



DEPARTMENT OF JUSTICE
GENERAL COUNSEL DIVISION

April 7, 2009

Drummond Kahn, Interim Director
Office of the Secretary of State/Audits Division
255 Capitol Street NE, Suite 500
Salem, OR 97310

Re: Opinion Request OP-2009-1

Dear Mr. Kahn:

This opinion is issued in response to several questions from the Audits Division of the Office of the Secretary of State regarding the use of certain lottery funds for Oregon State Fair (“State Fair”) purposes. Article XV, section 4, of the Oregon Constitution establishes the State Lottery and limits the uses of its proceeds.

In 1998, the people approved Measure 66, which amends Article XV, section 4. Measure 66 expands the permitted uses of lottery funds to include financing “the protection, repair, operation, and creation of state parks, * * * historic sites and recreation areas” and to “[m]aintain, construct, improve, develop, manage and operate state park and recreation facilities, programs and areas.” Or Const, Art XV, §§ 4(10) and 4a.

In 2005, the Legislative Assembly transferred administration of the State Fair to the State Parks and Recreation Department (the “Parks Department”) effective as of January 1, 2006. Or Laws 2005, ch 777, §§ 1, 11, 23. In conjunction with that transfer, the legislature has authorized the Parks Department to use Measure 66 funds for “Oregon State Fair operations and for “State Fair debt service” due on bonds authorized in 1999 to fund improvements to State Fair facilities. Or Laws 2007, ch 729, § 2(7), (8); Or Laws 2005, ch 697, § 2(8).

FIRST QUESTION PRESENTED

Is use of Measure 66 funds for State Fair operations consistent with the purposes of Measure 66 funds specified in the Oregon Constitution?

SHORT ANSWER

While the answer is not free from doubt, we conclude that the use of Measure 66 funds for current State Fair operations is consistent with the constitutionally permissible purposes of Measure 66 funds.

SECOND QUESTION PRESENTED

Is use of Measure 66 funds for the debt service on bonds issued in 1999 to fund improvements to State Fair facilities consistent with the purposes of Measure 66 funds specified in the Oregon Constitution?

SHORT ANSWER

Again, while the answer is not free from doubt, we conclude that the use of Measure 66 funds for debt service on the 1999 State Fair bonds is consistent with the constitutionally permissible purposes of Measure 66 funds.

THIRD QUESTION PRESENTED

If one or more of the uses discussed in the previous questions is not a constitutionally permissible use of Measure 66 funds, must the legislature reimburse the Measure 66 fund for any unconstitutional expenditures?

SHORT ANSWER

In light of our answers to the first two questions, we do not believe that corrective action is necessary. Any impermissible expenditure of Measure 66 funds would, however, need to be reimbursed.

DISCUSSION

1. Method of Analysis

To answer your questions, we must determine whether the people intended Measure 66 to permit the legislature to direct the Parks Department to use Measure 66 funds for State Fair operations or debt service payments. *Roseburg School Dist v. City of Roseburg*, 316 Or 374, 378, 851 P2d 595 (1993) (goal in interpreting constitutional amendment approved through initiative process is to determine people's intent); *Ecumenical Ministries v. Oregon State Lottery Comm'n*, 318 Or 551, 560, 871 P2d 106 (1994) (to discern intent, court uses the same method to construe an initiated constitutional provision as it does for a statute); *PGE v. Bureau of Labor and Industries*, 317 Or 606, 612 n 4, 859 P2d 1143 (1993) (prescribing method of statutory interpretation). The best evidence of the people's intent is the text of the Measure 66 itself. *Roseburg School Dist*, 316 Or at 378. In addition, we consider the context of Measure 66, which includes other relevant constitutional provisions and any relevant statutory framework in effect at the time the people approved the measure. *Martin v. City of Tigard*, 335 Or 444, 451, 72 P3d 619 (2003). If the people's intent is clear based on text and context, we look no further.

But if the people's intent is not clear, we consider the history of the provision. *Ecumenical Ministries*, 318 Or at 559. Indeed, the Supreme Court has cautioned against analyzing an initiated constitutional provision without considering its history. *Id.* at 559 n 7; *see also Coultas v. City of Sutherlin*, 318 Or 584, 590, 871 P2d 465 (1994) ("It is an unusual case in

which the text and context of a[n initiated] constitutional provision reflect the intent of the people so clearly that no alternative reading of the provision is possible”).

2. Oregon State Fair – History and Purposes

A state fair has been held at the same location in Salem since 1862. By 1870, the fairgrounds was close in size to its current 185 acres. See <http://www.oregonstatefair.org/about-the-fair/fair-history> (accessed February 24, 2009). The State Fair was under the control of the State Agricultural Society until 1885, when the Legislative Assembly created the State Board of Agriculture and charged it in part with providing for “an annual fair or exhibition * * * of all the industries and industrial products of the State.” Or Laws 1885, p. 57, § 4.

In 1913, the Legislative Assembly established the State Fair as a “state institution[,]” Or Laws 1913, ch 98, § 1, which, after January 1, 2006, is “administered and operated by the [Parks Department].” Or Laws 2005, ch 777, § 23; ORS 565.040. ORS 565.050 declares that the objects and purposes of the State Fair are:

[T]o disseminate knowledge concerning, and to encourage the growth and prosperity of all agricultural, stock raising, horticultural, mining, mechanical, artistic and industrial pursuits in this state. To this end the State Parks and Recreation Director shall operate the business and properties of the Oregon State Fair as a year-round fair and exposition center, display historical objects and do all things necessary or expedient for the full utilization of the properties and facilities of the fair. The director shall conduct an annual state fair for a period of not more than 17 days’ duration beginning and ending on such dates as the director considers appropriate.

