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Janet Billups
General Counsel
Oregon Health & Science University
3181 SW Sam Jackson L585
Portland, OR 97239

Re: Opinion Re: Oregon Health & Science University's Authority to Own Stock/Equity

Dear Ms. Billups:

For the reasons set forth below, it is my opinion that Oregon Health & Science University (OHSU) possesses express statutory authority to own stock or other equity interests in an entity, pursuant to ORS 353.050(19).¹ In addition, it is my opinion that OHSU's exercise of that statutory authority would not violate Article XI, section 6, of the Oregon Constitution, which prohibits the state from subscribing to or having an interest in stock, because OHSU is not the "state" for purposes of Article XI, section 6, and because the state would have no proprietary interest or other interest in stock or other equity interests owned by OHSU.²

¹ ORS 353.050(19) provides that OHSU shall have authority to:

Purchase, receive, subscribe for or otherwise acquire, own, hold, vote, use, sell, mortgage, lend, pledge, invest in or otherwise dispose of and deal in or with shares or other equity or interests in or obligations of any other entity. Separate funds may be established for such investments. The State of Oregon shall have no proprietary or other interest in such investments or such funds.

² Article XI, section 6, of the Oregon Constitution, provides:

I. Introduction: A Statement of the Issue and a Summary of the Analysis and Opinion

You have asked for my independent, objective analysis and opinion in response to the following question: Does the statute, ORS 353.050(19), that expressly authorizes Oregon Health & Science University to own stock or other equity interests in an entity, violate Article XI, section 6, of the Oregon Constitution, which prohibits the “state” from subscribing to or having an interest in stock? Put differently, if OHSU exercises its express statutory authority to own stock or an equity interest in an entity, would that violate Article XI, section 6?

Legislative Counsel (LC) already has opined, in a letter opinion to Senate President Peter Courtney dated December 23, 2015 (a copy is attached), that “there is likely no constitutional violation” and that a contrary conclusion by a court would be “unlikely.” (LC 1, 7.) In my experience, for longstanding and appropriate institutional reasons, Legislative Counsel rarely, if ever, provides unqualified or unequivocal conclusions in written opinions on legal issues that have not been resolved directly by the Oregon appellate courts. Terms such as “likely” and “unlikely” in an LC opinion typically can be indicators of a more-strongly-held opinion about the analysis, particularly where, as in this instance, essentially all of the actual LC analysis in the letter opinion fundamentally points to the same ultimate conclusion.

I agree with Legislative Counsel’s legal conclusion that OHSU stock ownership would not violate Article XI, section 6, of the Oregon Constitution. The letter opinion is well-reasoned and persuasive. As an independent analyst unconstrained by the institutional interests that may pertain to Legislative Counsel, however, I would state my conclusion in stronger terms than “likely” with respect to the result. I would opine that there is very little doubt as to the correct answer, which is that ownership of stock or other equity interests by OHSU would not violate Article XI, section 6, of the Oregon Constitution.³

The primary reason for my high degree of confidence in the result is an objective one. The result appears clear because while the Oregon Supreme Court may not have considered this precise factual circumstance, it has set forth the history, purposes and analysis of Article XI, section 6, in clear terms, in the court’s opinion in *Sprague v. Straub*, 252 Or 507 (1969) (“*Sprague*”). The LC letter opinion correctly recognizes that *Sprague* is the “seminal case” interpreting Article XI, section 6. (LC 5.) The *Sprague* opinion has stood unchanged for nearly 50 years and its application to the facts in this case plainly yields only one reasonable result, that OHSU is not the

The state shall not subscribe to, or be interested in the stock of any company, association or corporation.

³ Of course it never would be appropriate to profess unequivocal certainty about something inherently uncertain to some degree, such as a potential future appellate court decision on facts that had not been resolved directly by the courts before.

“state” for purposes of the limitation on stock ownership by the “state” in Article XI, section 6 (discussed in more detail below).

