IN THE CIRCUIT COURT FOR THE STATE OF OREGON

FOR THE COUNTY OF JOSEPHINE

ROBERT A. WHITE, JR. and SHELLEY ANN WHITE, Plaintiffs, v. JOSEPHINE COUNTY, Defendant.	Case No. 15CV23592 **PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT** **ORAL ARGUMENT REQUESTED**

UTCR 5.050

Pursuant to UTCR 5.050, plaintiffs request oral argument on this motion. Plaintiffs estimate that 60 minutes are required for oral argument. Official court reporting services are requested.

MOTION

Pursuant to ORCP 47, plaintiffs respectfully move for summary judgment:

(1) Declaring that Josephine County Ordinance 2014-007 ("Ordinance") is invalid and unenforceable because it is preempted by ORS 633.738(2); and

(2) Permanently enjoining defendant Josephine County ("County") from taking any action to enforce the Ordinance.

This motion is supported by following Memorandum of Points and Authorities, the Declaration of Robert A. White and the records and files of this case.

POINTS AND AUTHORITIES

I. INTRODUCTION

This case involves an ordinance of Josephine County ("Ordinance") that flouts an

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unambiguous and express preemption provision duly enacted by the Oregon legislature. The Ordinance is utterly irreconcilable with that provision. Nor does the Ordinance fall within a limited exception for ballot measures that, *inter alia*, qualified for ballot consideration "on or before January 31, 2013," since it did not so qualify until *more than a year later*. Accordingly, this Court should declare the Ordinance preempted and enjoin its enforcement.

Through ORS 633.738, the Oregon legislature has expressed, with the clearest possible intent, that there be a single, statewide policy with respect to regulation of genetically engineered organisms or "GEs," to the exclusion of *any* local regulation with respect to the production or use of agricultural, flower, nursery, or vegetable seeds or products of such seeds. It did so by providing that a "local government may not enact or enforce a local law or measure … to inhibit or prevent the production or use of agricultural seed … or products …." *Id.*

Notwithstanding ORS 633.738, the voters of Josephine County enacted the Ordinance, which unabashedly does exactly what ORS 633.738 precludes—*i.e.*, "inhibiting and "preventing" the "production or use of agricultural seed" by prohibiting the planting and cultivation of seeds from genetically engineered ("GE") plants (a.k.a. "GMOs" or "genetically modified" plants). The Ordinance is therefore invalid and unenforceable because, as a matter of law, ORS 633.738 preempts the Ordinance.

II. BACKGROUND

A. State law prohibits local regulation of seeds and products of seeds.

Regulation of GMOs has been the subject of much political activity in Oregon in recent years, both at the local and state levels. In 2013, to ensure a uniform state policy with respect to regulation of agricultural seed cultivation in Oregon and to avoid a patchwork of potentially conflicting local laws, the Oregon state legislature enacted ORS 633.738. In its entirety, ORS 633.738 provides:

> (1) As used in this section:
>
> (a) "Local government" has the meaning given that term in ORS

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> 174.116.[1]
>
> (b) "Nursery seed" means any propagant of nursery stock as defined in ORS 571.005.[2]
>
> (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.

(Emphasis added.) By its plain text, ORS 633.738 generally prohibits local enactments that inhibit or prevent the production or use of seeds or products of seeds (*i.e.*, plants). The preemption is express and unmistakable—*i.e.*, "a local government may not enact or enforce a local law or measure" contravening ORS 633.738.

B. The Ordinance.

The Ordinance (officially titled the "Josephine County Genetically Engineered Plant Ordinance") qualified for ballot consideration on February 18, 201, and was approved by voters in the county in an election held on May 20, 2014. Notwithstanding ORS 633.738, the

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[1] "Local government" means "all cities, counties and local service districts located in this state, and all administrative subdivisions of those cities, counties and local service districts" and thus plainly includes the County. ORS 174.116(1).

[2] "Nursery stock" generally "includes all botanically classified plants," with some exceptions. ORS 571.005(5).

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Ordinance states that its purpose is to avoid preemption, to "prohibit any person, corporation or entity from propagating, raising, or growing genetically engineered plants in Josephine County," and to enable the County to enforce the prohibition and to recover the costs of enforcement. Compl., Ex. 1, p. 1. Specifically, the Ordinance proclaims:

> It shall be unlawful for any person, corporation or other entity to:
>
> (A) Propagate, cultivate, raise, or grow genetically modified organisms in Josephine County, or to knowingly or negligently allow such activities to occur on one's land, except as provided in Section 6 below.
>
> (B) Intentionally or negligently cause or allow any genetically modified organisms or materials from within or outside of the jurisdiction of Josephine County to substantially enter, drift or be dispersed into and within Josephine County, in such a way as to risk genetic contamination of natural organisms within the jurisdiction of Josephine County. Josephine County may enforce such violations to the extent possible pursuant to applicable laws.

Compl., Ex. 1, pp. 2-3. The Ordinance then exempts certain medical research, educational, and scientific institutions, under certain circumstances. Compl., Ex. 1, p. 3. None of those exemptions are relevant here.

Although the voters of Josephine County adopted the Ordinance in May 2014, the County took no action to enforce the Ordinance until July 31, 2015. On that date, the County issued a public notice stating that "**ANY GROWING OF GENETICALLY ENGINEERED PLANTS/CROPS IN JOSEPHINE COUNTY AFTER SEPTEMBER 4, 2015, WILL BE IN VIOLATION OF ORDINANCE 2014-007**." Compl., Ex. 4 (emphasis in original); Answer of Josephine County, ¶ 5 ("Answer"). The notice further directed:

> Anyone currently growing genetically engineered plants/crops is required to contact Josephine County Sheriff Dave Daniel at (541) 474-5123 to notify the county and provide the following information: name, contact information, description of genetically engineered crop type, crop location, proposed phase-out plan to be completed before the September 4, 2015, deadline, and whether any technical assistance for the transition is requested.

Compl., Ex. 4; Answer, ¶ 5.

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C. Plaintiffs.

Plaintiffs are family farmers who live and farm in Josephine County. Declaration of Robert A. White ("White Decl."), ¶ 2. Over the last five years, plaintiffs have devoted their farm in large part to growing GE crops, including GE sugar beets for seed and stecklings.[3] White Decl., ¶ 3. When it appeared that crop rotation required plaintiffs to access more land to continue growing GE sugar beets, plaintiffs rented land adjacent to their farm for that purpose. White Decl., ¶ 4. After leasing the land, however, the Ordinance was adopted. In light of the County's threatened enforcement of the Ordinance, plaintiffs have been unable to plant and grow sugar beets as intended. White Decl., ¶ 5. Nevertheless, plaintiffs remain bound to pay rent for the rented property, and have been forced to devote the rented land to a crop that is less profitable than GE sugar beets. White Decl., ¶ 5. As a result, the plaintiffs have forgone profits which would have otherwise been realized. White Decl., ¶ 5.