ORS 565.090(1) specifies that the State Fair is to be “permanently located on the present grounds now owned by the state and heretofore devoted to State Fair purposes, located in the City of Salem.” After its legislative transfer to the Parks Department, the fairgrounds and “such additional lands as may hereafter be obtained by the [Parks Department] for the purposes of the Oregon State Fair are dedicated for the use of the Oregon State Fair and for other [Parks Department] programs.” *Id.*

In the 1997 OREGON BLUE BOOK (the last edition before Measure 66), the Secretary of State described the fairgrounds as follows:

* * * Included on the 185-acre fairgrounds are two exhibition halls totaling 48,000 and 36,000 square feet respectively; 4-H dormitory, [multi-stage, 8,700-seat] auditorium and barn; FFA and livestock pavilions; a beef barn; indoor horse show stadium; show horse barns, racetrack and stables. Many of these facilities are available year-round for rental.

OREGON BLUE BOOK at 106 (1997); see also ORS 565.160 (fairgrounds to include “horse barn facilities”); ORS 565.170 (“facilities suitable for housing exhibits and providing contest space for the homemaking arts and crafts”). The Parks Department also is authorized to issue licenses

permitting the holder to conduct “any business” on the fairgrounds. ORS 565.120; ORS 565.130.

Thus, the State Fair and its grounds have many characteristics. These include:

- Statutory sanction as a state institution;
- A year-round fair and exposition center;
- A large, permanently dedicated parcel of land in Salem with open spaces and buildings that is available for use by the State Fair and by other Parks Department programs;
- The location of an annual state fair;
- An historic event and location in itself;
- A place where historic objects are displayed; and
- A mandate to educate about and encourage Oregon agricultural, stock raising, horticultural, mining, mechanical, artistic and industrial pursuits.

3. Use of Measure 66 Funds for State Fair Operations

Until 1998, Article XV, section 4, of the Oregon Constitution specified that net lottery proceeds could be used only for job creation, economic development and public education. In 1998, as noted above, Measure 66 amended section 4 of Article XV to provide that 15 percent of net lottery proceeds must be deposited in a parks and natural resources fund and that one-half of that fund “shall be distributed for the public purpose of financing the * * * **operation and creation of state parks**, ocean shores and public beach access areas, historic sites and **recreation areas**.” Or Const, Art XV, § 4(10) (emphasis added). The use of that half of the parks and natural resources fund also is governed by Article XV, section 4a (a new section added by Measure 66), which provides in relevant part:

Any state agency that receives moneys from the parks and natural resources fund established under section 4 of this Article for the **public purpose of financing** the protection, repair, **operation**, creation and development **of state parks**, ocean shores and public beach access areas, historic sites and **recreation areas** shall have the authority to use the moneys for the following purposes:

- (1) * * * **manage and operate state park and recreation facilities, programs and areas**.

(Emphasis added.)

Given the foregoing, the answer to your first question depends on whether the people intended a meaning for “operation and creation of state parks, * * * historic sites and recreation areas” or “manage and operate state park and recreation facilities, programs and areas” that could encompass the operation of the State Fair and its grounds. To answer that question, we must

determine whether the State Fair and its grounds can be characterized either as a “state park[]” or else as a “recreation facilit[y], program[] [or] area[]” within the meaning of the constitutional text.^{1/} If they cannot be so characterized, then the use of Measure 66 funds to support the operation of the State Fair and its grounds is improper. We begin our analysis with consideration of the pertinent textual phrases.

a. Text: “State Parks”

The term “state parks” is not defined in the constitution and is made up of words of “common usage,” which ordinarily are given their “plain, natural and ordinary meaning[s].” *PGE*, 317 Or at 611. That is to say, the words usually are to be given one of the meanings ascribed to them in a dictionary in use at the pertinent time, such as WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY (unabridged 1993; the last edition before Measure 66) (“WEBSTER’S”), the dictionary commonly used by the Oregon Supreme Court. *See, e.g., Martin v. City of Tigard*, 335 Or 444, 458, 72 P3d 619 (2003) (using WEBSTER’S to determine ordinary meaning of terms used in Article XI, section 11b of the Oregon Constitution).

Two definitions of “park” in WEBSTER’S need to be considered:

2 : a tract of land maintained by a city or town as a place of beauty or of public recreation **3** : a large area often of forested land reserved from settlement and maintained in its natural state for public use (as by campers or hunters) or as a wildlife refuge.

WEBSTER’S at 1642.

Read literally, WEBSTER’S second definition incorporates maintenance only by a city or town – as opposed to the state – as part of its definition. We believe, however, that this is intended to illustrate a typical characteristic of that sort of park, rather than to establish a determinative criterion or necessary element (as is the case in many legal definitions). In other words, it is a descriptive, not prescriptive, definition. Imagine that a city maintains a parcel of land as a “park,” as defined under the second definition, for two centuries. Thereafter, the city turns over to the state government ownership and maintenance responsibilities. The state continues to operate the parcel in precisely the same manner. It is implausible to suggest that the common perception that the parcel is a “park” would suddenly change. As the purpose of resorting to the dictionary is to grasp the common meaning of terms, and as it does not seem to us that state versus local maintenance responsibilities bears on the common understanding of what constitutes a park, we reject a literal application of WEBSTER’S second definition.

Definitions found in other dictionaries vindicate that rejection of WEBSTER’S. For example, the AMERICAN HERITAGE DICTIONARY (3d ed. 1994) at 604, defines “park” in pertinent part as simply “[a]n area of land set aside for public use, as for recreation.” Another dictionary, THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE (2d ed. unabridged 1987) (“RANDOM HOUSE”) offers among its definitions, “**9**. any area set aside for public recreation.” Even WEBSTER’S third definition omits reference to any maintenance responsibility. It is similar to the first RANDOM HOUSE definition, which reads: “**1**. an area of land, usually in a largely

natural state, for the enjoyment of the public, having facilities for rest and recreation, often owned, set apart, and managed by a city, state, or nation.”

A notable feature of all of these definitions is imprecision. For example, WEBSTER’S third definition is one of the more detailed definitions. It indicates that a “park” is a “large area,” but does not indicate how large the area must be. Moreover, that definition indicates that a park is “often” – not always – “forested land reserved from settlement and maintained in its natural state for public use * * * or as a wildlife refuge.”

