to
16 arrange for the businesses to control competing vegetation, including invasive plant species, by
17 spraying pesticides on the woodlands again. The competing vegetation, including invasive
18 plants, compete for vital resources like sunlight, water, and nutrients, and, if not controlled, will
19 stunt the growth of economically valuable native plants, such as Douglas fir trees. To be
20 effective to control competing vegetation, including invasive species, the spraying of the
21 pesticides must be conducted before winter. Capri Dec., ¶4; Hiatt Dec., ¶4.

22 No one but “corporations” as defined by the Ordinance provides aerial spraying of
23 pesticides within Lincoln County. Plaintiffs cannot arrange for the aerial spraying of pesticides
24 on their woodlands because the Ordinance prohibits the aerial spraying of pesticides by the only
25 providers of the service. Capri Dec., ¶5; Hiatt Dec., ¶5.

26 Spraying or removal of competing vegetation, including invasive species, by hand is not

1 an economically viable, effective, or safe alternative to aerial spraying for protecting woodlands
2 from invasive species. Capri Dec., ¶6; Hiatt Dec., ¶6.

3 Spraying pesticides or removing plants by hand costs private landowners like Plaintiffs
4 between four and 10 times the cost of spraying pesticides by air—a cost difference that may
5 prevent Plaintiffs from being able to control competing vegetation, including invasive species.
6 Invasive species that Plaintiffs do not control are likely to spread to neighboring properties.
7 Capri Dec., ¶7; Hiatt Dec., ¶7.

8 For woodlands with steep slopes, aerial spraying can be the only way to apply pesticides
9 to competing vegetation, including invasive species. In some instances, slopes are too steep and
10 too dangerous for individuals to reach the competing vegetation, including invasive species, for
11 hand application or removal. The inability to spray by air will cause the quality and volume of
12 Plaintiffs’ trees to decline, which will, in turn, cause the value of the trees and land to decline.
13 Capri Dec., ¶8; Hiatt Dec., ¶8. The adverse effect of an ordinance on the marketability or value
14 of property supports a declaration on the validity of the ordinance. *Thunderbird Mobile Club,*
15 *LLC v. City of Wilsonville*, 243 Or App 457, 467-68 (2010).

16 The inability to spray by air also substantially increases the risk that Plaintiffs will violate
17 the Oregon Forest Practices Act, which requires that the young trees must be “free to grow”
18 within six years of harvest. To meet the “free to grow” standard, new trees must be vigorous,
19 well-distributed, and ready to grow successfully into a young forest. Because plant growth in the
20 Coast Range is so vigorous, woodland owners can only meet the “free to grow” standard by
21 controlling vegetation that competes with the young trees. Capri Dec., ¶9; Hiatt Dec., ¶9.

22 Plaintiff Wakefield Farms, although family owned, is registered as a limited liability
23 company and, as a result, is a “corporation” within the meaning of section 2(a) of the Ordinance.
24 Hiatt Dec., ¶2. All of the prohibitions of the Ordinance applicable to “corporations” apply to
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1 Plaintiff Wakefield Farms.⁷ Even if there were a provider of aerial spraying services that was
2 not a “corporation,” the Ordinance would nevertheless prohibit Plaintiff Wakefield Farms from
3 arranging for aerial spraying of its woodlands.⁸

4 2. **Standard for determining whether a state statute preempts local law**

5 The County’s authority to regulate the aerial spraying of pesticides is subject to control
6 by the state’s superior authority: “General grants of power to counties convey exactly that broad
7 grant articulated therein, *except that which is preempted by state law.*” *Allison*, 24 Or App at 581
8 (emphasis added; citation omitted). As Justice Peterson said about local government power to
9 adopt laws: “The legislature can give, and the legislature can take away. *State ex rel Emerald*
10 *People’s Utility Dist. v. Joseph*, 292 Or 357, 369 (1982) (Peterson, J., specially concurring). The
11 state has limited the power of the County to ban aerial spraying of pesticides and to enforce the
12 provisions that support that ban.

