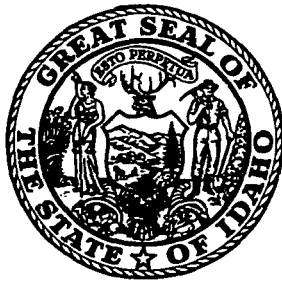
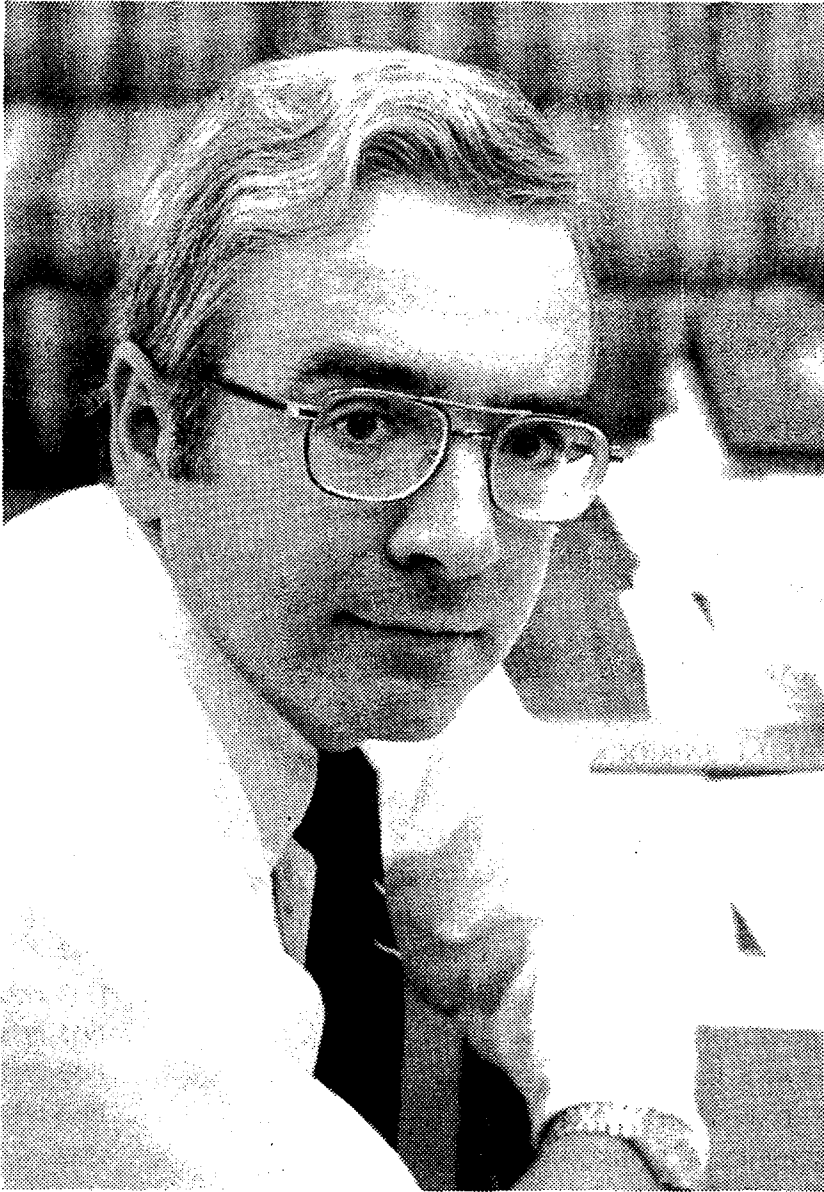


**ATTORNEY GENERAL'S
OPINIONS
FOR THE YEAR
1976**



Wayne L. Kidwell
Attorney General



WAYNE L. KIDWELL
Attorney General

ATTORNEYS GENERAL OF IDAHO

GEORGE H. ROBERTS	1891-1892
GEORGE M. PARSONS	1893-1896
ROBERT McFARLAND	1897-1898
S. H. HAYS	1899-1900
FRANK MARTIN	1901-1902
JOHN A. BAGLEY	1903-1904
JOHN GUHEEN	1905-1908
D. C. McDOUGALL	1909-1912
JOSEPH H. PETERSON	1913-1916
T. A. WALTERS	1917-1918
ROY L. BLACK	1919-1922
A. H. CONNER	1923-1926
FRANK L. STEPHAN	1927-1928
W. D. GILLIS	1929-1930
FRED J. BABCOCK	1931-1932
BERT H. MILLER	1933-1936
J. W. TAYLOR	1937-1940
BERT H. MILLER	1941-1944
FRANK LANGLEY	1945-1946
ROBERT AILSHIE (Deceased November 16)	1947
ROBERT E. SMYLIE (Appointed November 24)	1947-1954
GRAYDON W. SMITH	1955-1958
FRANK L. BENSON	1959-1962
ALLAN G. SHEPARD	1963-1968
ROBERT M. ROBSON	1969
W. ANTHONY PARK	1970-1974
WAYNE L. KIDWELL	1975

P R E F A C E

This second volume of Opinions during my tenure in office is offered as a service to those persons interested in the official legal opinions of Idaho's chief legal officer.

The Opinions of the Attorney General have played an important role in the enforcement and administration of our laws. In many instances they have saved money for the taxpayers and time for the State administrators by steering them clear of possible legal pitfalls.

It is my hope that this and subsequent books of Opinions of the Attorney General will prove to be a valuable manual for finding answers to many of our governmental problems.

WAYNE L. KIDWELL
Attorney General
State of Idaho

**LEGAL STAFF
FOR THE OFFICE
OF THE
ATTORNEY GENERAL
FOR
1976**

Wayne L. Kidwell — Attorney General

Pater E. Heiser, Jr. — Chief Deputy

Gordon S. Nielson — Senior Deputy

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ATTORNEY GENERAL OPINION NO. 76-1

TO: Gordon C. Trombley, Director, Department of Lands

Per request for Attorney General Opinion.

QUESTION PRESENTED: Is the College of Agriculture at the University of Idaho authorized to use any portion of the land granted to the State of Idaho under §10 of the Idaho Admission Bill?

CONCLUSION: No, the College of Agriculture is the beneficiary of the permanent fund established from the proceeds of the Agricultural Land Grant of §10 of the Idaho Admission Bill, but title to the lands themselves vests in the state with the management and disposition authority constitutionally granted to the State Board of Land Commissioners, and the enabling legislation creating such lands does not, without first obtaining permission and a lease thereof from the State Board of Land Commissioners, allow the physical use or occupancy of the granted lands.

ANALYSIS: Congress on July 2, 1862 "granted to the several states, for the purposes hereinafter mentioned," certain quantities of public lands equal to thirty thousand acres for each senator and representative in Congress under the census of 1860 or, under certain conditions, in lieu thereof land scrip (7 USC §301). This congressional Act provides that all the management expenses are to be paid by the state in order that the entire proceeds of the sale of these lands be invested in a perpetual fund,

... the capital of which shall remain forever undiminished (except so far as may be provided in Section 305 of this title), and the interest of which shall be inviolably appropriated, by each State which may take and claim the benefit of Sections 301-305, 307, and 308 of this Title, to the endowment, support and maintenance of at least one college where the leading object shall be, without excluding other scientific and classical studies and including military tactics, to teach such branches of learning as are related to agriculture and the mechanic arts, in such manner as the legislatures of the States may respectively prescribe, in order to promote the liberal and practical education of the industrial classes in the several pursuits and professions in life. 7 USCA, §304.

The conditions of the grant are set out in 7 USCA, §305 which states in part that

... the annual interest shall be regularly applied without diminution to the purposes mentioned in section 304 of this title, except that a sum, not exceeding 10 per centum upon the amount received by any State under the provisions of sections 301-304 of this title, may be expended for the purchase of lands for sites or experimental farms, whenever authorized by the respective legislatures of said States.

No portion of said fund, nor the interest thereon, shall be applied, directly or indirectly under any pretenses, whatever, to the purchase, erection, preservation, or repair of any building or buildings.

The Act further provides that "if any portion of the fund invested . . . be diminished or lost, it shall be replaced by the state to which it belongs; (7 USCA §305) and "no state shall be entitled to the benefits of this Act unless it shall express its acceptance thereof by the Legislature." (7 USCA §305).

On July 3, 1890 the Idaho Legislature accepted this Agricultural Land Grant by being admitted into the Union as a State of the United States. (26 Statutory Law 215, Chapter 656, Idaho Admission Bill). Congress in turn ratified Idaho's Constitution upon its admission as a State, and accepted the constitutional provisions dealing with all federal land grants — present and future. The Agricultural Land Grant to the State is found in §10 of the Idaho Admission Bill and reads as follows:

Ninety thousand acres of land, to be selected and located as provided in section 4 of this Act, are hereby granted to said state for the *use and support* of an agricultural college in said state, as provided in the Acts of Congress making donations of lands for such purposes. (Emphasis added).

When a state accepts a federal land grant, it also accepts the conditions of the grant, as evidenced by the italic phrase of §10 above. Thus, the state has entered into a compact with the federal government to carry out the conditions of the grant. This was discussed by the Idaho Supreme Court in *Newton v. State Board of Land Commissioners*, 37 Idaho 58, 219 P. 1053, (1923):

The Idaho Admission Bill, containing the land grants by the government to the state found in sections 4 and 5 above quoted, together with the acceptance by the Congress of the provisions of the constitution regulating the manner of locating such lands and the disposition thereof, constitute a compact between the government and the state, which neither may abrogate or modify without the consent of the other party to the pact. . . . 37 Idaho at 63.

Therefore, the lands granted to the state in §10 of the Idaho Admission Bill must be administered in accordance with the Congressional Act of 1862 and its amendments found in 7 U.S.C.A. §301, *et seq.*

As stated on page one of this opinion, these lands were granted to the states so that the proceeds of the sale of the lands will establish a permanent fund, the interest of which only will be used for the "endowment, support, and maintenance" of an agricultural college. But the Act does allow for the use of 10% of the fund for the purchase of sites, if the legislature so provides. The purpose of the Act is to insure that the funds are available to the institution, but not the land itself. The land is given to the state to be held in trust "subject to disposal at public auction for the *use and benefit* of the respective object for which said grants of land were made, . . . " Art. IX, §8, *Idaho Constitution*.

The principle that title to federal land grants vests in the state, and not the beneficiary of the grant is discussed in *State of Wyoming, ex rel., Wyoming College & Matt Borland v. William C. Irvine*, 206 U.S. 278, (1907) where the court after a lengthy review of the Agricultural Land Grant of 1862 and its amendments concluded that:

The grant made in this statute is clearly to the state, and not to any institution established by the state. 206 U.S. at 283.

In a later case, *Ross v. Trustees of University of Wyoming*, 228 P. 642 (Wyo. 1924), the Wyoming court discussed the beneficiary's authority over federal land grants, and distinguished between lands held by the University as University property and University grant lands:

But the words "its lands" can well be understood and limited, as in the original opinion, to apply to only lands acquired for the University either in its corporate name or otherwise, to be occupied and used as lands in the ordinary conduct of the University affairs, and not held as the granted public lands are, in trust, and solely for the purpose of sale to create a permanent fund, or for lease prior to sale for the income to be derived therefrom. There does exist that distinction between these lands and other lands or property which may be owned by the University unconditionally, and from which it acquires the benefit of occupation or possession necessary or convenient in the active conduct of the affairs of the institution, or any of its departments. When these lands or any part thereof are sold, the proceeds go into a permanent fund to be held by the State; no part of the principle of which may be used, but only the interest, for University purposes, presenting a different situation from that which would result in the sale of lands conveyed to or owned by the University unconditionally. 228 P. at 653 (Emphasis added).

The Court reaffirmed its earlier opinion regarding any authority of the beneficiary over grant lands by stating that:

... as to these state lands, the University's interest is that of a beneficiary, and its right is, not to have the lands, but only the income therefrom. 228 P. at 643.

The theory that the beneficiary is entitled only to the proceeds of the grant land, and not to the land itself is further supported by our Constitution which vests the State Board of Land Commissioners with the power of location, protection, sale and rental of these lands, (Art. IX, §§7 & 8, *Idaho Constitution*), "under such regulations as may be prescribed by law." Thus, the Land Board could lease or sell these lands even to the beneficiary thereof. As stated by the Idaho Supreme Court in *Pike v. State Board of Land Commrs.*, 19 Idaho 268, 113 P. 447, (1911), the State Board of Land Commissioners are

... (T)he trustees or business managers for the state in handling these lands, and on matters of policy, expediency and the business interest of the state, they are the sole and exclusive judges so long as they do not run counter to the provisions of the constitution or statute. 19 Idaho at 286.

This trust continues until the lands are disposed of at public auction, and at such time the proceeds of the sale will then be applied in accordance with the terms of the grant. (Art. IX, §8, *Idaho Constitution*). These proceeds constitute the permanent fund as defined in §5 of the Idaho Admission Bill, in Art. IX, §4

of the *Idaho Constitution* and 7 U.S.C.A. §304. Section 5 of the Idaho Admission Bill and §3, Art. IX of the *Idaho Constitution* state that only the interest of the fund can be used for the support and maintenance of the designated institution, and that the fund itself must remain "inviolable and intact," unless the legislature authorizes a portion of the permanent fund to be expended for the purchase of sites for the Agricultural College as provided for in 7 USCA §305.

SUMMARY: Congress gave 90,000 acres of land to the state for the purpose of endowing the State Agricultural College with a permanent operating fund, the income from which can only be used for the support of the school. Title to the land itself is vested in the State of Idaho, with the State Board of Land Commissioners as the legally designated trustees with duties of management, control and disposition of these lands. The proceeds generated by sale of these lands constitute the permanent fund which must then be applied in accordance with the terms of the grant.

The land can be used by anyone within the sound discretion of the State Board of Land Commissioners, and only the proceeds are designated for transfer to the beneficiary of the trust, i.e., the Land Grant.

AUTHORITIES CONSIDERED:

1. 7 U.S.C.A. §301, *et seq.*
2. Idaho Admission Bill, §§5, 10.
3. *Idaho Constitution*, Art. IX, §§3, 4, 7, 8.
4. *Pike v. State Board of Land Commissioners*, 19 Idaho 268, 113 P. 447 (1911).
5. *Newton v. State Board of Land Commissioners*, 37 Idaho 58, 219 P. 1053 (1923).
6. *State of Wyoming, ex rel, Wyoming College & Matt Borland v. William C. Irvine*, 206 U.S. 278 (1907).
7. *Ross v. Trustees of University of Wyoming*, 228 P. 642 (Wyo. 1924).

DATED This 8th day of January, 1976.

ATTORNEY GENERAL OF THE STATE OF IDAHO

WAYNE L. KIDWELL
Attorney General

ANALYSIS BY:

URSULA KETTLEWELL
Assistant Attorney General

ATTORNEY GENERAL OPINION NO. 76-2

TO: Monroeollaher
Director
State of Idaho
Department of Insurance

Per Request For Attorney General Opinion

QUESTION PRESENTED:

What is the reference base index date that should be used in calculating the adjustments to the \$25,000.00 amount that is set by Section 41-2005(4), *Idaho Code*?

CONCLUSION:

The reference base index date that should be used in calculating adjustments to the \$25,000.00 amount, set by Section 41-2005(4), *Idaho Code*, is the Consumer Price Index for December, 1967.

ANALYSIS:

Section 41-2005(4), *Idaho Code* is clear in its reference to Section 28-31-106, *Idaho Code*:

The amount of twenty-five thousand dollars (\$25,000) in this section is subject to the provisions on adjustment of dollar amounts contained in Section 28-31-106, *Idaho Code*.

Section 28-31-106, *Idaho Code*, is quite clear:

The index for December, 1967, is the Reference Base Index.

The answer to your question is the Consumer Price Index for December, 1967.

The reasoning for the connection of the two code sections is that of economics. The Uniform Consumer Credit Code, (U.C.C.C.) effective July 1, 1971, had a maximum ceiling of \$25,000 on consumer loans. However, as our economy changes and the Consumer Price Index continues to rise, the maximum figure of \$25,000 itself needs adjustment if consumers are to be allowed the same level of protection because, obviously, after a substantial increase in the Consumer Price Index, it takes more money to purchase the same amount of goods.

Rather than establish a firm maximum figure in the law, the Idaho Legislature, in adopting the Uniform Consumer Credit Code provisions promulgated by the National Commission on Uniform State Laws, provided an "automatic" adjustment system. This eliminates the necessity of legislative intervention in adjusting the dollar amount figures of the U.C.C.C. from time to time.

In order to allow a consumer to purchase life insurance on the consumer loan, the Legislature enacted Section 41-2005(4), *Idaho Code*. The legislative intent

was to set the maximum group insurance rate the same as the maximum loan figure. This allows the borrower to obtain necessary insurance, while at the same time prevents him from being required to overinsure.

As the Consumer Price Index goes up and the maximum allowable consumer loan figure increases, the Legislature intended the insurance coverage to raise at the same rate. Hence, the identical maximum amount was used and the identical adjustment provision was used. The adjustment provision stated in Section 28-31-106, *Idaho Code*, is specifically referred to in the group life insurance law, Section 41-2005(4), which sets the maximum allowable coverage.

The maximum allowable coverage under Section 41-2005(4), *Idaho Code*, must always be the same as maximum allowable amount as stated in Section 28-33-104(4), *Idaho Code*, inasmuch as both sections provide for periodic adjustment of dollar amounts pursuant to the provisions regarding the same as set forth in Section 28-31-106, *Idaho Code*. The fact that a reference base index is specifically not mentioned in Section 41-2005(4), *Idaho Code*, and Section 28-33-104(4), *Idaho Code*, does not alter the conclusion, for it is mentioned in Section 28-31-106, *Idaho Code*, the section which sets forth the adjustment procedure and method.

IDAHO AUTHORITIES CONSIDERED:

Sections 41-2005, 28-31-106, and 28-33-104, *Idaho Code*.

DATED This 14th day of January, 1976.

ATTORNEY GENERAL FOR IDAHO

WAYNE L. KIDWELL

ANALYSIS BY:

JAMES P. KAUFMAN
Assistant Attorney General

January 20, 1976

**SUMMARY OF ATTORNEY GENERAL
OPINION NO. 76-3**

BECAUSE OF THE EXTRAORDINARY LENGTH OF ATTORNEY GENERAL OPINION NO. 76-3, WE HAVE FURNISHED THIS SUMMARY OF THE QUESTIONS PRESENTED, ANALYSIS AND CONCLUSIONS FOR THOSE WHO MAY NOT NEED THE DETAILED LEGAL AUTHORITIES.

