OREGON TAX COURT

1163 State Street
Salem, Oregon 97301-2563
Telephone:(503)986-5645
Fax:(503)986-5507

FAX TRANSMISSION COVER SHEET

DATE: July 7, 2017

TO: John DiLorenzo: 503 778-5299

Tracy Pool Reeve: 503 823-3089

FROM: Judge Henry C Breithaupt

SUBJECT: Owen, et al. v. City of Portland, No. 17CV05043

COMMENTS: Ruling on cross-motions

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CIRCUIT COURT OF THE STATE OF OREGON
FOURTH JUDICIAL DISTRICT
MULTNOMAH COUNTY COURTHOUSE
1021 SW FOURTH AVENUE
PORTLAND, OR 97204

HENRY C. BREITHAUPT
JUDGE

PHONE (503) 986-5645
FAX (503) 986-5507
Henry.C.Breithaupt@ojd.state.or.us

July 7, 2017

John DiLorenzo Jr.
Davis Wright Tremaine LLP
1300 SW 5th Ave Ste 2400
Portland OR 97201

Tracy Pool Reeve
Portland Ofc of City Attorney
1221 SW 4th Ave Ste 430
Portland OR 97204

Re: Owen, et al. v. City of Portland, No. 17CV05043

Dear Counsel:

This case is before the court on cross-motions for summary judgment.

Plaintiffs argue that:

(1) The tenant relocation provisions of Defendant's Ordinance 188219 (the Ordinance), are pre-empted by state law, particularly ORS 91.225 insofar as they require relocation payments to be made in the event of certain rent increases followed by a tenant terminating a tenancy.

(2) The provisions of the Ordinance relating to imposition of relocation payments in the case of no cause evictions are pre-empted by provisions of ORS Chapter 90.

(3) The relocation assistance provisions of the Ordinance are impairments of the obligation of contract and invalid under Article I, section 21 of the Oregon Constitution.

(4) The Ordinance impermissibly creates a private right of action for certain tenants.

A. *Pre-emption by ORS 91.225*

Plaintiffs make a preliminary argument that in this case there is a question of how to apply the general rule that pre-emption of home-rule substantive law occurs only when it is shown that the

"legislature unambiguously expresses an intention to preclude local governments from regulating in the same area governed by an applicable statute." *Rogue Valley Sewer Services v. City of Phoenix*, 357 Or 437, 454, 353 P3d 581 (2015). The court does not understand the arguments of Plaintiffs, even if accepted, as altering the rules set down in prior cases addressing home-rule matters.

Here Plaintiffs make a claim of express pre-emption. They therefore have the burden to show that the legislature unambiguously intended in ORS 91.225 to pre-empt the actions taken by Defendant in the Ordinance.

The legislative provisions in ORS 91.225 that are to be considered are three:

(1) Subsection 1 of the statute states:

> "The Legislative Assembly finds that there is a social and economic need to insure an adequate supply of affordable housing for Oregonians. The Legislative Assembly also finds that the imposition of general restrictions on housing rents will disrupt an orderly housing market, increase deferred maintenance of existing housing stock, lead to abandonment of existing rental units and create a property tax shift from rental-owned to owner-occupied housing. Therefore, the Legislative Assembly declares that the imposition of rent control on housing in the State of Oregon is a matter of statewide concern."

(2) Subsection 2 of the statute states, in relevant part:

> "a city or county shall not enact any ordinance or resolution which controls the rent that may be charged for the rental of any dwelling unit."

(3) Subsection 7 of the statute states:

> "This section is applicable throughout this state and in all cities and counties therein. The electors or the governing body of a city or county shall not enact, and the governing body shall not enforce, any ordinance, resolution or other regulation that is inconsistent with this section."

Ambiguity exists when there are two or more plausible readings of a text. An ambiguity may be removed by consideration of context or legislative history. No party has provided the court with any legislative history bearing on the question before the court.

As to statutory text, ORS 91.225 addresses only rent. That is commonly understood to be the amount a tenant pays to a landlord. The Ordinance says nothing about that cash flow. Rather, it describes situations in which a payment from the landlord to the tenant is required.

As to statutory context, Defendant correctly points out that the decision in *Cope v. City of Cannon Beach*, 115 Or App 11, 836 P2d 775 (1992), *aff'd*, 317 Or 339 (1993). In that case, the court concluded that ORS 91.225 did not apply to a local ordinance that limited rentals for less than a minimum period of time. The plaintiff in that case had argued that the ordinance had the effect of limiting or controlling the rent received and therefore the ordinance was proscribed.

Defendant also correctly points to ORS 456.265(1) in which the legislature addressed local government legislation that would constrain decisions of landlords participating in federally subsidized housing programs as to withdrawal from the programs. In doing so, the legislature identified as a constraint and proscribed local legislation requiring: "the property owner to pay any * * * fee for tenant relocation from the property." The legislature knows how to address indirect constraints as well as explicit restraints. It has not done so in ORS 91.225.

The question becomes, does ORS 91.225 unambiguously proscribe the requirements in the Ordinance that require payments from landlords to tenants in the event of certain rent increases and subsequent tenant action?