D. The present lawsuit.

Plaintiffs filed the instant lawsuit on September 3, 2015, seeking a declaration that the Ordinance is invalid and unenforceable and seeking a mandatory injunction permanently enjoining the County from enforcing the Ordinance. The County agreed to stay any efforts to enforce the Ordinance until after the lawsuit is resolved.

III. ARGUMENT

A. Plaintiffs have standing.

As an initial matter, plaintiffs have standing to challenge the validity of the Ordinance.

1. Plaintiffs have standing to pursue declaratory relief pursuant to the Uniform Declaratory Judgments Act ("DJA"), ORS 28.010 to 28.160.

a. Standing under the DJA.

Plaintiffs have standing because their legal rights are currently affected by the Ordinance.

[3] A "steckling" is "a small late-planted plant of a biennial root crop (as beet or carrot) that is used, dug and stored over winter and replanted the next season for seed production." Webster's New Int'l Dictionary (2002 ed.), p. 2233.

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Standing is a concept that "identifies whether a party to a legal proceeding possesses a status or qualification necessary for the assertion, enforcement, or adjudication of legal rights or duties." *Kellas v. Dept. of Corrections*, 341 Or 471, 476-77 (2006). Whether a particular plaintiff has standing "depends on the particular requirements of the statute under which he or she is seeking relief." *Morgan v. Sisters School Dist. No. 6*, 353 Or 189, 194 (2013). Accordingly, because plaintiffs seek declaratory relief under the DJA, the statutory provisions of the DJA govern whether plaintiffs have standing. The DJA provides:

> Any person interested under a deed, will, written contract or other writing constituting a contract, or whose rights, status or other legal relations are affected by a constitution, statute, municipal charter, ordinance, contract or franchise may have determined any question of construction or validity arising under any such instrument, constitution, statute, municipal charter, ordinance, contract or franchise and obtain a declaration of rights, status or other legal relations thereunder.

ORS 28.020. Thus, to establish standing under the DJA, a plaintiff must show that his or her "rights, status or other legal relations" are "affected by" the statute or ordinance at issue.

Whether a plaintiff's "rights, status or other legal relations" are "affected" within the meaning of ORS 28.020 "implicates three related but separate considerations." *Doyle v. City of Medford*, 356 Or 336, 372 (2014). First, there must be "some injury or other impact upon a legally recognized interest beyond an abstract interest in the correct application of the validity of a law." *Morgan*, 353 Or at 195. This means "the challenged law must affect *that party's* rights, status, or legal relations." *Id*. (emphasis in original). Second, the "controversy must involve a dispute based on present facts rather than on contingent or hypothetical events." *Id*. at 196. Finally, the "court's decision must have a practical effect on the rights that the plaintiff is seeking to vindicate." *Id*. at 197. In other words, the relief that a party seeks, if granted, "must redress the injury that is the subject of the declaratory judgment action." *Id*.

b. Standing to challenge the validity or enforceability of an ordinance.

A party has standing to challenge the validity or enforceability of a statute or ordinance

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where that party has demonstrated that its "rights, status or other legal relations are affected by the law or enactment at issue." *See League of Oregon Cities v. State of Oregon*, 334 Or 645, 658 (2002).

c. Plaintiffs have standing to challenge the Ordinance.

Plaintiffs satisfy all of the requirements for standing under ORS 28.020. First, because plaintiffs have been unable to use the rented farmlands for their intended purpose and have incurred financial injury as a result, plaintiffs have suffered an "injury or other impact upon a legally recognized interest." *Morgan*, 353 Or at 195; *accord Marks v. City of Roseburg*, 65 Or App 102, 105-06 (1983) (holding that intent to use rented property for use that is permissible but for challenged ordinance gives rise to standing); *Thunderbird Mobile Club*, 243 Or App at 467-68 (declaration would have immediate effect on plaintiff's legal interests where ordinance affects the marketability and value of plaintiff's property). *Marks* makes clear that an impact on the use of rented property is sufficient to give rise to standing, and, to the extent that a property interest is somehow required, a leasehold is of course an interest in property. *See State Sav. & Loan Ass'n v. Bryant*, 159 Or 601, 631 (1938) ("A lease for years is commonly regarded as an interest in real property and is treated, in many respects, as real property."). Second, plaintiffs' claim for declaratory relief involves a "dispute based on present facts," *i.e.*, a real injury to plaintiffs' property due to Josephine County's enactment of the Ordinance, "rather than on contingent or hypothetical events." *Morgan*, 353 Or at 196. Third, if plaintiffs obtain a judgment in their favor, *i.e.*, that the Ordinance is preempted by ORS 633.738(2) and therefore invalid, plaintiffs' requested relief will "redress the injury that is the subject of the declaratory judgment action," as plaintiffs will be permitted to use the rented property for their originally intended purpose. *Morgan*, 353 Or at 197. Because the Ordinance directly affects plaintiffs' "rights, status or other legal relations," a declaration in plaintiffs' favor would have an "immediate effect on Plaintiffs' legal interests," and plaintiffs have standing to seek declaratory relief pursuant to ORS 28.020.

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2. Plaintiffs also have standing to seek injunctive relief.

Because plaintiffs have standing to pursue a claim for declaratory relief, it follows that plaintiffs also have standing to seek injunctive relief. Although "no statute governs the issue of standing to seek injunctive relief," the Oregon 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). In fact, as the Oregon Supreme Court has noted, in a number of cases addressing the standing requirements under the DJA where plaintiffs sought both declaratory and injunctive relief, the court "did not distinguish between the forms of relief in assessing the issue of standing." *Morgan*, 353 Or at 201 (citing *Hazell v. Brown*, 352 Or 455, 467-68 (2012); *League of Oregon Cities v. State*, 334 Or 645, 657-62 (2002); *Barcik v. Kubiaczyk*, 321 Or 174, 179 (1995)). Thus, "in light of the fact that the same standing standards apply to Plaintiffs' request for declaratory relief and injunctive relief," plaintiffs have standing to seek injunctive relief for the same reasons as described above with respect to plaintiffs' standing to bring a claim for declaratory relief. *Morgan*, 353 Or at 201-02.

B. The Ordinance is preempted by ORS 633.738(2).

1. Legal standard for determining whether a state statute preempts local law.

Plaintiffs are entitled to a declaration that the Ordinance is invalid and unenforceable because, as a matter of law, ORS 633.738(2) preempts the Ordinance. Under a local government's home rule authority, "the validity of local action depends, first, on whether it is authorized by the local charter or by a statute, or if taken by initiative, whether it qualifies as 'local, special (or) municipal legislation' under article IV, section 1(5); second, on whether it contravenes state or federal law." *City of La Grande v. Public Employees Retirement Bd.*, 281 Or 137, 142 (1978). "When a local enactment is found incompatible with a state law in an area of substantive policy, the state law will displace the local rule." *Id.* at 149. A local enactment is incompatible with state law if "both cannot operate concurrently" or if "the legislature meant its law to be exclusive." *Id.* at 148. Although local enactments are interpreted, if possible, as

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intended to function consistently with state laws," *id.* at 148, a state statute preempts a local enactment where the text, context, and legislative history of the state statute "unambiguously expresses an intention to preclude local governments from regulating" in the same area governed by the state statute, *Gunderson, LLC v. City of Portland*, 352 Or 648, 663 (2012).