13 For a local government like the County, the validity of its local law depends, first, on
14 whether the County has the authority to adopt the local law in the first instance. *City of La*
15 *Grande v. Public Employees Retirement Bd.*, 281 Or 137, 142 (1978). If yes,⁹ state law will
16 nevertheless “displace the local rule” if the local law is “incompatible with * * * state law in an
17 area of substantive policy.” 281 Or at 149. A local enactment is incompatible with state law in

18 ⁷ In addition to the outright ban on corporations engaging in aerial spraying of pesticides, the Ordinance
19 contains other provisions addressed to corporations including:

- 20 • Prohibiting corporations from violating any rights the Ordinance enumerates.
- 21 • Imposing strict liability on corporations for effects within the county for actions taken outside the
 county.
- 22 • Prohibiting corporations from recovering lost profits.

23 Section 6(a) purports to prohibit “corporations” from challenging the adoption of the Ordinance and
24 individual provisions of the Ordinance. A local government, however, lacks the authority to eliminate
25 rights conferred by statute, such as the Uniform Declaratory Judgments Act. *See Sims v. Besaw’s Cafe*,
165 Or App 180, 185 (2000) (“local governments lack authority to change state court jurisdiction”).

26 ⁸ Because Plaintiffs have standing to pursue a claim for declaratory relief, Plaintiffs also have standing to
obtain injunctive relief. Although “no statute governs the issue of standing to seek injunctive relief,” the
Supreme Court has “long applied essentially the same standing requirements that ordinarily apply in
declaratory judgment actions.” *Nordbye v. BRCP/GM Ellington*, 271 Or App 168, 177 (2015).

⁹ As explained above at pages 5 to 8, the answer to the question is “no”; the Ordinance fails the first part
of the test for validity of a local law.

1 an area of substantive policy if “both cannot operate concurrently” or if “the legislature meant
2 [state] law to be exclusive.” 281 Or at 148. Although local enactments are interpreted, if
3 possible, as intended to “function consistently with state laws,” 281 Or at 148, a state statute
4 preempts a local enactment where the state statute “unambiguously expresses an intention to
5 preclude local governments from regulating” in the same subject area governed by the state
6 statute. *Gunderson, LLC v. City of Portland*, 352 Or 648, 663 (2012). The Legislative
7 Assembly’s preemption of the Ordinance is unambiguous.

8 **3. The State Pesticide Control Act preempts the provisions of the**
9 **Ordinance that relate to pesticides**

10 Sections 3(a)–(c), 4, 5, and 6 of the Ordinance are preempted by ORS 634.057, which
11 provides that “[n]o * * * county * * * shall adopt or enforce any ordinance * * * regarding
12 pesticide * * * use[.]” ORS 634.057 is a broad proscription on local laws that regulates the use
13 of pesticides. The intent to preempt local laws is express and manifest, which means a
14 narrowing construction of state law to avoid preemptive effect is not permissible. *Homebuilders*
15 *Ass’n of Metropolitan Portland v. Metro*, 250 Or App 437, 443 (2012).

16 In *Advocates for Effective Regulation v. City of Eugene*, 160 Or App 292, 295 (1999), the
17 Court of Appeals addressed an amendment to a city charter that had been adopted by initiative
18 and that required users of pesticides to report their use. Opponents challenged the measure on
19 the ground the measure violated ORS 634.057. Supporters of the initiative argued that
20 ORS 634.057 did not preempt the measure because requiring the reporting of the use of
21 pesticides did not constitute regulating the “sale or use” of pesticides. The Court of Appeals
22 disagreed: ORS 634.057 preempts even a local law that requires no more than reporting the use
23 of pesticides. For the same reason that ORS 634.057 preempts a local law on *reporting* use of
24 pesticides, ORS 634.057 preempts a local law *banning* use of pesticides.

