OREGON JUDICIAL DEPARTMENT
Josephine County Court

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RE: Robert White et al. vs. Josephine County and Siskiyou Seeds, LLC et al.; Josephine County Case No. 15CV23592

Dear Counsel:

Both the plaintiff and intervenor-defendants have filed motions for summary judgment. The County has taken no position.

The sequence of events is as follows:

1. On October 8, 2013 Governor Kitzhaber signed Senate Bill 863 ("the Seed Bill") into law after it was enacted by the Oregon Legislature.
2. On May 20, 2014, the voters of Josephine County enacted BM 17-58, the "Josephine County Genetically Engineered Plant Ordinance" ("the GMO Ordinance"). The ordinance qualified for the ballot on February 19, 2014.
3. "The Seed Bill" contained the following provisions:

> **ORS 633.738 Prohibition of local laws to inhibit or prevent production or use of seed or products of seeds.**
> (1) As used in this section:
> (a) "Local government" has the meaning given that term in ORS 174.116.
> (b) "Nursery seed" means any propagant of nursery stock as defined in ORS 571.005.
> (2) Except as provided in subsection (3) of this section, a local government may not enact or enforce a local law or measure, including but not limited to an ordinance, regulation, control area or quarantine, to inhibit or prevent the

> production or use of agricultural seed, flower seed, nursery seed or vegetable seed or products of agricultural seed, flower seed, nursery seed or vegetable seed. The prohibition imposed by this subsection includes, but is not limited to, any local laws or measures for regulating the display, distribution, growing, harvesting, labeling, marketing, mixing, notification of use, planting, possession, processing, registration, storage, transportation or use of agricultural seed, flower seed, nursery seed or vegetable seed or products of agricultural seed, flower seed, nursery seed or vegetable seed.
> (3) Subsection (2) of this section does not prohibit a local government from enacting or enforcing a local law or measure to inhibit or prevent the production or use of agricultural seed, flower seed, nursery seed or vegetable seed or products of agricultural seed, flower seed, nursery seed or vegetable seed on property owned by the local government. [2013 s.s. c.4 §3].

The plaintiff's motion is based on this sequence of events. Plaintiff argues that it is clear and unambiguous that ORS 633.738 (2) pre-empts the GMO ordinance, and requests summary judgment on that basis.

Intervenors advance a number of arguments against plaintiff's motion and in favor of their cross motion, based on an allegation that plaintiffs lack legal standing to challenge the ordinance.

The Court will begin by addressing the intervenor's challenge to plaintiff's standing.

I. <u>The Standing Issue</u>

Intervenors essentially argue that plaintiffs are posing as GMO farmers so that large chemical companies, through them can attack the local ordinance.

As a starting point, the intervenors challenge much of Robert White's declaration, wherein he states:

> "Over the last five years my wife and I have devoted our farm in large part to growing genetically engineered crops, including genetically engineered sugar beets for seed and stecklings."

Pl. Mot. Summ. J. Decl. Robert White at p. 1 ¶3.

> "In 2013, it appeared to my wife and I that crop rotation required us to access more land to continue growing sugar beets. At the time, we rented 100 acres of land near our farm so that we could continue growing sugar beets. The terms of the rental agreement were to pay $10,000 per year and to maintain equipment used by us and to supply our

> own fertilizer and rotation crops. We paid $10,000.00 at the time of entering into the agreement, and have paid $10,000.00 per year since that time.

Id. At 2 ¶4.

> "At the time we entered into the agreement, we intended to grow genetically engineered sugar beets for seed and stecklings. After renting the land, however, the Ordinance was adopted. Particularly in light of the County's threatened enforcement of the Ordinance we have been unable to plant and grow genetically engineered sugar beets as we intended and as was the purpose for renting the land. Despite this, we remain bound to pay the agreed-upon rent for the leased property.

Id. At 2 ¶5.

> "Further, because, under the ordinance, we cannot grow genetically engineered sugar best (sic) as we intended, we have devoted the rented land to crops that are less profitable than genetically engineered sugar beets. Specifically, we have grown hay. Based upon our history farming genetically engineered sugar beets for seed and our understanding of the market for such seed, we believe we can gross only around $20,000 for hay but would have likely grossed $36,000 for GE sugar beets during 2015-16"

Id.

In sequence, intervenors challenge this declaration by asserting as follows:

1. That plaintiff's lease with Mr. Sauer is not a valid lease.
2. That, even if the lease is valid, it is not for the cultivation of GM crops.
3. That plaintiffs will not suffer financial injury.
4. That plaintiffs do not have a lease with Syngenta to grow GMO crops on rented farmland.
5. That plaintiffs have failed to mitigate loss or demonstrate a concrete interest in the case.