Whether and to what extent ORS 633.738 preempts local laws is a question of statutory interpretation. Particularly where, as here, the intent to preempt local laws is express and manifest, ordinary rules of statutory construction apply. *Homebuilders Ass'n of Metropolitan Portland v. Metro*, 250 Or App 437, 443 (2012) ("a narrowing construction of state law to avoid preemptive effect is not permissible if that intention is apparent" and whether an ordinance "falls within the scope of the statutory preemption … is a question of statutory construction resolved by resort to the familiar methodology" of *State v. Gaines* (internal quotation omitted)). When interpreting a statute, a court examines the text and context of the statute. *State v. Gaines*, 346 Or 160, 171 (2009). In addition, "a party is free to proffer legislative history to the court, and the court will consult it after examining text and context, even if the court does not perceive an ambiguity in the statute's text, where that legislative history appears useful to the court's analysis." *Id.* at 172. "If the legislature's intent remains unclear after examining text, context, and legislative history, the court may resort to general maxims of statutory construction to aid in resolving the remaining uncertainty." *Id.*

2. The plain text of ORS 633.738(2) shows that it preempts the Ordinance.

Here, there can be no question that the legislature intended ORS 633.738 to preempt local laws purporting to regulate seeds or products seeds, including GE seeds. The provision is titled "Production and use of seeds; *restrictions on local government laws or measures*." ORS 633.738 (emphasis added). The legislative findings which support ORS 633.738 further provide, in part:

> "(b) The economic benefits resulting from agricultural seed, flower seed, nursery seed and vegetable seed and seed product industries

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> in this state *make the protection, preservation and promotion of those industries a matter of statewide interest that warrants reserving exclusive regulatory power over agricultural seed, flower seed, nursery seed and vegetable seed and products of agricultural seed, flower seed, nursery seed and vegetable seed to the state*; and
>
> "(c) The agricultural seed, flower seed, nursery seed and vegetable seed and seed product industries in this state *will be adversely affected if those industries are subject to a patchwork of local regulations*."

ORS 633.733 (emphasis added).

As noted above, the key portion of the statute provides that "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." ORS 633.738(2) (emphasis added). To be clear, a local government cannot regulate in the area of agricultural seeds or products *at all*.

> 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.

Id. This language, especially in light of the legislative findings, clearly manifests the "intention that the operation of state law be exclusive." *Thunderbird Mobile Club*, 234 Or App at 473 (citing language that "'no city, town, county or other political subdivision shall adopt or enforce any ordinance, rule or regulation regarding' a particular subject area" as example of language that expressly preempts). Because the statute expressly prohibits local enactments that regulate or interfere with the production or use of seeds or crops, the sole question is whether ORS 633.738 preempts the Ordinance at issue here.[4] *See, e.g.*, *Conrady v. Lincoln Cnty.*, 260 Or App

[4] There is no question that the legislature has the authority to enact a law relating to a local concern where, as here, "the subject matter of the enactment is of general concern to the state as a whole." *La Grande*, 281 Or at 146; *see also City of Roseburg v. Roseburg City Firefighters, Local No. 1489*, 292 Or 266, 274 (1981) (*La Grande* "held in essence that the home rule

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115, 124-26 (2013), *rev denied*, 355 Or 567 (2014) (determining whether express state preemption of regulation preempted local zoning ordinance as applied to shooting range). It plainly does.[5]

The Ordinance has two prohibitions. The first purports to make it unlawful to "propagate, cultivate, raise, or grow genetically modified organisms in Josephine County, or to knowingly or negligently allow such activities to occur on one's land." Compl., Ex. 1, p. 2. This prohibition matches *exactly* what ORS 633.738(2) says a local government *cannot* prohibit: "the production … display, distribution, growing, harvesting, labeling, marketing, mixing, notification of use, planting, possession, processing, registration, storage, transportation or use" of seeds or crops. ORS 633.738(2) preempts the first prohibition in the Ordinance, which is therefore invalid and unenforceable as a matter of law.

The second prohibition in the Ordinance purports to make it unlawful to "intentionally or negligently cause or allow any genetically modified organisms or materials from within or outside of the jurisdiction of Josephine County to substantially enter, drift or be dispersed into and within Josephine County, in such a way as to risk genetic contamination of natural organisms within the jurisdiction of Josephine County." Compl., Ex. 1, p. 4. That prohibition is likewise incompatible with the substantive policy set forth in ORS 633.738, and thus also is preempted. *See La Grande*, 281 Or at 149. First, ORS 633.738 prohibits any "control area or quarantine." ORS 633.738(2). The Ordinance's prohibition against causing or allowing GMOs "from within or outside of the jurisdiction to substantially enter, drift or be dispersed into and

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amendments grant pre-eminence to local governments in matters of local political organization and that the legislature remains pre-eminent in matters of substantive law").

[5] Indeed, the Ordinance itself recognizes that it is preempted. One stated purpose of the Ordinance is to "maintain and protect seed sovereignty and local control, free from … overreaching preemption by the state" government. Compl., Ex. 1, p. 1. But the County cannot avoid preemption by declaring that it believes the state legislature has "overreached" by expressly preempting local enactments in the substantive area of GE legislation.

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within Josephine County" essentially purports to create a County-wide control area or quarantine, in contravention of ORS 633.738(2). Indeed, the prohibition against allowing GMOs from "outside of the jurisdiction to substantially enter" Josephine County purports to prohibit conduct in *other* counties. Not only is that outside Josephine County's legislative reach, it is also exemplifies the adverse effect of patchwork legislation the Legislature said supports statewide legislation. *See* ORS 633.733(c). Second, ORS 633.738 prohibits any local ordinance that "inhibits or prevents the production or use" of seeds or products of seeds. Growing plants, whether for seed or other output, often produces pollen or other aerial particulate matter. As such, the purported restriction on drift, dispersal, etc., effectively prohibits production, growing, or harvesting of seeds or crops. ORS 633.738 bars such local regulation.

Nor does the Ordinance fall within the limited exception of Ch 4, Sec. 4, Oregon Laws 2013 (first special session), which only applies to Ordinances that "on or before January 21, 2013, qualified for placement on the ballot in a county," since the Ordinance did not qualify until February 18, 2014.

3. The legislative history of ORS 633.738 further shows that the legislature intended to preempt local enactments like the Ordinance.

If the statute's text left any conceivable doubt as to the legislature's intent, the legislative history dispels it. That history makes plain that the legislature intended to preempt any local regulation in the area of production or use of genetically modified seeds or crops.