**WAYNE L. KIDWELL
ATTORNEY GENERAL**

QUESTIONS PRESENTED:

1. What powers are conferred upon Idaho cities by Article 12, Section 2, Idaho Constitution, and to what extent is Idaho a "home rule" state?
2. What powers are conferred upon Idaho cities by Sections 50-301 and 50-302, *Idaho Code*?
3. Does Article 7, Section 6 of the *Idaho* Constitution, when coupled with Section 50-302, *Idaho Code*, constitute a broad grant of legislative power to Idaho cities to assess and collect taxes on a local-option basis?

ANALYSIS AND CONCLUSION:

"Home rule" is, in essence, the right and power of self-government in affairs of local concern which may be granted to cities and counties either by the state constitution or by state statutes. In the absence of a grant of home rule powers, a city or county is merely an arm of the state, subject to absolute control by the legislature.

1. Article 12, Section 2 of the Idaho Constitution constitutes a direct, constitutional grant of home rule power to Idaho cities and counties in police power matters. But, consistent with the language of Article 12, Section 2 of the Idaho Constitution and Idaho case law, the exercise of local police power is subject to two major limitations. First, the police power may be exercised only within the territorial limits of the city or county. Second, the exercise of police powers through city ordinance or county resolution must not conflict with its charter or general laws. Such general laws include those promulgated by the United States Constitution, federal statutes, the Idaho Constitution and Idaho state statutes.

In contrast, Idaho cities and counties do not enjoy constitutional home powers in local matters which fall outside the realm of local police powers.

Thus, Idaho cities and counties must look to enabling legislation to validate all actions, such as the raising of revenue and the making of local improvements, which fall outside the realm of local police powers.

2. Sections 50-301 and 50-302, *Idaho Code*, are both general statutes relating to city powers. It is the opinion of the Attorney General that neither statute grants to Idaho cities any more power than is already conferred upon them by Article 12, Section 2 of the Idaho Constitution and by state statutes. These statutory sections do not constitute a general grant of power to Idaho cities, but rather act as a limitation upon the powers of cities. Thus, neither Section 50-301, *Idaho Code*, nor Section 50-302, *Idaho Code*, can be considered a grant of legislative home rule regarding matters beyond the realm of police powers.

3. Article 7, Section 6 of the Idaho Constitution is a constitutional provision which grants to the legislature the authority to invest, by law, local taxation powers in cities and counties. It is the opinion of the Attorney General that Article 7, Section 6 of the Idaho Constitution, when coupled with Section 50-302, *Idaho Code*, does not constitute a broad grant of legislative power to Idaho cities to assess and collect taxes on a local-option basis for two major reasons. First, on its face, Article 7, Section 6 of the Idaho Constitution requires enabling legislation to invest powers of taxation in municipal corporations. Such constitutional limitation cannot be supplanted by a general statutory enactment, such as Section 50-302, *Idaho Code*. Second, based upon the analysis of Section 50-301, *Idaho Code*, in response to question 2, Section 50-302, *Idaho Code*, does not constitute a general grant of power to cities, and thus, Section 50-302, *Idaho Code*, cannot be construed to be a law investing taxation powers in municipal corporations.

ATTORNEY GENERAL OPINION NO. 76-3

TO: Mr. F. W. Roskelley
Councilman, Pocatello
President, Association of Idaho Cities

Mr. R. R. Eardley
Mayor, Boise
Second Vice President
Association of Idaho Cities
1402 Broadway
Boise, Idaho 83706

Per request for Attorney General Opinion.

QUESTIONS PRESENTED:

1. What powers are conferred upon Idaho cities by Article 12, Section 2, Idaho Constitution, and to what extent is Idaho a "home rule" state?

2. What powers are conferred upon Idaho cities by Sections 50-301 and 50-302, *Idaho Code*?

3. Does Article 7, Section 6 of the Idaho Constitution, when coupled with

Section 50-302, *Idaho Code*, constitute a broad grant of legislative power to Idaho cities to assess and collect taxes on a local-option basis?

CONCLUSIONS:

1. Article 12, Section 2, Idaho Constitution, confers upon Idaho cities constitutional "home rule" only to the extent of police power functions. As to all other matters, Idaho cities must look to the legislature for enabling legislation.

2. Sections 50-301 and 50-302, *Idaho Code*, grant to cities no greater powers than those expressly granted by the constitution or state statutes.

3. Article 7, Section 6 of the Idaho Constitution, when coupled with Section 50-302, *Idaho Code*, does not constitute a broad grant of legislative power to Idaho cities to assess and collect taxes on a local-option basis.

ANALYSIS:

Due to the confusion and ambiguity surrounding the existence of home rule in Idaho, an introduction seems appropriate. As a general rule,

(m)unicipal corporations are political subdivisions of the state, and in the absence of constitutional restrictions, the legislature has absolute control over the number, nature, and duration of the powers conferred, and the territory over which they shall be exercised, and may qualify, enlarge, abridge, or entirely withdraw at its pleasure the powers of a municipal corporation. C. Rhyne, *Municipal Law* §4-2, at 61 (1957). (Emphasis added.) See also, 56 Am.Jur.2d *Municipal Corporations* §98 (1971); 62 C.J.S. *Municipal Corporations* §107 (1949).

Thus, municipalities generally have no inherent right of self-government or "home rule" unless expressly granted by the state constitution or state statutes. C. Rhyne, *Municipal Law* §4-2 (1957); 56 Am.Jur.2d *Municipal Corporations* §125 (1971).

Notwithstanding, in many jurisdictions, state control of municipalities has been limited by either legislative or constitutional home rule provisions. In such jurisdictions, home rule or self-government has been granted and home rule cities may have complete power and authority over matters of local concern, subject to limitation only by constitutional provisions and conflicting state statutes which deal with statewide concerns. 62 C.J.S. *Municipal Corporations* §108b and §187 (1949); 56 Am.Jur.2d *Municipal Corporations* §128 (1971).

To further aid in this discussion, another distinction which must be drawn is the distinction between constitutional home rule and legislative home rule. As these two types of home rule connote, under constitutional home rule a city derives power directly from the constitution and, as a result, the power granted is generally equal to the constitutional grant of power to the legislature. In contrast, under legislative home rule, a city's power is derived solely from legislative enactments, and the city is ultimately governed and controlled by

the legislature. Stephen L. Beer in his Idaho Law Review article entitled "Constitutional Home Rule for Idaho Cities" succinctly states the importance of the distinction.

The distinction between constitutional home rule and legislative home rule is important for many reasons. First, the courts have strictly construed legislative grants of power in favor of the granting power. Constitutional grants of power, on the other hand, are construed broadly in favor of the grantee. Second, legislative grants of power to municipal corporations are not vested rights and the legislature may change, modify or destroy them; whereas, constitutional grants of power cannot be changed or abolished except by constitutional amendment which requires direct consent of the electorate. Therefore, even though the *Idaho Code* grants broad powers to municipal corporations very similar to the grant of power found in Article 12, Section 2 of the Idaho Constitution, the power granted by the legislature does not have the inherent protections afforded constitutional provisions. In addition, in construing grants of power, the courts will strictly interpret them in favor of the legislature. 8 Idaho L. Rev. 355, at 355 (1972). (Citing, 1 Dillon, *Municipal Corporations* 449 (5th Ed. 1911); 2 McQuillin, *Municipal Corporations* 804-806 (3rd Ed. 1966); *Id.* at 15; *Idaho Code* §50-302.)

Assuming a constitutional home rule provision exists, a final determination which must be made is whether or not the constitutional provision is self-executing. If a constitutional home rule provisions is self-executing, no action by the legislature is necessary to make it effective. That is, the provision itself provides a basic source of local government power. 1 Antieau, *Municipal Corporation Law* §3.01 (1975). In contrast, constitutional home rule provisions which are not self-exacting require legislative enactments pursuant to constitutional mandates in order to make home rule effective. 1 Anieau, *Municipal Corporation Law* §3.01 (1975); 1 McQuillin, *The Law of Municipal Corporations* §3.2lb (3rd Ed. J. Dray 1971).

In sum, the following inquiries must be made. First, is Idaho a home rule state, and if so, to what extent? Second, if a home rule state, is Idaho governed by constitutional home rule or legislative home rule? Third, if governed by constitutional home rule, does Idaho have a self-executing home rule provision?

1. Regarding the issue of whether or not Idaho is a home rule state, a review of the authorities and Idaho case law raises ambiguities and differences of opinion. The Specific constitutional provision in question is Article 12, Section 2 of the Idaho Constitution which states:

Local police regulations authorized — Any county or incorporated city or town may make and enforce, within its limits, all such local police sanitary and other regulations as are not in conflict with its charter or with general laws.

Various authorities, citing this Idaho constitutional provision, unequivocally state that Idaho, along with about thirty other states, is a constitutional home

rule state. See, 1 Antieau, *Municipal Corporation Law* §3.00 (1975); Rhyne, *Municipal Law* §4-3 (1957); 38 *Was. L. Rev.* 743 (1963). Further, in a lengthy analysis, Stephen L. Beer concluded, in his law journal article entitled "Constitutional Home Rule for Idaho Cities" that Idaho does recognize constitutional home rule. 8 *Idaho L. Rev.* 355 (1972). In addition Antieau contends that the constitutional home rule provisions of the Idaho constitution, like California and Washington, among others, are self-executing and are basic sources of local government power. 1 Antieau, *Municipal Corporation Law*, §3.01 (1975).

From a review of these above-cited authorities, it appears that the major reason they consider Idaho a constitutional home rule state is that the Idaho constitutional provision is virtually identical to constitutional provisions of California and Washington, and that the constitutional provisions of California and Washington have been interpreted to grant constitutional home rule to cities. For example, in his law journal article, Stephen L. Beer cites the 1964 edition of Antieau's treatise, wherein Antieau takes the position that Idaho cities enjoy a direct constitutional grant of power, but, contends Antieau, the Idaho Supreme Court has often overlooked this power when deciding cases. In reaching his decision, Antieau relies upon the fact that Article 12, Section 2 of the Idaho Constitution is virtually identical to the California Constitution, Article 11, Section 11, through which California cities enjoy constitutional home rule. Antieau states:

Section 11 (of the California Constitution, Article 11) . . . provides: Any county, city, town or township may make and enforce within its limits all such local, police, sanitary and other regulations as are not in conflict with general laws. Washington's Constitution is the same, and Idaho's would be identical but, as in some other home rule states, the comma after "local" is omitted . . . It should be perceived that the language of these constitutional provisions could hardly be broader. If a local charter provision or ordinance should not be classified as "police" or "sanitary," it would almost always qualify as a "local" one, and in even more instances, it could be characterized as . . . "other." 8 *Idaho L. Rev.* 355, at 359-360 (1972). Citing, 1 Antieau, *Municipal Corporations Law* at 95, n. 7, and 100 (1964).

Based upon the above-cited provision, Beer concludes:

According to Antieau, these constitutional provisions permit home rule cities to enjoy the same police power within their territorial limits as the state has itself. Since the California and Washington constitutions provide home rule to their municipalities, and since Idaho drafted a similar provision, it can be assumed that Idaho's framers of its constitution intended to provide home rule to its cities. The Idaho Supreme Court in *State v. Robbins* has adopted this view and has used California judicial reasoning in interpreting Article 12, Section 2 of the Idaho Constitution on other cases. 8 *Idaho L. Rev.* 355 (1972), at 359-360. *State v. Robbins*, 59 *Idaho* 279, 81 *P.2d* 1078 (1938).

The Attorney General takes issue with such general statements for two

major reasons. First, as will be hereafter noted in the review of Idaho case law, a distinction should be drawn between constitutional home rule only to extent of police powers, as opposed to a comprehensive grant of constitutional home rule in all matters of local concern, as argued by Antieau and Beer. Second, due to differences in the Idaho Constitution as compared with the general constitutional provisions of California and Washington relating to municipal corporations, an across-the-board comparison cannot adequately be made.

Regarding the failure of the above-cited authorities to distinguish a limited form of home rule to the extent of police powers from an all-inclusive form of home rule, even Antieau, in the 1975 edition of his treatise, seems to back down from an all-inclusive interpretation of home rule. Antieau states:

The California Constitution provides: "It shall be competent in any charter framed under the authority of this section to provide that the municipality governed thereunder may make and enforce all laws and regulations in respect to municipal affairs, subject only to the restrictions and limitations provided in their several charters and in respect to other matters they shall be subject to general laws." Another section provides: "Any county, city, town or township may make and enforce within its limits all such local, police, sanitary and other regulations as are not in conflict with general laws." Provisions such as these are held to mean that home rule units *enjoy the same police powers within their borders as does the State itself*. "It is, of course, undisputed," says the California Court, "that a municipality, under Article XI, sec. 11 of the State Constitution may within its limits exercise police powers equal in extent to those of the state."

The Washington constitutional clause provides: "Any county, city, town or township may make and enforce within its limits all such local police, sanitary and other regulations as are not in conflict with general laws." Of this clause, the Washington Court has said: "*This is a direct delegation of the police power* as ample within its limits as that possessed by the Legislature itself. It requires no legislative sanction for its exercise so long as the subject-matter is local, and the regulation reasonable and consistent with the general laws." The Idaho constitutional clause is virtually identical, and under it the Idaho Court has said that home rule cities possess "*full police power in affairs of local concern*." (Emphasis added. 1 Antieau, *Municipal Corporation Law* §3.03, at 3-11 and 3-12 (1975). (Citing, Article XI, Section 8 and Article XI, Section 11, California Constitution; *McCay Jewelers v. Bowron*, 19 Cal.2d 595, 122 P.2d 543, 546 (1942); Article XI, §11, Washington Constitution; *Detamore v. Hindley*, 83 Wash. 322, 326, 145 P. 462 (1915); *State v. Musser*, 67 Idaho 214, 176 P.2d 199, 201 (1946).)

A comparison of these two positions taken by Antieau reveals that in his 1964 treatise, Antieau says that the constitutional provisions of Idaho, California and Washington grant very broad powers to municipalities. In contrast, in his 1975 edition, Antieau cites only authorities which say that the constitutional provisions of Idaho, California and Washington give a direct grant of police power in affairs of local concern, as opposed to a general grant of power over all municipal affairs. As will be shown in the analysis of Idaho case law, Antieau's

latter position comports with the position of the Idaho Attorney General.

Regarding a comparison between Idaho, California and Washington, there seems to be a danger in unequivocally saying that Idaho is a constitutional home rule state merely because California and Washington, with similar constitutional provisions, are constitutional home rule states. First, even though the constitutional provision allowing cities and counties to make and enforce all local police, sanitary and other regulations which are not in conflict with general laws are similar in the three states, both California and Washington also include constitutional provisions expressly providing for the adoption of city charters. In 1 McQuillin, *The Law of Municipal Corporations* §3.41, at 309 (3rd ed. Dray 1971), it is noted: "The method of creating a home rule charter is usually fixed by the constitution in the states where such charters are permitted, . . ." The Idaho Constitution contains no such provision relating to the adoption of home-rule charters. Second, similarly to Idaho, there is also dispute in Washington as to whether Washington is a constitutional home rule state.

Article 11, §5(a) of the California Constitution provides:

It shall be competent in any city charter to provide that the city government thereunder may make and enforce all ordinances and regulations *in respect to municipal affairs*, subject only to restrictions and limitations provided in their several charters and in respect to other matters they shall be subject to general laws. City charters adopted pursuant to this Constitution shall supersede any existing charter, *and with respect to municipal affairs shall supersede all laws inconsistent therewith. (Emphasis added.)*

The California Constitution further specifically provides detailed methods for establishing city charters and incorporating cities. (It should be noted that California completely amended its constitutional provisions relating to local government in 1970 but nonetheless, the general intent of the constitutional provisions remains the same, and Article 11, Section 11 of the California Constitution was merely renumbered.

In like manner, Article 11, §10 of the Washington Constitution provides that a city with a population of 20,000 inhabitants or more may "frame a charter for its own government, consistent with and subject to the Constitution and laws of this state, . . ." (Emphasis added.) Article 11, §10 of the Washington Constitution then specifically provides the procedures required to prepare and adopt each city charter.

Of course, it is not absolutely necessary, in either California or Washington, for a city to adopt a charter, pursuant to their respective constitutional provisions, in order to exercise all home rule powers. That is, all California and Washington cities, regardless of home-rule charters, are granted constitutional home rule at least to the extent of local police powers. A home-rule charter only makes it more difficult for the legislature to pre-empt home rule authority by passing a general law.

In contrast to the California and Washington Constitutions, there are no

constitutional provisions in Idaho relating to the adoption of home rule charters. The Idaho Constitution merely provides that the legislature shall establish general laws relating to the incorporation, organization and classification of cities and towns, such general laws being subject to alteration, amendment or repeal by further general laws. See, Article 12, §1, Idaho Constitution. Thus in the absence of a comparable Idaho constitutional provision, an *unqualified* comparison of constitutional home rule among the three states cannot adequately be made. This is not to say that California and Washington case law may never be looked to for guidance, but rather, when used, California and Washington cases must be qualified depending upon which constitutional provisions the court is interpreting.

By way of further comparison between the Washington and Idaho constitutional provisions, Antieau and Rhyne in their treatises on municipal corporations unequivocally state that Washington is also a home rule state, but an extensive law journal article by Philip A. Trautman, Professor of Law for the University of Washington, concludes that Washington is not a purely home rule state.

The conclusion to be drawn is that in Washington a home rule city is subordinate to the legislature as to any matter upon which the legislature has acted, whether it be regarded as of state, local, or joint concern. In the event of an inconsistency, the statute prevails. However, in those instances in which the legislature has said nothing, an analysis of interest is vital. If the subject is of paramount state concern, some delegation of power by the legislature, express or implied, to the municipal corporation must be found. This is likewise true in those instances in which there is a joint state-local problem. Since the state will be affected by any action of a municipal corporation, it is necessary that an authorization to act for the legislature be found. In those instances in which the matter is solely of local interest, however, home rule cities may act without a delegation from the legislature, express or implied. To that extent the home rule provision is self-executing. Any other interpretation leaves the provision without meaning, and unless and until the court clearly decides to the contrary, there is no reason to expect such treatment. 38 Wash. L. Rev. 743, 772 (1963).

It must be noted that this conclusion was made in reference to Article 11, Section 10 of the Washington Constitution, that provision which specifically provides that Washington cities containing a population of 20,000 inhabitants or more may frame a charter for their own government; and, as noted above, the Idaho Constitution does not have a comparable provision.

Notwithstanding, Trautman states that due to Article 11, §11 of the Washington Constitution, relating to police powers, a different rule applies with regard to home rule in local police power matters.