25 The Court of Appeals determined ORS 634.057 preempted even a local reporting law
26 because ORS 634.057 was part of a comprehensive statewide system, the State Pesticide Control

1 Act, intended to regulate “the formulation, distribution, storage, transportation, application and
2 use of pesticides” throughout the state. ORS 634.005. In adopting the State Pesticide Control
3 Act, the Legislative Assembly made its preemptive intentions clear:

4 The Legislative Assembly hereby determines that the citizens of
5 this state benefit from a system of safe, effective and scientifically
6 sound pesticide regulation. The Legislative Assembly further finds
7 that *a uniform, statewide system of pesticide * * * regulation that*
8 *is consistent, coordinated and comports with both federal and state*
9 *technical expertise is essential to the public health, safety and*
10 *welfare and that local regulation of pesticides does not materially*
11 *assist in achieving these benefits.*

12 ORS 634.055 (emphasis added). Consistent with that general statement of intent, the Legislative
13 Assembly specifically provided as to local regulation of pesticides:

14 No city, town, county or other political subdivision of this state
15 shall adopt or enforce any ordinance, rule or regulation regarding
16 pesticide sale or use, including but not limited to:

- 17 (1) Labeling;
- 18 (2) Registration;
- 19 (3) Notification of use;
- 20 (4) Advertising and marketing;
- 21 (5) Distribution;
- 22 (6) Applicator training and certification;
- 23 (7) Licensing;
- 24 (8) Transportation;
- 25 (9) Packaging;
- 26 (10) Storage;
- (11) Disclosure of confidential information; or
- (12) Product composition.

27 ORS 634.057.

28 There can be no argument that the State Pesticide Control Act covers the same
29 “pesticides” the Ordinance covers. Section 2(e) of the Ordinance, defines “pesticide” to mean:
30 “Pesticides” means any synthetic chemicals, or synthetic chemical

1 mixtures, that can be classified as algaecides, avicides,
2 bactericides, fungicides, herbicides, insecticides, miticides,
3 acaricides, molluscicides, nematicides, rodenticides, or virucides,
4 and shall include, but not be limited to, restricted and non-
restricted pesticides used to destroy plant, fungal, and/or animal
'pests'.

5 ORS 634.006(8) defines "pesticide" to include all of the substances the Ordinance defines as a
6 pesticide:

7 (a) "Defoliant" which means any substance or mixture of
8 substances intended for causing the leaves or foliage to drop from
a plant with or without causing abscission;

9 (b) "Desiccant" which means any substance or mixture of
10 substances intended for artificially accelerating the drying of plant
tissue;

11 (c) "Fungicide" which means any substance or mixture of
12 substances intended for preventing, destroying, repelling or
13 mitigating any fungus;

14 (d) "Herbicide" which means any substance or mixture of
15 substances intended for preventing, destroying, repelling or
mitigating any weed;

16 (e) "Insecticide" which means any substance or mixture of
17 substances intended for preventing, destroying, repelling or
18 mitigating any insects which may be present in any environment
whatsoever;

19 (f) "Nematocide" which means any substance or mixture of
20 substances intended for preventing, destroying, repelling or
mitigating nematodes;

21 (g) "Plant regulator" which means any substance or mixture of
22 substances intended, through physiological action, to accelerate or
23 retard the rate of growth or rate of maturation or to otherwise alter
24 the behavior of ornamental or crop plants or the produce thereof,
but does not include substances to the extent that they are intended
as plant nutrients, trace elements, nutritional chemicals, plant
inoculants or soil amendments; or

25 (h) Any substance, or mixture of substances intended to be
26 used for defoliating plants or for preventing, destroying, repelling

1 or mitigating all insects, plant fungi, weeds, rodents, predatory
2 animals or any other form of plant or animal life which is, or which
3 the department declares to be a pest, which may infest or be
4 detrimental to vegetation, humans, animals, or be present in any
5 environment thereof.

6 Within its “uniform statewide system,” the State Pesticide Control Act expressly
7 authorizes the aerial spraying of pesticides. A person may apply pesticides upon obtaining a
8 pesticide operator’s license, ORS 634.116, and aerial spraying is authorized pursuant to a special
9 aerial pesticide applicator certificate. ORS 634.128. The State Pesticide Control Act also
10 addresses the same subjects as the Ordinance, only differently. The State Pesticide Control Act
11 proscribes applications that might injure crops and animals, ORS 634.042 and ORS 634.045, and
12 limits where pesticide application may occur. ORS 634.206 – 634.242. The State Pesticide
13 Control Act prescribes the financial responsibility of pesticide operators, including limiting
14 liability for damages, ORS 634.116(6), (8), and creates a liability claims procedure. ORS
15 634.172. Enforcement of pesticide application laws is conferred on the State Department of
16 Agriculture, including the power to punish for violations. ORS 634.306; ORS 634.322; ORS
17 634.372; ORS 634.900. Each of these provisions is comparable to or overlaps with provisions of
18 the Ordinance.

