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Re: Measure 91 and Local Control

Date: March 4, 2015

You have asked us to examine whether Measure 91 preempts local governments in Oregon from regulating, prohibiting, or taxing the growing, processing, distribution, or retail sales of recreational marijuana. For the reasons that follow, the preemptive effect of Measure 91 is not free from doubt. Oregon's strong home rule principles, the history of the Oregon Liquor Control Act on which Measure 91 appears to be based, and federal law all call into question the preemptive effect of Measure 91.

I. Home Rule Authority

Before examining the text of Measure 91, it is important to note that Oregon is a home rule state, which allows a city or county the power to adopt ordinances on any matter unless specifically preempted by state law.[1]

City governments in Oregon derive their home rule authority through the adoption of a home rule charter by the voters of that community pursuant to Article XI, section 2, of the Oregon Constitution, which was added to the Oregon constitution in 1906 by the people's initiative. Article XI, section 2, provides, in part that:

> "The Legislative Assembly shall not enact, amend or repeal any charter or act of incorporation of any municipality, city or town. The legal voters of every city and

[1] Home rule stands in contrast to a corollary principle known as Dillon's Rule. Dillon's Rule holds that municipal governments may engage only in activities expressly allowed by the state because they derive their authority and existence from the state. John F. Dillon, 1 The Law of Municipal Corporations § 9b, 93 (2d ed 1873). Under Dillon's Rule, if there is a reasonable doubt about whether a power has been conferred to a local government, then the power has not been conferred. *Id.* §55, at 173. In contrast, in a home rule state like Oregon, a home rule charter approved by a vote of the people operates like a state constitution, in that it vests all government power in the governing body of the municipality, except as expressly stated in that charter, or in state or federal law.

> town are hereby granted power to enact and amend their municipal charter, subject to the Constitution and criminal laws of the State of Oregon."

All of Oregon's 242 incorporated cities have adopted home rule charters.

County governments derive their home rule authority from one of two sources. Some counties derive their home rule authority through the adoption of a home rule charter by the voters of that county pursuant to Article XI, section 10, of the Oregon Constitution, which was added to the Oregon constitution in 1958 by the people's initiative. Article XI, section 10, provides, in part that:

> "The legal voters of any county . . . may adopt, amend, revise or repeal a county charter. A county charter may provide for the exercise by the county of authority over matters of county concern."

Nine counties have adopted home rule charters.

Counties that have not adopted a home rule charter, are known as General Law counties. They enjoy similar home rule authority under ORS 203.035, which provides, in part, that "the governing body or the electors . . . may by ordinance exercise authority within the county over matters of county concern, to the fullest extent allowed by Constitutions and laws of the United States and of this state." Or Laws 1973, ch 282, § 2. The Oregon courts have held that the scope of authority provided to general law counties under ORS 203.035 is the same as that given to home rule counties under Article XI, section 10, of the Oregon Constitution. *See Allison v. Washington County*, 24 Or App 571, 581, 548 P2d 188 (1976) (so stating); *see also GTE v. PUC*, 179 Or App 46, 51-52, 39 P3d 201, *rev den*, 334 Or 492 (2002).

As noted above, the legal principle of home rule allows a city or county the power to adopt ordinances on any matter unless specifically preempted by state law. As such, the Oregon appellate courts have held that home rule municipalities have authority to enact substantive policies, even in an area also regulated by state statute, as long as the local enactment is not "incompatible" with state law, "either because both cannot operate concurrently or because the Legislature meant its law to be exclusive." *LaGrande/Astoria v. PERB*, 281 Or 137, 148-49, 576 P2d 1204, *aff'd on reh'g*, 284 Or 173, 586 P2d 765 (1978). Where there is a local enactment and state enactment on the same subject, the courts will attempt to harmonize state statutes and local regulations whenever possible. *Id.* at 148-49 ("It is reasonable to interpret local enactments, if possible, to be intended to function consistently with state laws[.]") A court will presume that the state did not intend to displace a local ordinance in the absence of an apparent and unambiguous intent to do so.[2] *See, e.g., State ex rel Haley v. City of Troutdale*, 281 Or 203, 210-11, 576 P2d 1238 (1978) (finding no manifest legislative intent to preempt local provisions that supplemented the state building code with more stringent restrictions).

[2] Criminal enactments are treated differently. Local criminal ordinances are presumed invalid, and that presumption cannot be overcome if the local enactment prohibits what state law allows or allows what state law prohibits. *See City of Portland v. Dollarhide*, 300 Or 490, 501, 714 P2d 220 (1986).