The statute is addressed to "general restrictions." It also appears to be clearly addressing the overall or general effect of the prohibited action, rent control, throughout a city or county and, perhaps, in neighboring areas. The legislative findings address general conditions in a market overall, effects on housing stock generally and property tax shifts that occur throughout a jurisdiction. The text of ORS 91.225 also indicates that its provisions were to be for the benefit of all landlords, at least ratably. That is, it seems that the legislature was most probably contemplating that the prohibited rent control was control from a given point in time or control that allowed only for limited percentage increases. It is difficult to imagine that the legislature intended something other than proscribing restrictions that would affect all sellers in the market--landlords.

With those observations as to a probable focus of ORS 91.225, subsection 2 identifies the proscribed action as a law that "controls the rent that may be charged." Consistent with the focus of subsection 1, it is jurisdiction wide in its scope. The prohibition is only directed at the provisions of the local law. The prohibition is *de jure* and does not address *de facto* consequences. The prohibition is as to the specific provisions in a legislative action. The prohibition does not address the indirect, possible, or even probable, results of the legislative action. Coupled with the language of subsection 1 as to "general restrictions on housing rents," the focus of ORS 91.225 is on broad general effect. The statute does not explicitly address increases resulting from factual coincidences, the occurrence of conditions stated in local law or, what Plaintiffs describe as that which "effectively results" of the Ordinance.

However, the Ordinance--while it applies throughout the city--will apply to any individual landlord only if conditions or contingencies are also satisfied as to that individual landlord. The landlord must raise rents by more than a specified amount in a specified period. And, for the Ordinance to apply, following such an increase, a tenant of that landlord must also terminate the tenancy.

It is possible that the Ordinance will not operate such that the goals of ORS 91.225 are frustrated. For example, for any landlord whose rents are within 10 percent of market, it would be market forces

rather than the operation of the ordinance that could well constrain the behavior of the landlord and the tenant. In that event, no market disruption, a concern of the legislature in enacting ORS 91.225, would occur.

Plaintiffs construe ORS 91.225 as proscribing both express controls on rent--which the Ordinance clearly does not do--as well as any provisions that, as applied, would have the effect of producing a control on rents. Plaintiffs do not address the question of whether the "effectively" or "as applied" analysis is to be considered as to landlords generally or as to individual landlords. And yet it seems obvious that the individual economic circumstances of any particular landlord could have a material effect on whether, or to what extent, the Ordinance constrains pricing decisions of the landlord. Whether the "effective" consequence of the Ordinance is considered as to individual landlords or all landlords, it would be a complicated assignment to determine what provisions of any ordinance, considered independently of market forces themselves, served as an actual control.

This court concludes that the legislature was only concerned with the effects that general and direct *de jure* restrictions would have on the market. Such a concern would be focused on local ordinances that froze rents or placed percentage limits on them applicable to all landlords--without regard to actions or choices of tenants. The Ordinance does not do that.

If the legislature had intended to proscribe ordinances that had the indirect effect of controlling rents it could have said so. The statute could have proscribed local legislation that either set controls explicitly or had the effect of imposing such controls. If that was the intent of the legislature, this court thinks the legislature would also have provided statutory guidance as to how local governments and courts could determine whether and when such indirect effects occurred. In ORS 91.225 the legislature neither spoke in terms of ordinances that indirectly controlled rent or had the effect of doing so. Nor did the legislature specify how any indirect provisions in law would be determined to have the effect of controlling rent.

That said, the court cannot conclude that the argument of the Plaintiffs--that ORS 91.225 is to be read as addressing "as applied" or "indirect" effects--is completely unreasonable or implausible. It is only to conclude that there are at least two plausible conclusions as to (1) the intent of the legislature in its adoption of ORS 91.225; and (2) whether it intended the statute to apply to home-rule local action such as the Ordinance.

When there is more than one plausible construction of ORS 91.225, the constitutional provisions on home-rule, as applied by the Supreme Court, requires this court to tip the balance in favor of the local home-rule jurisdiction. Just as ambiguity works against those who draft insurance policies, *see, Hoffman Construction Co. v. Fred S. James & Co.*, 313 Or 464, 836 P2d 703 (1992), the law of home-rule is that in the event of ambiguity as to the intent of the drafting body--the state legislature--local jurisdictions prevail.

In both the case of the insurance policy and the acts of the state legislature, the result is not permanent. The result reached here as to the pre-emptive effect, or not, of ORS 91.225 will, assuming this

decision is not reversed in the judicial branch, govern matters only so long as the legislature does not express an unambiguous intent to proscribe the action taken in the Ordinance.

In concluding this part of the analysis, the court sees no reason to address the arguments of the parties as to the "disaster" exception to ORS 91.225.

B. *Pre-emption of Provisions on No Cause Evictions*

The Ordinance also imposes an obligation of landlords to make payments to tenants in cases where a tenancy is terminated without cause. Plaintiffs argue that this provision of the Ordinance is pre-empted by the provisions of ORS Chapter 90 that permit a landlord to terminate a tenancy without cause and provisions on fixed term tenancies and notice provisions of Chapter 90.