Moreover, importantly as well, the 1995 legislation that was enacted to expressly provide for OHSU’s authority to own stock or other equity interests, ORS 353.050(19), was drafted in terms that purposefully mirrored the exact language of the court’s constitutional holding in *Sprague v. Straub* (1969). Pursuant to the statute, and in compliance with the constitutional holding in *Sprague*, an express condition of OHSU’s statutory authority to own stock (or another equity interest) is that “the State of Oregon has no proprietary or other interest” in the investment. ORS 353.050(19); *Sprague*, 252 Or at 518-21 (holding that there is no constitutional violation because the State of Oregon has no “proprietary interest” or “no interest” in the fund at issue). As a general matter and absent some unusual express provision in a transaction, if OHSU owns stock (or another equity interest) in an entity, then the state will not, in fact, have any proprietary interest in that investment (also discussed in more detail below). As such, the transaction would be in compliance with both the statute and the constitution.

2. Article XI, Section 6, of the Oregon Constitution: Meaning and Application

The Oregon Supreme Court interprets state constitutional provisions by examining the text of the provision, the context including the historical context, and case law interpreting and applying the provision. *Priest v. Pearce*, 314 Or 411, 415-16 (1992).

A. Text

Article XI, section 6, of the Oregon Constitution, which was enacted as part of the original state constitution, provides:

The state shall not subscribe to, or be interested in the stock of any company, association or corporation.

The term in this constitutional text centrally at issue is whether the “state” includes OHSU for purposes of this provision. The Oregon Supreme Court looks to the meaning of the term at the time the provision was adopted, here 1857, to ascertain the common meaning of the text of the provision. See *Interpreting Oregon Law*, p. 7-10 (2009, Hon. Jack Landau, ed.) (citing cases). The 1857 edition of Webster’s *An American Dictionary of the English Language* pertinently defines “state” as:

5. A political body, or body politic; the whole body of people united under one government; *more usually*, a commonwealth or body politic, having a representative legislature.

(Emphasis in original.)

That definition fits neatly with the State of Oregon. It, however, bears no material relation to OHSU, which is by law a “public corporation” with a statutory mandate pursuant to ORS 353.020 and ORS 353.030 to engage in research and provide clinical care and specialized professional education.

B. Context and History

The Oregon Supreme Court has recognized that the history surrounding the adoption of this provision reflects the constitutors’ intent in 1857 to prohibit the State of Oregon from investing in the stock of private corporations, in an attempt to avoid the financial misfortunes that many states had suffered in the second quarter of the 19th century from reckless investments in stocks of companies related primarily to railroads and canals during the preceding years. *Sprague*, 252 Or at 518. As such, the court interpreted Article XI, section 6, as a general prohibition against the purchase of corporate stocks by the State of Oregon. *Id.* at 518. As with the text of the provision, there is no indication in the history recited by the court that the provision was intended to apply to entities other than the State of Oregon itself.

C. Case Law

Not surprisingly given the text and historical context, the guidance provided by the holding and analysis in *Sprague* leads to the same conclusion, *viz.*, that the term “state” in Article XI, section 6, does not apply to OHSU.

The first critically important point to note is one that Justice Linde made clear in his opinion for the court in *State ex rel Eckles v. Woolley*, 302 Or 37, 45 (1986), that “characterizations [of entities] in judicial opinions responding to such arguments made in one context are inconclusive on substantially different issues arising in the context of different laws.” That is important here because the court’s prior characterization of OHSU as an “instrumentality of the state” for purposes of sovereign immunity under Article IV, section 24, of the Oregon Constitution, in *Clarke v. Oregon Health & Science University*, 343 Or 581, 597 (2007), should have little or no bearing on the determination here whether OHSU is the state for purposes of the unrelated constitutional prohibition in Article XI, section 6, on the state subscribing to or having an interest in stock. As is obvious, each constitutional provision speaks to an entirely different history and addresses an entirely different issue, one the general historical concern for recognizing and preserving governmental sovereign immunity unless waived, and the other the very specific and then-recent problem of reckless investments by the states themselves in corporate stock.

Indeed, historically, the sovereign immunity of the state was extended to a range of governmental entities other than the state itself. *See, e.g., Hale v. Port of Portland*, 308 Or 508 (1990) (holding that the Port of Portland was entitled to sovereign immunity, pursuant to Article IV, section 24). Thus, the court’s inquiry in *Clarke* under Article IV, section 24, was not whether OHSU *is* the state but rather whether OHSU is *an instrumentality of* the state (which is, by definition, not the state itself). Put differently, the court effectively was interpreting the term

“state” in Article IV, section 24, to include not just the State of Oregon itself but also instrumentalities of the state within its scope.