Accordingly, the Court of Appeals has explained, "[a] local ordinance is not incompatible with state law simply because it imposes greater requirements than does the state, nor because the ordinance and state law deal with different aspects of the same subject." *Thunderbird Mobile Club v. City of Wilsonville*, 234 Or App 457, 474, 228 P3d 650, *rev den*, 348 Or 524 (2010). Similarly, the legislature cannot preempt local government authority by negative implication. *See Gunderson, LLC v. City of Portland*, 352 Or 648, 662, 290 P3d 803 (2012) (explaining that even if a preemption based on a negative inference is plausible, if it is not the only inference that is plausible, it is "insufficient to constitute the unambiguous expression of preemptive intention" required under home rule cases). Therefore, where a state law expressly states that a local government may exercise certain authority, that expression does not imply that local governments are excluded from exercising other authority in the same area. Rather, in order to preempt local authority, the state law at issue must be clear and unambiguous.

II. Review of Measure 91 Provisions

With the foregoing principles in mind, this memorandum now turns to an analysis of whether various provisions of Measure 91 are preemptive of local government home rule authority. At the outset, it is important to note that it appears that the drafters of Measure 91 borrowed provisions from the Oregon Liquor Control Act (OLCA). Consequently, the case law interpreting those provisions of the OLCA, particularly holdings with respect to the preemptive effect of the OLCA, would be persuasive to a court interpreting Measure 91. *Cf. Lindell v. Kalugin*, 353 Or 338, 355, 297 P3d 1266 (2013) ("As a general rule, when the Oregon legislature borrows wording from a statute originating in another jurisdiction, there is a presumption that the legislature borrowed the controlling case law interpreting the statute along with it."). As the following discussion illustrates, the net effect of this case law is that the OLCA established a state system for the regulation of alcohol, but it did not displace local authority to regulate on many of the same matters.

a. Inconsistent Local Enactments

Section 58 of Measure 91 provides that:

> "Sections 3 to 70 of this Act, designed to operate uniformly throughout the state, shall be paramount and superior to and shall fully replace and supersede any and all municipal charter enactments or local ordinances inconsistent with it. Such charters and ordinances hereby are repealed."

That provision is remarkably similar to a provision within the OLCA that provides, in part:

> "The Liquor Control Act, designed to operate uniformly throughout the state, shall be paramount and superior to and shall fully replace and supersede any and all municipal charter enactments or local ordinances inconsistent with it. Such charters and ordinances hereby are repealed."

ORS 471.045.

Examining the text of both provisions, by their expressed terms they indicate that the law supersedes only "inconsistent" local enactments. In *Portland v. Sunseri*, 66 Or App 261, 265, 673 P2d 1369 (1983), the Oregon Court of Appeals concluded that the wording of ORS 471.045 indicated that the legislature did not intend to retain "exclusive regulatory power in the field of liquor control."

Indeed, along those lines, the Oregon appellate courts have interpreted the inconsistency provision within ORS 471.045 to set a high standard for preemption, clarifying that local enactments are inconsistent with state law only when they are in "direct conflict" with state law and the legislature's intent to preempt is "clear and unmistakable." *City of Coos Bay v. Aerie No. 58 of Fraternal Order of Eagles*, 179 Or 83, 101-02, 170 P2d 389 (1946). For example, in *Aerie No. 58*, the state law foreclosed local taxes on the "production, sale, licensing, or handling" of alcoholic beverages, and a local government imposed an occupation tax on clubs, night clubs, and service establishments that "served" liquor. Because the local tax was not imposed on any of the activities listed in the statute, the court concluded that there was no "direct conflict." *Id.*

The courts have also clarified that local enactments that are more restrictive than state law are not inconsistent with state law for purposes of ORS 471.045. *See Sunseri*, 66 Or App at 265 (upholding ordinance prohibiting employment of a person under 21 as an entertainer in a place where alcohol was sold where state law prohibited such employment of a person under 18).

Moreover, where the legislature has been silent, local governments retain their home rule authority to regulate and fill those gaps. For example, the Court of Appeals concluded that an ordinance prohibiting nude dancing in places licensed to sell liquor was not inconsistent with a state law allowing the OLCC to revoke a license from or impose penalty on a "lewd" establishment. *Sekne v. City of Portland*, 81 Or App 630, 635, 726 P2d 959 (1986), *rev den*, 302 Or 615 (1987). The court explained that, although the state law discussed "lewd" establishments, it did not address nude dancing. Because the legislature was silent on the topic, there could be no inconsistency. The court did not find inconsistency based on a negative implication.

Therefore, when examining the text of Section 58 of Measure 91, and comparing it to the wording of ORS 471.045, and the cases interpreting that provision, a court likely would find that Section 58 does not preempt local regulations that are either more restrictive, up to and including prohibition, or that fill gaps left by Measure 91.

b. Local Option

Some proponents of Measure 91 have claimed that Section 60 and 62 of the measure limit the means by which local governments may prohibit marijuana licensees to the initiative process at the next general election. However, neither the judicial interpretations of a similar provision within the OLCA nor Measure 91's text support that view.

