June 2, 1998

No. 8258

This opinion is issued in response to a request from The Honorable Kurt Schrader, State Representative, concerning possible legislation that would authorize school districts to impose a system development or other charge, known as a "school impact" fee, on developers of real property for the costs of capital construction of public schools needed to serve the residents of the development.

FIRST QUESTION PRESENTED

May the legislation be structured so that the school impact fee would not be a "tax" for purposes of Article XI, section 11b(3)(b), of the Oregon Constitution, which requires voter approval of bonds used to fund capital construction if the "taxes" to repay the bond debt are not to be subject to the rate limitations of section 11b? If so, how? Would the answer be different if:

a. there is a cap set on the fee?

b. the fee is subject to a graduated fee scale?

c. low income housing is exempted from the fee?

d. the fee is based on the occupancy, size or value of the residential improvement to real property?

ANSWER GIVEN

Legislation authorizing a school impact fee may be structured so that the fee would not be a "tax" for purposes of Article XI, section 11b, of the Oregon Constitution by imposing the fee on the person who develops the property, not on the property, and tying it to the privilege of engaging in the development activity, not to the mere ownership of the property. Assuming that these conditions are satisfied, the fee would not be a "tax" for purposes of Article XI, section 11b, whether or not: (a) there is a cap set on the fee; (b) the fee is subject to a graduated fee scale; (c) low income housing is exempted from the fee; or (d) the fee is based on the occupancy, size or value of the residential improvement to real property.

SECOND QUESTION PRESENTED

May a bill authorizing a school impact fee be structured so that it would not be a "bill for raising revenue" for purposes of Article IV, section 25, of the Oregon Constitution, which requires approval by three-fifths of the members of both houses of the Legislative Assembly? If so, how?

ANSWER GIVEN

A bill authorizing a school impact fee would not be a "bill for raising revenue" for purposes of Article IV, section 25, of the Oregon Constitution, if the fee is structured only to defray additional costs caused by the development. Moreover, it is at least questionable whether Article IV, section 25, of the Oregon Constitution even applies to state legislation authorizing local governments to impose taxes.

DISCUSSION

I. Article XI, Section 11b of the Oregon Constitution

The first question concerns Article XI, section 11b, of the Oregon Constitution. This provision, which was created through initiative and approved by the people on November 6, 1990, as Ballot Measure 5, establishes separate rate limitations on property taxes for public schools and for all other government operations. In general, Article XI, section 11b, does not require voter approval of property taxes, although voter approval of bonds is needed to exclude from the section 11b rate limitations those taxes to pay bonded indebtedness incurred for capital construction. In this regard, Article XI, section 11(b) provides in pertinent part:

(3) The limitations [on tax rates] apply to all taxes imposed on property or property ownership except

(b) Taxes imposed to pay the principal and interest on bonded indebtedness incurred or to be incurred for

> capital construction or improvements, provided the bonds are offered as general obligations of the issuing governmental unit and provided further that either the bonds were issued not later than November 6, 1990, or the question of the issuance of the specific bonds has been approved by the electors of the issuing governmental unit.

Or Const Art XI, § 11b(3). The building of schools is obviously capital construction. Thus, in order to exclude from the tax rate limitations of Article XI, section 11b, taxes to repay bond debt on bonds issued after November 6, 1990, to fund school construction, voters must approve the issuance of the specific bonds. This voter approval requirement does not apply, however, if the charges imposed to repay the bonds are not "taxes" for purposes of Article XI, section 11b because only "taxes" are subject to the rate limitations of section 11b.

Consequently, the answer to this question turns on the following definition of "tax," which applies to Article XI, section 11b:

> A "tax" is any charge imposed by a governmental unit upon property or upon a property owner as a direct consequence of ownership of that property except incurred charges and assessments for local improvements.