Also requiring separate attention are the police powers of municipalities. Here as with the power of eminent domain, all classes of cities are treated bascially alike. However, whereas in the case of the power of eminent domain no city may act without legislative authorization, in the case of police powers, all cities derive authority

directly from the constitution. 38 Wash. L. Rev. 743, 775 (1963).

Trautman notes that, in Washington, Article 11, Section 11. of the Washington Constitution does grant cities a broad measure of power. Nonetheless, the police powers of cities are strictly limited to their territorial boundaries, and where a state statute conflicts with a city ordinance, the state statute always prevails.

Since none of the aforementioned authorities are completely conclusive, resort must be had to Idaho case law for a determination of the status of home rule for Idaho cities.

Idaho Case Law

In his law journal article, Stephen L. Beer states: "The quandry whether the constitution was intended to directly grant constitutional home rule to Idaho municipalities has resulted in confusing case law." 8 Idaho L. Rev. 355, 360 (1972). After a lengthy analysis of most Idaho cases interpreting Article 12, Section 2 of the Idaho Constitution, Beer takes the position that prior to 1938 and the case of *State v Robbins*, 59 Idaho 279, 81 P.2d 1078 (1938), the Idaho Supreme Court did not recognize constitutional home rule. But, Beer contends that, since the *Robbins* case in 1938, the Idaho Supreme Court has, with a few exceptions, taken the position that Idaho does have constitutional home rule.

It seems appropriate to take issue with Beer's position for the reason that he does not adequately distinguish between constitutional home rule regarding police powers, as opposed to constitutional home rule regarding all matters of local concern. It is the position of the Attorney General that the Idaho Supreme Court has always acknowledged constitutional home rule with regard to police powers.

Cases Involving Police Power Matters:

Since the adoption of the Idaho Constitution, there have been approximately thirty-five appellate cases interpreting Article 12, Section 2 of the Idaho Constitution or dealing with related matters, even though Article 12, Section 2 of the Idaho Constitution was not always discussed. (For a summary of these Idaho cases, see Appendix A.) Of these, approximately twenty-nine cases have dealt with the police powers of Idaho cities. Of the approximately twenty-nine cases dealing with the police powers of cities and counties, eighteen cases expressly upheld the city or county ordinance as a valid exercise of police power, and eleven cases held the city or county ordinance conflicted with state law or the case was decided or remanded on other grounds.

Regarding the eighteen cases which upheld city or county ordinances, the Idaho Supreme Court has made the following representative statements. In *State v. Quong*, 8 Idaho 191, 67 P. 491 (1902), the court considered a situation where there was both a state law and a city ordinance making battery a crime. The court stated:

The ordinance is not in conflict, but in harmony, with the general law.

The authority of the city to enact police regulations, and to enforce them, where they do not contravene and general law of the state, is, under the provisions of our constitution, beyond question. The municipal government may not take from the citizens any constitutional rights — has no power to do so — yet by the express provisions of section 2, article 12, the power to make and enforce sanitary and police regulations is expressly given to cities and towns. The object of the provision is apparent, its necessity urgent. *State v. Quong*, supra., at 194.

In the case of *Foster's, Inc. v. Boise City*, 63 Idaho 201, 118 P.2d 721 (1941), the plaintiff challenged the validity of a parking meter ordinance, and the court ruled that such a parking meter ordinance was within the police powers of the city. In its decision, the Idaho Supreme Court did not specifically refer to Article 12, Section 2 of the Idaho Constitution, but did state:

The police power is a necessary concomitant to complete sovereignty and inheres primarily in the state. The exercise of that power, within the corporate limits of cities and villages, has been delegated to the respective municipalities. The full exercise of that power is one of the governmental duties of the respective municipalities as arms of the state, in preserving the health, safety and general welfare of the people. *Foster's, Inc. v. Boise City*, supra., at 211.

In another case, the court considered the conviction of the defendant under a Boise city ordinance prohibiting the drinking of intoxicating liquor in a public place, even though there was a state constitutional amendment ending prohibition. The court upheld the validity of the Boise city ordinance and ruled:

Under the above constitutional provision (article 12, section 2, Idaho Constitution) counties, cities and towns have full power in affairs of local government notwithstanding general laws of the state defining and punishing the same offense. (Citations omitted.)

. . . The ordinance is not repugnant to, nor in conflict with, the statutes, neither does it violate any constitutional principle, but merely a further or additional regulation enacted by the city under its police power, specifically granted to counties, cities and incorporated towns by section 2, article 12, of the Constitution. (Citations omitted.) *State v. Musser*, 67 Idaho 214, 176 P.2d 199 (1946), at 219.

As a final representative case, in *Rowe v. City of Pocatello*, 70 Idaho 344, 218 P.2d 695 (1950), the plaintiff challenged a city ordinance prohibiting door-to-door solicitations declaring such solicitations to be a public nuisance. The city ordinance was upheld as a valid exercise of local police power. In examining Article 12, Section 2 of the Idaho Constitution, the Supreme Court stated:

This is a direct grant of police power from the people to the municipalities of the state, subject only to the limitation that such regulation shall not conflict with the general laws. Comprehended in

the term, "general laws" are other provisions of the constitution, acts of the state legislature, and, of course, the constitution and laws of the United States. Under this constitutional provision, the cities of this state are in a notably different position than are cities in jurisdictions where their police power is strictly limited to that found in charter or legislative grants. *Rowe v. City of Pocatello*, supra., at 698.

For other Idaho cases upholding city and county ordinances as valid exercises of local police power, see, *State v. Preston*, 4 Idaho 215, 38 P. 694 (1894) (city vagrancy ordinance upheld even though state statute punishing the same offense); *In re Francis*, 7 Idaho 98, 60 P. 561 (1900) (upheld Grangeville city ordinance imposing license taxes on various callings and businesses); *Gale v. City of Moscow*, 15 Idaho 332, 97 P. 828 (1908) (upheld city ordinance prohibiting the sale of liquor within the city limits notwithstanding a state statute generally allowing for the sale of liquor); *Baillie v. The City of Wallace*, 24 Idaho 706, 135 P. 850 (1913) (upheld city's power and control over streets and sidewalks); *State v. Hart*, 66 Idaho 217, 157 P.2d 72 (1945) (upheld city ordinance prohibiting the carrying of a concealed weapon); *Clark v. Alloway*, 67 Idaho 32, 170 P.2d 425 (1946) (upheld city vagrancy ordinance even though it was broader in scope than a state statute on the same subject and provided for different penalties); *Clyde Hess Distributing Co. v. Bonneville County*, 69 Idaho 506, 210 P.2d 798 (1949) (upheld county regulation establishing more restricted hours for the sale of beer than those provided by state law); *State v. Poynter*, 70 Idaho 438, 220 P.2d 386 (1950) (upheld Pocatello city ordinance prohibiting the driving of an automobile while under the influence of intoxicating liquor even though state statute on same subject); *Gartland v. Talbott*, 72 Idaho 125, 237 P.2d 1067 (1951) (upheld county resolution restricting number of issuable beer licenses in a designated area); *Schmidt v. Village of Kimberly*, 74 Idaho 62, 256 P.2d 523 (1953) (upheld city ordinance regarding financing, establishment and operation of a municipal water and sewage system as valid exercise of police power); *Taggart v. Latah County*, 78 Idaho 100, 298 P.2d 979 (1956) (upheld county ordinance providing more prohibitive hours for the operation of licensed beer establishments than hours prohibited by state law); *State v. Clark*, 88 Idaho 365, 399 P.2d 955 (1966) (upheld county subdivision ordinance as valid exercise of police power); *County of Ada v. Walter*, 96 Idaho 630, 533 P.2d 1199 (1975) (upheld county zoning ordinance as valid exercise of police power).

In twelve other cases, the Idaho Supreme Court considered the validity of various city ordinances and county resolutions adopted under local police powers. Four of these cases held the city ordinance or county resolution conflicted with the general laws of the state, two of these cases held the city ordinance or county resolution was unreasonable and oppressive, and six of these cases were reversed on other grounds.

The four cases which held the city ordinance or county resolution conflicted with the general laws of the state are *In re Ridenbaugh*, 5 Idaho 371, 49 P. 12 (1897); *Mix v. The Board of County Commissioners of Nez Perce County*, 18 Idaho 695, 112 P. 215 (1910); *State v. Frederic*, 28 Idaho 709, 155 P. 977 (1916); and *Citizens for Better Government v. County of Valley*, 95 Idaho 320, 508 P.2d 550 (1973). In the *Ridenbaugh* case, the city ordinance in question permitted gambling within the Boise city limits, in contravention of a state law prohibiting gambling. The court stated:

Thus, it is shown by the original charter of Boise city, also by section 2 of article 8 of the constitution, and the act amending the charter of Boise city, that it was not the intention of the legislature or the framers of the constitution to empower the council of incorporated cities and towns to pass ordinances in conflict with the general laws of the state.

. . . It is not the intention to permit or authorize the councils of incorporated cities to legalize, by ordinance, acts prohibited as criminal by the general criminal laws of the state, or to enforce ordinances in conflict with the general law. In case of a conflict, the ordinance must give way. In *re Ridenbaugh*, *supra.*, at 375.

Thus, the city ordinance was declared invalid not because there was no express legislative authorization for its enactment, but rather because the ordinance conflicted with the general laws of the state.

Mix v. Board of County Commissioners of Nez Perce County, *supra.*, involving a conflict between a county ordinance prohibiting the sale of liquor within county and a Lewiston city ordinance allowing the sale of liquor within the county. The county prohibition was based upon a vote of the people of Nez Perce County under a state statute allowing local option in the prohibition of liquor. The court held that since the state statute allowing local option to the counties was a general law of the state, a county resolution adopted pursuant thereto was likewise a general law. Thus, the city ordinance was declared invalid upon the grounds that it conflicted with the general law of the state. In view of the state statute giving counties local option, this decision does not conflict with the general premise that cities and counties co-equally share their constitutional grant of police power.

The case of *State v. Frederic*, *supra.*, is often cited for the proposition that the Idaho Supreme Court does not recognize constitutional home rule. The case states:

A municipal corporation possesses only such powers as the state confers upon it, subject to addition or diminution at its discretion. These powers are conferred by the legislature under either special charter or general law. It is a well settled rule of construction of grants of power by the legislature to municipal corporations, that only such powers and rights can be exercised under them as are clearly comprehended in the words of the act or derived therefrom by necessary implication, regard being had to the object of the grant. Any ambiguity or doubt arising out of the terms used by legislature must be resolved in favor of the granting power. Regard must also be had to constitutional provisions intended to secure the liberty and to protect the rights of citizens to the end that no citizen shall be deprived of life, liberty or property without due process of law. *State v. Frederic*, *supra.*, at 715.

It is the opinion of the Attorney General that *State v. Frederic* need not be so narrowly read. In *State v. Frederic*, the defendant was indicted under a city ordinance for unlawful possession of liquor. Disposition of the case was complicated by the fact that the city ordinance in question had been adopted pursuant to statutory authority allowing cities to "license, regulate and prohibit the

selling or giving away" of intoxicating liquor, but after adoption of the city ordinance, Kootenai County and the City of Coeur d'Alene had adopted local-option prohibition thus, making the statutory authority inapplicable. In addition, after the adoption of the city ordinance, the state had passed a statute making Idaho a prohibition state. The court stated:

While, as before stated, the ordinance, except in the matter of punishment, being in substance a reenactment of the provisions of Senate Bill 50, might be contended to be in harmony with the state law and therefore not repugnant to sec. 2, art. 12 of the constitution, yet the question of conflict between the ordinance and the provisions of the state law in the matter of punishment is not a serious question involved in this case. *The real question for our determination is one of jurisdiction.* That is: Can a municipality confer upon police judges jurisdiction to summarily hear and determine acts denominated by the general law of the state indictable misdemeanors, by the enactment of an ordinance prohibiting such acts and prescribing a punishment therefor? *State v. Frederic*, supra., at 715-716.

It was concluded by the court that it was not the intention of the legislature to authorize municipalities to prohibit acts which, under the general laws of the state, were indictable misdemeanors. It was also noted that Article 1, Section 8 of the Idaho Constitution expressly prohibited the legislature from giving municipalities such jurisdiction over indictable misdemeanors.

To hold otherwise would be to concede that police magistrates have unlimited jurisdiction in all criminal matters, and that municipalities could by ordinance punish acts which, under the general laws, are felonies, such as murder, robbery, burglary, which would be in violation of the constitution and statutes of this state. *State v. Frederic*, supra., at 719.

Thus, the case was decided upon the grounds that the city ordinance, by improperly conferring jurisdiction on police judges, conflicted with general law, both constitutional and statutory, and not on the grounds that Idaho was not a constitutional home rule state with regard to local police powers..

Finally, in the recent case of *Citizens for Better Government v. County of Valley*, 95 Idaho 320, 508 P.2d 550 (1973), a county zoning ordinance was declared invalid for the reason that the county had not followed proper procedures for adoption of zoning ordinances as required by I.C. 50-1204. The Idaho Supreme Court conceded that zoning ordinances were clearly within the police power of a city or county, but held:

Idaho Const. art. 12, §2, authorizes a county to *make* police regulations not in conflict with the general laws. Although the appellant restricts the definition of a "general law" to laws defining the scope and nature of matters subject to regulation, the definition of "general law" under Idaho Const. art. 12, §2 is not so narrowly limited. The authority "to make" regulations comprehends not only the nature and scope of the subject matter of the regulation in relation to the general laws; but also the method and manner of its adoption. The authority "to make"

police regulations as used in the constitution includes the procedures for their adoption, which must not be in conflict with the general laws. A general law may confer direct authority to act as well as supply procedural requirements for the adoption of police regulations under Art. 12, §2. *Citizens for Better Government v. County of Valley*, supra., at 551.

Thus, the county zoning ordinance was invalidated only for the reason that the adoption procedures used conflicted with general state law.

The two cases which held the city ordinance or county resolution invalid because they were unreasonable and oppressive are *Continental Oil Co. vs. City of Twin Falls*, 49 Idaho 89, 286 P. 353 (1930) and *Barth v. DeCoursey*, 69 Idaho 474, 207 P.2d 1165 (1949). In *Continental Oil Co. vs. The City of Twin Falls*, supra., the court declared a city ordinance, which prohibited the construction of gasoline service stations near schools, invalid upon the grounds that it was an unreasonable restriction upon plaintiff's property rights. Notwithstanding, the court determined that, if the city ordinance had not been unreasonable, the police power to validly enact such an ordinance could be inferred from various statutes. The court did not really discuss Article 12, Section 2 of the Idaho Constitution, but did state:

A municipal corporation possesses only such legislative powers as are conferred upon it by the Constitution, charter or general statute. (See, *State v. Frederic*, 28 Ida. 709, 715, 155 Pac. 977). Such powers may be expressly laid down in the charter or legislative act, or they may be necessarily inferred from powers granted. *Continental Oil Co. v. The City of Twin Falls*, supra., at 104. (Emphasis added.)

Since the Idaho Constitution does provide a direct grant of local police power to cities and counties, this statement by the court does not conflict with the premise that Idaho does recognize constitutional home rule to the extent of local police powers.

A Canyon County resolution which prohibited the sale of beer at retail outside the boundaries of cities or villages within the county was declared invalid as being unreasonable, unjust and unduly oppressive in the case of *Barth v. DeCoursey*, supra. The court did not expressly discuss Article 12, Section 2 of the Idaho Constitution, but in a concurring opinion, Justice Taylor noted that Article 12, Section 2, Idaho Constitution, provides a direct grant of police power to counties and municipalites, which power is held co-equally by counties and municipalities.

The decisions of the six other cases which considered the validity of various city ordinances and county resolutions adopted under local police powers are not so easily categorized. Thus, each case must be considered individually.

In *State v. Robbins*, 59 Idaho 279, 81 P.2d 1079 (1938), the appellant had been convicted of selling beer in the City of Moscow without having received a county license to do so, even though he had obtained a city and state license. The gist of the issue before the court was whether a county resolution constituted a general law capable of pre-exempting a conflicting city ordinance. The

court ruled that Article 12, Section 2 of the Idaho Constitution granted co-equal authority to counties and cities to adopt police power regulations, and that a county ordinance could not operate as a "general law" capable of invalidating a contrary city ordinance. The Idaho Supreme Court further noted that the constitutional grant of police powers to counties and cities was not without limitation. That is, the constitutional grant of local police power was limited to regulations which did not conflict with general state laws.

In *State v. White*, 67 Idaho 311, 177 P.2d 472 (1947), the Idaho Supreme Court upheld the validity of a city ordinance which prohibited a person from allowing a vicious dog to run at-large within the city limits. The ordinance was held to be a valid exercise of police power, but the case was remanded upon the grounds that the defendant had not received a jury trial.

A similar result was reached in four related cases. In *State v. Romich*, 67 Idaho 229, 176 P.2d 204 (1946), the defendant had been convicted of selling intoxicating liquor in violation of a Boise city ordinance, even though, as in *State v. Musser*, supra., an Idaho constitutional amendment had ended prohibition. The court did not expressly discuss Article 12, Section 2 of the Idaho Constitution, but did rule that a city ordinance prohibiting the sale of intoxicating liquor was a valid exercise of police power, notwithstanding the constitutional amendment ending prohibition. Further, the court found no conflict with general law for the reason that the constitution and state statutes relating to the sale and control of liquor still gave authority to the cities to regulate these matters. The case was remanded upon the grounds that the defendant had not received a jury trial. In addition, the court partially invalidated the validity of the Boise city ordinance for the reason that a special legislative act to amend the Boise city charter provided for greater criminal penalties than those authorized by general law, particularly Section 49-69, I.C.A., later known as Section 49-1109, I.C.A., the forerunner of Section 50-302, *Idaho Code*. The court declared the greater penalty provision void, but nonetheless remanded the case for a new trial, presumably allowing only those penalties authorized by the forerunners of Section 50-302, *Idaho Code*. Accord, *State v. Brunello*, 67 Idaho 242, 176 P.2d 212 (1946); *State v. Leonard*, 67 Idaho 242, 176 P.2d 214 (1946); *State v. Finch*, 67 Idaho 277, 176 P.2d 214 (1946).

In sum, based upon the foregoing discussion of Idaho case law, it is the opinion of the Attorney General that the Idaho Court has never failed to recognize the direct constitutional grant of police power to cities and counties, pursuant to Article 12, Section 2 of the Idaho Constitution. To this extent, Article 12, Section 2 of the Idaho Constitution is self-executing. Of course, consistent with the language of Article 12, Section 2 of the Idaho Constitution and Idaho case law, the exercise of local police power is subject to two major limitations. First, the police power may be exercised only within the territorial limits of the city or county. Second, the exercise of police power through city ordinance or county resolution must not conflict with its charter or general laws. Such general laws include those promulgated by the United States Constitution, federal statutes, the Idaho Constitution and Idaho state statutes.