There are, however, commonalities between those imprecise definitions. Specifically, it appears that public use is a common feature of parks, and that such use generally (a) is recreational or conservational, (b) relates to the enjoyment of the natural state of the land, or else (c) has more than one of the preceding features. So long as these broad criteria’s are met, the common meaning of the term “park” appears to embrace a wide spectrum of uses of land. Indeed, the lack of precision in the definition generally corresponds to the reality that public lands have been set aside historically for a number of different public uses that are to some degree compatible with their designation as “parks.”

Other than requiring a “park” to fall within its common meaning, nothing in the text of Measure 66 indicates that the people intended to constrain the Assembly’s authority to designate parks that would be eligible for Measure 66 funding. The transfer of the State Fair to the Parks Department strongly suggests that the legislature intended to designate the State Fair as a park.

In order to determine whether the legislature properly has characterized the State Fair as a park, we apply the broad criteria of a park identified above to the State Fair and its grounds. After consulting the OREGON BLUE BOOK (1997) and ORS 565.050 (stating purposes of State Fair), we easily conclude that the fairgrounds are not in a natural state or primarily maintained for ornament or beauty. Uses of the State Fair and fairgrounds are not conservational and generally do not relate to the natural state of the land. There remains a question, however, as to whether the fairgrounds are maintained for “public recreation.”

The WEBSTER’S definition of the noun “recreation” is:

1 a : the act of recreating or the state of being recreated : refreshment of the strength and spirits after toil : **DIVERSION, PLAY** <to sit in the sun ... is one of my country *recreations* -- L.P.Smith> <obvious that there is little time for *recreation* -- J.M.Mogey> <I ... consider intervals of *recreation* and amusement as desirable for everybody -- Jane Austen> **b :** a means of getting diversion or entertainment <his *recreation* is gardening -- *Current Biography*>

WEBSTER’S at 1899. Attendance at the annual fair event, one of the year-round exposition events or other programs or events at the fairgrounds may be a means of obtaining diversion or entertainment for attendees. We noted above that the fairgrounds are more than a “tract of land” or a “piece of ground” – they include a large complex of buildings, some of which are designed and used for indoor activities. But the dictionary definitions of a park do not foreclose the existence of facilities that support recreational activities. For example, we have already noted that WEBSTER’S third definition indicates that the land is “often * * * maintained in its natural

state” (emphasis added). Similarly, the first RANDOM HOUSE definition describes land “usually in a largely natural state” (emphasis added).

Accordingly, we believe that the plain meaning of “state park” is probably broad enough to encompass the State Fair. As we discuss more thoroughly in the following section, the State Fair appears to be maintained for public recreation. Although the fairgrounds are not maintained in their natural state, that does not appear to be an absolute requirement under the plain meaning of “state park.” As stated above, we must supplement our textual analysis by considering the term in context, which we do in subsection C, below.

b. Text: “Recreation Facilities, Programs and Areas”

We next examine whether the State Fair and fairgrounds constitute a “recreation facilit[y], program[], [or] area[.]” Like “state parks,” this phrase is not defined by the constitution and is comprised of words of common usage. We turn again to WEBSTER’S, beginning with the nouns. Pertinent definitions of “facility” are:

5 a : something that promotes the ease of any action, operation, transaction, or course of conduct —usu. used in pl. <excellent *facilities* for graduate study> **b:** something (as a hospital, machinery, plumbing) that is built, constructed, installed, or established to perform some particular function or to serve or facilitate some particular end.

WEBSTER’S at 812-813 (emphasis added). The most apt definition of “program” is:

4 a: a plan of procedure: a schedule or system under which action may be taken toward a desired goal: a proposed project or scheme <had no ~ except to retain his job * * * > <sets up a buying ~ * * * > <significant characteristics of a leader are a . . . grasp of the current situation and a ~ for its solution * * * > <the party’s ~ toward socialism>.

Id. at 1812 (emphasis added). The pertinent definition of “area” is “a definitely bounded piece of ground set aside for a specific use or purpose <the state has provided several picnic ~s along the new highway> <a free parking ~ in the center of town>.” *Id.* at 115.

Given the description in the OREGON BLUE BOOK and in ORS 565.160 and 565.170, the buildings and other structures on the fairgrounds come within the second (**5b**) definition of “facility,” and the fairgrounds come within the definition of “area.” The statutorily mandated annual event at the fairgrounds may be, or be the result of, a state “program.”

All three nouns in the constitutional phrase are qualified by the adjective “recreation,” which means “RECREATIONAL; esp : equipped so as to provide diversions or amusements <has introduced winter ~ facilities * * * >.” WEBSTER’S at 1899. “Recreational” means “of or relating to recreation <a ~ area with cinder track, tennis courts, and practice fields * * * >.” *Id.* Used as a noun, “recreation” has the meaning quoted at 3. a. above, including “a means of getting diversion or entertainment.” *Id.* at 1899.

Therefore, to be a “recreation facility,” “recreation program,” or “recreation area,” the amusement, diversion or entertainment must be a facility’s “particular function” or “particular end,” a program’s “desired goal,” or an area’s “specific use or purpose.” We are aware that the underlying statutory purpose of the State Fair is to promote “agricultural, stock raising, horticultural, mining, mechanical, artistic and industrial pursuits.” ORS 565.050; Or Laws 1913, ch 98, § 1; Or Laws 1885, p. 57, §§ 4, 6. Its facilities and grounds necessarily serve these same purposes, with the particular function of some facilities identified even more precisely, such as the horse barn and contest space for the homemaking arts and crafts, ORS 565.160; ORS 565.170. Nevertheless, we cannot lose sight of the fact that the means chosen to achieve the underlying statutory end is a *fair*. A fair that fails to provide “diversion or entertainment” strikes us as unlikely to succeed in achieving the statutory goals. Indeed, ORS 390.010(3), now as in 1997, lists “fairs” among the “outdoor recreation opportunities” that benefit the state. We think that the legislature, therefore, likely intended for the State Fair and fairgrounds to be used for “recreation.”