Or Const Art XI, § 11b(2)(b). A school impact fee imposed to pay the principal and interest on bonds used to fund the construction of schools would be a "tax" requiring voter approval of the underlying bonds under Article XI, section 11b, if it were: (1) imposed by a governmental unit, and (2) imposed upon property or upon a property owner as a direct consequence of ownership.

A. Charge Imposed by Governmental Unit

We assume that the school impact fee would be imposed by a governmental unit. If it were not, it would not be a "tax" for purposes of section 11b. *See Comeaux v. Water Wonderland Improvement Dist.*, 12 OTR 132 (1992), *aff'd* 315 Or 562, 847 P2d 841 (1993).

B. Charge Imposed upon Property or Property Owner

A school impact fee imposed by a governmental unit would be a "tax" for purposes of section 11b only if it would be imposed "upon property or upon a property owner as a direct consequence of ownership." As described to us, the school impact fee would be a charge assessed on developers of real property within a school district for the cost of capital construction of public schools needed to serve the residents of the development. This fee appears to be a "system development charge" as defined by ORS 223.299(4)(a). A "system development charge" is

a reimbursement fee, an improvement fee or a combination thereof *assessed or collected at the time of increased usage of a capital improvement or issuance of a development permit, building permit or connection to the capital improvement*.

ORS 223.299(4)(a) (emphasis added).

We have previously concluded that, as so defined, a system development charge is not imposed on property or on the owner of the property as a direct consequence of ownership, but rather the charge is imposed because the owner elects to exercise a right of ownership, and to burden public facilities.

Letter of Advice dated May 13, 1991, to Representative Kelly Clark (OP-6407) at 5. Thus, we concluded that the system development charge was not a "tax" for purposes of Article XI, section 11b, of the Oregon Constitution. *Id.*

This advice was based, in part, on our analysis in an earlier formal Attorney General opinion in which we concluded that an amusement device tax was not a charge "upon property" under Article XI, section 11b(2)(b), because it was not imposed solely because the property was present in the taxing jurisdiction. 46 Op Atty Gen 442, 444 (1991) (relying on *Fox v. Galloway*, 174 Or 339, 348, 148 P2d 922 (1944)). Similarly, the amusement device tax was not imposed "upon a property owner as a direct consequence of ownership of that property" because the owner was not liable for the tax merely because she or he owned the property. 46 Op Atty Gen at 445. Instead, the amusement device tax was a charge imposed for the privilege of engaging in the activity of operating the amusement device. *Id.*[(1)]

This distinction between property taxes subject to Article XI, section 11b, and privilege taxes related to the use of property has been affirmed in subsequent court cases. The Oregon Tax Court addressed the very issue that was addressed in 46 Op Atty Gen 442, concluding that because the amusement device tax of ORS 320.011(1) is imposed upon a person who

engages in "the business of display or operation * * * for gain, benefit or advantage," it is a privilege tax imposed upon a person engaging in a business, not a charge on property for purposes of Article XI, section 11b. *Alien Enterprises, Inc. v. Dept. of Rev.*, 12 OTR 126, 130 (1992). Conversely, the Tax Court found that the City of Gresham's storm drainage user charge *was* a tax "on property" because it applied to all "impervious surfaces," which by definition meant virtually all improvements, and hence it was a "tax" under Article XI, section 11b. *Dennehy v. City of Gresham*, 12 OTR 194, 197 (1992).

The Oregon Supreme Court determined that a differently worded city storm drainage utility fee was not a "tax" under Article XI, section 11b, however, because it was not a charge upon property, but a fee for service, and it was imposed on the person responsible for paying the city's water utility charge, a person who was not necessarily the owner of the land. *Roseburg School Dist. v. City of Roseburg*, 316 Or 374, 851 P2d 595 (1993).

In this case, City structured the storm drainage utility fee in an effort to avoid the limitations of [Article XI, section 11b]. * * * Under the [Roseburg Municipal Code], the person responsible for paying City's water utility charges for a particular piece of property is responsible for paying the storm drainage utility fee. * * * Thus, the fee is not necessarily imposed on the owner, who may not be the occupier of the property and responsible for its water usage.