Cases Involving Other Matters Of Local Concern:

In matters other than police powers, the Idaho Supreme Court has been more restrictive. There are approximately six cases dealing with Article 12, Section 2 of the Idaho Constitution and related matters. In all of these cases, the Idaho Supreme Court held that enabling legislation by the state legislature was necessary in order to validate the city or county action.

Taking these cases in chronological order, in 1912, the Idaho Supreme Court decided the case of *Byrns v. City of Moscow*, 21 Idaho 398, 121 P. 1034 (1912). the suit sought a Writ of Prohibition prohibiting the City of Moscow from adopting an ordinance which would allow the issuance of municipal bonds to make street improvements. The court only briefly discussed Article 12, Section 2 of the Idaho Constitution, and ruled that Article 12, Section 1 and 2, gave the legislature authority to provide for the incorporation, organization and classification of Idaho cities, "and that such cities and towns shall have the power and authority given them by the laws enacted by the legislature." *Byrns v. City of Moscow*, supra., at 403. Since the questioned city action had not yet been officially adopted as an ordinance the court merely noted all of the state statutes dealing with local improvements by cities, and said that in order to make the proposed ordinance valid and enforceable, the city would have to comply with the applicable statutory provisions.

In like manner, the case of *Bradbury v. City of Idaho Falls*, 32 Idaho 28, 177 P. 388 (1918), an injunction was sought to enjoin the city of Idaho Falls from issuing and selling municipal bonds for the purpose of providing funds to pay for the cost of acquiring an adequate electric light and power plant. The city action was based upon an ordinance passed by the city council, and the court ruled that the power of municipalities to issue bonds must be derived from legislative enactment. Thus, as in *Byrns*, the Supreme Court took the position that the issuance of municipal bonds for local improvements was a matter of statewide concern and was subject to control by the legislature. The court cited 1 Dillon, *Municipal Corporations* §237 (5th ed.) for the proposition that:

(i)t is a general and undisputed proposition of law that a municipal corporation possesses and can exercise the following powers and no others: First, those granted in express words; second, those necessarily or fairly implied in or incident to the powers expressly granted; third, those essential to the accomplishment of the declared objects and purposes of the corporation, — and simply convenient, but indispensable. Any fair, reasonable, substantial doubt concerning the existence of power is resolved by the courts against the corporation and the power is denied. . . . *Bradbury v. City of Idaho Falls*, supra., at 32.

It is the contention of the Attorney General that this position does not negate the existence of constitutional home rule with regard to police powers for the reason that the position taken in *Bradbury* clearly states that a municipal corporation may exercise all powers expressly granted, and Article 12, Section 2 of the Idaho Constitution does constitute such an express grant of power.

Then, in 1923, the Idaho Supreme Court considered the case of *State v. Nelson*, 36 Idaho 713, 213 P. 358 (1923). The defendant had been prosecuted for violation of a city ordinance imposing a license tax upon certain businesses. The court held that the clear purpose of the ordinance was to raise revenue,

and was not for the purpose of regulation. As such, the city ordinance violated Article 7, Section 2 of the Idaho Constitution, which provides that only the legislature may impose license taxes on businesses. This case is not dispositive on the issue of constitutional home rule since the city ordinance in question clearly conflicted with a provision of the Idaho State Constitution.

In *Reynard v. City of Caldwell*, 53 Idaho 62, 21 P.2d 527 (1933), the City of Caldwell had levied special assessments against various properties, including city property, for local improvements. The plaintiff, a bond holder, sought a Writ of Mandamus to compel the city to pay its share of the special assessments. The Idaho Supreme Court only briefly discussed Article 12, Sections 1 and 2 of the Idaho Constitution and, similarly to their holding in *Byrns v. City of Moscow*, supra., held that Article 12, Sections 1 and 2 clearly gave the legislature power to provide for the incorporation, organization and classification of cities. But, the court added a qualification not present in their decision in *Byrns*. That is, the court further stated: “. . . such cities and towns shall have the power and authority given them by the laws enacted by the legislature, *subject only to constitutional limitation*. . .” *Reynard v. City of Caldwell*, supra., at 66-67. The court invalidated the city action upon the grounds that the city had attempted to incur an indebtedness exceeding the yearly income and revenue of the city without a two-thirds voter approval, contrary to the requirements of Article 8, Section 3 of the Idaho Constitution. Again, *Reynard* does not represent a limitation upon the constitutional grant of police power to cities; rather, *Reynard* does recognize that the power of the legislature to govern municipalities is subject to constitutional limitations, as may be found in Article 12, Section 2 of the Idaho Constitution.

Finally, in the case of *O'Bryant v. City of Idaho Falls*, 78 Idaho 313, 303 P.2d 680 (1956) and *Oregon Short Line Railroad Co. v. Village of Chubbuck*, 83 Idaho 62, 357 P.2d 1101 (1960), the Idaho Supreme Court did not discuss Article 12, Section 2 of the Idaho Constitution, but both cases did involve the authority of a city to act in matters other than police power matters. In *O'Bryant*, a declaratory judgment was sought. The lawsuit tested the validity of a city ordinance which granted a franchise to a cooperative gas association for the construction and operation of a gas distribution system within the city. The court again quoted 1 Dillon, *Municipal Corporations*, (5th ed.) §237 for the proposition that cities could exercise only such powers as were expressly granted, necessarily implied from powers expressly granted, or those essential to the declared objects and purposes of the corporation. The court held that construction, operation and maintenance of a gas distribution system did not fall within the police power of the city, and thus required an express legislative grant of power to validate the city ordinance. No express grant of power was found, and the court declared the city ordinance invalid.

Of more major importance, it should be noted that *O'Bryant* is the only Idaho case in which the Idaho Supreme Court directly addressed itself to a consideration of “home rule” as such, even though the court did not discuss Article 12, Section 2 of the Idaho Constitution. The court ruled:

(w)e are not concerned with the merits or demerits of so-called “home rule” by municipalities whereby the law would empower a municipal-

ity to construct, operate and maintain its own system of distribution of gas as compared with a system for distribution of gas constructed, maintained and operated by a public utility holding a certificate of convenience and necessity. *Such question is strictly a matter of policy for the people or the legislature and is not for consideration by the court.* This court is only concerned with statutes as it finds them and the application of same to the facts before the court. *O'Bryant v. City of Idaho Falls*, supra., at 687. (Emphasis added.)

From this, perhaps it can be said that the Idaho Supreme Court will not declare Idaho a constitutional home rule state as to any matters without clarification of existing law by the legislature, or without clarification by the people through adoption of a constitutional amendment.

In the case of *Oregon Short Line Railroad Co. v. Village of Chubbuck*, supra., the court again did not discuss Article 12, Section 2 of the Idaho Constitution. The Village of Chubbuck had enacted a city ordinance attempting to annex railroad land. The court merely held that annexation of additional territory could be expressly granted only by the legislature, and such annexation was subject to the conditions, restrictions and limitations imposed by the legislature. Consequently, the city ordinance was invalidated.

In conclusion, and as illustrated by the above six cases, the Idaho Supreme Court will most probably require enabling legislation to validate all city and county actions which fall outside the realm of local police powers. Thus, beyond the realm of local police powers, Idaho cities and counties do not enjoy constitutional home rule.

2. In response to the second question concerning the powers conferred upon Idaho cities by Sections 50-301 and 50-302, *Idaho Code*, these statutes provide:

Cities governed by this act (Municipal Corporations Act) shall be bodies corporate and politic; may sue and be sued; contract and be contracted with; accept grants-in-aid and gifts of property, both real and personal, in the name of the cities; acquire, hold, lease, and convey property, real and personal; have a common seal, which they may change and alter at pleasure; may erect buildings or structures of any kind, needful for the uses or purposes of the city; *and exercise such other powers as may be conferred by law.* I.C. §50-301. (Emphasis added.)

Cities shall make all such ordinances, by-laws, rules, regulations and resolutions *not inconsistent with the laws of the state of Idaho as may be expedient, in addition to the special powers in this act granted, to maintain the peace, good government and welfare of the corporation and its trade, commerce and industry.* Cities may enforce all ordinances by inflicting fines for the breach thereof, not exceeding the amount permissible in probate, justice and course of similar jurisdiction for any one (1) offense, or penalties not more than thirty (30) days imprisonment in the city jail, or both such fine and imprisonment, recoverable with costs, and in default of payment, to provide for confinement in prison or jail; . . . I.C. §50-302. (Emphasis added.)

Both of these sections were amended in 1967, but the operative provisions of both statutes were previously included as state law under different section numbers.

It is the opinion of the Attorney General that neither of these statutory provisions grant direct power to municipalities, but rather act as limitations upon the powers of municipalities. I.C. §50-301 clearly states that cities may exercise only "such other powers as may be conferred by law." Thus, by its own language, I.C. §50-301 contains an inherent limitation upon a city's power. In contrast, the effect of I.C. §50-302 is not so clearly limited.

There are approximately eight Idaho Supreme Court cases dealing with I.C. §50-302. None of these cases deals with I.C. §50-302 in depth, and the most succinct statement of the powers granted by I.C. §50-302 is found in the case of *Rowe v. City of Pocatello*, supra. In examining the powers granted by I.C. §50-1109, the forerunner of I.C. §50-302, the court stated:

These are broad powers. But in this state acts of the legislature governing municipal police regulations are to be looked to as limitations upon, rather than as grants of power to the municipalities. *Rowe v. City of Pocatello*, supra., at 698.

In all other Idaho cases referring to I.C. §50-302, or its forerunners, the Idaho Supreme Court has referred to I.C. §50-302 only to supplement Article 12, Section 2 of the Idaho Constitution, and in consequence, to supplement the proposition that municipalities have police power in affairs of local concern. See, *State v. Frederic*, supra. (ordinance in question imposed only the maximum penalties allowable to cities under I.C. §50-302 (then known as S.L. 1915, page 232, Section 2238K)); *Continental Oil Co. v. The City of Twin Falls*, supra. (I.C. §50-302 granted a city authority to enact a police power ordinance prohibiting the establishment of gasoline service stations near schools); *State v. Romich*, supra. (ordinance in question allowed for greater punishment than that allowed by Section 49-69, I.C.A., later known as Section 49-1109, I.C.A., the forerunner of I.C. §50-302); *State v. White*, supra. (Section 49-1109, I.C.A., the forerunner of I.C. §50-302, gave a city power to prohibit the allowing of a vicious dog to run at-large within the city limits); *State v. Paynter*, supra. (Section 49-1109, I.C., the forerunner of I.C. §50-302, in conjunction with Article 12, Section 2 of the Idaho Constitution, gave a city power to adopt an ordinance prohibiting the driving of an automobile while under the influence of intoxicating liquor); *Condie v. Mansor*, 96 Idaho 345, 528 P.2d 907 (1974) (I.C. §50-302 gave a city power to license a business and regulate it for the general welfare). It is interesting to note that in both *Continental Oil Co. v. The City of Twin Falls*, supra., and *State v. White*, supra., the Idaho Supreme Court upheld the validity of police power regulations based upon I.C. §50-302, or its forerunners, without even considering Article 12, Section 2 of the Idaho Constitution.

The foregoing case law referring to I.C. §50-302, or its forerunners, offers little evidence regarding the legislative purpose and intent of, or powers conferred by, I.C. §50-302. All of these cases consider only the validity of local police power enactments; that is, I.C. §50-302 has seemingly never been applied to city enactments extending beyond the realm of police powers.

Notwithstanding the absence of explicit case law, it is the opinion of the Attorney General that, for several reasons, neither I.C. §50-301 nor I.C. §50-302 grant cities any more power than is already conferred upon them by Article 12, Section 2 of the Idaho Constitution and by state statutes. First, even though not expressly interpreting I.C. §50-301 or I.C. §50-302, all Idaho cases which have considered the validity of local regulations relating to matters beyond the realm of police powers have held that an express legislative grant of power is necessary. See, "Cases Involving Other Matters of Local Concern," p. 21. Second, in *Rowe v. City of Pocatello*, supra., the Idaho Supreme Court did rule that I.C. §50-302 was not a grant of power to cities, but rather was a limitation upon the power of cities. Third, on its face, I.C. §50-302 contains a limitation of power; that is, city ordinances, by-laws, rules, regulations and resolutions may not be inconsistent with the laws of the State of Idaho. Fourth, I.C. §50-302 refers only to a municipality's interest in the "*peace, good government and welfare* of the corporation and its trade, commerce and industry." (Emphasis added.) The interests encompassed are really no more than police powers, and such police powers are already directly granted to the cities by Article 12, Section 2 of the Idaho Constitution.

In conclusion, it is the opinion of the Attorney General that neither I.C. §50-301 nor I.C. §50-302 grant to cities any more power than is already conferred upon them by article 12, Section 2 of the Idaho Constitution and by state statutes. Such statutory sections can in no way be considered a grant of legislative home rule regarding matters beyond the realm of police powers.

3. In response to the question whether Article 7, Section 6 of the Idaho Constitution, when coupled with I.C. §50-302, constitutes a broad grant of legislative power to Idaho cities to assess and collect taxes on a local-option basis, Article 7, Section 6 of the Idaho Constitution provides:

The legislature shall not impose taxes for the purpose of any county, city, town, or other municipal corporation, *but may by law invest in the corporate authorities thereof, respectively, the power to assess and collect taxes for all purposes of such corporation.* (Emphasis added.)

It is the opinion of the Attorney General that Article 7, Section 6 of the Idaho Constitution, when coupled with I.C. §50-302, does not constitute a broad grant of legislative power to Idaho cities to assess and collect taxes on a local-option basis for two major reasons. First, on its face, Article 7, Section 6 of the Idaho Constitution requires enabling legislation to invest powers of taxation in municipal corporations. Such constitutional limitation cannot be supplanted by a general statutory enactment, such as I.C. §50-302. Second, based upon the analysis of I.C. §50-302 in response to Question 2, I.C. §50-302 does not constitute a general grant of power to cities, and thus, I.C. §50-302 cannot be construed to be a law investing taxation powers in municipal corporations.

AUTHORITIES CONSIDERED:

1. Cal. Const. art. 11, §5(a) (1970), amending Cal. Const. art. 11, §8 (1879).
2. Cal. Const. art. 11, §7 (1970), amending Cal. Const. art. 11, §11 (1879).

3. Idaho Const. art. 7, §6.
4. Idaho Const. art. 12, §1.
5. Idaho Const. art. 12, §2.
6. Wash. Const. art. 11, §10.
7. Wash. Const. art. 11, §11.
8. Idaho Code §50-301 (1967).
9. Idaho Code §50-302 (1967), formerly R.C., §2238, subd. 11; reen. 1911, ch. 81, §1, subd. 11, p. 276; enacted as R.C., §2238k by 1915, ch. 97, §2, p. 232; compiled and reen. C.L. 152:20; C.S., §3948; I.C.A., §49-1109; I.C.A., 50-1109.
10. *County of Ada v. Walker*, 96 Idaho 630, 533 P.2d 1199 (1975).
11. *Condie v. Mansor*, 96 Idaho 345, 528 P.2d 907 (1974).
12. *Citizens for Better Government v. County of Valley*, 95 Idaho 320, 508 P.2d 550 (1973).
13. *State v. Clark*, 88 Idaho 365, 399 P.2d 955 (1966).
14. *Oregon Short Line Railroad Co. v. Village of Chubbuck*, 83 Idaho 62, 357 P.2d 1101 (1960).
15. *O'Bryant v. City of Idaho Falls*, 78 Idaho 313, 303 P.2d 680 (1956).
16. *Taggart v. Latah County*, 78 Idaho 100, 298 P.2d 979 (1956).
17. *Schmidt v. Village of Kimberly*, 74 Idaho 62, 256 P.2d 523 (1953).
18. *Garland v. Talbott*, 74 Idaho 125, 237 P.2d 1067 (1951).
19. *State v. Poynter*, 70 Idaho 438, 220 P.2d 386 (1950).
20. *Rowe v. City of Pocatello*, 70 Idaho 344, 218 P.2d 695 (1950).
21. *Clyde Hess Distributing Co. v. Bonneville County*, 69 Idaho 506, 210 P.2d 798 (1949).
22. *Barth v. DeCoursey*, 69 Idaho 474, 207 P.2d 1165 (1949).
23. *State v. White*, 67 Idaho 311, 177 P.2d 472 (1947).
24. *State v. Brunello*, 67 Idaho 242, 176 P.2d 212 (1946).
25. *State v. Leonard*, 67 Idaho 242, 176 P.2d 214 (1946).
26. *State v. Finch*, 67 Idaho 277, 176 P.2d 214 (1946).

27. *State v. Romich*, 67 Idaho 229, 176 P.2d 204 (1946).
28. *State v. Musser*, 67 Idaho 214, 176 P.2d 199 (1946).
29. *Clark v. Alloway*, 67 Idaho 32, 170 P.2d 425 (1946).
30. *State v. Hart*, 66 Idaho 217, 157 P.2d 72 (1945).
31. *Foster's, Inc. v. Boise City*, 63 Idaho 201, 118 P.2d 721 (1941).
32. *State v. Robbins*, 59 Idaho 279, 81 P.2d 1078 (1938).
33. *Reynard v. City of Caldwell*, 53 Idaho 62, 21 P.2d 527 (1933).
34. *Continental Oil Co. v. The City of Twin Falls*, 49 Idaho 89, 286 P. 353 (1930).
35. *Sate v. Nelson*, 36 Idaho 713, 213 P. 358 (1923).
36. *State v. Frederic*, 28 Idaho 709, 155 P. 977 (1916).
37. *Bradbury v. City of Idaho Falls*, 32 Idaho 28, 177 P. 388 (1918).
38. *Baillie v. The City of Wallace*, 24 Idaho 706, 135 P. 850 (1913).
39. *Byrns v. City of Moscow*, 21 Idaho 398, 121 P. 1034 (1912).
40. *Mix v. The Board of County Commissioners of Nez Perce County*, 18 Idaho 695, 112 P. 215 (1910).
41. *Gale v. City of Moscow*, 15 Idaho 332, 97 P. 828 (1908).
42. *State v. Quong*, 8 Idaho 191, 194. 67 P. 491 (1902).
43. *In re Francis*, 7 Idaho 98, 60 P. 561 (1900).
44. *In re Ridenbaugh*, 5 Idaho 371, 49 P. 12 (1897).
45. *State v. Preston*, 4 Idaho 215, 38 P. 694 (1894).
46. 1 Antieau, Municipal Corporation Law at 95, n. 7, and 100 (1964).
47. 1 Antieau, Municipal Corporation Law §§3.00, 3.01, 3.06 (1975).
48. 1 Dillon, Municipal Corporations §237 (5th ed. 1911).
49. 1 McQuillin, The Law of Municipal Corporations §§3.21b, 3.29 (3rd ed. Dray 1971).
50. Rhyne, Municipal Law §§4-2, 4-3 (1957).
51. 8 Idaho L. Rev. 355 (1972).
52. 38 Wash. L. Rev. 743 (1963).

