



DEPARTMENT OF JUSTICE
GENERAL COUNSEL DIVISION

May 9, 2013

Kingsley W. Click
State Court Administrator
Oregon Judicial Department
Supreme Court Building
1163 State Street
Salem, OR 97301

Re: Opinion Request OP-2013-3

Dear Ms. Click:

This opinion concerns the permissible use of proceeds from general obligation bonds sold pursuant to the authority of Article XI-Q, section 1, of the Oregon Constitution.

QUESTION PRESENTED

May the proceeds from bonds sold pursuant to the authority of Article XI-Q, section 1, of the Oregon Constitution be used to finance county courthouse construction, improvement, repair or remodeling?

SHORT ANSWER

No, under present circumstances. Proceeds from such bonds may be used to finance those costs only if the county courthouse property to be constructed, improved, repaired or remodeled “is or will be owned or operated by the State of Oregon.” It does not appear that county courthouses, or any parts of them, currently are “owned or operated” by the state.

DISCUSSION

I. Background

Article XI-Q, section 1, of the Oregon Constitution, provides:

(1) In the manner provided by law and notwithstanding the limitations contained in section 7, Article XI of this Constitution, the credit of the State of Oregon may be loaned and indebtedness incurred *to finance the costs of:*

*(a) Acquiring, constructing, remodeling, repairing, equipping or furnishing real or personal property that is or will be **owned or operated** by the State of Oregon, including, without limitation, facilities and systems;*

(b) Infrastructure related to the real or personal property; or

(c) Indebtedness incurred under this subsection.

(Emphasis added). Section 3 authorizes the Legislative Assembly to enact legislation to carry out the provisions of the Article. Or Const, Art XI-Q, § 3. The 2013 Legislative Assembly is considering a bill that authorizes Article XI-Q bonds to be issued for the purpose of giving grants to counties to construct, improve, repair or remodel county courthouses. House Bill 3126 (2013). You ask if Article XI-Q, section 1(1), authorizes the use of bond proceeds for those purposes. The answer depends on whether county courthouses, or the parts of them to be improved with bond proceeds, are, or will be, “owned or operated by the State of Oregon” for purposes of Article XI-Q, section 1(1).

II. Circuit Courts

A. Counties to provide and maintain rooms for circuit courts

To put the issue in context, we begin by discussing the state’s current rights, powers and duties with regard to county courthouses. Circuit courts, which are part of the state court system, are conducted in county courthouses. While the general policy of the state is to fund and operate state courts at the state level, ORS 1.001, the counties play a unique role in funding and operating the circuit courts, particularly with regard to the spaces that the circuit courts use. The state’s and counties’ respective responsibilities are set out in ORS 1.185 and 1.187. ORS 1.185(1) provides:

The county in which a circuit court is located or holds court shall:

(a) Provide suitable and sufficient courtrooms, offices and jury rooms for the court, the judges, other officers and employees of the court and juries in attendance upon the court, and provide maintenance and utilities for those courtrooms, offices and jury rooms.

(b) Pay expenses of the court in the county other than those expenses required by law to be paid by the state.

Hence, the county, rather than the state, is responsible for providing and maintaining the necessary physical facilities for the circuit courts to conduct their business. ORS 1.185(1)(b) also requires the counties to pay all of the circuit courts’ expenses that are not required by law to be paid by the state.

B. State to provide personal property for circuit courts

These statutes require the state to pay for the personal property necessary for operating the circuit courts. ORS 1.185(2) provides that:

(2) Except as provided in subsection (1) of this section, all *supplies, materials, equipment and other property* necessary for the operation of the circuit courts shall be provided by the state under ORS 1.187.

(Emphasis added). Although that statute's general reference to "other property" might suggest that the state possesses an obligation, or at least the authority, to provide the real property needed for court operations, the limiting reference to ORS 1.187 makes it clear that the state's responsibility is restricted to providing only necessary *personal* property. ORS 1.187 provides that:

Except as provided in ORS 1.185(1) and subject to applicable provisions of a plan established by the Chief Justice of the Supreme Court, the state shall provide the *supplies, materials, equipment and other personal property* necessary for the operation of the circuit courts. The cost of property provided by the state shall be paid from funds available for that purpose.

(Emphasis added).

C. Other state planning and funding for county courthouses

Although counties are responsible for providing and maintaining circuit courtrooms, the state engages in some planning relating to county courthouses and is authorized to contribute funds to counties for three specific uses related to county courthouses: capital improvements, security, and law libraries.