The concept embodied in ORS 633.738 was originally contained in Senate Bill 633, which was introduced in the 2013 legislative session. That bill was adopted by the Senate but failed to secure a vote in the House of Representatives. A copy of SB633A is attached as App. 1. Senate Bill 633A, with slight modifications, later became the foundation of one of the five pieces of legislation which made up the "Grand Bargain" adopted by the 2013 Special Session. The modified version of Senate Bill 633 contained a section which did not apply the preemption rule to "any local measure that was (1) proposed by an initiative petition and, on or before January

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31, 2013, qualified for placement on the ballot in a county; and (2) approved by the electors of the county in the election on May 20, 2014." The intention of the additional provision was to exempt the initiative petition which had already qualified for the ballot in Jackson County.

That version of SB 633 became LC 5-3.[6] A copy of LC 5-3 is attached as App. 2. LC 5 was heard by the Joint Interim Committee on the Special Session on September 26, 2013, days before the Special Session convened. By the time the Special Session convened -- October 1, 2013 -- LC 5 had become SB 863, which was heard before the Joint Committee on the Special Session. A copy of SB863 is attached as App 3.

Some of the legislative history surrounding Senate Bill 863 was noticed by federal magistrate judge Clarke in his Order relating to *Schulz Family Farms LLC v. Jackson County, et al.*, United States Federal District Court Case No. 1:14-cv-01975-CL (attached as Appendix 4). Judge Clarke observed:

> In the uncodified portion of SB 863, specifically Section 4, additional legislation was enacted to permit certain local government prohibitions on the production or use of various types of seed. Section 4 provides that ORS 633.738 "does not apply to any local measure that was: (1) Proposed by initiative petition and, on or before January 21, 2013, qualified for placement on the ballot in a county; and (2) Approved by the electors of the county at an election held on May 20, 2014." It is undisputed that the exception in Section 4 applies to Jackson County Ordinance 635.
>
> The legislative history shows that lawmakers specifically intended to allow the Jackson County Ordinance to go forward, even though the purpose of the Seed Bill was to prevent counties and local governments from enacting precisely such laws. At the Senate Committee on Rural Communities and Economic Development meeting held on March 12, 2013, the committee heard testimony from two state legislators representing Jackson County. County Ex. 9 (#51-9). Senator Alan Bates testified about the unique geography of Jackson County and the Rogue River Valley, and the impact of that geography on the farming community. Id. Representative Peter Buckley testified about the growing number of organic farmers in Jackson County, and the

[6] In legislative parlance, "LC" refers to a "legislative concept." Senate and House bills are printed, verbatim, from their LC equivalents at the time the bills are introduced. LC 5-3 was often referred to in testimony as "LC 5.".

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> importance of protecting their crops from potential harm caused by pollen drift from farms growing genetically engineered crops. Id. Later, during the Joint Interim Committee on Special Session meeting held on September 26, 2013, then-Governor John Kitzhaber testified that the intent of the Seed Bill was to "preempt counties from adopting their own ban on genetically engineered products *with the exception of the election in Jackson County that's already on the ballot*." County Ex. 8 (#51-8) (emphasis added). At the same meeting, Speaker of the House Tina Kotek confirmed that the intent was for "the Jackson County ballot that has been approved and cleared for the May 2014 ballot to continue to go through." Id.
>
> It is clear from the text and context of the Seed Bill that the Oregon legislature meant to preempt counties and other local governments from enacting laws banning the use of GE seeds so that the GMO issue could be addressed on a state-wide, uniform basis. **In other words, the Seed Bill preempts laws precisely like the Ordinance.** However, it is equally clear that the legislature meant to carve out a specific exception authorizing Jackson County Ordinance 635.

Order at pp. 9-10 (emphasis supplied).[7]

On September 26, 2013, Governor Kitzhaber testified before the Joint Interim Committee on Special Session concerning LC 5 and its role in the overall "Grand Bargain." The Governor said that LC 5

> *would preempt counties from adopting their own ban on genetically engineered products, with the exception of the election of Jackson County* that is already on the ballot. * * * This is about whether or not we think we should have 36 different agricultural policies around GE, or whether we should have one state policy. It is not a debate about whether or not we want an agricultural industry that includes genetically engineered products.

Hearing Before Joint Interim Committee on Special Session, Sept. 26, 2013, Recording Log 2:25:22 p.m. (emphasis added).

Later in the hearing, the Chair invited Yamhill County Commissioner Mary Stern, who was the President of the Association of Oregon Counties ("AOC") to testify on LC 5. Commissioner Stern said, in part:

[7] Judge Clarke thereby recognized that, but for the exception specific to Jackson County, the ordinance at issue there would have been expressly preempted by ORS 633.738.

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> AOC supports LC 5 because counties do not have the expertise, the staff, or the money to oversee and enforce programs that restrict any type of seeds or agriculture. We believe this issue is best left to the Department of Agriculture, with the help of OSU Extension Service. I know it's unusual for counties to come to you advocating against local control; it probably has never happened before—but we are here today for that because it is very important to us. In addition to the problems that local regulations would cause local jurisdictions, it would be a nightmare for farmers, and I'm sure you'll hear more about that today. * * * The bill before you reserves to the state the regulation of agricultural seeds, as well as flower and nursery stock seeds, and seed byproducts.

Hearing before Joint Interim Committee on Special Session, Sept. 26, 2013, Recording Log 4:32:51 p.m.

Even the opponents of the legislation made clear what the consequences of its passage would be. Lori Ann Burd, an attorney with the nonprofit Center for Food Safety (a group that has opposition to GE crops as its core organizational purpose) testified in opposition. She said in part:

> LC 5 would strip away the right of communities to make locally appropriate decisions about agriculture.

Hearing Before Joint Interim Committee on Special Session, Sept. 26, 2013, Recording Log 5:12:10 p.m.

On October 1, 2013, LC 5 was introduced as SB863 and referred to the Joint Committee on Special Session. Following hearings before the Joint Committee that day, the Bill was sent with a "Do Pass" recommendation to the Senate floor. During floor debate on October 2, 2013, the Bill's carrier, Senator Ferrioli, said:

> Mr. President, what this measure does is very simple: it finds and declares that regulation of agriculture, flower, vegetable and nursery seeds and seed production is reserved to the state. That's what the bill does.

Senate Floor Debate, Oct. 2, 2013, Counter No. 44:33.

Following adoption by the Senate, the House next took up the Bill. Representative Escoval led the debate and said:

> Colleagues: Senate Bill 863 is not about whether or not agricultural

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> seed is regulated, but rather where that regulation takes place. Local counties and municipalities are not technically or financially equipped to regulate agricultural crops. * * * Without Senate Bill 863, all farmers could potentially face new regulations from 36 counties, 242 cities and municipalities, as well as 36 special districts—a total of 314 different regulations could be in place.

House Floor Debate, Oct 2, 2013, Counter No. 2:56:03.

Once again, even opponents to the Bill made clear what the effect would be were Senate Bill 863 to become law. Representative Buckley, a fierce opponent of the legislation, said during the same floor debate "I believe this Bill wipes out City and County ordinances." *Id*., Counter No. 2:58:50. The Bill was thereafter adopted by the House and sent to Governor Kitzhaber for his signature. It was enacted as Ch 4, Special Session Laws 2013 and later codified as ORS 633.733 and 633.738. The special exemption for Jackson County was contained in a note to the ORS referenced as Section 4, Ch. 4, Or. Laws 2013 (first special session).