53. 56 Am.Jur.2d Municipal Corporations §§98, 125, 128 (1971).

54. 62 C.J.S. Municipal Corporations §§107, 108b, 187 (1949).

DATED This 19th day of January, 1976.

THE ATTORNEY GENERAL OF IDAHO

WAYNE L. KIDWELL

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APPENDIX A

CHRONOLOGICAL SUMMARY OF IDAHO CASE LAW

As early as 1894, the Idaho Supreme Court began interpreting Article 12, Section 2 of the Idaho Constitution in the case of *State v. Preston*, 4 Idaho 215, 38 P. 694 (1894). The defendant in *Preston* was convicted of vagrancy under a city ordinance. The defendant challenged the validity of the city ordinance on the grounds that vagrancy was also punishable under state statute. The Idaho Supreme Court did not discuss Article 12, Section 2 of the Idaho Constitution, but did rule that the city had authority to adopt an ordinance and punish vagrants notwithstanding a state statute on the same subject.

In the case of *In re Ridenbaugh*, 5 Idaho 371, 49 P. 12 (1897), the court considered a conflict between a Boise city ordinance which authorized gambling and a state law which prohibited gambling. The court recognized Boise as a special charter city established prior to the adoption of the Idaho Constitution, but nonetheless ruled:

Thus, it is shown by the original charter of Boise City, also by section 2 of article 12 of the constitution, and the act amending the charter of Boise City, that it was not the intention of the legislature or the framers of the constitution to empower the council of incorporated cities and towns to pass ordinances in conflict with the general laws of the state . . . It is not the intention to permit or authorize the councils of incorporated cities to legalize, by ordinance, acts prohibited as criminal by the general criminal laws of the state, or to enforce ordinances in conflict with the general law. In case of a conflict, the ordinance must give way. *In re Ridenbaugh*, *supra.*, at 375.

In the case of *In re Francis*, 7 Idaho 98, 60 P. 561 (1900), the Idaho Supreme Court considered a petition for a writ of prohibition which sought to challenge the validity of a Grangeville ordinance imposing certain license taxes upon various callings and businesses. The court briefly referred to Article 12, Section 2 of the Idaho Constitution, and held that this provision of the Constitution authorized the enactment of the challenged ordinance and further, that there

was nothing in the charter of Grangeville or in the general law which prohibited the passing of the ordinance.

In 1902, the Idaho Supreme Court considered a situation in which there was both a state law and city ordinance making battery a crime. The court ruled:

The ordinance is not in conflict, but in harmony, with the general law. The authority of the city to enact police regulations, and to enforce them, where they do not contravene any general law of the state, is, under the provisions of our constitution, beyond question. The municipal government may not take from the citizens any constitutional right — has no power to do so — yet by the express provisions of section 2, article 12, the power to make and enforce sanitary and police regulations is expressly given to cities and towns. The object of the provision is apparent, its necessity urgent. *State v. Quong*, 8 Idaho 191, at 194, 67 P. 491 (1902).

The city ordinance was held to be a valid exercise of local police power.

The Idaho Supreme Court considered the issue of an apparent conflict between a state statute generally allowing the sale of liquor and a city ordinance prohibiting the sale of liquor within the city limits in the case of *Gale v. City of Moscow*, 15 Idaho 332, 97 P. 828 (1908). The court considered both Article 12, Section 2 of the Idaho Constitution, and a state statute, S.L. 1907, page 518, which allowed cities to “license, regulate and prohibit selling or giving away of any intoxicating, malt, vinous, mixed or fermented liquor, . . .” The court further stated that the constitutional provision gave the City of Moscow the authority to make and enforce all necessary “police regulations” relating to the civil government within its jurisdiction.

In the case of *Mix v. The Board of County Commissioners of Nez Perce County*, 18 Idaho 695, 112 P. 215 (1910), the suit was based upon a petition for a Writ of Mandamus seeking to compel the county commissioners to issue a liquor license to the petitioner. The County of Nez Perce voted to prohibit the sale of liquor within the county which prohibition conflicted with a Lewiston City ordinance allowing the sale of liquor. Similarly to Boise, Lewiston is a special charter city, chartered prior to the adoption of the Idaho Constitution. The court held:

Special charter cities cannot by ordinance make acts lawful that are made criminal by the general law of the state. Sec. 2, art. 12, of the state constitution prohibits special charter cities from making or enforcing any local, police, sanitary or other regulation that is in conflict with its charter or the general law of the state. At 705.

The choice by the voters of Nez Perce County to prohibit the sale of liquor within the county was based upon a state statute allowing local option in the prohibition of liquor, and the court ruled that the state statute upon which the prohibition was based was a general law of the state, and thus, a county

resolution adopted pursuant thereto also constituted a general law of the state. The city ordinance was consequently invalidated.

A Writ of Prohibition, prohibiting the City of Moscow from adopting a city ordinance authorizing the issuance of municipal bonds to make street improvements, was sought in the case of *Byrns v. City of Moscow*, 21 Idaho 398, 121 P. 1034 (1912). The court only briefly discussed the applicability of Article 12, Section 2, Idaho Constitution, and stated:

Referring first to the constitutional provisions with reference to the incorporation, organization and classifications of cities and towns, we think that the constitution, art. 11 (sic), sec. 1 and 2, clearly confers upon the legislature to provide for the incorporation, organization and classification of cities, and that such cities and towns shall have the power and authority given them by the laws enacted by the legislature. In the present case, there was an applicable state law allowing local improvements by cities and villages. *Byrns v. City of Moscow*, supra., at 403.

The court held that Moscow had the statutory authority to adopt such an ordinance, so long as the statutory procedures were followed.

In *Baillie v. The City of Wallace*, 24 Idaho 706, 135 P. 850 (1913), the plaintiff sought to recover for personal injuries alleged to have been sustained by reason of an obstruction over a sidewalk in the City of Wallace. The court merely referred to the language of Article 12, Section 2, Idaho Constitution and applicable state statutes for the proposition that a city is given absolute power and control over streets and sidewalks.

In the case of *Bradbury v. City of Idaho Falls*, 32 Idaho 28, 177 P. 388 (1918), the plaintiff sought an injunction to enjoin the city of Idaho Falls from issuing and selling municipal bonds for the purpose of providing funds to pay for the cost of acquiring an adequate electric light and power plant. The action by the city was based upon an ordinance passed by the city council. The court ruled that the power of municipalities to issue bonds must be derived from legislative enactment. In addition, the court held that any such legislative enactment must be strictly construed against the grantee. The court cited 1 Dillon, *Municipal Corporations* §237 (5th ed.) for the proposition that:

(i)t is a general and undisputed proposition of law that a municipal corporation possesses and can exercise the following powers, and no others: First, those granted in express words; second, those necessarily or fairly implied in or incident to the powers expressly granted; third, those essential to the accomplishment of the declared objects and purposes of the corporation, — not simply convenient, but indispensable. Any fair, reasonable, substantial doubt concerning the existence of power is resolved by the courts against the corporation, and the power is denied . . . *Bradbury v. City of Idaho Falls*, supra., at 32.

The court noted that there was a state statute allowing municipalities to issue

bonds for the purpose of purchasing light and power plants, but using a strict construction of the statute, the court held that the statute did not give a city authority to issue bonds to improve existing light and power plants.

In *State v. Frederick*, 28 Idaho 709, 155 P. 977 (1916), the defendant was charged with violating a city ordinance prohibiting the unlawful possession of intoxicating liquor. The ordinance in question was in substance identical to a state statute except that the ordinance imposed only the maximum penalty allowable to cities under *Idaho Code* 50-302, then known as S.L. 1915, page 232, Section 2238K. After adoption of the city ordinance, the state had passed a statute making Idaho a prohibition state, and making possession of liquor an indictable misdemeanor. The court stated:

A municipal corporation possesses only such powers as the state confers upon it, subject to addition or diminution at its discretion. These powers are conferred by the legislature under either special charter or general law. It is a well settled rule of construction of grants of power by the legislature to municipal corporations, that only such powers and rights can be exercised under them as are clearly comprehended in the words of the act or derived therefrom by necessary implication, regard being had to the object of the grant. Any ambiguity or doubt arising out of the terms used by the legislature must be resolved in favor of the granting power. Regard must also be had to constitutional provisions intended to secure the liberty and to protect the rights of citizens to the end that no citizen shall be deprived of life, liberty or property without due process of law. *State v. Frederic*, supra., at 715.

Since the state statute had made possession of liquor an indictable misdemeanor, the actual issue before the court was one of jurisdiction.

That is: Can a municipality confer upon police judges jurisdiction to summarily hear and determine acts denominated by the general law of the state indictable misdemeanors, by the enactment of an ordinance prohibiting such acts and prescribing a punishment therefor? *State v. Frederic*, supra., at 715-716.

The court concluded that it was not the intention of the legislature to authorize municipalities to prohibit acts which, under the general laws of the state, were indictable misdemeanors. In fact, the court noted that Article 1, Section 8 of the Idaho Constitution expressly prohibited the legislature from giving municipalities such jurisdiction over indictable misdemeanors. Thus, the case was decided upon the grounds that the city ordinance, by improperly conferring jurisdiction on police judges, conflicted with the general laws of the state, both constitutional and statutory.

The case of *State v. Nelson*, 36 Idaho 713, 213 P. 358 (1923) involved the prosecution of the defendant for violation of a city ordinance imposing a license tax upon certain businesses. The clear purpose of the ordinance was for the purpose of raising revenue and not for the purpose of regulation. The court referred to Article 7, Section 2 of the Idaho Constitution, which provides that only the legislature may impose a license tax. The court held the ordinance an illegal attempt to raise revenue and stated:

One of the distinctions between a lawful tax for regulatory purposes and one solely for revenue is: if it be imposed for regulation, under the authority of sec. 2, art. 12, of the constitution, the license fee demanded must bear some reasonable relation to the cost of such regulation; . . . At 722.

The court considered a city ordinance prohibiting gasoline service stations near schools in *Continental Oil Co. v. The City of Twin Falls*, 49 Idaho 89, 286 P. 353 (1930). While examining the validity of the ordinance, the court stated:

A municipal corporation possesses only such legislative powers as are conferred upon it by the Constitution, charter or general statute. (See, *State v. Frederic*, 28 Ida. 709 (715) 155 Pac. 977.) Such powers may be expressly laid down in the charter or legislative act, or they may be necessarily inferred from powers granted. At 104.

The court then quoted Article 12, Section 2, Idaho Constitution; and further stated that there was no express authority for the enactment of such an ordinance, but the general police power to enact such ordinances could be inferred from the various statutes governing police powers, including I.C. 50-302. Notwithstanding, the court threw out the ordinance upon the grounds that it was an unreasonable restriction upon the plaintiff's property rights.

In *Reynard v. City of Caldwell*, 53 Idaho 62, 21 P.2d 527 (1933), the City of Caldwell had levied special assessments against various properties, including city property, for local improvements. The plaintiff, a bond holder, sought a writ of Mandamus to compel the city to pay its share of the special assessments. The Idaho Supreme Court only briefly discussed Article 12, Sections 1 and 2 of the Idaho Constitution, and stated:

Referring to the constitutional provisions with reference to the incorporation, organization and the classification of cities and towns, we think that the Constitution, article 11 (sic), sections 1 and 2, clearly confer the power upon the legislature to provide for the incorporation, organization, and classification of cities, and that such cities and towns shall have the power and authority given them by the laws enacted by the legislature, subject only to constitutional limitation . . . *Reynard v. City of Caldwell*, supra., at 66-67.

The court then referred to Article 8, Section 3 of the Idaho Constitution which provides that no county or city may incur any indebtedness exceeding the yearly income and revenue of the county or city without a two-thirds voter approval. In addition, the legislature had enacted laws concerning the method whereby cities and counties could obtain special assessments for local improvements. The court refused to issue the Writ of Mandamus for the reason that the plaintiff had not shown that the city had lawfully made assessments against its own property.

In *State v. Robbins*, 59 Idaho 279, 81 P.2d 1078 (1938), the appellant had been convicted of selling beer in the City of Moscow without having received a county license to do so, even though he had obtained a city and state license. The gist of the case was whether a county conviction could lie where both the

state and city had licensed the defendant. The court cited Article 12, Section 2 of the Idaho Constitution and explained that this section was an exact copy of Article 11, Section 11 of the California Constitution. The court then cited a California case, *Ex parte Knight*, 55 Cal.App. 511, 203 Pac. 777, 778, which stated:

The only limitation upon the exercise of the power is that the regulations to be made under it shall not be "in conflict with general laws" as this limitation applies equally to regulations of the county and the city it cannot be held by the terms of the limitations that the regulation of either of these bodies is a general law for the other, and it is held that an ordinance passed by a county is not a "general law" within the meaning of this section of the Constitution. Citing, *Ex parte Roach*, 104 Cal. 272, 37 Pac. 1044; *Ex parte Campbell*, 74 Cal. 20, 25, 15 Pac. 318, 5 Am.St. 418.

The Idaho Supreme Court further stated:

However, the right to an exercise of police power of the state in local police, sanitary and other regulations, has not been granted to counties and municipalities by the constitution without limitation. That right is limited to such regulations as are not in conflict with general laws. *State v. Robbins*, supra., at 286.

The court invalidated the county action on the grounds that cities and counties co-equally share local police power, and that a county resolution could not operate as a "general law" capable of invalidating a contrary city ordinance.

In the case of *Foster's, Inc. v. Boise City*, 63 Idaho 201, 118 P.2d 721 (1941), the Idaho Supreme Court considered plaintiff's challenge to the validity of a parking meter ordinance. One of plaintiff's contentions was that the parking meter ordinance violated Article 12, Section 2, Idaho Constitution. Even though the court did not specifically refer to this constitutional provision, the court stated:

The police power is a necessary concomitant to complete sovereignty and inheres primarily in the state. The exercise of that power, within the corporate limits of cities and villages, has been delegated to the respective municipalities. The full exercise of that power is one of the governmental duties of the respective municipalities as arms of the state, in preserving the health, safety and general welfare of the people. *Foster's, Inc. v. Boise City*, supra., at 211.

The city ordinance was upheld as a valid exercise of police power.

The Idaho Supreme Court upheld a validity of a city ordinance prohibiting the carrying of a concealed weapon in the case of *State v. Hart*, 66 Idaho 217, 157 P.2d 72 (1945). The court briefly referred to Article 12, Section 2, Idaho Constitution, and merely stated that such an ordinance was within the police power of the municipality.

The case of *Clark v. Alloway*, 67 Idaho 32, 170 P.2d 425 (1946) involved a malicious prosecution and false imprisonment action. The plaintiff had been

arrested pursuant to a city vagrancy ordinance, and plaintiff appealed from judgment for the defendant. One of plaintiff's contentions was that the city ordinance was invalid since there was a state law prohibiting a similar crime. The court did not discuss Article 12, Section 2, Idaho Constitution, but did rule that a city ordinance was not unconstitutional merely because it was broader in scope than the general statute and provided for different penalties.

In *State v. Musser*, 67 Idaho 214, 176 P.2d 199 (1946), the defendant was convicted of drinking intoxicating liquor in a public place in violation of a Boise city ordinance, even though there was a constitutional amendment ending prohibition. The court held that "Boise city possesses full police power in affairs of local concern," *State v. Musser*, supra., at 218, and further held that since Boise was a special charter city, its charter and ordinances could not be amended by general law. Referring to Article 12, Section 2, Idaho Constitution, the court stated:

Under the above constitutional provision counties, cities and towns have full power in affairs of local government notwithstanding general laws of the state defining and punishing the same offense. *State v. Musser*, supra., at 219. Citing, *State v. Quong*, supra.; *Continental Oil Co. v. City of Twin Falls*, supra.; *State v. Robbins*, supra.; *State v. Hart*, supra; and *Clark v. Alloway*, supra.

Further, the court compared Article 12, Section 2, Idaho Constitution, to an almost identical California constitutional provision. Quoting 14 Cal.Jur. sec. 8, p. 726, the Idaho Supreme Court stated:

This power, vested by direct grant, is as broad as that vested in the legislature itself, subject to two exceptions: it must be local to the county or municipality and must not conflict with general laws. *State v. Musser*, supra., at 219.

Finally, it was noted that there was no conflict between the state constitution and the city ordinance, and it was held:

The ordinance is not repugnant to, nor in conflict with, the statutes, neither does it violate any constitutional principle, but merely a further or additional regulation enacted by the city under its police power, specifically granted to counties, cities and incorporated towns by section 2, article 12 of the Constitution. *State v. Musser*, supra., at 219.

In *State v. Romich*, 67 Idaho 229, 176 P.2d 204 (1946), the defendant had been convicted of selling intoxicating liquor in violation of a Boise city ordinance, even though as in *State v. Musser*, supra., an Idaho constitutional amendment ended prohibition. The court did not discuss Article 12, Section 2 of the Idaho Constitution expressly, but did cite *State v. Frederic*, supra., for the proposition that a municipal corporation possesses only such powers as the state confers upon it. Nonetheless, it was ruled that a city ordinance prohibiting the sale of intoxicating liquor was a valid exercise of police power, notwithstanding the constitutional amendment ending prohibition. Further, the court found no conflict with general law for the reason that the constitution and state statutes

relating to the sale and control of liquor still gave authority to the cities to regulate these matters. The case was remanded upon the grounds that the defendant did not receive a jury trial. In addition, the court partially invalidated the validity of the Boise city ordinance for the reason that a special legislative act to amend the Boise city charter provided for greater criminal penalties than those authorized by general law particularly Section 49-69, I.C.A., later known as Section 49-1109, I.C.A., the forerunner of Section 50-302, *Idaho Code*. The court declared the greater penalty provision void, but nonetheless remanded the case for a new trial, presumably allowing only those penalties authorized by the forerunners of Section 50-302, I.C. Accord, *State v. Brunello*, 67 Idaho 242, 176 P.2d 212 (1946); *State v. Leonard*, 67 Idaho 242, 176 P.2d 214 (1946); *State v. Finch*, 67 Idaho 277, 176 P.2d 214 (1946). A dissenting opinion in *State v. Romich*, supra., noted that a special charter city, such as Lewiston and Boise, was not bound by general law.