Id. at 379-80.

C. School Impact Fee and Article XI, Section 11b

Based on the foregoing analysis and authorities, we conclude that legislation may be enacted authorizing a school impact fee that would not be a "tax" for purposes of Article XI, section 11b, of the Oregon Constitution. To avoid the limitations of this constitutional provision, the fee must fall on the person who develops the property, not on the property, and must be a consequence of being granted the privilege of engaging in development activity, not a consequence of mere ownership of the property. Assuming that these conditions are met, the fee would not become a "tax" for purposes of Article XI, section 11b, whether or not (a) there was a cap set on the fee, (b) the fee was subject to a graduated fee scale, (c) low income housing was exempted from the fee, or (d) the fee was based on the occupancy, size or value of the residential improvement to real property.

II. Article IV, Section 25, of the Oregon Constitution

The next question concerns Article IV, section 25, of the Oregon Constitution, which requires that "bills for raising revenue" be passed by three-fifths of all members elected to each House of the Legislative Assembly. Article IV, section 25, states in pertinent part:

> (1) Except as otherwise provided in subsection (2) of this section, a majority of all the members elected to each House shall be necessary to pass every bill or Joint resolution.
>
> (2) Three-fifths of all members elected to each House shall be necessary to pass bills for raising revenue.

In interpreting a constitutional provision adopted through the initiative or referendum process, we apply the same method of analysis outlined by the court in *PGE v. Bureau of Labor and Industries*, 317 Or 606, 612 n 4, 859 P2d 1143 (1993). We first look at the text and context of the provision to determine the intent of the voters, giving words of common usage their plain, natural and ordinary meaning. *Id.* at 611. The context of a constitutional provision adopted by ballot measure includes related ballot measures before the voters at the same election and pre-existing provisions of the constitution. *Ecumenical Ministries v. Oregon State Lottery Comm.*, 318 Or 551, 559, 871 P2d 106 (1994). If the voters' intent is clear from the text and context, the search ends there. If the voters' intent is not clear from the text and context of the constitutional provision, we look to its history to attempt to discern that intent. *Id.* at 559. The history of an initiated or referred constitutional provision includes information available to the voters at the time the measure was adopted, such as the ballot title and arguments for and against the measure included in the Voters' Pamphlet, as well as contemporaneous news reports and editorials on the measure. *Id.* at 560 n 8.

A. "Ordinary Meaning" of the Words

The pivotal expression in Article IV, section 25, is found in the common words "bills for raising revenue." Taken individually, each of these words has an ordinary, non-technical meaning. Thus, "bills" refers to written proposals for laws that have been introduced in the legislature. The word "for" is merely the preposition pointing to the intended effect of the bill, as "in order to bring about or further." Webster's Third New International Dictionary (Webster's) 886 (unabridged 1993). In this context, "raising" is the present progressive tense of "raise," which means "to bring together : collect, gather,

levy." *Id.*, at 1877. And, the word "revenue" means the "yield of taxes, excises, customs, duties, and other sources of income that a nation, state, or municipality collects and receives into the treasury for public use : public income of whatever kind." *Id.* at 1942. This suggests that when the people approved the three-fifths requirement, they may have intended it to apply to bills that raise all forms of income produced by state government. Nevertheless, we must also consider the meaning of the phrase "bills for raising revenue" in the context of other, related provisions of the constitution.