Based on the text, context and legislative history, there can be no doubt that ORS 633.738 specifically preempts the Ordinance at issue here.

C. Because the Ordinance is invalid and unenforceable, plaintiffs are entitled to a permanent injunction.

A party is entitled to injunctive relief where there is "an appreciable threat of continuing harm," *Eagles Five, LLC v. Lawton*, 250 Or App 413, 422 (2012), and the harm is "irreparable, *i.e.*, there must be no adequate remedy at law," *Levasseur v. Armon*, 240 Or App 250, 259 (2010). Further, a party has standing to enjoin a governmental action where, as here, "the challenged action injures the plaintiff in some special sense that goes beyond the injury the plaintiff would expect as a member of the general public." *Eckles v. State*, 306 Or 380, 386 (1988). Finally, pursuant to ORS 28.080, a court may grant "other forms of coercive relief, including injunctive relief" when "based on a declaratory judgment" and when "necessary and proper." *Ken Leahy Constr., Inc. v. Cascade Gen., Inc.*, 329 Or 566, 575 (1999).

Here, plaintiffs' entitlement to injunctive relief is beyond dispute. In fact, the County cannot be heard to argue that it has any conceivable right to enforce the Ordinance if it is

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declared invalid. *See Swett v. Bradbury*, 335 Or 378, 389-90 (2003) (court assumes responsible government officials will honor the court's declaration without the necessity of an accompanying injunction). In all events, Plaintiffs have a right to possession, use, and enjoyment of their property. *Nearing v. Weaver*, 295 Or 702, 707 (1983) (property owner has legally protected "interest in the use and enjoyment of their land); *see also Edwards v. Talent Irrigation Dist.*, 280 Or 307, 309 (1977) (same); *Hall v. State ex rel Oregon Dep't of Transp.*, 355 Or 503, 511 (2014) (property owner has "right of possession, enjoyment, and use"). Plaintiffs desire and intend to use their property to grow genetically engineered sugar beets for seed and stecklings. That is unquestionably a lawful pursuit, but for the Ordinance. The County's initial threat to enforce the Ordinance, even though the Ordinance is invalid, constitutes *per se* irreparable harm. Indeed, the principle that an injunction is a property remedy against enforcement of an invalid law goes back at least a century and remains well-established. *See Chan Sing v. City of Astoria*, 79 Or 411, 415 (1916) ("A court of equity will sustain a suit to enjoin prosecutions under a void law."); *Kroner v. City of Portland*, 116 Or 141, 150 (1925) ("It may be premised that injunction is a proper remedy to prevent the enforcement of void legislation."); *McLaughlin v. Helgerson*, 116 Or 310, 313 (1925) ("If the statute were unconstitutional as alleged in the complaint, and its enforcement would result in an invasion of plaintiff's rights of property, then it is obvious that plaintiff would have no adequate remedy at law for such invasion of his property rights, and a court of equity would have jurisdiction to restrain the enforcement thereof…."); *Alum. Utensil Co. v. City of North Bend*, 210 Or 412, 419 (1957) (noting that "it is well settled in this state that if the enforcement of an ordinance, invalid because of its conflict with constitutional provisions, will adversely affect the property rights of the accused, enforcement may be enjoined by a court of equity" in the context of a manufacturer who was facing criminal prosecution for violating ordinance at issue); *Northwestern Title Loans, LLC v. Division of Finance and Corporate Securities*, 180 Or App 1, 8 (2002) (citing *Alum. Utensil Co.* and "and the cases collected therein dating back to 1905" and noting that "if the threatened enforcement of an allegedly invalid

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ordinance or statute may harm the property rights of a party, the court has authority to issue an injunction to prevent the threatened harm from occurring.").

Moreover, under ORS 28.080, "further relief may be granted whenever necessary or proper," and such "further relief" may include injunctive relief. *See Ken Leahy Constr., Inc.*, 329 Or at 575. Here, injunctive relief is "necessary and proper" because an injunction is necessary to effectuate the declaration that Ordinance is invalid and to give plaintiffs complete relief. *See id.* at 572, 575-76 (analyses for granting a declaratory judgment and for determining what coercive relief is appropriate to effectuate the declaration are separate; ORS 28.080 is designed to provide a plaintiff with complete relief). Plaintiffs are entitled to a permanent injunction so that they can enjoy their rightful, peaceful use of their rented property.

IV. CONCLUSION

For the foregoing reasons, the court should grant plaintiffs' motion, issue a declaratory judgment declaring that the Ordinance is invalid and unenforceable, and enter an injunction permanently enjoining the County from enforcing the Ordinance.

DATED this 20th day of October, 2015.

DAVIS WRIGHT TREMAINE LLP

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A-Engrossed
Senate Bill 633

Ordered by the Senate April 25
Including Senate Amendments dated April 25

Sponsored by Senators HANSELL, JOHNSON, KRUSE, ROBLAN, BAERTSCHIGER JR

SUMMARY

The following summary is not prepared by the sponsors of the measure and is not a part of the body thereof subject to consideration by the Legislative Assembly. It is an editor's brief statement of the essential features of the measure.

Makes legislative finding and declaration that regulation of agricultural seed, flower seed, **nursery seed** and vegetable seed and products of agricultural seed, flower seed, **nursery seed** and vegetable seed be reserved to state. Prohibits enactment or enforcement of local measures to regulate agricultural seed, flower seed, **nursery seed** and vegetable seed or products of agricultural seed, flower seed, **nursery seed** and vegetable seed.

A BILL FOR AN ACT

Relating to the preemption of local laws regulating agriculture.

Be It Enacted by the People of the State of Oregon:

SECTION 1. Sections 2 and 3 of this 2013 Act are added to and made a part of ORS 633.511 to 633.750.

SECTION 2. (1) As used in this section, "nursery seed" means any propagant of nursery stock as defined in ORS 571.005.

(2) The Legislative Assembly finds and declares that:

(a) The production and use of agricultural seed, flower seed, nursery seed and vegetable seed and products of agricultural seed, flower seed, nursery seed and vegetable seed are of substantial economic benefit to this state;

(b) The economic benefits resulting from agricultural seed, flower seed, nursery seed and vegetable seed and seed product industries in this state make the protection, preservation and promotion of those industries a matter of statewide interest that warrants reserving exclusive regulatory power over agricultural seed, flower seed, nursery seed and vegetable seed and products of agricultural seed, flower seed, nursery seed and vegetable seed to the state; and

(c) The agricultural seed, flower seed, nursery seed and vegetable seed and seed product industries in this state will be adversely affected if those industries are subject to a patchwork of local regulations.

SECTION 3. (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,

NOTE: Matter in **boldfaced** type in an amended section is new; matter [*italic and bracketed*] is existing law to be omitted. New sections are in **boldfaced** type.

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.