In 1947, the Idaho Supreme Court decided the case of *State v. White*, 67 Idaho 311, 177 P.2d 472 (1947). The defendants appealed from a conviction of allowing a vicious dog to run at-large within the city limits. The court did not discuss Article 12, Section 2, Idaho Constitution, but did look to Section 49-1109, I.C.A., the forerunner of Section 50-302, *Idaho Code*. In reaching its decision that the city ordinance was valid, the court cited *State v. Musser*, supra., and stated: "Boise city possesses full police power in affairs of local concern." *State v. White*, supra., at 473. The case was remanded upon the grounds that the defendant had not received a jury trial.

A Writ of Mandamus was sought to compel the Canyon County Board of Commissioners to issue a county license to sell beer in the case of *Barth v. DeCoursey*, 69 Idaho 474, 207 P.2d 1165 (1949). The suit challenged a county resolution which prohibited the sale of beer at retail outside the boundaries of a city or village. The court did not discuss Article 12, Section 2, Idaho Constitution, but merely stated:

It is the general rule that where authority to license and regulate a business is granted by the legislature to a municipality, the regulation adopted must not be unreasonable, unjust or unduly oppressive. At 1167.

It was ruled that the Canyon County resolution was unreasonable, prohibitory and contrary to state law. In a concurring opinion, Justice Taylor noted that Article 12, Section 2, Idaho Constitution provided a direct grant of police power to counties and municipalities, which power was held co-equally by counties and municipalities.

In *Clyde Hess Distributing Co. v. Bonneville County*, 69 Idaho 506, 210 P.2d 798 (1949), the plaintiff challenged a county regulation prohibiting the sale of beer between more restricted hours than those allowed by state law. The court noted that both the applicable state law and county ordinance were prohibitive, the only difference being that the county ordinance was more prohibitive. Further, it was held that the legislature had not intended to occupy the whole field of liquor regulation. Citing, Am.Jur. 37, p. 790, the court said:

Thus, where both an ordinance and a statute are prohibitory and the only difference between them is that the ordinance goes further in its prohibition, but not counter to the prohibition under the statute, and the municipality does not attempt to authorize by the ordinance what the legislature has forbidden or forbid what the legislature has expressly licensed, authorized, or required, there is nothing contradictory between the provisions of the statute and the ordinance because of which they cannot co-exist and be effective. *Clyde Hess Distributing Co. v. Bonneville County*, supra., at 800. Citing, *Clark v. Alloway*, supra., *State v. Musser*, supra.; and *State v. Brunello*, supra.

The court referred to Article 12, Section 2, Idaho Constitution, only for the proposition that a county cannot make police regulations effective within a municipality; that is, the police powers of counties and municipalities are co-equal.

In *Rowe v. City of Pocatello*, 70 Idaho 344, 218 P.2d 695 (1950), the plaintiff challenged a city ordinance prohibiting door-to-door solicitations. Such solicitations were declared by the ordinance to be a public nuisance. The court examined the general legislative powers conferred by Section 50-1109, I.C., the forerunner of Section 50-302, I.C., and stated:

These are broad powers. But in this state acts of the legislature governing municipal police regulations are to be looked to as limitations upon, rather than as grants of power to the municipalities. *Rowe v. City of Pocatello*, supra., at 698.

In addition, the court looked at Article 12, Section 2, Idaho Constitution, and held:

This is a direct grant of police power from the people to the municipalities of the state, subject only to the limitation that such regulation shall not conflict with the general laws. Comprehended in the term, "general laws" are other provisions of the constitution, acts of the state legislature, and, of course, the constitution and laws of the United States. Under this constitutional provision, the cities of this state are in a notably different position than are cities in jurisdictions where their police power is strictly limited to that found in charter or legislative grants. *Rowe v. City of Pocatello*, supra., at 698.

It was further stated by the Idaho Court that where a city's powers were not granted directly by the constitution, the municipality was limited to such powers as had been expressly granted, necessarily implied or essential to the objects and purposes of the city. Citing, *Bradbury v. City of Idaho Falls*, supra. The city ordinance was upheld upon the grounds that it was a valid exercise of local police regulation and was not in conflict with any general laws.

In the case of *State v. Poynter*, 70 Idaho 438, 220 P.2d 386 (1950), the defendant was convicted under a Pocatello ordinance of driving an automobile while under the influence of intoxicating liquor. The constitutionality of the ordinance was challenged, then the court discussed both Article 12, Section 2 of the Idaho Constitution and Section 50-1109, I.C., the forerunner of Section 50-302,

I.C. Based upon these and other provisions, the court upheld the ordinance, and said:

The state and a municipal corporation may have concurrent jurisdiction over the same subject matter and in which event the municipality may make regulations on the subject notwithstanding the existence of state regulations thereon, provided the regulations or laws are not in conflict.

The mere fact that the state has legislated on a subject does not necessarily deprive a city of the power to deal with the subject by ordinance. (Citations omitted.)

A municipal corporation may exercise police power on the subjects connected with municipal concerns, which are also proper for state legislation. *State v. Poynter*, supra., at 388-389.

A county resolution restricting the number of issuable beer licenses in a designated area was challenged in the case of *Garland v. Talbott*, 74 Idaho 125, 237 P.2d 1067 (1951). The court referred to the applicable state laws allowing cities and counties to increase and regulate beer establishments, and held:

Also, to be considered is §2 of Art. 12, of the State Constitution, which is a direct grant of police power to the counties and municipalities of the state, subject to the limitation that such powers shall not be exercised in conflict with "the general laws." Under the provision the counties and cities of this state are not limited to police powers granted by the legislature, but may make and enforce, within their respective limits, all such police regulations as are not in conflict with the general law. Hence, the statutes are to be looked to for limitations upon the police power of the municipalities rather than as grants of such power. *Garland v. Talbott*, supra., at 1069. Citing, *State v. Musser*, supra.; *Clyde Hess Distributing Co. v. Bonneville County*, supra.; and *Rowe v. City of Pocatello*, supra.

The court held that a limitation on a number of beer licenses which could be issued within a city or county was a legitimate police power regulation.

In *Schmidt v. Village of Kimberly*, 74 Idaho 62, 256 P.2d 523 (1953), the plaintiff sought a declaratory judgment on the constitutionality of the Revenue Bond Act and the validity of a village ordinance providing for the establishment and operation of a municipal water and sewage system and for the financing of the same through issuance of revenue bonds. The court upheld the validity of the acts of the city. In examining Article 12, Section 2, Idaho Constitution, the court stated:

It is admitted that a municipality may make and enforce all reasonable rules and regulations essential and appropriate to the preservation of public health, as a valid exercise of its police power. In this state that power is given to the municipalities by the constitution itself. *Schmidt v. Village of Kimberly*, supra., at 523. Citing, Art. 12, §2, Idaho Constitution; and *Rowe v. City of Pocatello*, supra.

The establishment of an adequate sewage disposal system was found to be clearly appropriate to the promotion of public health.

The facts presented in the case of *Taggart v. Latah County*, 78 Idaho 100, 298 P.2d 979 (1956) were identical to those presented in the case of *Clyde Hess Distributing Co. v. Bonneville County*, supra. That is, the plaintiff challenged a county ordinance which established more prohibitive hours for the operation of a licensed beer establishment than were prohibited by state statute. The court stated: "rticle 12, section 2 of the Idaho Constitution gives a high source of police power." *Taggart v. Latah County*, supra., at 982. In keeping with the *Hess* decision, the court held that the county ordinance was valid, and not unreasonable or discriminatory.

A declaratory judgment, testing the validity of a city ordinance granting a franchise to a cooperative gas association for the construction and operation of a gas distribution system within the city, was sought in the case of *O'Bryant v. City of Idaho Falls*, 78 Idaho 313, 303 P.2d 680 (1956). The suit challenged the authority of Idaho Falls to grant such a franchise. The court quoted 1 Dillon, *Municipal Corporations*, (5th Ed.) ¶237 wherein it is stated:

It is a general and undisputed proposition of law that a municipal corporation possesses and can exercise the following powers, and no others: First, those granted in express words; second, those necessarily or fairly implied in or incident to the powers expressly granted; third, those essential to the accomplishment of the declared objects and purposes of the corporation, — not simply convenient, but indispensable. ny fair, reasonable, substantial doubt concerning the existence of power is resolved by the court against the corporation, and the power is denied. *O'Bryant v. City of Idaho Falls*, supra., at 682-683.

Based upon the foregoing, the court held that neither the constitution nor the statutes of Idaho expressly granted to cities the right to construct, operate and maintain a gas distribution system. It should also be noted that *O'Bryant* appears to be the only Idaho case in which the Idaho Supreme Court directly addressed itself to a consideration of "home rule," even though rticle 12, Section 2 of the Idaho Constitution was not discussed. The court stated:

We are not concerned with the merits or demerits of so-called "home rule" by municipalities whereby the law would empower a municipality to construct, operate and maintain its own system of distribution of gas as compared with a system for distribution of gas constructed, maintained and operated by a public utility holding a certificate of convenience and necessity. Such question is strictly a matter of policy for the people or the legislature and is not for consideration by the court. This court is only concerned with statutes as it finds them and the application of same to the facts before the court. O'Bryant v. City of Idaho Falls, supra., at 687. (Emphasis added.)

From this, perhaps it can be said that the Idaho Supreme Court will refuse to declare Idaho a constitutional home rule state regarding any matters of local concern without clarification of existing law by the legislature, or without clarification by the people through adoption of a constitutional amendment.

In the case of *Oregon Short Line Railroad Co. v. Village of Chubbuck*, 83 Idaho 62, 357 P.2d 1101 (1960), the plaintiff brought an action to void an ordinance which attempted to annex railroad land. The court did not discuss Article 12, Section 2, Idaho Constitution, but did rule:

Municipal corporations can exercise only such powers as are expressly granted or necessarily implied from the powers granted; doubt as to the existence of powers, must be resolved in favor of the granting power. *Oregon Short Line Railroad Co. v. Village of Chubbuck*, supra., at 1103. Citing, *State v. Frederic*, supra.; *Continental Oil Co. v. City of Twin Falls*, supra.; and *O'Bryant v. City of Idaho Falls*, supra.

The court held the attempted annexation invalid upon the grounds that cities have the power to annex additional territory only under the conditions, restrictions and limitations imposed by the legislature.

In *State v. Clark*, 88 Idaho 365, 399 P.2d 955 (1966), the defendant was convicted of violating a county subdivision ordinance. On appeal, the defendant alleged that the county did not have authority to adopt a subdivision ordinance. In interpreting Article 12, Section 2, Idaho Constitution, the court quoted both *State v. Musser*, supra., and *Gartland v. Talbott*, supra. (Both of these quotes are hereinabove quoted in this summary.) The court also compared the Idaho constitutional provision with Article XI, Section 11 of the California Constitution, a similar provision, and quoted *Pasadena School District v. City of Pasadena*, 166 Cal. 7, 134 P. 985, 47 L.R.A., N.S. 892 (1913). Therein the California Court stated that this constitutional provision conferred power upon every county, city and town to make and enforce within its limits all local police, sanitary, and other regulations which were not in conflict with the general laws, subject only to the limitation that such regulations must not conflict with the general laws enacted by the legislature on the subject. The Idaho Court then stated:

From a review of the cases construing such constitutional provision it may be said that there are three general restrictions which apply to legislation under the authority conferred by such provision: (1) The ordinance or regulation must be confined to the limits of the governmental body enacting the same, (2) It must not be in conflict with other general laws of the state, and (3) It must not be unreasonable or arbitrary enactment. *State v. Clark*, supra., at 960.

The subdivision ordinance was upheld as a valid exercise of local police power.

A citizens group brought a declaratory judgment seeking to declare the county zoning ordinance void in *Citizens for Better Government v. County of Valley*, 95 Idaho 320, 508 P.2d 550 (1973). Valley County had adopted a zoning ordinance without following proper procedures for adoption of zoning ordinances as required by I.C. 50-1204. In discussing Article 12, Section 2, Idaho Constitution, the court stated:

Idaho Const. art. 12, §2, authorizes a county to make police regulations not in conflict with the general laws. Although the appellant restricts

the definition of a "general law" to laws defining the scope and nature of matters subject to regulation, the definition of "general law" under Idaho Const. Art. 12, §2, is not so narrowly limited. The authority "to make" regulations comprehends not only the nature and scope of the subject matter of the regulation in relation to the general laws, but also the method and manner of its adoption. The authority "to make" police regulations as used in the constitution includes the procedure for their adoption, which must not be in conflict with the general laws. A general law may confer direct authority to act as well as supply procedural requirements for the adoption of police regulations under Art. 12, §2. *Citizens for Better Government v. County of Valley*, supra., at 551.

The zoning ordinance was declared void by the court for failure of the county to comply with the statutory requirements for a public hearing following published notice.

In the case of *County of Ada v. Walker*, 96 Idaho 630, 533 P.2d 1199 (1975), Ada County sued the defendant for violation of a zoning ordinance prohibiting the maintenance of mobile home parks in specified areas. The court merely referred to Article 12, Section 2 of the Idaho Constitution for the proposition that this constitutional provision granted authority for adoption of zoning ordinances by a city or county, and held that zoning ordinances constitute a valid exercise of local police power.

ATTORNEY GENERAL OPINION NO. 76-4

TO: Gordon C. Trombley
Director
Department of Lands
Building Mail

Per Request For Attorney General Opinion

QUESTIONS PRESENTED:

"1) May a lien attach, as provided under §38-1308, subsections (4) and (5), upon the real property of the "landowner?" 2) In a situation where the landowner is also the operator, may a lien attach to his real property, or would such lien attach only to his personal property?"

CONCLUSION:

1) No lien may attach to the real or personal property of a "landowner" under the provisions of Section 38-1308, *Idaho Code* unless he is also the "operator".

2) When a "landowner" is also the "operator", both his real and personal property may be subject to a lien.

ANALYSIS:

"1) May a lien attach, as provided under §38-1308, subsections (4) and (5), upon the real property of the "landowner?"

The Idaho Forest Practices Act, Title 38, Chapter 13, *Idaho Code*, was enacted by the 1975 Legislature of the State of Idaho. During the nearly one year since the enactment of that legislation no test cases in point have developed, within the State of Idaho and it appears that no other states' laws are drafted in a manner which sufficiently resemble the Idaho Act to draw comparisons, therefore this opinion will, in essence, be an exercise in pure statutory construction.

The Idaho Forest Practices Act, Title 38, Chapter 13, *Idaho Code*, hereinafter "Act", speaks throughout the Act to three distinct entities with which the Act concerns itself. These "entities" are defined in §38-1303, *Idaho Code*, as follows:

(3) "Operator" means a person who conducts or is required to conduct a forest practice.

(6) "Landowner" means a person, partnership, corporation, or association of whatever nature that holds an ownership interest in forest land, including the state.

(7) "Timber owner" means a person, partnership, corporation, or association of whatever nature, *other than the landowner*, that holds an

ownership interest in forest tree species on forest land. (Emphasis added).

It is apparent that under the Act a landowner *may not*, by definition, be also the "timber owner".

Throughout the Act the three entities are consistently listed and mentioned together. However, in the section of the Act in question, §38-1308, *Idaho Code*, it is readily apparent that the Legislature did not intend by the Act to confer the authority to file a lien against the "landowner" for repair of damage or correction of unsatisfactory conditions resulting from violation of the rules and regulations promulgated by the Board of Land Commissioners. Section 38-1308 (4), *Idaho Code*, allows the State of Idaho to file a lien against the real and personal property of an operator and mandates that the lien shall be certified under oath by the Department of Lands and filed in the office of the county clerk and recorder of the county or counties where the *real and personal property of the operator is located*. Thus there appears to be no question that the "operator" is subject to a lien on both his personal and real property to reimburse the State for expenses incurred by the State in repairing or correcting damage or unsatisfactory conditions which the operator has refused to correct on his own.

The real crux of the issue is found in §38-1308(5), *Idaho Code*. Subsection (5) reads as follows:

If the department is unable to recover the full debt in the manner provided for in subsection (4) of this section, the amount remaining due shall become a general lien upon the real and personal property of the *timber owner*. Another notice of lien, containing a statement of the demand, an itemization of expenditures incurred, the date incurred and where incurred, the amount recovered from the operator and timber owner and the names of the parties against whom the lien attached shall be certified under oath by the department and filed in the office of the county clerk and recorder of the county or counties *where the real and personal property of the landowner is located and where considered necessary to recover the expenses incurred by the department . . .* (Emphasis supplied).

From the above-quoted portions of subsection (5) it is apparent that an inconsistency exists. The first sentence of that subsection unequivocally refers to the authorization of a general lien upon the real and personal property of the "timber owner". The second sentence of subsection (5) deals with the procedure for attaching a valid general lien upon the said real and personal property of the *timber owner*. It is within sentence two of subsection (5) that the inconsistency most obviously appears. The Act states that in order to perfect a lien against the timber owner, the Department of Lands must file the notice of lien in the county or counties where the real and personal property of the *landowner* is located and where considered necessary to recover the expenses incurred by the Department.

It is the opinion of the Attorney General that the Legislature did not intend that the lien process be available as against the "landowner" and that the Act

itself does, in fact, not provide such a remedy. It is respectfully asserted that the Legislature intended that the lien against the timber owner be filed where the real and personal property of the "timber owner" is located and not where the real and personal property of the landowner is located. Nevertheless, the Act also allows the lien to be filed "where considered necessary".

It goes without saying that as long as the trees on any given parcel of forest land are not severed from the realty, the growing timber belonging to the timber owner must be located in the same county or counties as the land on which they grow, i.e., the landowner's land. Therefore, the Department of Lands of the State of Idaho could file a valid lien against the property of the timber owner by filing notice of the lien in the county or counties where the timber was located, which, of course, would also be the same county or counties where the land of the landowner is situated.

After analyzing the statute in question, it is apparent that no authorization exists therein for the filing of a lien against any of the property, be it real or personal, owned by the "landowner". Rather, the Act authorizes such a lien to attach to the real and personal property of only the operator and the timber owner's property. It should be noted that by definition a landowner who owns the timber on his own land, cannot be a "timber owner" under the Act and the lien provided for in subsection (5) cannot attach to the landowner's property. The procedural steps necessary to perfect such a lien against the timber owner are set out in the second sentence of subsection (5), §13-1308, *Idaho Code*, and it appears that an oversight by the Legislature caused the word "landowner" to be utilized therein rather than the proper term "timber owner".

Therefore, it is the opinion of the Office of the Attorney General that §38-1308, subsections (4) and (5) do not provide authority for the attachment of lien upon the real and/or personal property of "landowner" as defined in the Act unless he is also the operator.

"2) In a situation where the landowner is also the operator, may a lien attach to his real property, or would such a lien attach only to the personal property?"