This pre-emption argument is one of pre-emption by conflict rather than express pre-emption. Plaintiffs argue that the effect of the Ordinance is to limit a landlord in the exercise of a right, no cause eviction, recognized by state law.

On this question Defendant correctly points out that the decision in *Thunderbird Mobile Club v. City of Wilsonville*, 234 Or App 457, 228 P3d 650 (2010) controls. The court does not find persuasive the attempts of Plaintiffs to distinguish the *Thunderbird* case.

The provisions of the Ordinance as to no cause eviction are not pre-empted by state law.

C. *Unconstitutional Impairment of Contract*

Plaintiffs point out that the Ordinance, by its terms, applies to leases and tenancies that came into force before the passage of the Ordinance. By supplemental declaration Plaintiffs have established that one of them is a party to a lease that was in effect when the Ordinance was passed and under which that Plaintiff could be adversely affected by the Ordinance. Plaintiffs argue that the effect of the Ordinance is to impair the obligation of that contract in violation of Article I, section 21 of the Oregon Constitution.

The parties debate how the question of constitutionality should be addressed. Plaintiffs admit that their challenge is a facial challenge. (Ptfs' Supp Br at 2: "This case presents a paradigmatic facial challenge.") Defendant argues that as a facial challenge, Plaintiffs must show that the ordinance could not be constitutionally applied in any circumstance.

The court is of the opinion that the proper way to proceed is to issue declaratory relief as to the constitutionality of the Ordinance as to the lease that is in the record. To be left, potentially for another day, is the question of the preclusive effect, or not, of the ruling of this court.

The court has an initial difficulty as to the argument of Plaintiffs. Neither in their briefs nor at oral argument did they identify what obligation in the lease in the record is arguably impaired. The case law on constitutional provisions on impairment of contract typically involves a plaintiff arguing that an obligation of the other party to the contract has been reduced or eliminated. Plaintiffs however point to no

obligation of any tenant that is reduced or eliminated by the Ordinance. Nothing in the Ordinance allows a tenant to hold over in the case of a termination without cause. Nor does the Ordinance relieve a tenant of the obligation to pay an increased rent if they continue to occupy the leased premises.

Rather, Plaintiffs argue that the effect of the Ordinance is to reduce the value to them of the contracts in existence when the Ordinance was adopted. The court has been provided with no authority that if legislation diminishes the value of a contract to one party, the obligation of the other party to the contract has been impaired. The court cannot accept that position. To do so would result in a conclusion that any regulatory legislation that imposes new costs on some parties to contracts would be invalid as diminishing the value of the contract. This point is also related to the "police power" exception to contract clause analysis, to which the court now turns.

There is no question that the Oregon Supreme Court, in its construction of the contract clause of the Oregon Constitution, has followed much of the case law of the United States Supreme Court dealing with the federal constitutional contract clause. The Oregon Supreme Court has followed the view that a contract "cannot be considered as a binding force to prevent the future exercise of the state's police powers." *Powell Grove Cem. v. Multnomah Co.*, 228 Or 597, 600, 365 P2d 1058 (1961). Taking the phrase "police power" as being a description of the legislative authority of a government, Plaintiffs make no argument that Defendant has acted without authority existing in its home-rule ordinance. The challenge is only as to whether the exercise of that authority violates a statutory or Oregon constitutional limit.

Defendant argues, and the court concludes, that the Ordinance was a legislative response to a socio-economic problem in the city. The legislative authorities of the city regularly address such problems through legislation. Such legislation may, and often does, change the cost-benefit balance for persons doing business or just living in the city. Such legislation may be popular with some and unpopular with others. As some testimony at the hearings on the Ordinance stated, such legislation may be unwise or ineffective or even make matters worse.

That said, the constitutional challenge of Plaintiffs is not that the Ordinance is unwise. The challenge is that the Oregon Constitution does not permit the legislative decisions contained in the Ordinance. Those legislative decisions fit within the "police power" exceptions applicable to claims of this type and this court concludes that the Ordinance is not unconstitutional under the contract clause of the Oregon Constitution. The foregoing analysis also applies to the provisions of the Ordinance that address fixed term tenancies.

The court also wishes to point out that this conclusion does not involve application of the so called "public purpose" exception that the United States Supreme Court has recognized. The Oregon Supreme Court has not recognized that exception. See, *Moro v. State of Oregon*, 357 Or 167, 229-231, 351 P3d 1 (2015). However, as the court made clear in *Moro*, this exception applies to contracts to which the state or some other government is a party. That, of course, is not the situation with which this court is presented.

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D. *Creation of Private Cause of Action*

This court considers itself bound, on this point, by the decision in *Sims v. Besaw's Café*, 165 Or App 180, 997 P2d 201 (2000)(*en banc*). Defendant prevails on this point.

E. *Conclusion*

The motion of Defendant is granted. The motion of Plaintiffs is denied. Counsel for Defendant is directed to submit appropriate forms of order and judgment.

Very Truly Yours,

Henry Breithaupt
7/7/17