LC 5-3
2013 1st Special Session
9/29/13 (CDT/ps)

D R A F T

SUMMARY

Makes legislative finding and declaration that regulation of agricultural seed, flower seed, nursery seed and vegetable seed and products of agricultural seed, flower seed, nursery seed and vegetable seed be reserved to state. Prohibits enactment or enforcement of local laws or measures to regulate agricultural seed, flower seed, nursery seed and vegetable seed or products of agricultural seed, flower seed, nursery seed and vegetable seed.

Declares emergency, effective on passage.

A BILL FOR AN ACT

Relating to preemption of the local regulation of agriculture; and declaring an emergency.

Be It Enacted by the People of the State of Oregon:

SECTION 1. Sections 2 and 3 of this 2013 special session Act are added to and made a part of ORS 633.511 to 633.750.

SECTION 2. (1) As used in this section, "nursery seed" means any propagant of nursery stock as defined in ORS 571.005.

(2) The Legislative Assembly finds and declares that:

(a) The production and use of agricultural seed, flower seed, nursery seed and vegetable seed and products of agricultural seed, flower seed, nursery seed and vegetable seed are of substantial economic benefit to this state;

(b) The economic benefits resulting from agricultural seed, flower seed, nursery seed and vegetable seed and seed product industries in this state make the protection, preservation and promotion of those industries a matter of statewide interest that warrants reserving exclusive regulatory power over agricultural seed, flower seed, nursery

NOTE: Matter in **boldfaced** type in an amended section is new; matter [*italic and bracketed*] is existing law to be omitted. New sections are in **boldfaced** type.

seed and vegetable seed and products of agricultural seed, flower seed, nursery seed and vegetable seed to the state; and

(c) The agricultural seed, flower seed, nursery seed and vegetable seed and seed product industries in this state will be adversely affected if those industries are subject to a patchwork of local regulations.

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(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.

SECTION 4. Section 3 of this 2013 special session Act does not apply to any local measure that was:

(1) Proposed by initiative petition and, on or before January 31, 2013, qualified for placement on the ballot in a county; and

(2) Approved by the electors of the county at an election held on May 20, 2014.

SECTION 5. This 2013 special session Act being necessary for the immediate preservation of the public peace, health and safety, an emergency is declared to exist, and this 2013 special session Act takes effect on its passage.

Enrolled
Senate Bill 863

Sponsored by JOINT COMMITTEE ON SPECIAL SESSION

CHAPTER .....

AN ACT

Relating to preemption of the local regulation of agriculture; and declaring an emergency.

Be It Enacted by the People of the State of Oregon:

SECTION 1. Sections 2 and 3 of this 2013 special session Act are added to and made a part of ORS 633.511 to 633.750.

SECTION 2. (1) As used in this section, "nursery seed" means any propagant of nursery stock as defined in ORS 571.005.

(2) The Legislative Assembly finds and declares that:

(a) The production and use of agricultural seed, flower seed, nursery seed and vegetable seed and products of agricultural seed, flower seed, nursery seed and vegetable seed are of substantial economic benefit to this state;

(b) The economic benefits resulting from agricultural seed, flower seed, nursery seed and vegetable seed and seed product industries in this state make the protection, preservation and promotion of those industries a matter of statewide interest that warrants reserving exclusive regulatory power over agricultural seed, flower seed, nursery seed and vegetable seed and products of agricultural seed, flower seed, nursery seed and vegetable seed to the state; and

(c) The agricultural seed, flower seed, nursery seed and vegetable seed and seed product industries in this state will be adversely affected if those industries are subject to a patchwork of local regulations.

SECTION 3. (1) As used in this section:

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SECTION 5. This 2013 special session Act being necessary for the immediate preservation of the public peace, health and safety, an emergency is declared to exist, and this 2013 special session Act takes effect on its passage.

Passed by Senate October 2, 2013

.....
Robert Taylor, Secretary of Senate

.....
Peter Courtney, President of Senate

Passed by House October 2, 2013

.....
Tina Kotek, Speaker of House

Received by Governor:

.....M.,....., 2013

Approved:

.....M.,....., 2013

.....
John Kitzhaber, Governor

Filed in Office of Secretary of State:

.....M.,....., 2013

.....
Kate Brown, Secretary of State

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

MEDFORD DIVISION

SCHULTZ FAMILY FARMS LLC, et al,

Plaintiffs,

v.

JACKSON COUNTY,

Defendant,

v.

CHRISTOPHER HARDY, et al,

Intervenor-defendants.

Case No. 1:14-cv-01975

ORDER

CLARKE, Magistrate Judge.

This matter comes before the Court on cross motions for partial summary judgment filed by Schultz Family Farms, LLC, James Frink, Marilyn Frink, and Frink Family Trust (collectively, "Plaintiffs") (#46), defendant Jackson County ("the County") (#47), and intervenor defendants Christopher Hardy, Oshala Farm, Our Family Farms Coalition (OFFC), and the Center For Food Safety (CFS), (collectively, "intervenors") (#57). For the reasons discussed below, the County's motion and the intervenors' motion are GRANTED and the Plaintiffs'

motion is DENIED. Defendants are entitled to summary judgment on Plaintiffs' first claim for relief.

BACKGROUND

Plaintiffs originally filed this action in the Circuit Court for the State of Oregon for the County of Jackson on November 18, 2014. On December 10, Defendant Jackson County removed the action to federal court based on federal question jurisdiction under 28 U.S.C. § 1331 and supplemental jurisdiction under 28 U.S.C. § 1367(a). Plaintiffs' action challenges Proposed Jackson County Ordinance 635, which voters approved as ballot measure 15-119 on May 20, 2014, to ban the growing of genetically engineered plants in Jackson County. The ordinance is set to go into effect in June 5, 2015.

Plaintiffs Shultz Family Farms LLC, James Frink and Marilyn Frink, and Frink Family Trust are Oregon farmers who currently reside in Jackson County, Oregon. They have all previously grown and have currently planted crops of Roundup Ready® Alfalfa (RRA), which is grown from genetically engineered seeds. Plaintiffs claim that Ordinance 635 conflicts with Oregon's Right to Farm Act, ORS § 30.930-947, and that it will require plaintiffs to destroy valuable crops they have already planted, cultivated, and planned to sell, without just compensation, in violation of the Oregon and United States Constitution. Plaintiffs seek declaratory relief and injunctive relief to permanently enjoin enforcement of the ordinance. Alternatively, plaintiffs seek damages as compensation for the destruction of their property as a result of the ordinance.

Defendant Jackson County claims the ordinance was passed in compliance with the Right to Farm Act, and additionally claims that Oregon's Senate Bill 863, recently signed into law, regulates the use of agricultural seeds and agricultural seed products (crops) and is a clear

indication that the Oregon Legislature meant to allow Jackson County to pass the ordinance at issue in this case.