The concept of recreation is such that it will almost always coexist with other goals. To recreate is not necessarily to undertake any particular activity in itself. For example, many people consider hunting to be a recreational activity, despite the fact that at least one of its purposes is to procure food. Others consider jogging to be a form of recreation even though a jogger may be motivated by the desire to become (or stay) fit. Still others may consider driving to be a form of recreation, though the general goal of driving is to arrive at a destination.

We do not mean to suggest that Lottery funds can be expended for facilities that could be used in any way that individuals might subjectively find diverting or entertaining. Use of the funds to build a highway, for example, would not be proper, despite our awareness that some individuals may drive for recreational purposes. Instead, for purposes of textual analysis, we think the question is whether public recreation is a “particular,” “desired,” or “specific” purpose for which particular facilities, programs, or areas are provided.

With respect to the State Fair, it appears that its operation is and was intended to provide “diversion or entertainment” as an important means of achieving its ultimate statutory ends. Nor do we have any doubt that, in general, the facilities at the fairgrounds – including an amphitheatre, livestock pavilion, horse stadium, and sports facilities – were conceived similarly. The existence of an enunciated statutory purpose does not preclude the conclusion that a particular and central function of the State Fair – and the fairgrounds – is to provide diversion or entertainment, or in other words, recreation. On the basis of text alone, therefore, we would conclude that the State Fair and the fairgrounds likely fit within the constitutional phrase “recreation facilities, programs, or areas.” As instructed by *Martin*, however, we turn now to our contextual analysis of that phrase and the phrase “state parks.”

c. Context of Article XV, Sections 4(10) and 4a

We next consider context and whether any other constitutional provisions or statutes would have informed the people’s understanding of Article XV, sections 4(10) and 4a, at the time of their adoption. In light of our understanding of the text of Measure 66 stated above, we focus our examination of context on this question: Does context support a conclusion that the

State Fair and its fairgrounds are within Measure 66's intended meanings for "park" or "recreation facilities, programs, or areas?"

As noted above, context for a people-initiated constitutional provision includes any relevant statutory framework in effect at the time the people approved the provision. *Martin*, 335 Or at 451. ORS chapter 390 (1997), which governed state park and recreation areas generally when Measure 66 was considered by the voters, contained a number of statutes relevant to both of our inquiries. This relevant context indicates that the expenditure of Measure 66 funds for the operating expenses of the State Fair and fairgrounds is probably permissible.

Although ORS chapter 390 (1997) did not contain generally applicable definitions for "state parks" or "recreation facilities, programs, or areas," the chapter did define "recreation facility" and "state recreation area" for purposes of certain statutes, and contained a number of pertinent references to "parks" and "recreation." These statutes suggest that (1) the State Fair and Fairgrounds may properly be considered a "state park" within the meaning of Measure 66; and (2) the intended meaning of the constitutional phrase "recreation facilities, programs, or areas" is likely narrower than the dictionary alone would suggest, but probably encompasses the State Fair and fairgrounds.

In 1997, ORS 390.143 dealt (as it currently does) with agreements to provide interpretive services to "recreation facilities." ORS 390.143(5) (1997) provided that the term "recreation facility," for purposes of that statute, "includes but is not limited to state parks and all recreational, historical and scenic attractions owned or under the control of the State of Oregon and administered by the State Parks and Recreation Department."

Also relevant is ORS 390.605(3) (1997), which defined "state recreation area" as "a land or water area, or combination thereof, under the jurisdiction of the State Parks and Recreation Department used by the public for recreational purposes." This definition is not directly applicable; it applied to various statutes dealing only with ocean shores and adjacent lands (ORS 390.610, 390.620 to 390.676, 390.690, and 390.705 to 390.770), ORS 390.605(3) (1997). Nevertheless, it provides some contextual support for the textual understanding of recreation that we have explained above.

In 1998, ORS chapter 390 did not mention the State Fair, as it was not a Parks Department responsibility at that time. But, as noted above, ORS 390.010 (1997), which then and now articulates the state's policy for outdoor recreation resources, did refer to "fairs" generically. That statute, which has not been materially amended since its enactment in 1965 (Or Laws 1965, ch 299, § 1), provides in relevant part:

The Legislative Assembly recognizes and declares:

(1) It is desirable that all Oregonians of present and future generations and visitors who are lawfully present within the boundaries of this state be assured adequate outdoor recreation resources. * * *

(2) The economy and well-being of the people are in large part dependent upon proper utilization of the state's outdoor recreation resources * * *.

(3) *It is in the public interest to increase outdoor recreation opportunities* * * * through necessary and appropriate actions, including, but not limited to, the following:

* * *

(c) Preservation and restoration for public enjoyment and education of structures, objects, facilities and resources which are examples of Oregon history, archaeology and natural science.

* * *

(e) *Encouragement of outdoor activities such as festivals, fairs*, and events relating to music, dance, drama, art and sports.

ORS 390.010 (1997) (emphasis added). A separate statute gave the Parks Department an explicit mandate to pursue this legislative statement of purpose.

Specifically, ORS 390.117(4) (1997) provided that “[i]t is the function of the State Parks and Recreation Commission to promote the policy of this state toward outdoor recreation resources identified in ORS 390.010.” Given that ORS 390.010 included “fairs” as a type of “outdoor recreation opportunit[y],” and “outdoor activit[y],” ORS 390.117(4) made it part of the function of the Parks and Recreation Commission to promote fairs.

Particularly if one considers the State Fair an “outdoor activity,” the statutory context provides a strong indicator that expenditure of Lottery funds on the fair falls within the contemplated scope of Measure 66. Although there are indoor events and exhibits at the State Fair, we understand that the annual State Fair is largely an outdoor experience. For example, the carnival, amphitheater concerts, and sports and recreation activities take place outdoors. Many vendor and vendor-related activities also take place outdoors.