Plaintiffs respond that they are long time farmers in Josephine County, pre-dating the GMO ordinance and that they are contractually bound to Mr. Sauer, with or without an attorney prepared document; that any indefiniteness concerning the duration of the lease is cured by ORS 91.060; that sufficient consideration has been paid to form the contract with Mr. Sauer, which is all that is necessary, and that plaintiffs remain contractually bound to Mr. Sauer. With regard to an agreement with Syngenta, plaintiffs assert that no current lease is necessary so long as plaintiffs indicate an intention to so contract, but for the ordinance.

Although addressing intervenor's arguments concerning the Sauer lease, and the Syngenta contract, etc., plaintiffs most strenuously argue that Oregon courts don't require any such considerations; and that there is a much lower bar for a litigant to have standing, than as asserted by intervenors. Marks vs. City of Roseburg, 65 Or App 102 (1983); Thunderbird Mobile Club LLC vs. City of Wilsonville, 234 Or App 457 (2010).

In Marks vs. City of Roseburg, (supra), Roseburg passed an ordinance prohibiting: "...any practice of occult arts, either public or private...".

The City sought to dismiss plaintiff's declaratory judgment action challenging the ordinance because plaintiffs did not live in, or operate such a business in Roseburg and therefore lacked standing. Plaintiffs had previously rented a house in Roseburg to practice palmistry for profit; but because the ordinance moved outside of Roseburg they could legally engage in palmistry. The Court wrote, on page 106:

> "They (the plaintiffs) state that they intend to live in Roseburg if the action is resolved in their favor...It is obvious from the forgoing that the controversy is justiciable and that plaintiffs have standing."

In Thunderbird Mobile Club LLC vs. City of Wilsonville, (supra), the City of Wilsonville passed an ordinance regulating the conversion of mobile home parks to other uses. The City's ordinance was more onerous than state law. Plaintiffs were the owner of the mobile home park, and challenged, by declaratory judgment, the City's ordinance. The City responded by asserting that plaintiff lacked standing.

At the time of the litigation, plaintiff had listed the mobile home park for sale, and given notice of that listing to its tenants. The City argued that the plaintiff had not yet sought to close the park, or entered into a contract to sell the park. Nevertheless, the trial court concluded that there was an:

> "...actual, present conflict between the parties, that determination of plaintiff's claims will have a practical effect upon the parties, that the issues are not academic or speculative". Page 464.

The Court of Appeals agreed with the trial court, writing on page 468:

> "But none of those are steps that plaintiff is required to take to pursue his challenges to the lawfulness of the ordinance on preemption or substantive due process grounds, so long as the facts otherwise indicate that the mere enactment of the ordinance has affected plaintiff's legal interests."

With respect to Mr. and Mrs. White, the Court finds as follows:

1. They have been farming in Josephine County since 2004. At that time, they purchased farmland that had a preexisting, but overgrown crop of Christmas trees.
2. They elected to remove the Christmas trees and plant grain crops.
3. They've contracted with Syngenta for approximately 10 years to grow, on a limited basis, genetically modified crops.
4. They entered into a lease with Mr. Sauer to grow GM sugar beets in the spring of 2013, before Josephine County passed its GMO ordinance.
5. Their intent was to plant 30 acres of GM sugar beets on their own property in August of 2013, and then rotate this crop from their own property to Mr. Saurer's property in approximately March of 2014.
6. Mr. Sauer has been paid for the leased ground; although plaintiffs have not been able to rotate a GM crop to his property, because of the GMO ordinance. Likewise, the plaintiff's had determined that Syngenta is unwilling to contract with them because of the GMO ordinance.
7. Plaintiff's paid Mr. Sauer $10,000 in 2013 and $10,000 in 2014 on account of their lease. They remain obligated to Mr. Sauer for additional lease payments.
8. Plaintiffs did not utilize Mr. Sauer's property as intended, because of the GMO ordinance.

Comparing these facts with those in Marks vs. City of Roseburg, supra, and Thunderbird Mobile Club LLC vs. City of Wilsonville, supra, the plaintiffs have demonstrated that their conflict with the ordinance is not academic or speculative and that the determination in this case will have a practical effect on them. The intervenor's motion for summary judgment based on an alleged lack of standing by plaintiffs is denied.

II. Constitutional Issues

Intervenors assert that ORS 633.738(2) is unconstitutional because it results in a regulatory void. That is so because without Josephine County's ordinance, all regulation would be left with the State of Oregon and the intervenors present evidence that the Oregon Department of Agriculture does not have present plans to regulate GM crops.