19 Even if the State Pesticide Control Act did not contain a provision comparable to or
20 overlapping with a provision of the Ordinance, that omission would not mean that there was an
21 area of pesticide regulation permitted to the County. The State Pesticide Control Act prohibits
22 not only “regulation” of pesticide sale or use, but more broadly the adoption or enforcement of
23 “any ordinance * * * regarding” pesticide sale or use.” (Emphasis added.) The term
24 “regarding” means “about.” *State v. Hobbs*, 218 Or App 298, 305 (2008) (“concerning,”
25 “regarding,” “relating to,” “respecting,” and “about” are synonyms). The list of what constitutes
26 prohibited local interference with state regulation of “sale or use” of pesticides is not exhaustive,
i.e., not limited to the activities listed in ORS 634.057. To be preempted, a provision of the
Ordinance only has to be about pesticide use. The scope of preemption is so complete that the

1 Legislative Assembly has spelled out only three exceptions to preemption: regulations of
2 pesticides “strictly necessary” to comply with (1) the Uniform Building Code; (2) a uniform fire
3 code; or (3) any requirement of state or federal pesticide regulation. ORS 634.063.¹⁰ None of
4 these exceptions applies. ORS 634.057, therefore, preempts not only the Ordinance’s direct ban
5 on aerial spraying, but also any other provision of the Ordinance about pesticides.

6 **4. The Oregon Forest Practices Act preempts the provisions of the**
7 **Ordinance that relate to application of pesticides to woodlands**

8 The State Pesticide Control Act should be the only authority this Court needs to
9 invalidate the substantive sections of the Ordinance. However, even if the State Pesticide
10 Control Act did not exist, the substantive sections of the Ordinance would still be preempted.
11 Sections 3(a)–(c), 4, 5, and 6, to the extent applicable to forest practices on lands outside urban
12 growth boundaries, are preempted by the Oregon Forest Practices Act, ORS 527.722(1), which
13 reads:

14 Notwithstanding any provisions of ORS chapters 195, 196, 197,
15 215 and 227, and except as provided in subsections (2), (3) and (4)
16 of this section, no unit of local government shall adopt any rules,
17 regulations or ordinances or take any other actions that prohibit,
18 limit, regulate, subject to approval or in any other way affect forest
practices on forestlands located outside of an acknowledged urban
growth boundary.

19 ORS 527.620(5)(d) includes within the definition of the “forest practices” that local governments
20 may not regulate the “[a]pplication of chemicals.”¹¹

21 The Oregon Forest Practices Act not only expressly preempts local laws on the
22 application of chemicals to forests, but vests exclusive lawmaking authority over forest
23

24 ¹⁰ This action does not contend the State Pesticide Control Act preempts the Ordinance insofar as the
Ordinance applies to the County’s property. ORS 634.060 authorizes a county to limit use of pesticides
25 on county land.

26 ¹¹ The exceptions to the preemption imposed by ORS 527.720(1) are for the enforcement of the Building
Code and of zoning laws on property within an urban growth boundary. ORS 527.720(2) – (4). None of
the exceptions applies here.

1 environments with the State Board of Forestry. ORS 527.630(3) provides:

2 To encourage forest practices implementing the policy of ORS
3 527.610 to 527.770 and 527.990 and 527.992, it is declared to be
4 in the public interest to vest in the State Board of Forestry
5 exclusive authority to develop and enforce statewide and regional
6 rules pursuant to ORS 527.710 and to coordinate with other state
7 agencies and local governments which are concerned with the
8 forest environment.

9 For these reasons, the Attorney General has repeatedly said that the Oregon Forest Practices Act
10 “prohibit[s] a county from regulating * * * the use of forest pesticides, on lands governed by the
11 state’s Forest Practices Act.” 41 Op Atty Gen 21 (1981); *see also* 40 Op Atty Gen 500 (1980); 40
12 Op Atty Gen 446 (1980).

