



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

September 19, 2022

Tony Aiello
Tyler Smith & Associates PC
181 N Grant St Ste 212
Canby, OR 97013

John Mansfield
County Counsel
3439 NE Sandy Blvd Ste 230
Portland, OR 97232

**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.¹ 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.²

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

¹ See *Fessler v. Quinn*, 143 Or. App. 397 (1996).

² 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.).

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

⁴ *Amended Complaint*, page 11, *Defendant's Motion to Dismiss*, page 2.

⁵ *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.⁶ 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..."⁷ 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**

⁶ 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' 4th, 5th and 6th Claims for Relief are Dismissed.

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

Oregon Health Authority enter into an agreement pursuant to ORS 190.110; or (B) Perform the duties described in this section in accordance with ORS 431.413 (2) or (3)

SECTION 5. Licensure. (1) Except as provided in subsection (8) of this section, the Department of Revenue shall issue licenses to, and annually renew licenses for, a person that makes retail sales of tobacco products or inhalant delivery systems at qualified premises. (2) To be qualified for licensure under this section, a premises: (a) Must be a premises that is fixed and permanent; (b) May not be located in an area that is zoned exclusively for residential use; (c) Must meet any qualification for engaging in the retail sale of tobacco products and inhalant delivery systems enacted as an ordinance by the governing body of a local public health authority under section 17 of this 2021 Act, provided that the department has knowledge of the qualification pursuant to an agreement entered into under section 13 of this 2021 Act. (3) For the purpose of licensing premises under this section, the department shall adopt rules establishing: (a) Procedures for applying for and renewing licenses; and (b) Licensure application, issuance and renewal fees. (4) An application submitted under this section and information related to applying for or renewing a license under this section is confidential and not subject to public disclosure under ORS 192.311 to 192.478. However, the department may share an application submitted under this section and information related to applying for or renewing a license under this section with the Department of Justice, the Oregon Health Authority or a local public health authority. (5) The Department of Revenue shall publish a list that includes the name of each person to which a license has been issued under this section, the address of each premises for which a license has been issued under this section and any other information that the department determines is relevant to the public with respect to the retail sale of tobacco products and inhalant delivery systems. (6) Fees established under subsection (3)(b) of this section must be reasonably calculated to cover but not exceed the costs incurred by the department in administering sections 1 to 14 of this 2021 Act. (7) All moneys collected under this section shall be deposited in the suspense account described in section 10 of this 2021 Act. (8) The department may not require a person that makes retail sales of tobacco products or inhalant delivery systems to obtain a license under this section if the person holds a license or other authorization issued by a city or local public health authority pursuant to section 18 of this 2021 Act.

Therefore, whatever ordinances are enacted must enforce these and additional standards.

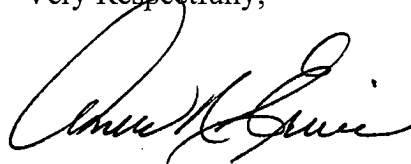
This is the flaw in the County's interpretation. Their ordinance does not seek to enforce these standards and/or any additional standards, nor does it seek to establish "additional" local qualifications before a retailer may sell flavored tobacco products. Instead, it deletes these standards and qualifications by enacting a blanket prohibition on retail sale of flavored tobacco and nicotine products in Washington County. The County argues that this provision, "grants local authorities' broad power to enact standards regulating tobacco sales." Thus, the County equates "*regulating the sale of tobacco products*" with *prohibiting the sale of otherwise licensed tobacco products*. But during oral argument when the Court asked County Counsel whether such standards to regulate gave the County authority to prohibit the sale of all tobacco (flavored or otherwise), the County conceded it did not. Presumably, the County recognizes that the State licensing scheme preempts them from a total ban, but it's hard to understand how that same licensing scheme would in turn authorize a partial

ban when those products have been duly licensed by the same legislative scheme that would prevent a complete ban.

Further, SB 587 Section 7, provides for suspension of issued licenses only if a local public health authority has issued a violation and provided a hearing. And Section 17(5)(a) requires the Oregon Health Authority to ensure all standards created by state law and rule be enforced consistently throughout the state. This would be meaningless if each county or local public health authority can refuse to allow state authorized licenses.

I neither smoke nor use tobacco products and recognize the great personal health hazards that attach to the ingestion of tobacco related products. But the decision to disallow licensed retail sale of such products must come from the state, not county by county. Certainly, the county has broad power to regulate how sales are made, but they cannot bar them entirely. To the extent that the County's reasons for doing so have merit, that merit would extend to the entire state. It is therefore up to the State to enact a ban on flavored tobacco. Accordingly, I find that WCO 878 is preempted by state law and therefore unenforceable. Plaintiffs should submit a conforming Judgment.⁸

Very Respectfully,

A handwritten signature in black ink, appearing to read "Andrew R. Erwin", written in a cursive style.

Andrew R. Erwin
Circuit Court Judge

⁸ Given my ruling on Counts 1 and 2, Count 3 is deemed moot.