Sections 60 and 62 provide that:

> "SECTION 60. Petition and election for local option.

"(1) The governing body of a city or a county, when a petition is filed as provided in this section, shall order an election on the question whether the operation of licensed premises shall be prohibited in the city or county.

"(2) Except as provided in subsections (3), (4), and (5) of this section, the requirements for preparing, circulating and filing a petition under this section:

"(a) In the case of a city, shall be as provided for an initiative petition under ORS 250.265 to 250.346. (b) In the case of a county, shall be as provided for an initiative petition under ORS 250.165 to 250.235.

"(3) A petition under subsection (2) of this section:

"(a) Must be filed not less than 60 days before the day of the election; and

"(b) Must be signed by not less than 10 percent of the electors registered in the city or county.

"(4) If ORS 250.155 makes ORS 250.165 to 250.235 inapplicable to a county or if ORS 250.255 makes ORS 250.265 to 250.346 inapplicable to a city, the requirements for preparing, circulating and filing a petition under this section shall be as provided for an initiative petition under the county or city charter or an ordinance adopted under the county or city charter.

"(5) No signature is valid unless signed within 180 days before the petition is filed.

"(6) An election under this section shall be held at the time of the next statewide general election.

"(7) An elections under this section shall be conducted under ORS chapters 246 to 260.

"* * * * *

"SECTION 62. Effective date of local option. In each county or city that returns a majority vote for or against prohibition, the law shall take effect on January 1 following the day of election."

Those provisions are remarkably similar to the local option provisions of the OLCA. *See* ORS 471.506. Oregon's local option provisions have a long history, which began in 1904 with an initiative that put into state law the authority for local voters to decide whether to prohibit the sale of liquor. Or Laws 1905, ch 2, §§ 1-18.[3] Throughout Oregon's history, local governments'

[3] The law was far more detailed than the local option currently provided in ORS 471.506, but it contained a somewhat similar structure. When a petition signed by "not less than ten percent of the registered voters of any county in the State, or any subdivision of any county, or precinct of a county" was filed with the county clerk, the law provided that the county court "shall order an election to be held . . . to determine whether the sale of intoxicating liquors shall be prohibited in such county or subdivision of such county or in such precinct." Or Laws 1905, ch 2, § 1.

authority to regulate alcohol has been subject to the ability of the voters to decide whether to prohibit the sale of liquor. *See* Or Const, Art XI, § 2 (providing that "the exclusive power to license, regulate, control, or to suppress or prohibit, the sale of intoxicating liquors therein is vested in such municipality; but such municipality shall within its limits be subject to the provisions of the local option law of the State of Oregon."). However, the authority for voters to make that choice is not exclusive; it is also vested in local governing bodies. *See, e.g., Salem Brewery Ass'n v. City of Salem*, 69 Or 120, 138 P 255 (1914) (holding that amendment to home rule provision vested authority to enact prohibition in city council; intent of the local option was to allow the people to achieve a local opt out if a city council refused to enact prohibition).

Just as that history demonstrates that Oregon's early local option laws did not displace the authority of a city council or county commission to enact a prohibition ordinance, the text and interplay of Measure 91's local option (Sections 60 and 62) likewise do not evidence a preemptive intent. Specifically, nothing in the text of Sections 60 or 62 limit the authority of a local governing body. Those provisions do not, for example, provide that the "only" means of prohibiting marijuana licensees is through a local initiative petition. Because Oregon courts do not recognize preemption by negative implication, a court would be less likely to interpret the measure's listing of one means of prohibiting marijuana licensees as foreclosing all other local choice.[4]

Moreover, it is notable that Section 62 states that "in each county or city that returns a majority vote *for or against prohibition* . . ." thereby indicating that cities and counties could opt in or out of allowing marijuana licensees over time. Thus, where a local governing body may have acted to prohibit the operation of a licensed facility, Section 62 would allow a petition to put forth the question on whether the prohibition should remain.

c. Time, Place, and Manner

Section 59 of Measure 91 provides, in part,

> "Cities and counties may adopt reasonable time, place and manner regulations of the nuisance aspects of establishments that sell marijuana to consumers if the city or county makes specific findings that the establishment would cause adverse effects to occur."