13 **5. Right to farm and forest laws preempt the provisions of the**
14 **Ordinance that relate to application of pesticides to farm and forest**
15 **lands**

16 Like the Oregon Forest Practices Act, ORS 30.930 to 30.947 preempts sections 3(a)–(c),
17 4, 5, and 6 of the Ordinance, to the extent the sections apply to farm or forest practices. In ORS
18 30.933, the Legislative Assembly determined that farming and forest practices are so “critical to
19 the economic welfare of this state” that farm and forest practices may not be regulated by a local
20 government or deterred through private litigation. The Legislative Assembly prohibits “[a]ny
21 local government * * * regulation,” ORS 30.934, and “any private right of action or claim for
22 relief,” ORS 30.934, based on “mist from * * * use of pesticides,” ORS 30.932, applied to
23 forestland--so long as the pesticide use complies with the Oregon Forest Practices Act. ORS
24 30.930(4) (defining “forest practices”).

25 The Ordinance’s prohibition on aerial spraying of woodlands is exactly the kind of local
26 regulation ORS 30.930 to 30.947 prohibits, as are the rights of action the Ordinance grants to
enforce the prohibition.

E. Conclusion

The proponents of the Ordinance have been clear in their view of the place of the
Ordinance in relation to state law: they claim a “right to local community self-government * * *

1 that * * * is being thwarted by pre-emption laws in which the State dictates that certain matters
2 can only be decided at the State level, thereby overruling the will of the people[.]”¹² The
3 claimed right does not exist. Just as the state has the authority to prohibit a county from
4 enforcing an ordinance that adversely affects gays and lesbians, *de Parrie v. State*, 133 Or App
5 613, 619 (1995) (upholding ORS 659.870), the state has the authority to prohibit a county from
6 enforcing an ordinance that adversely affects woodland owners and the businesses that serve
7 them. Summary judgment should be granted to Plaintiffs. This Court should find the Ordinance
8 void in its entirety because not validly adopted or, in the alternative, declare that sections 3(a)–
9 (c), 4, 5, and 6 of the Ordinance are invalid and enjoin the County from enforcing those sections.

10 Dated this 11th day of August, 2017.

11 DAVIS WRIGHT TREMAINE LLP

12
13 By s/ GREGORY A. CHAIMOV

14 Gregory A. Chaimov, OSB #822180

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21 Portland, Oregon 97201

22 Facsimile: 503-778-5299

23 Attorneys for Plaintiffs

24
25
26 ¹² <http://www.lincolncountycommunityrights.org/>.

FREEDOM OF LINCOLN COUNTY FROM AERIALY SPRAYED PESTICIDES

Section 1 – Purpose

At a time when the rights of corporations are being protected at the expense of the people's rights, we must reaffirm what the Oregon Constitution guarantees: "that all [people], 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."

We assert that our right of local community self-government to claim and protect our constitutionally-guaranteed right to safety is inherent, fundamental, and inalienable, and that – as the United States Declaration of Independence proclaimed – governments derive their just powers from the consent of the governed.

The practice of aerial spraying of pesticides on Lincoln County's forests is causing serious chemical contamination of our county's air, people, wildlife, ecosystems, and watersheds, as well as terminal degradation of our soil. A large number of pesticides being used, among them 2,4-D, glyphosate (Roundup), and atrazine, have been proven harmful to both humans and the environment.

It is important to note that only a small fraction of the approximately 12,000 pesticides registered for use in Oregon, including those being used in aerial spraying, have ever been tested for safety. None have been tested for the effects of repeated exposure over time, or for the effects of their routine application in combination with other pesticides and chemicals.

Lincoln County's most populated communities are located at the base of our life-giving watersheds. However, clear-cut logging operations and the aerial spraying of pesticides before and after replanting are taking place upstream in those watersheds, exposing people, ecosystems, and natural communities to chemical contamination.

Current laws and regulations permit and protect the practice of aerial spraying of pesticides, threaten our public health, violate our constitutionally-guaranteed right to safety, and interfere with our right of local community self-government. The risks from toxic trespass from aerial spraying of pesticides, due to the failure of our federal, state, and local governments to protect us, are therefore no longer acceptable.