While there are a number of structures at the fairgrounds, many of those are open to the air, either because they have no roof (such as the amphitheater area), or they have no walls (such as the 4H barn), or they have large barn-style doors that allow light and air and remain open during the State Fair. A perusal of the State Fair website, <http://www.oregonstatefair.org>, accessed February 24, 2009, reveals that the majority of photographs depicting fair activities are outdoor scenes.

Even if we were to conclude that the State Fair is not an outdoor fair of the type the legislature envisioned in enacting ORS 390.010, that statute’s heavy emphasis on “outdoor” resources does have some textual limits. Significantly, ORS 390.010(3)(c) indicates that the “preservation and restoration for public enjoyment and education of structures, objects, [and] facilities” that are examples of Oregon history as also being examples of “outdoor recreation,” even though structures and facilities generally have areas that are “indoors” and historic “objects” often are viewed indoors.

Another statute in existence in 1998 was ORS 390.121 (1997), which set forth the powers of the State Parks and Recreation Commission. This statute authorized the commission to acquire real property with cultural, historic or recreational value or “other places of attraction” that would contribute to the “general welfare, enjoyment and pleasure of the public”:

In carrying out its responsibilities, the State Parks and Recreation Commission may:

(1) Acquire * * * real property * * * deemed necessary for the operation and development of state parks, roads, trails, campgrounds, picnic areas, boat ramps, nature study areas, waysides, relaxation areas, visitor and interpretive centers, department management facilities, such as shops, equipment sheds, office buildings, park ranger residences *or other real property or any right or interest because of its natural, scenic, cultural, historic or recreational value, or any other places of attraction* and scenic or historic value which in the judgment of the State Parks and Recreation Department *will contribute to the general welfare, enjoyment and pleasure of the public.*

ORS 390.121(1) (emphasis added) (1997). The commission also had authority to build and maintain facilities to support these purposes. ORS 390.121(2) (1997). The State Fair and its grounds at least arguably constitute a place of attraction that contributes in large part to the general welfare, enjoyment and pleasure of the public in a manner consistent with this statute.

Each of the statutes just discussed uses the term “recreation,” and, in our view, each offers insight into the intended meaning of that term in Measure 66. Specifically, these statutes tie the broad and amorphous concept of recreation to the overall mission of the Parks Department. In other words, some activities may be primarily “recreational” and still not qualify for Measure 66 funds if they are not adequately linked to the Parks Department’s statutory functions as they were understood in 1998. We do not need to examine the precise contours of these limitations. For purposes of our contextual analysis, an adequate connection between the Parks Department’s mission in 1998 and the State Fair and fairgrounds is demonstrated by the statutes describing Parks Department functions related to fairs in 1997.

Put slightly differently, the statutes indicate that recreation areas can be one aspect of a park system, consistent with various dictionary definitions of “park” discussed above.^{2/} The statutes also indicate that fairs are recreational in ways relevant to the role of the Parks Department in 1998, such that the legislature’s decision to transfer control of the State Fair and fairgrounds to the Parks Department was likely consistent with the pertinent understandings of “parks” and “recreational areas” that prevailed when Measure 66 was approved. This, in turn, suggests that once the State Fair and fairgrounds became Parks Department responsibilities, expenditure of Measure 66 funds for operations likely became permissible.

On the whole, we believe the context of Measure 66 supports the conclusion that expenditure of Lottery funds on the State Fair and the fairgrounds falls within the measure’s contemplated scope. But the State Fair does have a unique statutory mandate that gives it a character different than most outdoor recreational areas or historic sites. Given this difference,

and because the Oregon Supreme Court has cautioned against analyzing an initiated constitutional provision without considering its history, we turn to the history of Measure 66.

d. History of Ballot Measure 66

The history of an initiated measure includes materials available to the people at the time the measure was approved that disclose their understanding of the measure, such as the ballot title, explanatory statement, the arguments for and against the measure included in the Voter's Pamphlet, as well as contemporaneous media coverage. *Ecumenical Ministries*, 318 Or at 559. The weight accorded to such information depends on its objectivity and the degree to which it reveals the people's understanding. *Stranahan*, 331 Or at 65.

The ballot title for Measure 66 stated: "Amends Constitution: Dedicates Some Lottery Funding to Parks, Beaches; Habitat, Watershed Protection." *1998 General Election Voters' Pamphlet* at 135. The ballot summary said in pertinent part:

Amends constitution. State lottery proceeds currently limited to job creation, economic development, public education. Measure dedicates 15 percent of net lottery proceeds to new fund for parks, beaches, salmon, wildlife habitat, watershed protection. Dedicates half of fund to create, maintain, state parks, ocean shores, public beach access, historic sites, recreation areas.

Id.

The explanatory statement to Measure 66, to which two of the five members of the drafting committee dissented, seems to suggest that state parks supported by the new funds would be natural areas:

This measure requires that 15 percent of net proceeds from the State Lottery be deposited in a newly-created parks and natural resources fund. The money in the fund will be divided equally with half of the money spent for creating, protecting and operating *state parks*, ocean shore *and other natural recreation areas* * * *.

The money for *state parks and other natural recreation areas* may be allocated and spent by a variety of state and local agencies.

Id. at 136 (emphasis added). As the terms of Measure 66 clearly permit the support of "historic sites," and "historic sites" are not necessarily in a natural state, this suggested limitation in the explanatory statement is at odds with the text of Measure 66. Nevertheless, the explanatory statement provides some basis for contending that the "state parks" and "recreation areas" supported by Measure 66 must be "natural" areas.