Intervenors Christopher Hardy and Oshala Farms are Oregon farmers who currently reside in Jackson County and grow traditional (non-genetically engineered) crops. Intervenors OFFC and CFS are public interest groups who similarly represent local Oregon farmers, as well as other supporters of Ordinance 635. Intervenors claim that Ordinance 635 was passed in order to protect their farms and crops from transgenic contamination from crops of genetically engineered plants. Intervenors allege that their local customers will not purchase seeds or plants that have been contaminated with genetically engineered pollen because consumers do not want to eat genetically engineered foods and crops. Additionally, intervenors claim that once transgenic contamination occurs, it becomes difficult if not impossible to contain it, thereby causing irreparable damage to their crops.

SUMMARY

This case, and the issue of genetically engineered plants in general, involves a number of competing interests, as well as important considerations about basic questions fundamental to our everyday lives. Where does our food come from? What is our food made of? What are the long term effects of consuming genetically engineered food products? What are the long term impacts on global food scarcity if GE crops are banned? The Court's decision today, however, does not attempt to answer any of these complex and difficult questions. Today's decision is simply about the statutory construction of the Right to Farm Act, Jackson County Ordinance 635, and Oregon Senate Bill 863. Ultimately, the Court has determined that the Ordinance is not preempted by the Right to Farm Act, and it is specifically authorized by SB 863. Therefore the defendants are entitled to summary judgment on Plaintiff's first claim.

DISCUSSION

Plaintiffs bring claims seeking to overturn Jackson County Ordinance 635. All parties have moved for summary judgment on the Plaintiff's first claim, which includes two requests for relief. Plaintiffs ask the Court to enter an order "(1) [d]eclaring the Ordinance invalid, unlawful, and null and void; and (2) [g]ranting preliminary and permanent injunctive relief to enjoin the County from taking any action to enforce the Ordinance." Compl. 22 (#1-1).

Plaintiffs' motion for partial summary judgment is based on the assertion that the Ordinance is invalid based on Oregon's Right to Farm Act. Or. Rev. Stat. §§ 30.930, et al. The defendants, by contrast, assert that they are entitled to summary judgment on this claim because (1) the Ordinance is valid under the Right to Farm Act, and (2) the Ordinance is specifically authorized by another, more recent, Oregon law, Senate Bill 863. The Court agrees with the defendants.

I. Oregon Rules of Statutory Construction

A federal court interpreting Oregon law should "interpret the law as would the [Oregon] Supreme Court." Powell's Books, Inc. v. Kroger, 622 F.3d 1202, 1209 (9th Cir. 2010) (alteration in original). Therefore, the court applies the framework for statutory interpretation established in PGE v. Bureau of Labor and Industries, 317 Or. 606, 859 P.2d 1143 (1993), and subsequently modified by State v. Gaines, 346 Or. 160, 206 P.3d 1042 (2009). See Sundermier v. State ex rel. Pub. Employees Ret. Sys., 269 Or. App. 586, 595, 344 P.3d 1142, 1147 (2015). Under that framework, the goal of statutory interpretation is to discern the intent of the legislature that enacted the statute. Gaines, 346 Or. at 171, 206 P.3d 1042. The most persuasive evidence for determining the legislature's intent is the "text and context" of the statute itself. Id. A statutory term's "context" includes both its immediate context—the "phrase or sentence in which the term

appears"—and the "broader context," which includes other statutes "on the same subject." State v. Stamper, 197 Or.App. 413, 417–18, 106 P.3d 172, rev. den., 339 Or. 230, 119 P.3d 790 (2005).

Statements of statutory policy are also considered useful context for interpreting a statute. Providence Health System v. Walker, 252 Or.App. 489, 500, 289 P.3d 256 (2012), rev. den., 353 Or. 867, 306 P.3d 639 (2013). Such statements, however, "should not provide an excuse for delineating specific policies not articulated in the statutes[.]" Warburton v. Harney County, 174 Or.App. 322, 329, 25 P.3d 978, rev. den., 332 Or. 559, 34 P.3d 1177 (2001). After consulting a statute's text and context, we consider any "pertinent legislative history." Gaines, 346 Or. at 177, 206 P.3d 1042. Finally, and only if the legislature's intent remains unclear, we will "resort to general maxims of statutory construction." Id. at 172, 206 P.3d 1042.

II. The Ordinance is valid under Oregon's Right to Farm Act

Oregon's Right to Farm Act provides:

> Any local government or special district ordinance or regulation now in effect or subsequently adopted that makes a farm practice a nuisance or trespass or provides for its abatement as a nuisance or trespass is invalid with respect to that farm practice for which no action or claim is allowed under ORS 30.936 or 30.937.

Or. Rev. Stat. § 30.935. Sections 30.936 and 30.937 disallow private right of actions and claims for relief based on nuisance or trespass for "farming or forest practice(s) on lands zoned for farm or forest," and "farming or forest practice(s) allowed as a preexisting nonconforming use." Both sections include exceptions for (a) damage to commercial agriculture products, and (b) death or serious physical injury. Or. Rev. Stat. §§ 30.936(2)(a)-(b), 30.937(2)(a)-(b).

As used in ORS 30.930 to 30.947, a "farming practice" means a "mode of operation on a farm" that:

1. Is or may be used on a farm of a similar nature;
2. Is a generally accepted, reasonable and prudent method for the operation of the farm to obtain a profit in money;
3. Is or may become a generally accepted, reasonable and prudent method in conjunction with farm use;
4. Complies with applicable laws; and
5. Is done in a reasonable and prudent manner.

Or. Rev. Stat. § 30.930(2). A "'nuisance' or 'trespass' includes but is not limited to actions or claims based on noise, vibration, odors, smoke, dust, mist from irrigation, use of pesticides and use of crop production substances." Or. Rev. Stat. § 30.932.

Additionally, the Right to Farm Act provides a statement of the legislative findings and policies that lead to its enactment:

1. The Legislative Assembly finds that:
    a. Farming and forest practices are critical to the economic welfare of this state.
    b. The expansion of residential and urban uses on and near lands zoned or used for agriculture or production of forest products may give rise to conflicts between resource and nonresource activities.
    c. In the interest of the continued welfare of the state, farming and forest practices must be protected from legal actions that may be intended to limit, or have the effect of limiting, farming and forest practices.
2. The Legislative Assembly declares that it is the policy of this state that:
    a. Farming practices on lands zoned for farm use must be protected.
    b. Forest practices on lands zoned for the production of forest products must be protected.
    c. Persons who locate on or near an area zoned for farm or forest use must accept the conditions commonly associated with living in that particular setting.
    d. Certain private rights of action and the authority of local governments and special districts to declare farming and forest practices to be nuisances or trespass must be limited because such claims for relief and local government ordinances are inconsistent with land use policies, including policies set forth in ORS 215.243, and have adverse effects on the continuation of farming and forest practices and the full use of the resource base of this state.

Or. Rev. Stat. § 30.933.