The phrase "bills for raising revenue" also appears in Article IV, section 18, of the Oregon Constitution, which requires such bills to originate in the House of Representatives. In the only case concerning the three-fifths requirement in Article IV, section 25, the court observed that the phrase "bills for raising revenue" has been part of the basic constitutional law of Oregon since statehood and of the nation since its founding. *Dale v. Kulongoski*, 322 Or 240, 242, 905 P2d 844 (1995) (citing Or Const, Art IV, § 18; US Const, Art I, § 7). Article IV, section 18, was part of the original Oregon Constitution approved in 1857, and is similar to, and was probably based on, Article I, section 7, of the United States Constitution and similar provisions of many other state constitutions.(2) As to the meaning of the phrase "bills for raising revenue," the court observed:

While it cannot be gainsaid that the phrase [bills for raising revenue] includes general taxation bills, for such bills do produce revenue, the phrase itself historically has not been deemed to require interpretation or translation in order that it be understood. *See, e.g., Northern Counties Trust v. Sears*, 30 Or 388, 401-03, 41 P 931 (1895); 25 Op Atty gen 100-01 (1950-52); *Twin City Bank v. Nebeker*, 167 US 196, 17 S Ct 766, 42 L Ed 134 (1897).

322 Or at 242-43. Although viewing the meaning of the words "raising revenue" to be "simple and understandable," *id.* at 243, the court did not provide a definition, let alone address the issues of what might be a bill for "raising revenue."(3) Because the court cited state and federal Origination Clause cases as a basis for its statement that the words "bills for raising revenue" did not require interpretation, we look to the historical meaning of that phrase as construed by those cases. *See Davis v. O'Brien*, 320 Or 729, 741, 891 P2d 1307 (1995) (prior case law interpretations are part of contextual analysis).

B. Historical Meaning of "Bills for Raising Revenue"

We look first to the Oregon case cited in *Dale v. Kulongoski* and the cases cited therein. In *Northern Counties Trust*, 30 Or 388, 401-03, 41 P 931 (1895), the Oregon Supreme Court addressed whether an 1893 act of the legislature that provided salaries for the counties' sheriffs, clerks and recorders and levied taxes for the same in lieu of local fees previously charged was one for raising revenue and, therefore, unlawful in that it originated in the Senate in violation of Article IV, section 18, of the Oregon Constitution. In concluding that the law was not one for raising revenue, the court commented as follows:

The controlling feature which characterizes bills of this nature, says JOHNSON, J., is that they "impose taxes upon the people, either directly or indirectly, or lay duties, imposts, or excises, for the use of the government, and give to the persons from whom the money is exacted no equivalent in return, unless in the enjoyment, in common with the rest of the citizens, of the benefit of good government": *United States v. James*, 13 Blatch. 207 (Fed. Cas. 15464) [challenging the validity of an act originating in the U.S. senate that increased the rate of postage] * * * Mr. Story, in discussing this clause of the national constitution, says "the history of the origin of the power already suggested abundantly proves that it has been confined to bills to levy taxes in the strict sense of the words, and has not been understood to extend to bills for other purposes, which may incidentally create revenue. * * * And this is the trend of subsequent decisions of the national courts touching the construction of this clause of the constitution: * * * .

30 Or at 401-02 (emphasis added; citations omitted).

The *Northern Counties Trust* opinion cited *Dundee Mortgage Co. v. Parrish*, 24 F 197, 201 (D Or 1885), which held that a bill repealing a property tax exemption was not a bill for raising revenue because the bill did not authorize or provide for the levying of a tax.

A bill for raising revenue is a bill levying a tax on all or some of the persons, property, or business of the country, for a public purpose; and the assessment or listing and valuation of the polls or property preliminary thereto, and all laws regulating the same, are merely measures to secure what may be deemed a just or expedient basis for the levying of a tax or raising a revenue thereon.

Id. at 200 (emphasis added).

The court also noted *Mumford v. Sewall*, 11 Or 67, 4 P 585 (1883), which held that a bill repealing a mortgage tax

exemption was not a bill for raising revenue, and made this observation:

But it is not sufficiently clear that a law which merely declares that certain property heretofore exempt from taxation shall thereafter be subject to taxation is strictly a law for raising revenue. We do not feel warranted, therefore, as at present advised, in declaring the law unconstitutional on this ground.