Twenty-one arguments in support of Measure 66 follow the explanatory statement in the *Voters' Pamphlet*. Many of these refer to preserving Oregon's "unique qualities," "natural heritage," and "great outdoors," (*see id.*, e.g., 137-138, 144). Those arguments reinforce the suggestion from the explanatory statement that parks and recreation areas must be "natural areas" in order to receive Measure 66 funding. There is no doubt that the *Voters' Pamphlet*,

taken as a whole, forcefully argues that Measure 66 will do wonders for Oregon's natural areas. Even the sole dissenting argument accepts that proposition, rejecting only the choice to use gambling revenues (*id.* at 147, Marbet).

But despite the overall focus on natural areas, many arguments, including a number of those that generally focus on natural areas, at least hint that the measure provides funding for Oregon's entire park system. (*Id.* at 137, Jagodnik, imagining that "the gates of every park * * * were closed"; 137, McCaig, "[o]ur state parks"; 138, McCaig, "operation of our state parks"; 138, McCaig "[p]revent the closure of state parks"; 139, Talbot, "our park facilities"; 140-143, McCaig, "operation of our parks"; 145, McCaig, "rebuild our parks"). Voters recognizing those indications would likely have their understanding of the measure shaped by the types of properties then administered by the Parks Department.

We are informed that the state park system in 1998 included many scenic natural settings; parks with miles of hiking, biking and horse trails; facilities and access to a variety of recreational opportunities; outstanding natural resource areas; scenic corridors and viewpoints; waysides; and heritage and cultural areas and sites. Some parks were primarily facility-based, such as Kam Wah Chung (the site of a museum), Frenchglen (where a hotel is operated), and Wolf Creek (which boasts an inn and a tavern). Others combined outstanding natural settings with facilities for business, government or non-profit meetings or retreats, such as Silver Falls State Park. Thus, the state park system in 1998 encompassed more than natural resources and natural resource-based recreation. A voter who understood the measure to provide funding for the entire park system would probably have expected that most funding would likely go to natural areas, consistent with the focus of the park system and the *Voters' Pamphlet*, while recognizing that funding would be available for facility-based parks.

A similar suggestion comes from the handful of *Voters' Pamphlet* arguments that specifically refer to various types of improvements. These include light houses (*id.* at 139, 143, 145), boat launches (*id.* at 137, Jagodnik), and generic "park facilities" (*id.* at 139, Booth and Booth), including facilities with "dry rot, leaky sewers, and corroded electrical systems" (*id.* at 139, Talbot).

A number of the multiple, separate arguments presented by Patricia McCaig (also a member of the Measure 66 Explanatory Statement Committee) listed "potential projects" in various counties around the state that would be eligible for funding if Measure 66 passed. The list for Multnomah County included "CrownPoint/Vista House (Columbia Gorge): Improve recreational access; acquisition; repair and maintenance." *Id.* at 141. Although Crown Point has an unparalleled view, Vista House is a historic building with public spaces used for a museum and gift shop, along with restrooms. The list for the Oregon Coast included Fort Stevens, which boasts a number of historic military installations. *Id.* at 140. Appearing on the Lane County list was the Heceta Head Lighthouse. *Id.* at 143. And the Marion County list included Silver Falls State Park, which offers a conference center among its facilities. *Id.* at 142. It is true that the nature of the potentially eligible projects at those sites is only generically described. But anyone reading Ms. McCaig's lists would have reason to believe that the measure funded more than only "natural areas."

Yet another of Ms. McCaig's arguments refers to the Parks Commission as the overseer of half the funds:

How will the money be distributed?

- Half the money (the part dedicated to parks) will be distributed and overseen by the Oregon Parks Commission. * * *

Id. at 138. That point arguably suggests that the "parks" portion of the Measure 66 could be co-extensive with the jurisdiction of the Parks Commission. As we have seen, that jurisdiction included a number of facilities-based parks and parks with various facilities in addition to open or natural areas.

To the extent that the people understood that they were saving the state park system generally, that intent likely was not restricted to natural areas. If we were required to make our determination based solely on the *Voters' Pamphlet*, its emphasis on natural areas would make it a close question as to the people's intent. But the purpose of consulting the enactment history of the Measure is to inform our contextually-sensitive reading of the text. The fact that consideration of the history alone would present a close question does not dissuade us that our interpretation of the text of Measure 66 in context reflects the intent of the people.

For the reasons explained above, we conclude that the operating expenses of the State Fair and fairgrounds are likely constitutionally permissible uses of Measure 66 funds.

4. Use of Measure 66 Funds for Debt Service on State Fair Facilities

You also ask about the use of Measure 66 funds to pay for debt service on debt related to the State Fair. The debt in question predates the legislature's decision to place the State Fair and fairgrounds under the control of the Parks Department. It arises from a 1999 enactment permitting the then-Director of the State Fair and Exposition Center to request that the State Treasurer issue "lottery bonds * * * to fund projects for improvement, restoration, upgrading and preservation of systems, facilities and equipment of the Oregon State Fair." 1999 Or Laws, ch 702, § 5.

In both 2005 and 2007, financial administration bills authorized the Parks Department to use Measure 66 funds to pay the debt service on the State Fair bonds for the biennia commencing July 1 of those years. Specifically, chapter 697, Oregon Laws 2005, and chapter 729, Oregon Laws 2007, establish "as the maximum limits for payment of expenses from lottery moneys allocated from the Parks and Natural Resources Fund to the State Parks and Recreation Department" the amounts of \$4,235,235 and \$4,235,070, respectively, for "Oregon State Fair debt service."^{3/} The 2007 amount is in addition to \$3,510,848 for "Oregon State Fair operations."

The legislature authorized the State Fair bonds in question after finding that State Fair improvements would contribute to economic development and job creation. *See, e.g.*, Or Laws 1999, ch 702, section 5(2) (authority for State Fair lottery bonds based on promotion of agricultural industry and resulting economic development and job creation, along with jobs in

Salem and Keizer areas associated with the fair). That is, the bonds were *not* authorized based on the permissible uses of lottery proceeds that Measure 66 added to Article XV, section 4. However, the expenditures of Measure 66 funds – that is, the payments for debt service on the underlying bonds – occurred after the date on which the legislature decided to give the Parks Department control of the State Fair and fairgrounds.^{4/}

In other words, had the various improvements to the State Fair and fairgrounds been financed directly and immediately using lottery proceeds, the cost of the improvements would not have come out of the Parks and Natural Resources Fund established by Measure 66. But if the improvements had been made after the legislature transferred the State Fair and fairgrounds to the Parks Department, then, consistent with our conclusion above, Measure 66 funds could be used to pay for the improvements.