1. Capital improvements

First, ORS 1.176 requires the Chief Justice of the Supreme Court to develop a biennial plan prioritizing the need for capital improvements to county courthouses in the state and establishing budgets for improvement projects. The list of projects and costs must be submitted to the legislature with a request for an allocation from the Criminal Fine Account to the State Court Facilities and Securities Account. *Id.* The Criminal Fine Account contains amounts paid as "monetary obligations in criminal actions," which are distributed to various other state accounts, including the State Court Facilities and Securities Account. ORS 137.300. Funds in the State Court Facilities and Securities Account may be used for "[c]apital improvements for courthouses[.]" ORS 1.178(2)(d). Pursuant to ORS 1.176, those courthouses include county courthouses. "Capital improvement" is not defined, but the most pertinent ordinary meaning of "improvement" is "2 * * * b * * * (1): a permanent addition to or betterment of real property that enhances its capital value and that involves the expenditure of labor or money and is designed to

make the property more useful or valuable as distinguished from ordinary repairs —see BENEFICIAL IMPROVEMENT, NECESSARY IMPROVEMENT, VOLUNTARY IMPROVEMENT [.]” WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY at 1138 (2d ed 2002).^{1/}

2. Planning for and funding security

Second, funds in the State Court Facilities and Securities Account are used to make “[d]istributions to court facilities security accounts maintained under ORS 1.182.” ORS 1.178(2)(c). “[C]ourt facilities securities accounts maintained under ORS 1.182” are county accounts used “for the purpose of providing security in buildings that contain * * * [among other things, circuit court] * * * facilities * * * located within the county.” ORS 1.182(1)(a). Expenditures from those accounts “shall be made only for developing or implementing a plan for court security improvement, emergency preparedness and business continuity under ORS 1.180.” ORS 1.182(1)(b). Those moneys are available “in addition to any other moneys expended by the county on court facilities securities programs and personnel” and counties may not reduce county expenditures “by reason of the additional moneys provided from distributions under ORS 1.178.” ORS 1.182(1)(c).

Before 2012, the Chief Justice was authorized to approve adoption of a state security plan only for the Supreme Court, Court of Appeals, Oregon Tax Court and office of the State Court Administrator, not for the circuit courts. *Former* ORS 1.177(1). Responsibility for a circuit court’s security plans lay solely with that court’s presiding judge, though the judge was required to submit the adopted plan and any revisions or amendments to the Chief Justice. ORS 1.180(8). While those plans relate largely to security procedures and training, they also could address issues such as making an emergency alarm system accessible to all court employees and improving inadequate facilities. *See former* ORS 1.177 (setting out what the plans could include). Pursuant to ORS 1.180, the presiding judge of each judicial district similarly was authorized to adopt a security plan for facilities housing a circuit court. In 2012, the legislature amended ORS 1.177 to expand the scope of the Chief Justice’s authority by authorizing the Chief Justice to adopt standards, and a state plan, for state court security, emergency preparedness and business continuity for facilities used by judges or staff of a circuit court * * *.” *See* Or Laws 2012, ch 107, section 75 (amending ORS 1.177). But the legislature did not amend ORS 1.180 or 1.182(1)(b), meaning that counties continue to receive and spend state funds to implement security plans developed under ORS 1.180 for buildings that house circuit courts.

3. Funding for law libraries

Third, in 2011, the legislature adopted a statute that appropriates \$7.4 million in general funds to the Judicial Department for the biennium beginning July 1, 2011, “for the purpose of operating law libraries or providing law library services.” Or Laws 2011, ch 628, section (2)1. The Chief Justice must distribute those funds “to the counties of this state based on revenues received from filing fees collected during the 2009-2011 biennium in civil actions commenced in the circuit court for the county. Or Laws 2011, ch 628, § 2(2). In 2012, that law was amended to

prohibit counties containing more than 400,000 inhabitants from spending more than \$716,000 “for capital outlays for court facilities” from the funds provided to operate law libraries and provide library services. Or Laws 2012 (spec sess), §74a. The legislature appears to have contemplated that the library funds provided by the state could be spent, within the prescribed limitation, on court facilities.

D. State currently does not enter into agreements with counties

You inform us that the state does not enter into any agreements with counties concerning its occupancy and use of rooms in county courthouses for circuit court operations. We also understand that the state does not enter into any type of agreement with counties regarding the county courthouse spaces improved with funds provided by the state.

With that background in mind, we turn to Article XI-Q.