Although there are no Oregon cases on point, intervenors cite: City of Cleveland vs. State of Ohio, 989 N.E. 2nd 1072 for that proposition. In that case, the City of Cleveland enacted a local regulation of industrially produced trans-fat. Before the ordinance went into effect, the State of Ohio passed legislation preempting such local regulation, declaring that:

> "The regulation of the provision of food nutrition information and consumer incentive items at food service operations and how food services operations are characterized are matters of general statewide interest that require state wide regulation...".

Ultimately the Ohio Court of Appeals found the state regulation unconstitutional because it replaced the City's regulation, with no regulation. Like Josephine County, the City of Cleveland

is a home rule municipality. The Ohio Court of Appeals found that such state regulation of a home rule municipality was unconstitutional unless the state law was "a general law", among other requirements. To be a "general law" within the meaning of Ohio law, the law had to:

> "(1) be part of a statewide and comprehensive legislative enactment, (2) apply to all parts of the state alike and operate uniformly throughout the state, (3) set forth police, sanitary, or similar regulations, rather than purport only to grant or limit legislative power of a municipal corporation to set forth police, sanitary or similar regulations, and (4) prescribe a rule of conduct upon citizens generally." (emphasis added).

In other words, in Ohio, it is only permissible to take away a locality's power to regulate, if the state has its own replacement plan for regulation. It is not permissible to merely take away a home rule municipality's right to regulate with nothing to replace it.

The Ohio Court found that the state law did not provide a body of regulation, to replace the City's ordinance; and hence was not a "general law". Because it was not a "general law", it could not preempt the Cleveland legislation.

If this was Ohio, and not Oregon, this Court could say that ORS 633.738 is not a "general law". However, as plaintiff points out and strenuously argues that while Ohio requires a state to impose "police, sanitary or similar regulations"; there is no such requirement in Oregon. Further, plaintiff provides examples of other state statutes which preempt local regulation without any replacement regulatory scheme (e.g. rent control, drones and shooting ranges).

Further, plaintiff argues that the only legal standard for preemption that can be binding on this Court is found in The City of LaGrande vs. Public Employees Retirement Board, 281 OR 137. In that case, a state law required police and firefighters to be covered by Oregon's retirement system, as opposed to their municipality's plan. The issue is whether or not the state law preempted the localities' right to provide their own benefits, even if they are less generous than the State PERS system. The City of LaGrande stands for the general proposition that local laws are not to be randomly overturned by state legislation. If possible, they must be interpreted so that both will be valid; and only if the two are incompatible, will the state law preempt the local rule. In this case, the conflict could not be more clear that the County's GMO ordinance, and ORS 633.738 are incompatible. The state law says that the localities may not legislate in this area; and the voters of Josephine County have attempted to legislate in the exact same area. It is impossible to read the two enactments in harmony; so that the local ordinance must give way.

Intervenors concede this obvious conflict on page 31 of their "Opposition to Summary Judgment Motion", to wit:

> "There is no dispute that the Legislature expressly intended state reservation of regulatory powers over agricultural seed, flower seed, nursery seed or vegetable seed, and the product of those seeds."

However, intervenors then suggest a number of routes that this Court can avoid that obvious conflict. They are as follows:

a. "Product of seeds" does not include "plants".

Intervenors posit that "products of seeds", actually means packaged seeds, as opposed to plants. This Court agrees with plaintiff that this would result in an absurd interpretation and result. Because this text is clear, the Court will not concern itself with the legislative history of ORS 633.738. Portland General Electric vs. Bureau of Labor, 317 OR 606.

b. Disregard of "LaGrande" precedent.

Perhaps a higher court than this Court may elect to abandon the Supreme Court precedent of LaGrande with respect to this case or some future case on the basis that a home rule counties' ordinances should be treated with more deference than, non-home rule counties. Needless to say, this Court is not a "higher court".

c. Lack of rational basis for cutoff date; or area of regulation

This is a legislative prerogative. Intervenors assert that it is unconstitutional for the legislature to arbitrarily set a cutoff date for preemption; and to limit the exemption to just Jackson County as opposed to the "...the greater Rouge (sic) River Valley geographic region". Again, the power to set or remove cutoff dates, or to define geographic areas is with the Oregon State Legislature; and not with this Court.

III. Conclusion

Plaintiffs have standing to challenge BM-1758. Therefore, intervenor's motion for summary judgment is denied. ORS 633.738 preempts BM-1758. Therefore plaintiff's motion for summary judgment is granted. Mr. DiLorenzo should draw up a consistent judgment.

Very truly yours,

Pat Wolke
Circuit Court Judge

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