Id. at 71 (emphasis added).(4)

The discussion of "bills for raising revenue" in *Northern Counties Trust* ends with this comment:

Considering the similarity of the state and national constitutions touching bills for raising revenue, and the high and unbroken line of authority upon the proper construction of the latter, it is certainly a very persuasive and weighty argument for applying the same construction to the former.

30 Or at 403.

The U.S. Supreme Court case cited in *Dale v. Kulongoski* addressed whether an act of Congress that provided for a national currency and imposed a tax to meet the expenses of the new currency program was a revenue bill which, under the federal constitution, must originate in the House of Representatives. *Twin City Bank v. Nebeker*, 167 US 196, 17 S Ct 766, 42 L Ed 134 (1897). The Court concluded that it was "clearly not a revenue bill" and stated:

Mr. Justice Story has well said that the practical construction of the Constitution and the history of the origin of the constitutional provision in question proves that revenue bills are those that levy taxes in the strict sense of the word, and are not bills for other purposes which may incidentally create revenue. 1 Story, Const. § 880.

Id. at 136 (emphasis added).(5)

Traditionally, bills imposing fees and special assessments have not been viewed as "bills for raising revenue," either because the charge is an exercise of governmental power for regulatory purposes or is to reimburse the government for certain expenses. For example, the Oregon Supreme Court found that a bill requiring liquor to be sold only by licensed vendors and imposing a fee for a liquor license was an exercise of the state's regulatory power and not a bill for raising revenue. *State v. Wright*, 14 Or 365, 374, 12 P 708 (1887), *overruled on other grounds*, *Warren v. Crosby*, 24 Or 558, 34 P 661 (1893). Similarly, this office concluded that a bill requiring payment of fees relating to agricultural motor fuel was not a bill for raising revenue because the fees would be credited to the motor fuel fund and not used for payment of the general expenses of state government. 19 Op Atty Gen 258 (1939); *see also* 17 Op Atty Gen 242 (1935) (bill that increased certain pilotage fees was not a bill for raising revenue). In contrast, we concluded that a bill that would impose fees on race licenses and on gross receipts from mutual wagering must originate in the House because the revenues would far exceed the cost of regulation. 25 Op Atty Gen 100 (1951); *see also* 15 Op Atty Gen 113 (1931) (bill requiring local governments to levy a privilege tax on gross earnings of utilities was a bill for raising revenue because revenue would far exceed cost of regulating the utility).

In the *Head Money Cases (Edye v. Robinson)*, 112 US 580, 5 S Ct 247, 28 L Ed 798 (1884), the United States Supreme Court determined that a fee imposed by the federal government on ship operators, rather than on the passengers (the "direct" beneficiaries of the fee), was not a "tax." The Court found that a tax was, in general terms, an exaction that goes to the general support of government. *Id.* at 595-96. Thus, the Court also held that a bill that imposed a property tax in the District of Columbia to pay for certain railroad improvements in the district was not a bill for raising revenue under the federal Origination Clause. *Millard v. Roberts*, 202 US 429, 26 S Ct, 50 L Ed 1090 (1906). More recently, the Court held that a bill imposing a special assessment does not raise revenue within the meaning of the Origination Clause. *United States v. Munoz-Flores*, 495 US 385, 398, 110 S Ct 1964, 1972, 109 L Ed2d 384 (1990)

In summary, the courts have generally tended to favor a narrow construction of what constitutes a "bill for raising revenue" which must originate in the lower house. Sutherland Stat Const § 9.06 (5th Ed 1994 rev), at 582; *see also Barnum v. Dept. of Rev.*, 5 OTR 508, 524 (1974). A "high and unbroken" line of both federal and state cases discussing the Origination Clause has held that the phrase "bills for raising revenue" will be construed narrowly to apply only to those measures whose primary purpose is to raise revenues for general governmental uses. A bill that creates a particular governmental program and raises revenue specifically to support that program is not a bill for raising revenue.