Under the Act it is entirely possible that the same legal person can simultaneously fit the definitions as set out in the Act for the operator and timber owner or the operator and the landowner. In the latter circumstance, the Act clearly provides, in subsection (4) of §38-1308, that the real and personal property of the operator is subject to the lien authority granted by the Act.

Therefore, the real and personal property of the landowner would not be subject to a lien because he was the landowner, but it would be subject to the lien because he is the "operator". For this reason, when the landowner is also the operator, both his real and personal property may be attached under the Act. However, if the landowner also owns the timber but is *not* the operator, the lien may not attach to his personal or real property pursuant to §38-1308(5), *Idaho Code* authorizing such liens against the "real and personal property" of the timber owner, since §38-1303(7), *Idaho Code* precludes the landowner from being the "timber owner" for purposes of the Act.

Therefore, it is the opinion of the Office of the Attorney General that the

landowner will be exempt from the liens authorized by the Act only when he is not also an "operator".

IDAHO AUTHORITIES PRESENTED:

1. Title 38, Chapter 13, *Idaho Code*.
2. Sections 38-1308 and 38-1303, *Idaho Code*.

DATED This 20th day of January, 1976.

ATTORNEY GENERAL FOR IDAHO

WAYNE L. KIDWELL

ANALYSIS BY:
TERRY E. COFFIN

Deputy Attorney General

ATTORNEY GENERAL OPINION NO. 76-5

TO: Honorable Monroe C. Gollaher
Director of Insurance
Room 206 Statehouse
Building

Per request for Attorney General Opinion.

QUESTION PRESENTED: "Whether an optional 'School Ring Extended Service Agreement' sold in conjunction with a class ring is insurance, subject to regulation by the Department of Insurance wherein the vendor of the ring agrees to replace the ring for fifteen dollars (\$15.00) plus the current gold variation applicable if a loss occurs as a result of (a) accidental loss; (b) loss from fire; (c) loss by theft, burglary or larceny; or (d) if the ring becomes severely damaged through no wilful negligence."

CONCLUSION: Yes, such an extended service agreement does constitute insurance subject to regulation by the Department of Insurance.

ANALYSIS: The pertinent terms of the "School Ring Extended Service Agreement" provides in part that:

" . . . agrees to replace your class ring for only \$15.00 *plus* the current gold variation applicable . . . under any of the following provisions:

- (a) Accidental Loss
- (b) Loss from Fire
- (c) Loss by Theft, Burglary, or Larceny.

. . . further agrees to replace your class ring at the above replacement cost if it is severely damaged (through no wilful negligence on your part) and the ring is returned at the time a claim is submitted . . .

This agreement is an extension of . . . regular guarantee and shall be effective for the period ending two anniversary years following your scheduled graduation. This agreement covers the original ring purchased only and does not cover replacement rings."

The agreement further provides that the amount of gold variation is determined by the current price of gold over \$100.00 on the international market at the date the purchaser replacement request is acknowledged, which amount is then added to the \$15.00 replacement fee.

The pertinent sections of the *Idaho Insurance Code* dealing with this question read as follows:

" 'Authorized', 'unauthorized' insurer defined. — (1) An 'unauthorized insurer' is one duly authorized by a subsisting certificate of authority issued by the commissioner (director) to transact insurance in this state.

(2) An 'unauthorized' insurer is one not as authorized." *Idaho Code* §41-110;

" 'Insurance' defined. — 'Insurance' is a contract whereby one undertakes to indemnify another or pay or allow a specified or ascertainable amount or benefit upon determinable risk contingencies." *Idaho Code* §41-102;

and

" 'Insurer' defined. — 'Insurer' includes every person engaged as indemnitor, surety, or contractor in the business of entering into contracts of insurance or of annuity." *Idaho Code* §41-103.

The issue in this situation can be narrowed down to the question of whether the "School Ring Extended Service Agreement" can be construed to be a warranty of the school ring or is it a contract to indemnify the purchaser of the ring against loss or damage resulting from perils outside of and unrelated to defects in the ring itself.

Mein v. United States Car Testing Co., 184 N.E. 2d 489, 492, states the applicable rule as follows:

"Whether a warranty amounts to insurance depends upon its terms. A warranty or guaranty issued to a purchaser in connection with the sale of goods containing an agreement to indemnify against loss or damage resulting from perils outside of and unrelated to inherent weaknesses in the goods themselves constitutes a contract substantially amounting to insurance within the purview of a statute regulating the right of a foreign corporation to do business in the state."

Mein v. United States Car Testing Co., 184 N.E. 2d 489, 492 (1961). (See also *State ex. rel. Duffy v. Western Auto Supply Co.*, 16 N.E. 2d 256, 259 (1938) and *State ex. rel. Herbert v. Standard Oil Co.*, 35 N.E. 2d 427, pp. 440 and 441 (1941)).

"But a written warranty representing that the articles sold are so well and carefully manufactured that they will give satisfactory service under ordinary usage for a specified length of time, and providing for an adjustment in the event of failure from faulty construction or materials, but expressly excluding happenings not connected with imperfections in the articles themselves is not a contract substantially amounting to insurance within the meaning of such a statute."

Mein v. United States Car Testing Co., 184 N.E. 2d 489, 492, (1961) (See also *State ex. rel. Duffy v. Western Auto Supply Co.*, 16 N.E. 2d 256, 259 (1938) and *State ex. rel. Herbert v. Standard Oil Co.*, 35 N.E. 2d 437, pp. 441 and 442 (1941)).

The foregoing distinction between a warranty and insurance has been adopted in 1 Couch Cyclopedia of Insurance Law (2d Ed.) 42, Section 1.15 and in 44 C.J.S., Insurance, §1b, p. 474.

A careful examination of the "extended service agreement" (here under consideration) indicates that the agreement indemnifies the purchaser of a school ring against loss not connected with imperfections in the sold articles themselves. The terms of the agreement purport to indemnify the purchaser of the ring from perils outside of and unrelated to inherent weaknesses in the ring itself; i.e., accidental loss, loss by fire, loss by theft, burglary or larceny, or severe damage through no wilful negligence. Therefore, we would conclude that a "person" obtaining such agreements is engaged in the business of transacting insurance and must do so under the authorization of a certificate of authority issued by the Director of Insurance to avoid violation of Section 41-305(1), *Idaho Code*, which reads as follows:

"41-305 Certificate of authority required. — (1) No person shall act as an insurer and no insurer or its agents, attorneys, subscribers, or representatives shall directly or indirectly transact insurance in this state except as authorized by a subsisting certificate of authority issued to the insurer by the commissioner (director), except as to such transactions as are expressly otherwise provided for in this code."
Idaho Code §41-305(1).

IDAHO AUTHORITIES CONSIDERED:

1. Statutes — *Idaho Code* Sections 41-102, 41-103, 41-110 and 41-305.

DATED This 20th day of January, 1976.

ATTORNEY GENERAL OF THE STATE OF IDAHO

WAYNE L. KIDWELL
Attorney General

ANALYSIS BY:

ROBERT M. JOHNSON
Assistant Attorney General

ATTORNEY GENERAL OPINION NO. 76-6

TO: Mr. James Clements, Principal
Shoshone High School
Shoshone, Idaho 83352

Per Request For Attorney General Opinion

QUESTION PRESENTED:

Do high school administrators have the right to search and seize contraband drugs when found in a student's locker, on his person, or in his car on school grounds? If so, what legal procedures and precautions should school administrators take in finding drugs under these circumstances?

CONCLUSION:

Yes, school administrators have the right, although not an unlimited right, to search and seize narcotics where the facts and circumstances within the administrator's knowledge are sufficient to warrant a reasonable belief that such narcotics are located in the student's locker, on his person, or in his car on school grounds.

ANALYSIS:

Any discussion of the authority of school officials to conduct searches and seizures at the public high school must be reviewed in light of the constitutional rights guaranteed to students and juveniles in this country. A logical starting point for examining the constitutional rights of a juvenile is found in the case of *In re Gault*, 387 U.S.1, 18 L.Ed.2d 527 (1967), wherein it was held that "neither the 14th Amendment nor the Bill of Rights is for adults alone." Juveniles are also entitled to the constitutional rights and safeguards of due process of law. Building upon the *Gault* foundation, the United States Supreme Court stated, in *Tinker v. Des Moines Community School District*, 393 U.S. 503, 21 L.Ed.2d 731 (1969), that a juvenile does not leave his constitutional protection at the school house door. The essence of the *Tinker* decision was the students' constitutional rights under the First Amendments to freedom of expression and speech. These rights have traditionally enjoyed superior status in the decisions of the Supreme Court, but the Court in *Tinker* held that any conduct by the student which materially disrupts the classroom or involves disorder or invasion of the rights of others is not protected under the First Amendment.

In the case of *In re Winship*, 397 U.S. 358, 25 L.Ed.2d 368 (1970), the Supreme Court extended the rights of juveniles in delinquency proceedings in holding that "the constitutional safeguard of proof beyond a reasonable doubt is as much required during the adjudicatory stage of a delinquency proceeding as are those constitutional safeguards applied in *Gault* — notice of charges, rights to counsel, the rights of confrontation and examination, and the privilege of self-incrimination." The Court in *Winship* was especially cognizant of those circumstances in which a juvenile is accused of an act which would constitute a crime if committed by an adult.

Recently, the Supreme Court has further extended the constitutional protection and safeguards of public school students. The Court declared in *Goss v. Lopez*, — U.S. —, 42 L.Ed.2d 725 (1975), that the command of due process of law within the Fourteenth Amendment requires that school administrators afford the student, suspected of misconduct and subject to a short disciplinary suspension, notice of the accusation against him and an opportunity to explain his version of the facts to the school authority.

Although, the above cases do not directly answer the question on the students' constitutional rights under the Fourth Amendment, the cases illustrate a trend toward extending constitutional protections to juveniles and, in particular, to high school students. The question remains whether or not the student has all the protections of the Fourth Amendment when under investigation by his high school principal or some other school official.

The Fourth Amendment does not prohibit all searches and seizures but protects "the right of the people to be secure in their persons, houses, papers, and effects, against *unreasonable* searches and seizures" (emphasis added).

It is clear in Idaho that evidence unlawfully obtained will not be admissible in juvenile court proceedings to prove the allegations against a minor. Rule 8B. Idaho Rules for Juvenile Proceedings. It is apparent, therefore, that if juvenile court proceedings or criminal charges are contemplated as a result of finding narcotics in the high school, the conduct of school administrators must be lawful in order that the evidence can be used to prove the allegations against the student.

It has long been the rule that evidence is not rendered inadmissible in a criminal case because it has been obtained through a search and seizure by a private individual. *Burdeau v. McDowell*, 256 U.S. 465, 65 L.Ed 1048, 13 ALR 1159 (1921).

The basic "exclusionary rule" applies to evidence unlawfully obtained by law enforcement agents or "government officials." *Elkins v. United States*, 364 U.S. 206, 4 L.Ed.2d 1669 (1960); *Mapp v. Ohio*, 367 U.S. 643, 6 L.Ed.2d 1081, 84 ALR2d 933 (1961), reh.den. 368 U.S. 871, 7 L.Ed.2d 72.

There has recently been considerable debate in many state courts throughout the United States on the position of the school administrator as either a government official or a private citizen. Listing the many cases which support each of the theories would not be of assistance in analyzing the problem because the cases are evenly divided on each position. A clear status of the school administrator has, therefore, not emerged.

Resolution of the school official's scope of authority under the Fourth Amendment is further complicated by the fact that many of the courts taking a position on the status of the school administrator have also adopted the theory of "in loco parentis" as justification for search and seizure in the public school. Generally under this theory the teacher and school administrator are charged with the rights, duties and responsibilities of the parents in effectuating the educational function in the schools.

In reviewing all the state cases on this subject, it is apparent that the majority of courts have applied a standard of conduct upon the high school administrator which is framed in terms of "reasonable suspicion." At first glance, such a standard seems to indicate a softening of the more rigid standard of "probable cause." While the difference between the two terms is a matter of degree, the essence of each standard, no matter how phrased, is REASONABLENESS.

"Probable cause" for search and seizure without a warrant involves factual and practical considerations of the circumstances within the knowledge of the official which are sufficient to warrant a reasonable belief that an offense has been or is being committed.

"Reasonable suspicion" involves factual and practical considerations of the circumstances which do not rise to a reasonable belief that the accused person is guilty of the offense. An example of the difference between the two terms was given in the case of *People v. Peters*, 273 N.Y.S.2d 217, 219 N.E.2d 595, 600. Probable cause which will justify arrest of a suspect is satisfactory grounds for belief that a crime was committed by the suspect, while reasonable suspicion which will justify detention of the suspect for questioning is satisfactory grounds for suspecting that a crime was committed. The difference between the two standards is proportionate to the difference in degree of invasion between arrest and detention and between a full search and frisk of the suspect.

To control the rising rate of crime in the schools and to maintain ordinary school discipline so that the educational function can be performed, the increasing weight of authority in judicial decisions indicates that something less than the strict standards to which police officers are held is appropriate given the facts and circumstances of school searches. *Doe v. State*, — N.M. —, 540 P.2d 827, 832 (Sept. 1975).

School administrators should proceed in conducting warrantless searches and seizures at the high school with caution and base their decision to act upon a reasoned analysis of the situation.

Applying the above principles, it should be recognized that the facts and circumstances necessary to justify warrantless searches and seizures at the high school will vary depending on the type of search conducted. Generally, the school or school board retains ownership rights to the student lockers and makes some type of loan arrangements with the student for its use. Without full ownership rights, the student can expect complete protection of those items in his locker only against fellow students. For this reason, in situations not involving an emergency where the safety and well being of the students are threatened school administrators may conduct warrantless searches and seizures of narcotics in a student locker upon facts and circumstances leading to a "reasonable suspicion" that the locker contains contraband drugs.

A standard of reasonable suspicion can also be applied to searches conducted of the student at the high school. The ease by which narcotics can be concealed upon the person and quickly transferred to other persons or places results in the conclusion that when drugs are suspected to be on a student, action must be taken upon "reasonable suspicion" in order that the situation

may be controlled and order maintained in the school.

A more rigid standard should be applied in searches and seizures of drugs when a student is located in a car on school grounds. It would seem reasonable that the car is a more protected area than the locker or student. The school has no possessory interest in the student's automobile and the expectation of privacy is greater than those activities carried on within the school building. It is suggested, therefore, that warrantless searches and seizures of students and/or their cars be conducted only when facts and circumstances warrant the school administrator to reasonably believe that "probable cause" exists and that a crime has been or is being committed in the automobile by the student.

Among the factors to be considered in determining the sufficiency to conduct a warrantless search of a student's locker, his person, or his car are the following: age of the student, history and performance record in school, seriousness of the problem in the school, the exigency to make the search without delay, reliability of information used as a basis for the search, and the observations of the student and locker to be searched.

SUMMARY:

Under the special circumstances of the school environment and the need to maintain control and discipline, the school administrator may conduct warrantless searches and seizures for narcotics. Judging from the trend to extend constitutional protections to juveniles and students, the final decision to proceed with the search and seizure at the high school will depend upon the facts and circumstances of each situation and the conclusion that the action is reasonable.

AUTHORITIES CONSIDERED:

In re Gault, 387 U.S. 1, 18 L.Ed.2d 527 (1967); *Tinker v. Des Moines Community School District*, 393 U.S. 503, 21 L.Ed.2d 731 (1969); *In re Winship*, 397 U.S. 358, 25 L.Ed.2d 368 (1970); *Goss v. Lopez*, 419 U.S. 565, 42 L.Ed.2d 725 (1975); *Burdeau v. McDowell*, 256 U.S. 465, 65 L.Ed. 1048, 13 ALR 1159 (1921); *Elkins v. United States*, 364 U.S. 206, 4 L.Ed.2d 1669 (1960); *Mapp v. Ohio*, 367 U.S. 643, 6 L.Ed.2d 1081, 84 ALR 2d 933 (1961), reh. den. 368 U.S. 871, 7 L.Ed.2d 72; *People v. Peters*, 273 N.Y.S.2d 217, 219 N.E.2d 595; *Doe v. State*, — N.M. —, 540 P.2d 827 (1975); Rule 8B., Idaho Rules for Juvenile Proceedings; Fourth Amendment, United States Constitution.

ATTORNEY GENERAL FOR IDAHO

WAYNE L. KIDWELL

ANALYSIS BY:

JAMES F. KILE
Assistant Attorney General
Criminal Justice Division

DATED This 22nd day of January, 1976.

ATTORNEY GENERAL OPINION NO. 76-7

TO: Representative Doyle C. Miner
Statehouse Mail

Per Request For Attorney General Opinion

By special bond election, the voters of Madison County recently approved the issuance of negotiable coupon bonds for the stated purpose of "extending and enlarging the existing county hospital, including necessary equipment". The County Commissioners of Madison County and many of the county's citizens desire to use the bond proceeds to construct a new hospital to be located on County land a short distance from the existing hospital. They desire to use the old hospital for various County purposes, some of which involve supportive hospital services in conjunction with the new facility.

QUESTION PRESENTED:

You have asked what legal principles may be used to test whether the bond election ballot's statement of purpose was legally sufficient to authorize bonding for the improvement contemplated.

CONCLUSION:

The *Idaho Constitution* requires bond election ballots to be sufficiently definite to reasonably apprise the voters of the general nature, purpose, and scope of the improvement contemplated.

ANALYSIS:

The relevant portion of Article VIII, Section 3, *Idaho Constitution* provides:

LIMITATIONS ON COUNTY AND MUNICIPAL INDEBTEDNESS. — No county, city, board of education, or school district, or other subdivision of the state, shall incur any indebtedness, or liability, in any manner, or for any purpose, exceeding in that year, the income and revenue provided for it for such year, without the assent of two-thirds of the qualified electors thereof voting at an election to be held for that purpose. . .

Thus, the constitution requires a statement of the purpose of such an election. The leading Idaho cases construing the requirements of such a statement of purpose are *King v. Independent School District*, 46 Idaho 800, 272 Pac. 507 (1928), and *Durand v. Cline*, 63 Idaho 304, 119 P.2d 891 (1941). *King v. Independent School District* holds that voters must vote on the question of issuing bonds for a general purpose. However, it is not necessary to submit to the voters, detailed plans of the proposed construction. As the Court said in that case:

The use of the word 'purpose' in sec. 3, art. 8, of the constitution was intended in the broad and general sense of whether an indebtedness over the yearly income should be incurred by the municipality or body concerned, and of course, for the specific but general purpose indi-

cated; but it does not seem to us that the 'purpose' meant that a vote should be on each item of expenditure contemplated, but rather the general 'purpose' of borrowing money for the general purpose contemplated.