Our fundamental right to clean air, water, and soil not contaminated by aerial spraying of pesticides cannot be achieved when that right is routinely overridden by corporate minorities claiming legal powers to engage in that contamination. Nor can sustainability of any kind be achieved within a system of preemption which enables corporate decision-makers to wield state governmental power to override local self-government, and when the state itself restricts the county's lawmaking powers in ways that prevent the people of the county from protecting the health, safety and welfare of people and natural communities from such harms as aerial spraying of pesticides.

The people of Lincoln County believe that aerial spraying of pesticides is not necessary, because the task of eliminating weeds and competing vegetation after tree planting can also be accomplished by manual action, without the use of any pesticides, however applied, without contaminating the environment, and without endangering the safety of all life in it, while at the same time creating many direly needed jobs for our community. Increasingly mechanized logging, including the practice of aerial spraying of pesticides, utilized by corporations extraneous to our communities, no longer makes any sizable contribution to our local economy,

but nevertheless is now carried out by these corporations that wield tremendous power over decision-making in our county.

Now, therefore, the people of Lincoln County hereby adopt this Ordinance, which shall be known and may be cited as the "Freedom from Aerially Sprayed Pesticides Ordinance of Lincoln County"

Section 2 – Definitions

- (a) "Corporations," for purposes of this Ordinance, includes any corporation, limited partnership, limited liability partnership, business trust, public benefit corporation, 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.
- (b) "Ecosystems" means wetlands, streams, rivers, aquifers, and other water systems, as well as all naturally occurring habitats that sustain wildlife, people, flora and fauna, soil-dwelling or aquatic organisms.
- (c) "Engage in aerial spraying of pesticides" means the physical deposition of pesticides into the land, water, or air by any aerial method, including, but not limited to, all actions taken to prepare for that physical deposition.
- (d) "Natural Communities" means communities of wildlife, flora, fauna, soil-dwelling, aerial, and aquatic organisms, as well as humans and human communities that have established sustainable interdependencies within a proliferating and diverse matrix of organisms, within a natural ecosystem.
- (e) "Pesticides" means any synthetic chemicals, or synthetic chemical mixtures, that can be classified as algaecides, avicides, bactericides, fungicides, herbicides, insecticides, miticides, acaricides, molluscicides, nematocides, rodenticides, or virucides, and shall include, but not be limited to, restricted and non-restricted pesticides used to destroy plant, fungal, and/or animal 'pests'.

Section 3 - Statements of Law – Freedom from Aerially Sprayed Pesticides Bill of Rights

- (a) Right to be Free from Toxic Trespass. All people of Lincoln County, along with natural communities and ecosystems within the County, possess the right to be free of aerially sprayed pesticides.
- (b) Right to Clean Air, Water, and Soil. All people of Lincoln County possess the right to clean air, water, and soil free of aerially sprayed pesticides; and that right shall include the right to be free from potential contamination of the air, water, and soil within the County from aerially sprayed pesticides.
- (c) Right to Rural Preservation. All people of Lincoln County possess a right to an unspoiled rural quality of life free of aerially sprayed pesticides. The right 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.
- (e) Governmental Legitimacy. To the extent necessary to secure this Ordinance, all governments in the United States owe their existence to the people of the community that those governments serve, and governments exist to secure and protect the rights of the people and those communities; and further, any system of government that becomes destructive of those ends is not legitimate, lawful, or constitutional.
- (f) Right of Local Community Self-Government. For the limited purpose of securing Lincoln County to be free of aerially sprayed pesticides, the people of Lincoln County possess both a collective and individual right of

self-government in their local community, a right to a system of government that embodies that right, and the right to a system of government that protects and secures their human, civil, and collective rights.

(g) Right to Assert the Right of Self-Government. The people of Lincoln County possess the right to use their local government to enact this Ordinance that secures Lincoln County to be free of aerially sprayed pesticides, and the making and enforcement of this Ordinance by the people through a municipal corporation or any other institution shall not eliminate, limit, or reduce their sovereign right of local community self-government as stated in subsection 3(f).

(h) Rights as Self-Executing. All rights delineated and secured by this Ordinance are inherent, fundamental, and unalienable, and shall be self-executing and enforceable against both private and public actors.

Section 4 – Statements of Law – Prohibitions Necessary to Secure the Bill of Rights

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

(b) It shall be unlawful for any corporation to engage in aerial spraying of pesticides within Lincoln County.