The text and the context of the Right to Farm Act very clearly demonstrate that the legislature meant to protect farms and farming practices from urban encroachment. The language of the statute plainly states that the legislature intended to protect farming practices, which are "critical to the economic welfare of the state," from "the expansion of residential and urban uses" of such land. "Persons who locate on or near an area zoned for farm or forest use must accept the conditions commonly associated with living in that particular setting." Or. Rev. Stat. § 30.933(2)(d). In other words, in the conflicts that arise between active, functioning farms and new, neighboring suburbanites, who inevitably find the farming practices loud, smelly, invasive, or simply irritating, the Oregon legislature has decided, as have many states, to tip the scales in favor of the farms.

These intentions and policy considerations are further supported by the exception provided by the legislature for both private claims and ordinances based on farming practices that cause "damage to commercial agriculture." The exception demonstrates that the Right to Farm Act does not give free license to use *any* farming practices. While farming practices may not be limited by a suburbanite's sensitivities, they may be limited if they cause damage to another farm's crops.

With this understanding of the text and context of the Right to Farm Act, we turn to the Ordinance in question to determine its validity under the Act. Under Jackson County Ordinance 635, it is a "violation for any person or entity to propagate, cultivate, raise, or grow genetically engineered plants within Jackson County." Jackson County Code ("JCC") 635.04. "Genetically engineered" is defined, in part, as the "modification of living plants and organisms by genetic engineering, altering or amending DNA using recombinant DNA technology such as gene

deletion, gene doubling, introducing a foreign gene, or changing the position of genes, and includes cell fusion." JCC 635.03. Section 2 of the Ordinance states the "findings" and gives the primary purposes of the Ordinance, one of which is to protect local farmers from "significant economic harm to organic farmers and to other farmers who choose to grow non-genetically engineered crops" that can be caused by "genetic drift" from GE crops. JCC 635.02(c).

Based on the text and context of the Right to Farm Act and Ordinance 635, the Court finds that the Ordinance intends to protect against damage to commercial agriculture products, and therefore it falls into the exception to the Right to Farm Act. For this reason, the Ordinance is valid on its face.

Plaintiffs assert that the exception for damage to commercial agriculture products is not available without a showing of "actionable damage," and they claim that the Ordinance is invalid because it applies to all GE farming, without requiring such a showing or evidence of actual damage.[1] The Court disagrees. Farmers have always been able to bring claims against other farmers for practices that cause actionable damage to their commercial agriculture products under sections 30.936 and 30.937 of the Right to Farm Act. The Ordinance, by contrast, is enacted pursuant to section 30.935, and serves to prevent such damage before it happens. There is nothing in the text or context of the Right to Farm Act to indicate that a showing of actionable damage is necessary before the enactment of an ordinance, and the Court declines to create such a requirement.

III. The Ordinance is specifically authorized by Senate Bill 863

[1]Plaintiffs also claim that use of GE seeds and crops is considered a "farming practice" under the Right to Farm Act, and therefore Ordinance 635 is invalid because it "provides for the abatement" of such farming practice, and effectually makes it a nuisance under the laws of Jackson County. Because the Court finds the Ordinance falls into the exception for damage to commercial agriculture, the Court declines to address whether the use of GE seeds is a "farming practice" under the Right to Farm Act.

During the 2013 First Special Session, the Oregon Legislature enacted legislation specifically related to local government ordinances, or other regulations, that would inhibit or prevent the production or use of various types of agricultural seed and seed products. This legislation was enacted as Senate Bill 863 ("SB 863" or "Seed Bill"), and codified in part as ORS 633.733 and ORS 633.738.

ORS 633.738 provides, in pertinent part, that:

> [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.

Or. Rev. Stat. § 633.738(2). In the uncodified portion of SB 863, specifically Section 4, additional legislation was enacted to permit certain local government prohibitions on the production or use of various types of seed. Section 4 provides that ORS 633.738 "does not apply to any local measure that was: (1) Proposed by initiative petition and, on or before January 21, 2013, qualified for placement on the ballot in a county; and (2) Approved by the electors of the county at an election held on May 20, 2014." It is undisputed that the exception in Section 4 applies to Jackson County Ordinance 635.

The legislative history shows that lawmakers specifically intended to allow the Jackson County Ordinance to go forward, even though the purpose of the Seed Bill was to prevent counties and local governments from enacting precisely such laws. At the Senate Committee on

Rural Communities and Economic Development meeting held on March 12, 2013, the committee heard testimony from two state legislators representing Jackson County. County Ex. 9 (#51-9). Senator Alan Bates testified about the unique geography of Jackson County and the Rogue River Valley, and the impact of that geography on the farming community. Id. Representative Peter Buckley testified about the growing number of organic farmers in Jackson County, and the importance of protecting their crops from potential harm caused by pollen drift from farms growing genetically engineered crops. Id. Later, during the Joint Interim Committee on Special Session meeting held on September 26, 2013, then-Governor John Kitzhaber testified that the intent of the Seed Bill was to "preempt counties from adopting their own ban on genetically engineered products *with the exception of the election in Jackson County that's already on the ballot*." County Ex. 8 (#51-8) (emphasis added). At the same meeting, Speaker of the House Tina Kotek confirmed that the intent was for "the Jackson County ballot that has been approved and cleared for the May 2014 ballot to continue to go through." Id.

It is clear from the text and context of the Seed Bill that the Oregon legislature meant to preempt counties and other local governments from enacting laws banning the use of GE seeds so that the GMO issue could be addressed on a state-wide, uniform basis. In other words, the Seed Bill preempts laws precisely like the Ordinance. However, it is equally clear that the legislature meant to carve out a specific exception authorizing Jackson County Ordinance 635.

IV. Intervenors' Motion to Strike is Denied

Intervenor defendants move to strike portions of four declarations filed by Plaintiffs in support of their motion for summary judgment, or alternatively to lodge the intervenors' objections to the same. Because the Court did not rely on the declarations in its summary

judgment decision, the motion is denied as moot. The objections are therefore lodged, as requested.

ORDER

Jackson County Ordinance is valid under the Right to Farm Act, and it is specifically authorized by Oregon law. The motions for partial summary judgment by the County (#47) and the intervenors (#57) are therefore are GRANTED. Plaintiffs' motion (#46) is DENIED. Intervenors' motion to strike (#82) is DENIED. The Court notes the objections made by the intervenors to the declarations submitted by the plaintiffs.

IT IS SO ORDERED and DATED this 29 day of May, 2015.

MARK D. CLARKE
United States Magistrate Judge

CERTIFICATE OF SERVICE

I hereby certify that I served a copy of the foregoing **PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT** on:

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☐ by mailing a copy thereof in a sealed, first-class postage prepaid envelope, addressed to said attorney's last-known address and deposited in the U.S. mail at Portland, Oregon on the date set forth below;

☐ by causing a copy thereof to be hand-delivered to said attorney's address as shown above on the date set forth below;

☐ by sending a copy thereof via overnight courier in a sealed, prepaid envelope, addressed to said attorney's last-known address on the date set forth below;

☒ by using the Court's efiling system; or

☐ by emailing a copy thereof to said attorney at his/her last-known email address as set forth above.

Dated this 20th day of October, 2015.

DAVIS WRIGHT TREMAINE LLP

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