It may be argued that a bill authorizing a new fee or assessment to defray part or all of an expense that traditionally has been borne by government effectively raises revenue for traditional governmental expenses because it "relieves" the

government from funding that expense from "tax" revenues and makes those "extra" tax revenues available for other, general governmental purposes. Although it is conceivable that the courts might agree with this argument, for a number of reasons we believe that is unlikely. First, we have found no cases suggesting a willingness to adopt this view if presented. Second, as noted above, the courts generally have favored a narrow construction of what constitutes a revenue bill which must originate in the lower house, and we believe the courts will apply similar principles in construing Article IV, section 25, of the Oregon Constitution as to whether a bill requires approval by three-fifths of both legislative houses. Third, even though the legislature is now subject to a permanent duty, under Article XI, section 11(9), of the Oregon Constitution (Measure 50 (1997)) to replace from the General Fund revenue lost by the public school system because of the limitations of that section, this duty is not related specifically to school construction costs, particularly additional costs due to development. In fact, the additional cost of such schools arises not from the limitations of Measure 50, but rather from growth in the school age population brought about by development. Finally, the fact that such costs have traditionally been defrayed by tax revenues does not imply a legal duty to continue paying for such costs with tax revenues. Thus, a new fee that funds a category of government expense that historically has been funded by tax revenues does not "raise revenue" for general governmental uses by freeing up the tax revenues for other purposes because it is not necessary for the government to fund the original expense with taxes or otherwise.

Accordingly, if the same meaning is given to the phrase "bills for raising revenue" in Article IV, section 25, as has been given to that phrase in Article IV, section 18, we believe that a court would conclude that legislation authorizing a school impact fee is not a "bill for raising revenue" for purposes of the three-fifths requirement.

C. Enactment History of Three-Fifths Requirement

Because it is possible that the cases interpreting the Origination Clause, Article IV, section 18, may not govern the interpretation of Article IV, section 25, we also consider the history of section 25. The three-fifths requirement to pass bills for raising revenue was added to Article IV, section 25, on May 21, 1996, when the people approved Ballot Measure 25, which had been referred to the people by House Joint Resolution 14 (1995). Additional evidence of the meaning of the expression "bills for raising revenue" is found in the Legislative Argument in Support of Measure 25, which constitutes part of the history of the measure.(6) The Argument states, in pertinent part:

Voting yes on Ballot Measure 25 will make it more difficult for the *Oregon Legislature to increase tax rates or to impose new taxes*. * * * Ballot Measure 25 would thus ensure that *higher tax rates or new taxes* could be passed by the legislature only if there was broad consensus throughout the state on the need for such measures.

Adopting Ballot Measure 25 will result in a state government that is more responsive to voters by limiting the *state's ability to impose higher taxes or new taxes* on the public to only those cases where there is substantial majority support for those taxes.

(Emphasis added.) None of the other arguments for or against Measure 25 that appeared in the Voters' Pamphlet took issue with the emphasized language. Thus, we may reasonably assume that voters understood that the three-fifths vote requirement of Measure 25 would apply to laws that "increase tax rates," "impose higher taxes" or "impose new taxes."

In this way, the Voters' Pamphlet is consistent with the historical meaning of the words "bills for raising revenue," which is discussed above. The ordinary meaning of the word "tax" is a "pecuniary charge imposed by legislative or other public authority upon persons or property for public purposes : a forced contribution of wealth to meet the public needs of a government." Webster's at 2345. Similarly, as the *Northern Counties Trust*, *Dundee Mortgage Co.* and other Origination Clause cases indicate "bills for raising revenue" impose "taxes" on people for the general use of the government. Taxes are distinguished from assessments, which give to the persons from whom the money is exacted an equivalent government benefit in return. *Northern Counties Trust*, 30 Or at 402; *Dundee Mortgage Co.*, 24 F at 201.(7)