(c) Corporations engaged in aerial spraying of pesticides in any municipality or designated jurisdiction adjacent to Lincoln County shall be strictly liable for damages caused by those pesticides to the residents and ecosystems within Lincoln County.

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

Section 5 – Enforcement

(a) Any corporation that violates any provision of this Ordinance shall be guilty of an offense and, upon conviction thereof, shall be sentenced to pay the maximum fine allowable under State law for that violation. Each day or portion thereof, and violation of each section of this Ordinance, shall count as a separate violation.

(b) Lincoln County or any resident of Lincoln County, may enforce the rights and prohibitions of this Ordinance through an action brought in any court possessing 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.

(c) Any action brought by either a resident of Lincoln County or by Lincoln County to enforce or defend the rights of ecosystems or natural communities secured by this Ordinance shall bring that action in the name of the ecosystem or natural community in a court possessing jurisdiction over activities occurring within Lincoln County. Damages shall be measured by the cost of restoring the ecosystem or natural community to its state before the injury, and shall be paid to Lincoln County to be used exclusively for the full and complete restoration of the ecosystem or natural community.

(d) If the County Government fails to enforce or defend this law, or a court fails to uphold this law's limitations on corporate power, this law shall not be affected by the failure to enforce or defend, or by the failure to uphold the limitations on corporate power, and any person may then enforce the rights and prohibitions of this law through direct action. If enforcement through direct action is commenced, this law shall prohibit any private or public actor from filing a civil or criminal action against those participating in direct action. If filed in violation

of this provision, the applicable court must dismiss the action promptly, without further filings being required of direct action participants. "Direct action" as used by this provision shall mean any activities or actions carried out to directly enforce the rights and prohibitions contained within this law."

Section 6 – Enforcement – Corporate Powers

- (a) Corporations that violate this Ordinance, or seek to violate this Ordinance, shall not be deemed to be "persons" to the extent that such treatment would interfere with the rights or prohibitions enumerated by this Ordinance, nor shall corporations possess any other legal 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.
- (b) Corporate claims to "future lost profits" shall not be considered property interests under this Ordinance, and thus, shall not be recoverable by corporations seeking those damages.
- (c) 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.

Section 7—Severability

The provisions of this Ordinance are severable. If any court 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 the Ordinance.

Section 8 - Repealer

All inconsistent provisions of prior Ordinances adopted by Lincoln County are hereby repealed, but only to the extent necessary to remedy the inconsistency.

Section 9 - Effect

This Ordinance shall take effect thirty (30) days after adoption.



Dana W. Jenkins
LINCOLN COUNTY CLERK
225 W. Olive Street-Room 201
Newport, Oregon 97365

County of Lincoln
"Customer Service is #1"
www.co.lincoln.or.us/clerk/
(541) 265-4131

July 14, 2015

Barbara B. Davis
PO Box 2170
Waldport, OR 97394

Maria Sause
15 NW Brook Street
Newport, OR 97365

Re: Initiative Petition/Determination of Compliance with Requirements

Dear Ms. Davis and Ms. Sause,

I have reviewed your proposed initiative petition for compliance with the following requirements for a local initiative petition:

1. Does the proposed local initiative measure comply with the Single Subject Rule?
2. Is the proposed local initiative a "legislative" measure that can properly be submitted to the voters under the people's initiative power?

My determinations are as follows:

1. The proposed measure complies with the Single Subject Rule.
2. The proposed measure is a "legislative" measure that can properly be submitted to the voters.

Since I have determined that your proposed initiative does comply with questions 1 and 2 above, it can go forward and I will send it to the District Attorney for preparation of a ballot title.

Sincerely,

Dana W. Jenkins
Lincoln County Clerk



Dana W. Jenkins
LINCOLN COUNTY CLERK
225 W. Olive Street-Room 201
Newport, Oregon 97365

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INVOICE

TO:

Oregonians for Food and Shelter

FOR:

Copies

AMOUNT:

\$1.50

TOTAL:

\$1.50

Please return this invoice with remittance to:

Dana W. Jenkins
LINCOLN COUNTY CLERK
225 W. Olive Street - Room 201
Newport, Oregon 97365

*IMPORTANT: Do not hesitate to contact Dana Jenkins at (541)265-4131 if you have questions.
Thank you.*

Original Notice

July 15, 2015

FORMS.invoice

LINCOLN COUNTY CHARTER

Section 29.4. SEARCH AND SEIZURE.