[4] The explanatory statement in the Voters' Pamphlet provides, "A city or county may opt out of having marijuana businesses only by petition signed by 10 percent of registered voters and approved by a majority of voters at a general election." Although a court interpreting Section 60 would look to the Voters' Pamphlet to determine the intent of the voters, the court would have to reconcile that statement in the Voters' Pamphlet with the text of the measure. *State v. Gaines*, 346 Or 160, 172-73, 206 P3d 1042 (2009) ("[A] party seeking to overcome seemingly plain and unambiguous text with legislative history has a difficult task before it."). Moreover, a single statement in the Voters' Pamphlet is unlikely to be sufficient to overcome the exacting constitutional standard that state statutes must meet to preempt local enactments.

The text of section 59 is not preemptive. It allows cities and counties to adopt reasonable time, place and manner regulations, but it does not foreclose other regulatory options, including prohibiting recreational marijuana facilities from operating. In particular, the measure does not provide that local governments "may only" adopt or "are limited to" adopting reasonable time, place and manner regulations. The section's permissive language, providing that cities and counties "may adopt" certain regulations, does not satisfy the constitutional standard for preemption – the text of the measure does not preempt in clear and unambiguous terms or otherwise preclude local choice.

The second subsection of section 59 supports that conclusion:

> "The authority granted to cities and counties by this section is in addition to, and not in lieu of, the authority granted to a city or county under its charter and the statutes and Constitution of this state."

Given the lack of preemptive language in section 59, it is unlikely that a court would conclude that that section preempts local government authority to extensively regulate, or prohibit, a recreational marijuana facility.

d. Local Tax

Section 42 of Measure 91 provides,

> "No county or city of this state shall impose any fee or tax, including occupation taxes, privilege taxes and inspection fees, in connection with the purchase, sale, production, processing, transportation, and delivery of marijuana items."

The structure of section 42 is similar to a statutory provision on local liquor taxes:

> "No county or city of this state shall impose any fee or tax, including occupation taxes, privilege taxes and inspection fees, in connection with the production, sale, mixing, serving, transporting, delivering or handling of malt or other alcoholic liquors."

ORS 473.190.

The Oregon appellate courts have held that ORS 473.190, upon which Section 42 is based, is preemptive, but that preemption is not absolute. *See Portland Distributing Co. v. Department of Revenue*, 307 Or 94, 100, 763 P2d 1189 (1988) (upholding local business income tax, as applied to wholesale beer distributor); *Aerie No. 538*, 179 Or at 100-01 (upholding an annual occupation tax on clubs, night clubs, and service establishments where liquor was served). Therefore, where there is no "direct conflict," the courts will uphold a local government's tax. For example, a local government may be able to impose a tax on the transfer, handling, or serving of marijuana products, because taxes associated with those activities are not expressly foreclosed by the text of the measure.[5] In addition, although the courts have not been

[5] The explanatory statement in the Voters' Pamphlet stated, "Local taxation is prohibited." For the reasons set forth in footnote 4, a court would not find that statement dispositive.

faced with the question of whether a previously enacted tax is preempted by ORS 473.190, in other cases, the court has required the legislature to be clear in its intent to prohibit collection of a previously enacted local tax. *See City of Eugene v. Jiggles Tavern & Grill*, 153 Or App 54, 954 P3d 857 (1998) (holding that state law that prohibited "collection" of local tax preempted local government from collecting tax enacted prior to statute's effective date).

III. Federal Law

Even if a court were to conclude as a matter of state law that Measure 91 preempts local authority over marijuana licensees, those preemptions (and indeed the entire regulatory structure of Measure 91) may be without effect under federal law. The federal Controlled Substances Act (CSA) prohibits the manufacture, distribution, and possession of marijuana. In *Emerald Steel Fabricators v. BOLI*, 348 Or 159, 178, 230 P3d 518 (2010), the Oregon Supreme Court concluded that the CSA preempted the state of Oregon from giving a right to use marijuana, and therefore the provisions of the Oregon Medical Marijuana Act (OMMA) that establish such a right were without effect. The court explained that the portions of the OMMA that gave such a right worked as an obstacle to the purposes and objectives of the CSA. Similarly, a court could conclude that the provisions in Measure 91 that purportedly preempt local governments regarding marijuana licensees, and that create the extensive licensing system to engage in the right to grow, possess, distribute, or engage in the retail sale of marijuana, stands as an obstacle to the federal law. Therefore, a court would likely find that those provisions of Measure 91 are similarly without legal effect.

Conclusion

Despite assertions to the contrary, Measure 91 does not clearly preempt local governments. Oregon's strong home rule principles, the history of the Oregon Liquor Control Act on which Measure 91 appears to be based, and federal law all call into question the preemptive effect of Measure 91. Consequently, if the legislature does not act to clarify and preserve local control, local governments are likely to face litigation regarding their authority to regulate, prohibit, and tax recreational marijuana facilities, resulting in uncertainty for local governments, business owners, and residents alike.