



OREGON JUDICIAL DEPARTMENT  
WASHINGTON COUNTY CIRCUIT COURT  
TWENTIETH JUDICIAL DISTRICT  
Washington County Court  
150 N First Avenue  
Hillsboro OR 97124

September 19, 2022

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**Schwartz, et al. v. Washington County, Washington County Circuit Court Case  
22CV04836, Letter Ruling regarding Washington County's Motion to Dismiss.**

Dear Counsel:

The Court heard this matter on August 29, 2022. Tony L. Aiello, Jr. appeared on behalf of plaintiffs, and John Mansfield appeared on behalf of defendant. Defendant filed an ORCP 21A(8) Motion to Dismiss on the grounds that SB 587 authorizes the County to ban flavored tobacco and nicotine products, and therefore plaintiff's claims have no legal merit. Plaintiffs challenge whether SB 587 authorizes banning state licensed tobacco sales, arguing that it only provides reasonable regulation of those sales. Parties agree on the material facts that give rise to the complaint, and both seek a ruling on the pleadings as a matter of law.

In reviewing a motion brought under 21A(8), the court assumes the truth of the facts alleged in the complaint and gives plaintiff the benefit of all inferences that can reasonably be drawn from those facts.<sup>1</sup> Furthermore, given that both parties agree that there are no issues of material fact and that the court should rule on the pleadings as a matter of law, an ORCP 21(A)(8) motion to dismiss is a functional equivalent of an ORCP 47 C Motion for Summary Judgment.<sup>2</sup>

SB 587 was signed into law on July 19, 2021, and it created statewide tobacco retail licenses, including flavored tobacco and nicotine products.<sup>3</sup> Plaintiffs are state licensed (or license pending) retail sellers of flavored tobacco and nicotine products.<sup>4</sup> On November 2, 2021, Washington County Board of Commissioners enacted Ordinance No. 878, while sitting as the Local Public Health Authority.<sup>5</sup> Relying upon their state licenses, plaintiffs have substantially invested in their

<sup>1</sup> See *Fessler v. Quinn*, 143 Or. App. 397 (1996).

<sup>2</sup> See *Black v. Arizala*, 182 Or. App. 16, 27 (2002)(holding that it was appropriate for the court to treat ORCP 21A(8) pleadings as the functional equivalent ORCP 47C citing ORS 1.160.).

<sup>3</sup> *Amended Complaint*, page 12; *Defendant's Motion to Dismiss*, page 2.

<sup>4</sup> *Amended Complaint*, page 11, *Defendant's Motion to Dismiss*, page 2.

<sup>5</sup> *Amended Complaint*, page 3; *Defendant's Motion to Dismiss*, page 5.

businesses, which are now endangered by WCO 878 which outright bans the retail sale of flavored tobacco and nicotine products.

Much has been made in arguments before this Court regarding the safety concerns of minors obtaining and using flavored tobacco. This Court acknowledges the legitimate health and safety concerns of restricting access and use of tobacco by minors. And while the plaintiffs concede the appropriateness of the County’s motivation, they strongly challenge the efficacy of banning a product that is already prohibited to minors. But the dispute before this court does not hinge on whether the County’s actions are virtuous or even likely to result in decreased use of tobacco by minors.<sup>6</sup> Rather, this dispute boils down to which party has the correct reading of SB 587(Section 17(2)). Plaintiffs argue that this provision does not grant authority for the County Ordinance that bans flavored tobacco and nicotine products outright. Instead, they argue, that it only allows the county to pass ordinances to enforce standards for how they are sold. Defendant also cites the same provision as authorizing them to legislate a county-wide ban on such products.

That Section provides:

**SECTION 17. Local regulation... (2) Each local public health authority may: (a) Enforce, pursuant to an ordinance enacted by the governing body of the local public health authority, standards for regulating the retail sale of tobacco products and inhalant delivery systems for purposes related to public health and safety in addition to the standards described in paragraph (b) of this subsection, including qualifications for engaging in the retail sale of tobacco products or inhalant delivery systems that are in addition to the qualifications described in section 5 of this 2021 Act.**

So the question is whether WCO 878 is an “Ordinance enacted by the governing body of the local public health authority, [to enforce] standards for regulating the retail sale of tobacco products...”<sup>7</sup> If not, then regardless of the virtue in enacting it, a county ban is unauthorized, and preempted. If it is, then state law does not expressly or impliedly preempt its ban. Accordingly, this Court must determine what is meant by “*standards for regulating the retail sale of tobacco.*”

I begin by noting that the “standards” for which the local health authority may enforce by enacting ordinances are “*in addition to standards*” (and qualifications) for engaging in retail sale of tobacco described in Section 17(b) and Section 5. Those standards and qualifications are:

**SECTION 17. Local Regulation...(2)(b) (A)Administer and enforce standards established by state law or rule relating to the regulation of the retail sale of tobacco products and inhalant delivery systems for purposes Enrolled Senate Bill 587 (SB 587-B) Page 6 related to public health and safety if the local public health authority and the**

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<sup>6</sup> Plaintiffs fail to carry the necessary proof that the county’s actions in enacting WCO 878 were Arbitrary and Capricious as alleged in their Fifth Claim for Relief. Nor am I persuaded that Ordinance 878 violates Article VI, Section 10 or Article 1, Section 20 of the Oregon Constitution. Accordingly, plaintiffs’ 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> Claims for Relief are Dismissed.

<sup>7</sup> I do find that WCO 878 was enacted by the Washington County Local Public Health Authority and ratified by Washington County voters.