Indeed, the distinction between taxes and assessments is not limited to Origination Clause jurisprudence; rather, it is one of general law. *See Dennehy v. Dept. of Rev.*, 305 Or 595, 603, 756 P2d 13 (1988) (holding that tax increment financing of urban renewal districts was not subject to tax base limit of then Article XI, section 11, of the Oregon Constitution because the charges were more "akin to special assessments for the benefit of the property," than a property tax). In *Northern Pac. Ry. Co. v. John Day Irr. Dist.*, 106 Or 140, 211 P 781 (1923), the court observed:

The difference existing between taxation for general governmental purposes by the state or its political subdivisions, and assessment for local improvements, was well understood by the people of the state for a period of half century [sic] prior to the adoption of the Six Per Cent Tax Limitation Amendment.

Id. at 164.

Because we may assume that the voters read the Voters' Pamphlet, we may also assume that they understood that the phrase "bills for raising revenue" in Measure 25 referred to bills that would impose new or higher "taxes." This understanding of "bills for raising revenue" is consistent with that developed in cases addressing the same phrase in the Origination Clauses of the state and federal constitutions.

D. Bills Authorizing Local Taxes

Assuming *arguendo* that a school impact fee is viewed as a "tax" creating revenue for general governmental purposes, it is still unlikely that the courts would hold that a bill authorizing the school impact fee is subject to Article IV, section 25, of the Oregon Constitution. By its terms, Article IV, section 25, applies only to state legislation, for it refers to "bills" and requires approval of each "House" of the Legislative Assembly. In fact, the Legislative Argument in Support of Measure 25 states that the measure will limit the "state's ability" to impose higher or new taxes. Thus, the amendment is a limitation on state, not local government, legislation. As we understand it, the legislation at issue would not itself "raise revenue" or "impose" taxes. Rather, the legislation would only authorize school districts to raise revenue through the school impact fee.

E. School Impact Fee and Article IV, Section 25

Applying the foregoing points and authorities, we conclude that the courts probably would hold that a bill authorizing school districts to impose school impact fees would not be a bill for raising revenue under Article IV, section 25, of the Oregon Constitution. If the Oregon Supreme Court adheres to the line of cases it has followed in interpreting the same phrase in Article IV, section 18, it is very unlikely the court would find that a bill authorizing school impact fees requires three-fifths approval of both houses of the Legislative Assembly. In reaching this conclusion, we assume that such legislation would authorize funding for only those capital expenditures of school districts that are necessary to provide school services to new residential developments, not to raise revenues for general government purposes.(8)

HARDY MYERS
Attorney General

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1. Likewise, in 46 Op Atty Gen 447 (1991), we concluded that motor vehicle registration fees, weight-mile taxes, snowmobile vehicle registration fees, title transfer fees and commercial vehicle proportional registration fees were not "property taxes" under Article XI, section 11b, of the Oregon Constitution because they were not imposed on property or property owners as a direct consequence of ownership of that property.

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2. Apparently, the concept was borrowed from the British Parliament by the Commonwealth of Virginia for its constitution of 1776. The provision in the Virginia constitution was the progenitor of that found in the federal constitution. *Dale,* 322 Or at 243 n 1, (citing 2 Story's Commentaries on the Constitution 338-65 (1st ed 1833)).

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3. The issue before the court in *Dale* was whether the words "raising revenue" in the title of the ballot measure proposing the three-fifths requirement adequately described the measure.