INTENT: The intent of this charter amendment is to provide the citizens of Josephine County with local protection of one of their inalienable rights as originally defined by our founding fathers in the U.S. Constitution and the Bill of Rights.

Section 1. The following provision shall be adopted into the Josephine County Home Rule Charter and shall govern all actions by individuals and organizations, both public and private, within Josephine County.

In Josephine County, the right of the people to be secure in their persons, houses, papers, and effects, against any unreasonable searches and seizures¹ shall not be violated, and no Warrants shall issue¹ but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

DEFINITION: UNREASONABLE: No public official, elected, appointed, or any agent of the government, or entity, is to enter private property, for the purpose of obtaining information, data, or material, without obtaining prior written consent of the property owner and tenant, or court order issued upon probable cause.

Section 2. No elected or appointed officials of Josephine County shall pass or enforce any law, ordinance, resolution, administrative rule, or statute that denies or erodes any of the provisions of this Charter Amendment. Where any current law, ordinance, resolution, administrative rule, or statute within or outside of Josephine County may be interpreted to deny or erode any of the provisions of this Charter Amendment, that interpretation is void and is not enforced within Josephine County by any individual, group, or federal, state or local governmental body or agency.

Section 3. No changes or abridgments of any of the provisions of this Charter Amendment shall be made or enforced by any entity acting within Josephine County or upon individuals within Josephine County without a 2/3rds majority vote of the voters of Josephine County in acceptance.

Section 4. The Josephine County Board of Commissioners and the Josephine County District Attorney must enforce all of the provisions of this Charter Amendment. This enforcement must include citing persons charged with violating this Charter Amendment by issuing a Class C Misdemeanor Citation. No person shall be immune from such citation regardless of any personal or official capacity whatever. Judicial proceedings regarding such citations shall follow the same as in the issuance of any other Misdemeanor Citation.

Section 5. No individual within Josephine County shall be barred from seeking civil relief in the Courts of Josephine County from any injury or potential injury arising from the violations of any of the provisions of this Charter Amendment. No person or body, public or private, shall be immune from jurisdiction by the Courts of Josephine County over matters arising from this Charter Amendment. Civil claims arising from this amendment shall be heard by a duly constituted jury in the Courts of Josephine County unless all parties named in such claims unanimously agree to adjudication of the claims solely by a Judge of the Josephine County Courts or by some other mediator.

MISCELLANEOUS:

- (A) Conflict Clause – If any portion of this Charter Amendment is in conflict with any other provision of this charter, that portion most recently approved by a 2/3rds vote of the voters of Josephine County shall prevail.
- (B) Severability Clause – If a part of this Charter Amendment is invalid, all parts that are severable from the invalid part shall remain in effect. If a part of this Charter Amendment is invalid in one or more of its applications, that part remains in effect for all valid applications that are severable from the invalid applications. [Amended September, 1995]

CERTIFICATE OF SERVICE

I hereby certify that, on August 11, 2017, I served a copy of the foregoing

PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT on:

<p>Wayne Belmont, OSB #841662 Email: wbelmont@co.lincoln.or.us Lincoln County Counsel 110 Lincoln County Courthouse 225 W. Olive Street Newport, OR 97365 Tel: 541.265.4108</p> <p>Rob Bovett, OSB #910267 Email: rbovett@oregoncounties.org Association of Oregon Counties 1201 Court Street, NE, Suite 300 Salem, OR 97301 Tel: 503.585.8351</p> <p style="text-align: center;">Of Attorneys for Defendants</p>	<p>Ann B. Kneeland, OSB #992977 Community Environmental Legal Defense Fund PO Box 10294 Eugene, OR 97440 Telephone: 541-514-9720 Email: ann@kneelandlaw.net</p> <p style="text-align: center;">Attorney for Intervenor-Defendant Lincoln County Community Rights</p>
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by emailing a copy thereof to the email address as shown above.

DAVIS WRIGHT TREMAINE LLP

By s/ GREGORY A. CHAIMOV

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