

TESTIMONY OF JOHN DiLORENZO, JR.
ON BEHALF OF OREGONIANS FOR FOOD AND SHELTER, INC.
BEFORE THE SENATE COMMITTEE ON RURAL
COMMUNITIES AND ECONOMIC DEVELOPMENT
IN SUPPORT OF SUPPORT OF SB 633

March 12, 2013

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Good afternoon Mr. Chair and members of the Committee. For the record my name is John DiLorenzo. I am a partner with the law firm of Davis Wright Tremaine and am here on behalf of my longtime client, Oregonians for Food and Shelter to testify in support of Senate Bill 633 and to propose a further amendment to that bill.

Senate Bill 633 makes a legislative finding and a declaration that the regulation of agricultural seed, flower seed, vegetable seed and products of those seeds are matters of statewide concern and should not be subject to a patchwork of local regulations. In particular, Section 3 of the bill prohibits local governments from enacting or enforcing measures including ordinances, regulations, control areas or quarantine areas to either inhibit or prevent production or use of agricultural seed, flower seed or vegetable seed or their products. It contemplates that regulation, if any, would be applicable on a statewide basis.

Of course, one of the reasons for a local pre-emption bill is to avoid the possibility of multiple local regulations. My client is of the view that such regulations which begin and end at county lines are not in the best interests of the state's agricultural industry and threaten to ultimately require farmers to subject their farming operations to a multiplicity of rules (several which may actually be

contradictory) on a county-by-county and local government-by-local government basis.

But there is another reason why SB 633 should be enacted. Oregon's Right to Farm and Forest Act, which is found in ORS 30.930 – 30.947 was enacted 20 years ago to address the expansion of residential and urban uses into rural areas which created conflict with farm and forest practices. Paulette Pyle and I were among the proponents of that legislation during the 1993 legislative session. These conflicts sometimes rose above mere angry arguments to a higher level of confrontation and threatened the peace in some areas of the state. The Right to Farm and Forest Act has helped balance these sometimes conflicting uses.

The Right to Farm and Forest Act defines "farming practice" as a mode of operation on a farm that (a) is or may be used on a farm of a similar nature; (b) is a generally accepted, reasonable and prudent method for the operation of the farm to obtain a profit and money; (c) is or may become a generally accepted, reasonable and prudent method in conjunction with farm use; (d) complies with applicable laws and (e) is done in a reasonable and prudent manner.

"Forest practice" has a very similar definition under the law.

Our current law prohibits local governments from enforcing any ordinance that makes a farm practice a nuisance or trespass or provides for its abatement as a nuisance or a trespass and renders those ordinances invalid.

As you are also aware, there is currently an effort in Jackson County to enact, by initiative, an ordinance which would ban the propagation, cultivation, raising or growing of certain plants in Jackson County. The proposed ordinance

itself suggests that its purpose is to minimize impacts on urban “citizen gardeners” and organic farmers who wish to avoid pollen drift.

I believe that the practices which this proposed ordinance seeks to prohibit meet the statutory definition of farming practice because they are (1) modes of operation on a farm, (2) used generally on Jackson County farms, (3) are generally accepted, reasonable and prudent methods in connection with farm use, (4) comply with applicable state and federal laws, and (5) are done in a reasonable and prudent manner.

I have no doubt that if the proposed Jackson County ordinance or similar ordinances are adopted, the Right to Farm and Forest Act could be used to invalidate them. However, doing so would involve protracted litigation.

The Right to Farm and Forest Act contains a very strong attorney fee provision at ORS 30.938. The two Court of Appeals cases which have interpreted the Act have made clear that the party who asserts that he or she is engaging in a farming or forest practice shall, upon prevailing, be entitled to a judgment for his or her reasonable attorneys’ fees and costs incurred at trial and on appeal.

And so, if unimpeded, the proliferation of local ordinances like that which is currently proposed in Jackson County would not only subject counties and local governments to significant defense costs as they are compelled to defend challenges, it would also make them ultimately liable for the attorneys’ fees of the farmers who are challenging the validity of the ordinances. We respectfully submit that these are costs which local governments in agricultural areas can hardly afford.

Should SB 633 be enacted, there will be no question that these types of local ordinances are invalid and pre-empted and the counties would have no obligation

to enforce these local measures at all. Absent SB 633, a local government whose voters approve such a prospective ordinance would have no choice but to attempt to enforce the ordinance, only to be rebuffed by farmers who are the subject of the enforcement and to be liable for the farmers' attorneys' fees.

We therefore feel that enactment of SB 633 will be of great benefit to counties who are also struggling with their own budgets.

Finally, my client seeks to propose an additional amendment for two purposes. First, SB 633, as drafted, only prohibits local governments from enacting or enforcing "measures." Some of those measures could be in the form of charter amendments; and some of them could take the form ordinances, regulations, control areas or quarantine areas. The word "measure" is a term of art defined by ORS 260.005(14) and is a law that is first "submitted to the people for their approval or rejection." We are therefore concerned, that as printed, SB 633 would only pre-empt local ordinances which were first submitted to the voters. The bill as printed would not necessarily prohibit such ordinances which were not the subject of the initiative process. We therefore recommend that at line 21 of the first page of the bill, the words "local law or" be inserted before the word "measure" to make clear that the purpose of the pre-emption statute is to also pre-empt these types of local ordinances which are adopted by the local government governing bodies.

In addition, it has become apparent that the prohibitions on local laws contained within SB 633 only apply to those which "inhibit or prevent the production or use of agricultural seed, flower seed or vegetable seed or products of agricultural seed, flower seed or vegetable seed." We are concerned that the products of these seeds might not include trees grown as nursery stock, whether as

grafts, tree seedlings, cuttings or otherwise. For this reason, we propose adding nursery stock by referencing provisions in ORS Ch. 571.

These are contained in the -1 amendments which are submitted to you for your consideration.

Thank you for devoting the time to address SB 633 and for your consideration of our arguments. We are prepared to answer any questions which your committee members may have.