By contrast, *Sprague* identifies a very different and specific historical concern behind Article XI, section 6, in its holding as follows:

We find nothing in the history of the various constitutional provisions in Oregon and elsewhere relating to the investment of state funds or the pledging of the state’s credit indicating a concern for any losses other than those that would result in a diminution of state-owned assets.

252 Or at 523. Accordingly, Article XI, section 6, prohibits the state a) from subscribing to stock and b) from having an interest in stock.

The former prohibition expressly prohibits the state from subscribing to (owning) stock, which would run the risk of a diminution of “state-owned assets.” The latter expressly prohibits the state from having an interest in stock, likewise protecting the state from running the risk of a diminution in “state-owned assets.” Moreover, the prohibition on the state having an interest in stock implicitly thereby recognizes that other governmental entities could own stock so long as the state itself has no interest in that stock. That is precisely the circumstance here with OHSU, wherein the legislature in ORS 353.050(19) has authorized OHSU to own stock and other equity interests but only if the “State of Oregon shall have no proprietary or other interest in such investments or such funds.”

The court’s holding in *Sprague* further recognized the first part of the constitutional prohibition by holding that there was no violation of Article XI, section 6, because “the people intended the prohibition in Article XI, § 6 to apply only to funds owned by the state[.]” *Sprague*, 252 Or at 524. And the court’s holding in *Sprague* also dealt with the second part of the constitutional prohibition, by determining that there was no violation of Article XI, section 6, because the State of Oregon “has no proprietary interest in the Industrial Accident Fund or in the contributions made to the fund by the state” and concluding that the state thus “has no interest” in that fund. *Id.* at 518-521 (citing ORS 656.634).

The legislature in 1995 relied on the court’s constitutional interpretation of Article XI, section 6, in *Sprague*, which had been decided in 1969 and had stood for a quarter century by 1995. In adopting ORS 353.050(19), as part of the legislation that created public corporation status for OHSU, the legislature correctly looked to *Sprague* and granted to OHSU a range of authority including the authority to purchase stock or other equity interests, but only if the “State of Oregon shall have no proprietary or other interest in such investments or funds.”

One additional point bears mention here. I want to be clear that I am not stating or suggesting that legislative adoption of ORS 353.050(19) somehow thereby exempts OHSU from having to comply with Article XI, section 6, if that constitutional provision were deemed to apply to OHSU. No one of course would assert that the legislature is free to pass laws that violate the

constitution. Rather, the point is that I agree with Legislative Counsel that ORS 353.050(19) is a lawful, constitutional exercise of legislative authority, because the terms of the statute comply with the terms of the constitution as explicated by the Oregon Supreme Court in *Sprague*. Pursuant to the court's analysis in *Sprague*, OHSU should not be considered to be the "state" for purposes of Article XI, section 6, and OHSU therefore may be authorized by the legislature to own stock or other equity interests, so long as the state itself has no proprietary or other interest in the investment, which is precisely what ORS 353.050(19) provides.

D. The State of Oregon Has No Proprietary or Other Interest in Stock or Other Equity Interests Owned by OHSU

This is one aspect of my memorandum where I have nothing to add to the analysis and conclusion of Legislative Counsel. At pages 2-3 and 7 of the opinion letter, Legislative Counsel sets forth facts that lead Legislative Counsel to an unqualified conclusion that the State of Oregon would not own and would have no proprietary or other interest in stock/equity investments that would be owned by OHSU.

With that factual conclusion, the constitutional analysis is complete. In my opinion, ORS 353.050(19) does not violate Article XI, section 6, of the Oregon Constitution. Therefore, OHSU's exercise of its express statutory authority to purchase stock or other equity interests, with the condition that the State of Oregon has no proprietary or other interest in the investment, would not violate Article XI, section 6.

Very truly yours,

HOLLAND & KNIGHT LLP



Roy Pulvers