III. Article XI-Q

A. Interpretation Methodology

Your question requires us to interpret the meaning of “real or personal property owned or operated by the State of Oregon” as used in Article XI-Q, section 1, of the Oregon Constitution. Article XI-Q was adopted by Oregon voters in the general election on November 2, 2010. *See* Ballot Measure 72 (2010) (containing Article XI-Q (then designated as XI-P)). It was submitted to the people through legislative referral. SJR. 48 (2010)(creating the provision for referral to the people). The interpretive methodology that applies to initiated Oregon constitutional provisions applies to provisions adopted by the voters pursuant to legislative referral. *State v. Harrell*, 353 Or 247, 254-255, 297 P3d 461(2013) (so stating, citing *Stranahan v. Fred Meyer, Inc.*, 331 Or 38, 56, 11 P3d 228 (2000)).

Under that framework, our task is to discern the intent of the voters. *Id.* The best evidence of the voters’ intent is the text and context of the provision itself and, if the intent is clear, “the court does not look further. *Ecumenical Ministries v. Oregon State Lottery Comm.*, 318 Or 551, 559, 871 P2d 106 (1994). Nevertheless, “caution must be used before ending the analysis at the first level, *viz.*, without considering the history of the constitutional provision at issue.” *Stranahan*, 331 Or at 57. The history includes “sources of information that were available to the voters at the time the measure was adopted and that disclose the public’s understanding of the measure, such as the ballot title and materials in the voters’ pamphlet. *Ecumenical Ministries*, 318 Or at 560 n 8.

B. Meaning of “real or personal property”

Article XI-Q does not define any of the terms that it uses. We give words of common usage their plain, natural and ordinary meanings. *Ecumenical Ministries*, 318 Or at 567. The dictionary that is most often used by Oregon courts in determining plain meanings, WEBSTER’S

THIRD NEW INTERNATIONAL DICTIONARY (unabridged 2002) contains no definition of the phrase “real property” so we parse the terms. The pertinent definition of “real” is “of or relating to things (as lands, tenements) that are fixed, permanent, or immovable; *specifically*: of or relating to real estate < *real property*>[.]” WEBSTER’S at 1890. These applicable definitions of “property” are “**2 a**: something that is or may be owned or possessed : WEALTH, GOODS; *specifically*: a piece of real estate * * * **b**: the exclusive right to possess, enjoy, and dispose of a thing : a valuable right or interest primarily a source or element of wealth : OWNERSHIP * * * **c**: something to which a person has a legal title : an estate in tangible assets (as lands, goods, money) or intangible rights (as copyrights, patents) in which or to which a person has a right protected by law [.]” WEBSTER’S at 1818, *see also*, BLACK’S LAW DICTIONARY at 1252 (defining “property” as “[t]he right to possess, use, and enjoy a determinate thing (either a tract of land or a chattel); the right of ownership * * *. Also termed *bundle of rights*.”) (8th ed 1999).

“Real property” is used as a term of art in the law. The legal definition is “[l]and and anything growing on, attached to, or erected on it, excluding anything that may be severed without injury to the land. Real property can be either corporeal (soil and buildings) or incorporeal (easements).” *Id.* at 1254. “Incorporeal” in this context means “of, relating to, or constituting a right that has no physical existence but that issues out of corporate property which has a physical existence and that concerns or is annexed to or exercisable in relation to such property[.]” WEBSTER’S at 1145.

In both its plain and legal senses “real property” encompasses land, buildings, and other fixtures erected on or growing from the land as well as rights in those things. Hence, county courthouse buildings, the land on which they are situated, other immovable elements on the property, like landscaping, and the rights in those things are “real property.”

The plain meaning of “personal property” is an “: estate or property other than real property consisting in general of things temporary or movable including intangible property : property recoverable by a personal action: CHATTELS.” WEBSTER’S at 1687.

C. Owned

The pertinent definition of the verb “own” is “to have or hold as property or appurtenance: have a rightful title to: whether legal or natural: POSSESS.” WEBSTER’S at 1612. The applicable definition of “possess” is similar: “to have and hold as property : have a just right to : be master of “ OWN <*possessing* lands and money>.” WEBSTER’S at 1770. The pertinent definitions of “property” as used in “to have or hold as property,” are “the exclusive right to possess, enjoy, and dispose of a thing: a valuable right or interest primarily a source or element of wealth: OWNERSHIP” or “something to which a person has a legal title : an estate in tangible assets (as land, goods money)[.]” *Id.* at 1818, *see also*, BLACK’S LAW DICTIONARY at 1252 (defining “property” as “[t]he right to possess, use, and enjoy a determinate thing (either a tract of land or a chattel); the right of ownership * * *. Also termed *bundle of rights*.”) (8th ed 1999). The pertinent definitions of “title” are “**2 a**: the union of all the elements constituting legal ownership and being divided in common law into possession, right of possession, and right of

property *b*: something that constitutes a legally just cause of exclusive possession: the body of facts or events that give rise to the ownership of real or personal property.” WEBSTER’S at 2400.