In the case of the 1999 State Fair bonds, however, the improvements occurred prior to the transfer of the fair to the Parks Department. The improvements were financed with bonds backed by general lottery proceeds – not necessarily Measure 66 funds. But the debt service payments in question were made, at legislative direction, from the Parks and Natural Resources Fund after the Parks Department was given control of the State Fair. Consequently, the critical issue presented is: When during this chain of events were Measure 66 funds expended such that the use restrictions applicable to those funds needed to be met?

The constitutional text indicates that the limitations of Measure 66 – and Article XV, section 4 generally – apply to funds that are “used” and “distributed.” *See* Article XV, § 4(3) and (10). The term “used” alone might be interpreted to require that the Measure 66 requirements be met at the time a decision is made that ultimately results in the expenditure of Measure 66 funds. But the principle that constitutional provisions should be read harmoniously if possible leads us to believe that “used” should be interpreted consistently with “distributed.” According to WEBSTER’S, “distribute” means “**1 a** : to divide among several or many : deal out : apportion, esp. to members of a group or over a period of time.” WEBSTER’S at 660. As a result, we conclude that the conditions of Measure 66 first apply when the moneys in the Parks and Natural Resources Fund are “deal[t] out” or “apportion[ed].”^{5/} In this case, that means we must determine whether the conditions imposed by Measure 66 were present when the legislature authorized the Parks Department to access the Parks and Natural Resources Fund for payment of the debt service on the State Fair bonds. The relevant conditions are contained in Article XV, section 4(10): Expenditures of Measure 66 moneys must “finance[e] the protection, repair, operation, [or] creation of state parks * * * [or] recreation areas.”^{6/}

As noted above, the stated purpose of the State Fair bonds was to “fund projects for improvement, restoration, upgrading and preservation of systems, facilities and equipment of the Oregon State Fair.” 1999 Or Laws, ch 702, § 5. These activities easily align with the constitutionally-listed activities of “protection, repair, operation and creation.” In addition, the verb “fund,” used in the 1999 legislation initially authorizing the State Fair bonds, is synonymous with the verb “finance” as used in Article XV, section 4(10). The 1999 legislation, however, describes the purpose of the bonds themselves. The question we face is whether *making payments due* on those bonds constitutes “financing the protection, repair, operation [or] creation of state parks * * * [or] recreation areas.”

On the one hand, the bonds were already issued, and the improvements already completed, before the legislature transferred the State Fair and fairgrounds to the control of the Parks Department. Expending Measure 66 funds, therefore, does not result in any appreciable benefit to “state parks * * * [or] recreation areas” that would not exist without the expenditure.

But on the other hand, we have no reason to doubt that the projects funded by the State Fair bonds have ultimately resulted in benefits to the State Fair and fairgrounds, which are now under the control of the Parks Department – and we have concluded that Measure 66 funds may properly be expended for the operations of the State Fair and fairgrounds. Moreover, what the constitution specifically permits is “*financing*” various kinds of projects that result in benefits to “state parks * * * [or] recreation areas.” Article XV section 4(10) (emphasis added). If “financing” includes providing funds to repay debt previously incurred for a completed project, then it seems that expenditure of Measure 66 funds for debt service is permissible. That is because the expenditures would “finance” a project that resulted in the “protection [or] repair of” what was, at the time of the expenditures, “[a] state park[] * * * [or] recreation area[.]”

According to WEBSTER’S, the verb “finance” means “1 : to raise or provide funds or capital for” WEBSTER’S at 851. This is a broad definition that does not seem to impose requirements as to timing. Moreover, we understand that so-called “take-out financing,” which is commonly associated with construction projects like those funded by the State Fair bonds, generally occurs after a project is completed or well underway. We do not suggest that the legislature’s actions authorizing expenditures of Measure 66 funds amount to “take-out” financing. But the fact that post-construction financing is common further suggests that “financing” does indeed encompass the provision of funds to repay debt previously incurred for completed projects. And nothing that we have identified in the relevant historical materials suggests that the people intended a more restrictive meaning for the verb “financing” when they approved Measure 66.

In light of the above, we conclude that expenditure of Measure 66 funds to pay debt service on the State Fair bonds is likely permissible. We emphasize that this conclusion is not free from doubt. As noted above, it can be argued that the expenditures do not result in any incremental benefit to “state parks * * * or recreation areas” that would not exist without the expenditures.

5. Reimbursement of the Parks and Natural Resources Fund

Finally, you ask whether the legislature must reimburse unconstitutional expenditures from the Parks and Natural Resources Fund. Because we believe that both uses of the Parks and Natural Resources Fund discussed in this opinion are permissible, we do not believe that the legislature is required to take any corrective action. We note, however, that we have consistently advised that impermissible expenditures of constitutionally-dedicated funds must be reimbursed. *See*, for example, 47 Op Atty Gen 214, 216-223 (1994) (concluding that counties would be obligated to reimburse monies spent by the counties “pursuant to invalid statutory authority”); Letter of Advice dated May 18, 2005 to Tom Byler, Executive Director, Oregon Watershed Enhancement Board, and Chuck Hibner, Deputy Director, Audits Division, OP-2005-2 at 14-15, note 14 (directing addressees to 47 Op Atty Gen 214 “[f]or a discussion of an agency’s

responsibility subsequent to a judicial determination that its distribution of moneys pursuant to a legislative mandate violated the Oregon Constitution”).