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4. Although neither *Northern Counties Trust* nor *Mumford* expressly acknowledges the point, the validity of their conclusion that a bill repealing a property tax exemption is *not* a "billing for raising revenue," may depend upon the fact that, under the levy-based property tax system authorized by former Article XI, section 11, of the Oregon Constitution that existed at the times of those decisions, the repeal of an exemption did not increase the total amount of taxes that lawfully could be imposed. Rather, the repeal simply shifted taxes from those taxpayers who had not enjoyed the benefit of the

exemption to those who had. Under the current rate limitations of the Article XI, section 11, however, it is conceivable that a bill repealing an exemption could result in an increase in the total amount of taxes collected and, thus, constitute a bill for raising revenue.

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5. *Twin City Bank v. Nebeker* has been frequently cited as leading authority on the meaning of the words "bills for raising revenue" in Article I, section 7, of the United States Constitution. *See, e.g., United States v. Munoz-Flores*, 495 US 385, 397, 109 L Ed2d 384, 399, 110 S Ct 1964 (1990) (finding that an act, that may have originated in the U.S. Senate, which imposed a special assessment on persons convicted of federal offenses did not violate the Origination Clause of Article I, section 7, of the United States Constitution). It is ironic, then, that the Court that issued the *Twin City Bank* opinion disclaimed such intent:

The case is not one that requires either an extended examination of precedents, or a full discussion as to the meaning of the words in the Constitution, "bills for raising revenue." What bills belong to that class is a question of such magnitude and importance that it is the part of wisdom not to attempt, by any general statement, to cover every possible phase of the subject.

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42 L Ed at 136.

6. The explanatory statements and arguments published in the Voters' Pamphlet concerning a measure are part of the history of the measure that may be considered in ascertaining the voters' intent. *Ecumenical Ministries v. Oregon State Lottery Comm.*, 318 Or 551, 560 n 8, 871 P2d 106 (1994); *see also Lipscomb v. State Board of Higher Education*, 305 Or 472, 484-85, 753 P2d 939 (1988); *Northwest Natural Gas Co. v. Frank*, 293 Or 374, 381, 648 P2d 1284 (1982). Although the Oregon Supreme Court has admonished that "[d]iscriminating and cautious use must be made of such material because of its partisan character," *see State ex rel Chapman v. Appling*, 220 Or 41, 68-69, 348 P2d 759 (1960), such cautions have been given in the context of initiated measures. We are unsure whether they apply as well to legislatively referred measures. In any case, because no arguments appear in the Voters' Pamphlet that contradict those identified here, we believe the court would assume, as we do, that the voters would accept the Legislative Argument as an accurate description of the intended effect of the proposed constitutional amendment and, thus, give it weight.

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7. Taxes are also to be distinguished from fines and penalties which are intended to regulate and punish misconduct.

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8. For similar reasons, the school impact fee should not be considered a "property tax" for purposes of Article XI, section 11 (Measure 50 (1997)). Nevertheless, the "fee shifting restriction" in Article XI, section 11(19), limits not only property taxes but also other charges. It provides, in part:

(a) The Legislative Assembly shall by statute limit the ability of local taxing districts to impose new or additional fees, taxes, assessments or other charges for the purpose of using the proceeds as alternative sources of funding to make up for ad valorem property taxes revenue reductions caused by the initial implementation of this section, unless the new or additional fee, tax, assessment or other charge is approved by voters.

We have not been asked to consider whether and, if so, how a school impact fee might be subject to this provision. We note, however, that Oregon Laws 1997, chapter 541, section 456(5) defines "shift" in terms of new or increased fees being imposed only "during the initial implementation period" to replace property tax reduction amounts. Section 456(9) defines "initial implementation period" as "the fiscal year for which property tax reductions are calculated under sections 20 to 35 of this 1997 Act [310.200 to 310.242]." ORS 310.200 to 310.242 relate to the ad valorem property tax reductions for the

tax year beginning July 1, 1997. ORS 310.200. Thus, assuming for the sake of discussion that the "fee shifting restriction" in Article XI, section 11(19), would apply to a school impact fee, its effect would be limited to the initial implementation period" of Measure 50, i.e., tax year beginning July 1, 1997.

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