Applying those definitions, under the pertinent statutes, the state provides all of the personal property necessary for the circuit courts to operate and presumably owns that property. The state could use the proceeds from Article XI-Q bonds to finance the cost of acquiring, repairing, equipping or furnishing personal property to be used by the circuit courts in county courthouses.

On the other hand, the *counties* are required to provide suitable and sufficient rooms for the circuit court to conduct their business. The counties’ statutory duty to provide those rooms is not tied to any specific or identifiable property. Even assuming that the statute creates an obligation that the state may seek to have enforced, because the obligation does not relate to any identified or specific real property it is not an ownership interest in real property as commonly understood. Moreover, the state does not currently execute leases or obtain any other type of written agreement through which it obtains rights to possess and use specific rooms in county courthouses or that provides it with rights with respect to the county courthouse improvements that it funds in whole or in part. Therefore, no agreements establish any rights in specific county courthouse spaces. For those reasons, it does not appear that the state currently owns any part of county courthouses.

D. Operated

1. Plain meaning

The pertinent definition of “operate,” used as a transitive verb as it is in Article XI-Q is “to manage and put or keep in operation whether with personal effort or not < *operated* a grocery store>.” WEBSTER’S at 1581. The relevant definition of “manage” is “to control and direct: handle either well or ill, cope with: CONDUCT, ADMINISTER.” *Id.* at 1372. The pertinent definition of “operation” is “the quality or state of being functional or operative – usually used with *in* or *into*[.]” *Id.* at 1581. Accordingly, the plain meaning of to “operate” is to manage and put or keep in functional or operative condition.

The thing that must be “operated” by the state under Article XI-Q is “real or personal property,” which in this case is the county courthouse or parts of it. Operating the circuit courts does not suffice as the circuit courts are not real property; nor does operating the circuit courts *in* the county courthouses constitute operating the county courthouses. To interpret Article XI-Q to include the latter would require us to add words to the constitutional provision, specifically, to interpret it to encompass real property “in which the state operates.” We may not insert words into the provision that are not there. ORS 174.010. See *PGE v. Bureau of Labor and Industries*, 317 Or 606, 612, 859 P2d 1143 (courts must interpret the words that have been included in the statute, not omit words that have been included or insert words that have not); *Ecumenical Ministries*, 318 Or at 559-60 (stating that the rules for construing statutes apply to construing initiated constitutional provisions).

Accordingly, for the state to operate a county courthouse facility or any part of it, the state must manage and put or keep the facility in functional or operative condition. But as discussed above, ORS 1.185(1) requires the *counties* to: 1) provide suitable and sufficient rooms for circuit court operations, 2) maintain those rooms, and 3) provide utilities. The obligation to “maintain” those spaces means “to keep in a state of repair, efficiency, or validity: preserve from failure or decline * * * to * * * carry on : keep up * * * [and] to provide for : bear the expense of [.]” WEBSTER’S at 1362 (defining “maintain”). Under that statute, the counties manage and put or keep in functional or operative condition the county courthouse spaces occupied by the circuit courts. The counties, therefore, are responsible for “operating” the rooms occupied by the circuit courts in county courthouses.

The state does exercise certain planning and funding responsibilities pertaining to county courthouses that arguably reflect some role for the state in the operation of county courthouses. As discussed above, the state, acting through the Chief Justice, adopts standards and plans for county courthouse security, which in addition to establishing security procedures and training needs, may identify needed facilities improvements. ORS 1.177(1) The state provides some funding to implement those plans, but the county is responsible for implementing the plans and using county funds, in addition to state funds, to do so. We doubt that the state’s role in helping to finance security in county courthouses amounts to operating them.

The state also provides funding for county law libraries. But the legislature did not give the state any statutory responsibility to manage those libraries. To “operate” those libraries, the state would have to manage *and* put or keep them in a functioning and operational state. The state does not appear to operate the law libraries.

The state also funds county courthouse improvement projects identified by the Chief Justice. The resulting improved spaces are, at a minimum, put into operative or functional condition by the state. It is less clear that, simply by funding the improvement projects, the state manages the resulting spaces. For the state to “manage” those spaces, there would have to be a clear responsibility to direct and control them.