CONCLUSION

Based on the text, context and history of Measure 66, we conclude that Article XV, sections 4 and 4a, of the Oregon Constitution likely authorize the use of Parks and Natural Resources Fund moneys to finance the operation and maintenance of the State Fair and its grounds. As used in Measure 66, the term “state park” is not so restrictive as to preclude the legislature from so designating the State Fair and fairgrounds. Moreover, the State Fair and its grounds appear to fall within the plain meaning of “recreation area,” at least from the standpoint of its attendees and visitors. We also determine that the legislature properly authorized the use of Measure 66 funds to pay debt service on lottery bonds issued for State Fair facilities.

Sincerely,

Philip Schradle
Chief Counsel
General Counsel Division

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^{1/} Our discussion focuses on the constitutional terms “recreation areas” and “state parks.” In light of our conclusions based on those provisions, we do not discuss whether the State Fair might also be an “historic site” within the meaning of Measure 66. We note, however, that the Oregon State Fair Stadium and Poultry Building Ensemble is listed on the National Register of Historic Places. In addition, the State Fair itself has historical significance, as our discussion in Section 2 indicates; *see also* <http://www.oregonstatefair.org/about-the-fair/fair-history> (accessed March 3, 2009).

Despite these features, and despite our acknowledged inability to remove all doubt from our answers to the questions presented, we do not believe that it would be fruitful to examine whether the State Fair is an “historic site.” That question would require us to determine whether and to what extent various state and federal laws pertaining to different kinds of historic places should govern our understanding of the constitutional text. After answering those questions, we would still confront issues concerning the proper interplay between the phrases “state parks” and “historic sites.” *See* note 2, below, and the main body of our advice from which that note originates. In fact, those issues would be even more complicated when applied to the constitutional phrase “historic sites,” because Article XV, section 4a appears to limit uses of funds for such sites more strictly than uses of funds for recreation areas. *Compare* subsections (1) and (2) of Article XV, section 4a. As a result, we believe that analyzing whether the State Fair is an “historic site” would pose additional complications without shedding further light on the overall propriety of using Measure 66 funds for State Fair operations, maintenance, or debt.

^{2/} The interconnectedness of the concepts of “parks” and “recreation” in this context is also suggested by a broader look at Measure 66 itself. Four specific portions of Measure 66 are pertinent. First, Measure 66 added the phrase “or restoring and protecting Oregon's parks, beaches, watersheds and critical fish and wildlife habitats” to the list of acceptable uses of “proceeds from the State Lottery” in Article XV, section 4(3). Second, Measure 66 added precisely the same phrase to Article XV, section 4(4)(d), describing the purposes for which the legislature may appropriate funds from the Oregon State Lottery Fund. This phrase contains no mention of recreation. However, Measure 66 also directed the creation of the Parks and Natural Resources Fund, half of which must “be distributed for the public purpose of financing the protection, repair, operation, and creation of state parks, ocean shore and public beach access areas, historic sites and recreation areas.” Article XV, § 4(10). Similarly Measure 66 created Article XV, section 4a, which details the ways in which money distributed from the Parks and Natural Resources Fund “for the public purpose of financing the protection, repair, operation, creation and development of state parks, ocean shores and public beach access areas, historic sites and recreation areas” can be used.

This structure, which moves from broadly describing acceptable uses of lottery funds to describing some ways in which the Parks and Natural Resources Fund may be used, suggests that a “recreation area” must also be a “park” or otherwise fit within the allowable uses of lottery revenues. The Parks and Natural Resources Fund contains “proceeds from the State Lottery,” after all. The structure also requires that we consider the enumerated permissible uses of the Parks and Natural Resources Fund when construing the permissible uses of the “proceeds from the State Lottery,” as it would be inconsistent to read the limitations on using lottery revenues to preclude specifically authorized uses of the Parks and Natural Resources Fund. In other words, the interplay between the various provisions of Measure 66 is such that we must read each of them in light of the other – the explicit approval of expenditures for “recreation areas” may broaden our understanding of “state parks” even as that latter phrase constrains what might otherwise be a broad understanding of “recreation areas.”

^{3/} We understand that the Department of Administrative Services (“DAS”) has accounted for the payment of the State Fair bonds using Measure 66 funds as follows: Unobligated net lottery proceeds are allocated to the Lottery Bond Fund until it is fully funded for each fiscal year. *See* ORS 286A.570 and 286A.576(2)(a). Moneys in the bond fund are used to pay outstanding bonds such as the State Fair bonds. Consistent with Article XV, section 4, of the Oregon Constitution, 18 percent of net lottery proceeds are transferred to the Education Stability Fund and 15 percent of such proceeds are transferred to the Parks and Natural Resources Fund. *See* ORS 286A.576 (4) (“percentages of [dedicated revenues] * * * shall be calculated without deducting * * * the amount of unobligated net lottery proceeds that are required to pay lottery bonds”). In 2005 and 2007, DAS deducted the amounts of State Fair debt service payments that the legislature authorized to be paid from the Parks and Natural Resources Fund from the 15 percent allocation of net lottery proceeds to that fund.

^{4/} It is possible that some of the debt service payments actually occurred before the Parks Department officially assumed control of the State Fair and fairgrounds. In 2005, the legislature allocated \$4.2 million from the Parks and Natural Resources Fund to pay debt service on the State Fair lottery bonds “for the biennium beginning July 1, 2005.” 2005 Or Laws, ch 697, § 2. The transfer of the State Fair and fairgrounds to the Parks Department was effective January 1, 2006. 2005 Or Laws, ch 777, § 1. Payments may have occurred between July 1, 2005 and January 1, 2006. Even so, such payments would have occurred after the legislative determination that the State Fair and fairgrounds should be subject to Parks Department control. As a result, we would analyze such payments in the same way that we analyze payments occurring on and after January 1, 2006.

^{5/} The limitations do not cease to apply after that point.

^{6/} The alternative allowable use of Measure 66 funds, for “financing the restoration and protection of native salmonid populations, watersheds, fish and wildlife habitats and water quality in Oregon,” is clearly inapplicable.