Finally, in 2007, the Legislative Assembly created the Interim Committee on Court Facilities to evaluate the status of the state’s court facilities and to make recommendations on the standards for reasonable and sufficient court facilities and the cost of meeting those standards. Or Laws 2007, ch 860, §18. The resulting General Facilities Design Assessment Criteria (December 13, 2007) address not only courtrooms, but also other aspects of court buildings that impact court operations, including building configuration, public waiting areas, signage, parking, HVAC and plumbing systems. But we are unaware of any legislation that provides state funding to implement those standards or that obligates the state, rather than the counties, to ensure that county courthouses comply with those criteria.

In sum, the state does not appear to have a significant role in managing and putting or keeping county courthouses in a functioning or operative state. Rather, under ORS chapter 1, the counties are responsible for managing and keeping county courthouses functioning, including the

spaces occupied by the circuit courts as the counties have the clear statutory obligation to provide and maintain those spaces for circuit court operations. But, because that conclusion is not free from all doubt, we examine the legislative history.

2. Legislative history

As discussed, Article XI-Q was submitted to the voters in 2010 as Ballot Measure 72. Voters' Pamphlet materials concerning that measure are pertinent sources of legislative history. *Ecumenical*, 318 Or at 560 n 8. Ballot Measure 72 does not contain any discussion about the meaning of the terms "owned or operated" by the state. The ballot title itself simply refers to borrowing for the "state's real and personal property projects." Voters' Pamphlet, November 2, 2010 General Election at 68.

The Explanatory Statement informs voters that:

Ballot Measure 72 would amend the state constitution to add a new exception to allow the state to issue general obligation bonds to finance acquisition, construction, remodeling, repair, equipping or furnishing of state owned or operated property. Currently, the state constitution forbids lending the state's credit or borrowing in excess of \$50,000, with some exceptions. *General obligation bonds are the cheapest method of borrowing the state may use and would cost less than the certificates of participation the state currently uses.*

Id. at 69 (emphasis added). The summary also contains this highlighted statement. *Id.* at 68. The voters were told that Article XI-Q was necessary to provide a cheaper method of financing state projects than the certificates of participation that the state was currently using to finance those projects. It would be reasonable for the voters to have understood that Article XI-Q bonds would be available to fund the same types of projects relating to real or personal property that were funded with certificates of participation.

The relevant statute governing certificates of participation, ORS 283.085, has not been amended since 2010, and, as relevant, provides for certificate of participation financing in the following circumstances:

(1) "Available funds" means funds appropriated or otherwise made available by the Legislative Assembly to pay amounts due under a financing agreement * * * [.]

* * * * *

(4)(a) "Financing agreement" means a lease purchase agreement, an installment sale agreement, a loan agreement or any other agreement:

(A) *To finance real or personal property that is or will be **owned and operated by the state** or any of its agencies;*

(B) To finance infrastructure *related to a facility that is owned and operated by the state;*

(C) To finance infrastructure components that are *owned or operated by a local government agency of this state* if the director determines that financing the infrastructure *will facilitate the construction or operation of an adult or juvenile corrections facility or a public safety training facility owned and operated by that state or any of its agencies;*

(Emphasis added). Pursuant to that statute, at the time Ballot Measure 72 was submitted to voters, certificate of participation financing was available only to pay the cost of financing agreements for facilities owned *and* operated by the state and projects related to those facilities. As the state does not “own and operate” county courthouses, certificates of participation would not have been available to finance their construction, improvement, repair or remodeling. But, while the materials in the Voters’ Pamphlet suggest that Article XI-Q was intended to authorize financing of the projects that were then being financed with certificates of participation, the *language* of Article XI-Q is more expansive – authorizing financing for real property owned *or* operated by the state. We must give effect to the language that the voters approved. For that reason, the history is not helpful.

CONCLUSION AND RECOMMENDATION

For the reasons set forth above, we conclude that a court considering the issue would probably conclude that the state currently neither owns nor operates county courthouses nor any part of them for purposes of Article XI-Q, section 1. Consequently, proceeds from Article XI-Q bonds cannot be used to finance county courthouse construction, improvement, repair or remodeling unless the state obtains the necessary ownership interest or operational authority.

Sincerely,

[Steven A. Wolf]

Steven A. Wolf
Chief Counsel
General Counsel Division

SAW:clr:DM4065930

¹ In 2011, the legislature enacted a temporary prohibition on expending funds for capital improvements to county courthouses. Or Laws 2011, ch 697, §61a(3) (prohibiting the state from expending any funds for capital improvements to courthouses during the biennium beginning July 1, 2011). That prohibition was repealed in 2012. Or Laws 2012, ch 107, § 78.