In *Durand v. Cline*, 63 Idaho 304, the Idaho Supreme Court reviewed all Idaho cases dealing with statement of purpose requirements. The court noted with approval the above quoted language from *King v. Independent School District*. The court went on to summarize the cases as follows:

The rule deducible from the decisions is that *the purpose must be sufficiently definite to reasonably apprise the voters of the general nature, purpose, and scope of the improvement contemplated*, but that it need not go into minute detail, and, on the other hand, of course, is not to be so general as to allow unlimited expenditures not properly connected with and necessary for the complete accomplishment of the main purpose . . . (Emphasis supplied)

This constitutional "rule" has been applied in two types of bond election challenges. The first type of challenge occurred in *King v. Independent School Dist.*, supra. There, the challenge was to the validity of the election itself, and the plaintiff sought a writ of prohibition to restrain the School District from disposing of certain bonds. The second type of challenge occurred in *Durand v. Cline*, supra. In that case, the challenge was not to the election or the issuance of bonds. Rather, it was to the validity of a particular expenditure which was argued to be outside the purposes authorized by the election. In both types of challenges, the Idaho Supreme Court construed Article VIII, Section 3, *Idaho Constitution* as requiring the statement of purpose to be sufficiently definite to reasonably apprise the voters of the general nature, purpose, and scope of the improvement contemplated.

The statute of limitations for the first type of challenge is forty days from the time of the canvass of votes and declaration of results of the election. The canvass and declaration of results occurred on September 26, 1975. Thus, since no party filed suit by November 5, 1975, a challenge of the validity of the election cannot now be maintained.

A challenge of the *Durand v. Cline* type to contest the authorized uses of bond proceeds could be maintained. The key to resolving such a challenge is an analysis of the specific language of the bond election ballots. The relevant portions of the bond proposition read as follows:

"Shall the Board of County Commissioners of Madison County, Idaho, be authorized to issue the negotiable coupon bonds of said county in the amount of \$2,500,000.00 for the purpose of extending and enlarging the existing county hospital, including necessary equipment," . . .

Thus, the critical question is whether the purposes for which expenditures were authorized by the above wording of the bond election ballot include the building of a new hospital located on county land a short distance from the existing hospital. In other words, we must ask whether the stated purpose of "extending and enlarging the existing county hospital, including necessary

equipment," was "sufficiently definite to reasonably apprise the voters of the general nature, purpose, and scope" of a proposed new hospital facility physically separated from the old hospital building. If the stated purpose did not reasonably apprise the voters of such a contemplated improvement, then expenditure for such a purpose would not be constitutionally permissible.

In addition to constitutional requirements, Section 31-3513, *Idaho Code* enumerates the procedural requirements to be followed in hospital bond elections. Also, that section limits the purposes for which bond proceeds may be used to "the purposes authorized by such election". We consider this restriction to be merely a restatement of the constitutional requirement that bond proceeds be used only for the general purposes stated in the notice of election and on the ballot. Regarding the various procedural requirements of Section 31-3513, *Idaho Code*, it should be noted that the Madison County Commissioners scrupulously followed the legal requirements of the section in their wording of ballot and otherwise. Although this does not prevent a constitutionally based challenge, it does indicate the utmost good faith on the part of the County Commissioners throughout the election process.

Since the election was conducted in good faith and with due regard for statutory procedures, any challenge of proposed uses of bond proceeds must be based upon the constitutional requirement stated previously. The challenger must prove that the ballot's stated purpose of "extending and enlarging the existing county hospital . . ." did not reasonably apprise the voters of the general nature, purpose, and scope of the improvement contemplated.

It is important to realize that this is not a question of legal interpretation. Rather, it is a question of factual determination which depends for its answer upon a knowledge of what the voters of Madison County in fact understood the ballot to mean.

In this regard, there has been some discussion of the relevance of the substantial public information campaign which preceded the election. As a legal matter, the electorate authorized only expenditures "for the purpose of extending and enlarging the existing county hospital, including necessary equipment". However, the scope of this quoted phrase is determined by the electorate's understanding of it according to the constitutional test enumerated in *Durand v. Cline, supra*. Thus, to the extent the electorate's understanding of the phrase was altered by pre-election information, the publicity is relevant.

Essentially, Idaho courts are interested in determining what in fact the electorate intend to authorize by such elections. Expenditures are then limited to the scope of such authorization.

IDAHO AUTHORITIES CONSIDERED:

1. *Idaho Constitution* — Article VIII, Section 3.
2. Statutes — Sections 31-3513 and 34-2001A, *Idaho Code*.
3. Cases — *King v. Independent School District*, 46 Idaho 800, 272 Pac. 507 (1928); *Durand v. Cline*, 63 Idaho 304, 119 P.2d 891 (1941).

DATED This 23rd day of January, 1976.

ATTORNEY GENERAL OF IDAHO

WAYNE L. KIDWELL

ANALYSIS BY:

DAVID G. HIGH
Assistant Attorney General

ATTORNEY GENERAL OPINION NO. 76-8

TO: Eugene Crawford
First District Commissioner
County Commissioners
Ada County Courthouse
Boise, Idaho 83702

Per Request For Attorney General Opinion

QUESTION PRESENTED:

Does Idaho law allow a county board of commissioners to hire employees to be paid from the budget of the board?

CONCLUSION:

Though Idaho law clearly precludes a board of county commissioners from hiring a person as a deputy or assistant who would attempt to assume any of the duties of the board, the law is less clear with regard to the hiring of merely ministerial or clerical employees. Since there is no Idaho Supreme Court case directly dealing with the issue, we must conclude that the exigencies and realistic additional duties imposed upon a board of county commissioners by our modern, complex society would cause our courts to allow a board to hire such persons as were necessary to perform ministerial and clerical functions so that the board itself could discharge its duties in an efficient, thorough manner.

ANALYSIS:

Long before statehood, Idaho had the predecessor of what is now designated Section 31-2003, *Idaho Code*. The former law was enacted as part of the Revised Statutes in 1887, and originally read as follows:

Sec. 1815. Every county officer except probate judge, commissioner, school superintendent and coroner may appoint as many deputies as may be necessary . . . (and so on.)

The statute (§31-2003) as it presently reads states that every county officer except a commissioner may appoint as many deputies as may be necessary for the prompt and faithful discharge of the duties of his office. In 1893, when the Idaho Constitution came into effect, Article 18, Section 6 thereof originally provided that county commissioners could authorize certain county officials "to appoint such deputies and clerical assistance (sic.) as the business of their offices may require." Nothing in the constitutional provision could be construed as allowing the same right of appointment to the commissioners themselves and, as set forth above in Section 1815, there existed a specific statutory prevention against such hiring or appointment. The constitutional provision, as will be discussed at length *infra*, has been amended through the ensuing years, but still contains no language which could be construed as an authorization for county commissioners to appoint their own deputies or clerical assistants.

An early Idaho Supreme Court case, *Taylor v. Canyon County*, 7 Idaho 171,

61 P. 521 (1900), which has not been superseded nor subsequently explained by the Court, sheds some light on the scope of old Section 1815 of Idaho's Revised Statutes, and states:

Referring to the appointment of deputies, section 1815 of the Revised Statutes provides that every county officer, except probate judge, commissioner, school superintendent, and coroner may appoint as many deputies as may be necessary for the faithful and prompt discharge of the duties of his office, and by an act amendatory of said section the school superintendent is authorized to appoint a deputy. (Laws 1889, p. 9.) Section 1816 of the Revised Statutes requires any county officer, who may be granted a leave of absence to appoint a deputy to act during his absence. Section 1817, 1818, 1819, and 1820 pertain to the appointment of deputies. And the general rule is that all ministerial duties which the principal has the authority to perform may be performed by a deputy. (9 Am. & Eng. Encyl of Law, 2d ed., 370.) *Under the statutes the payment of salaries of deputies became a grievous burden to the taxpayer, and relief was demanded and was granted by that provision of said section 6 of the constitution which provides that only the sheriff, auditor, recorder, and clerk may be empowered to employ deputies, whose salaries shall be a charge against the county, and then only upon due application to the board of county commissioners, and the board is authorized to fix the salaries of all deputies so appointed. It is part of the history of the county government of the state that the county officers not included among those who may be empowered by the board to employ a deputy needs one at some time during his term of office on account of his sickness or being by force of circumstances obliged to leave his office for a time. Take, for instance, the assessor and tax collector. His duties take him from his office several weeks in the year, and in our large counties almost daily some citizen and taxpayer wishes to do business with the office, and the framers of the constitution fully understood those facts and conditions, and we do not think that they intended that said provision of section 6, article 18, should operate as a repeal of said section 1815, and the act amendatory thereof, any further than to relieve the county from the payment of all deputies' salaries except of those appointed by the sheriff, auditor, recorder, and clerk when duly empowered by the board, and the salaries of such deputies fixed by the board as provided in said section 6 of the constitution. (Emphasis supplied.)*

Since the latter portion of the above-quoted language from the *Taylor* case clearly holds that Section 1815 (now §31-2003, I.C.) was not totally superseded by Article 16, Section 6, *Idaho Constitution*, we must conclude that, under the present state of the law, a board of county commissioners may not appoint any deputies to assist them in the performance of their duties. It must be made clear, however, that the term "deputy" does not cover that type of employee who merely performs ministerial or clerical duties.

Although the State of Idaho does not record debate in the legislature on code sections, the law defining "deputy" is clear. A "deputy" as used in a statute is a person with authority to take over for another and to act for him in his name and behalf in all matters in which the principal may act. *Amico v. Erie County*

Legislature, 36 A.D.2d 415, 321 N.Y.S.2d 134; *State ex rel. Rush v. Board of Commr's of Yellowstone County*, 121 Mont. 162, 191 P.2d 670. See for further but repetitive examples, 12 WORDS AND PHRASES, *Deputy*, p. 295. On the other hand an "assistant" within a statute, standing alone, does not necessarily contemplate an officer but one who helps or who stands by and aids another to whom he must look for authority to act. *State ex rel. Dunn v. Ayers*, 112 Mont. 120, 113 P.2d 785; *State ex rel. Dunn v. Bartraw v. Longfellow*, 95 Mo.App. 660, 69 S.W. 596. See also 4A WORDS AND PHRASES, *Assistant*, p.188. Though one California appellate court considered the terms "deputy" and "assistant" and determined that the hiring of an assistant was neither the hiring of a deputy nor the creation of an additional public office, the California statute therein construed has no counterpart in Idaho law and the case, therefore, provides us with no clear-cut guidance for this instant question. See *Foucht v. Hirni*, 57 Cal. App. 685, 208 P. 362 (1922).

As originally adopted, Article 18, Section 6, *Idaho Constitution*, provided in pertinent part as follows:

The county commissioners may employ counsel when necessary. The sheriff, auditor and recorder, and clerk of the district court, shall be empowered by the county commissioners to appoint such *deputies and clerical assistance* (sic.) to receive such compensation as may be fixed by the county commissioners . . .

As amended in 1894 (see, S.L. 1893, p. 224), this portion of the section was changed to read:

The county commissioners . . . the county commissioners, may employ counsel when necessary. The sheriff, auditor and recorder and clerk of the district court shall be empowered by the county commissioners to appoint such *deputies and clerical assistance* (sic) as the business of their offices may require; such *deputies and clerical assistants* to receive such compensation as may be fixed by the county commissioners . . .

When the section was amended for the fifth time, in 1912 (see S.L. 1912 (es), p. 53, S.J.R. No. 1), it was amended to read as it now stands:

. . . the county commissioners may employ counsel when necessary. The sheriff, county assessor, county treasurer, and ex-officio tax collector, auditor and recorder and clerk of the district court shall be empowered by the county commissioners to appoint such *deputies and clerical assistants* as the business of their office may require, said *deputies and clerical assistants* to receive such compensation as may be fixed by the county commissioners.

In construing constitutional language, it is important to consider the proceedings of the constitutional convention so as to interpret the provision as nearly as possible with the objects and purposes contemplated at the time of its adoption. *Oneida County Fair Bd. v. Smylie*, 86 Idaho 341, 386 P.2d 374 (1963); *Higer v. Hansen*, 67 Idaho 45, 170 P.2d 411 (1946). Further, such provisions must be read in the light of the law existing at the time of the adoption of the provisions. *Idaho*

Mut. Ben. Ass'n v. Robison, 65 Idaho 793, 154 P. 2d 156 (1944). Therefore, we must look to the debate surrounding the adoption of Article 18, §6, *Idaho Constitution*, to determine the purposes sought to be accomplished and the evils sought to be remedied.

The Idaho constitutional delegates had only two purposes which they sought to accomplish and one evil which they sought to remedy in adopting Article 18, Section 6:

"The principle all through is to get the cheapest county government we can and be efficient." Idaho Constitution Convention Proceedings, Vol. II, at 1809.

"There is no use attempting to disguise the fact that in the different counties in our territory there may be a conflict between the (county officer) and the county commissioners in a political sense." *Id.* at 1817-1818

To put it simply the framers wanted the most efficiency for the least expense at the county level, and to accomplish this in a way most likely to avoid political clashes, discontent and dissatisfaction.

Noting the sentence, "The county commissioners may employ counsel when necessary," from Art. 18, §6, heated debate among the framers made it clear that the provision was adopted to eliminate any necessity of employing full-time counsel in addition to the county prosecuting attorney and, thus, to save money. Regarding the remaining portion of said Section, previously set forth, *supra*, it is clear that the objective of the framers was not only to eliminate additional county offices — which would cost taxpayer money — but also to *restrict* the right of the commissioners to exercise control over other elected county officials through appointment of their deputies and clerical assistants, leaving the commissioners only the right to fix the salaries of these employees. The framers also feared that the commissioners might:

" . . . become bull-headed and strong-headed about this thing and that, and the first thing they would do would be to appoint some person contrary to the wishes of the (county officers)." *Id.*, at 1818.

Summarily, the delegates to the constitutional convention, when adopting Article 18, §6, put frugality and political balance above all else.

Also dealing with Article 18, Section 6 of the Idaho Constitution, the Idaho Supreme Court case of *Clayton v. Barnes*, 52 Idaho 418, 16 P.2d 1056 (1932) states:

(6) Sec. 6, art. 18, of the Constitution provides that: "The legislature by general and uniform laws shall provide for the election biennially in each of the several counties of the state, of county commissioners, . . . a county assessor . . . No other county offices shall be established, . . . The County Commissioners may employ counsel when necessary . . ."

Sec. 7, art. 18, of the Constitution provides for fixed annual compensation of all county officers provided for in sec. 6, art. 18. Sec. 6, art. 18, in providing that the county commissioners may employ counsel when necessary, is a limitation upon the authority of the county commissioners to employ counsel and a denial of the authority of all other county officials to do so.

'In accordance with the maxim "*expressio unis est exclusio alterius*," where a statute enumerates the things upon which it is to operate, or forbids certain things, it is to be construed as excluding from its effect all those not expressly mentioned; and where it directs the performance of certain things in a particular manner, or by a particular person, it implies that it shall not be done otherwise nor by a different person.' (59 C.J. 984, sec. 582.)

'Devolution of this power upon the court negatives intention to allow it to be used elsewhere or by any other tribunal or person. *Expressio unius est exclusio alterius*.' *Taylor v. Taylor*, 66 W. Va. 238, 19 Ann. Cas. 414, 66 S.E. 690, 692.)

It is held in *Taylor v. Michigan Public Utilities Com.*, 217 Mich. 400, 186 N.W. 485, that under the maxim '*Expressio unius est exclusio alterius*,' when a statute creates and regulates and prescribes the mode and names the parties granted the right to invoke its provisions, that mode must be followed, and none other, and such parties only may act. (See also, C.S., sec. 3428.) If the position taken by respondent as to the validity of the claims presented and allowance of additional funds for his office was well taken, an orderly procedure to determine the questions is provided, justifying the allowance and payment by the county of attorney's fees necessarily incurred. Inasmuch as the county attorney was not in a position to represent respondent as he would be required to represent the board in such a proceeding, respondent could have made proper application to the board, which he did not do, for the employment of counsel, to maintain an action to determine the questions involved, and upon its wrongful refusal to comply with his request, its action was subject to review upon appeal from its order. Furthermore, proceedings are available to require the board to employ counsel in matters over which it has jurisdiction and control as well as to enjoin such action where it is without jurisdiction or control. Upon the determination of such appeal or other proceeding, if the circumstances justified it, counsel would be employed by the board at the expense of the county. The commissioner's authority is further limited to such matters over which they have jurisdiction and control and then only when necessary, and the facts creating such necessity must be made a matter of record. (*Hampton v. Board of Commrs. of Logan County*, 4 Ida. 646, 43 Pac. 324; *Conger v. Commissioners of Latah County*, 5 Ida. 347, 48 Pac. 1064; *Conger v. Board of Commrs. of Latah County*, 4 Ida. 740, 48 Pac. 1064; *Barnard v. Young*, 43 Ida. 382, 251 Pac. 1054.) 52 Idaho at 423-425.

Since Section 31-2003, *Idaho Code*, contains only a prohibition against a board of county commissioners appointing a deputy, as opposed to hiring clerical or

ministerial help, the lack of language therein regarding such employees might lead to the legal brick wall of "*expressio unius est exclusio alterius*" as set forth in *Clayton v. Barnes*, *supra*, where it not for the subsequent legal rationale eliminating the harshness of that ancient doctrine in later Idaho Supreme Court, of which the language in *Noble v. Glens Ferry Bank, Limited*, 91 Idaho 364, 421 P.2d 444 (1966), is typical:

"(The doctrine of *expressio unius est exclusio alterius*) is not an unimpeachable rule of law, but merely a logical statement that the court, in cases consistent with recognized rules of interpretation, will adhere to the literal language of a statute in determining the legislative intent. The applicability of the doctrine to any particular statute depends upon whether the legislative intent appears in clear terms in the statute. If not . . . *the intention is to be taken or presumed according to what is consonant with reason and good discretion.*" (Emphasis added). 91 Idaho at 367.

The Idaho Supreme Court stated further:

"It has been generally stated that the doctrine of *expressio unius* deserves lesser weight (as compared to greater weight) in the interpretation of statutes . . . to remove doubts." *Id.*, at 367. *See also Rio Grande Motor Way, Inc. v. Public Service Commission*, 21 Utah 2d 377, 445 P.2d 990 (1968); *Johnson v. General Motors Corp.*, 199 Kan. 720 433 P.2d 585 (1967); *Knowles v. Holly*, 82 Wash. 2d 694, 513 P.2d 18 (1973).

At most, the exception-riddled doctrine gives rise to an inference. It is a fundamental rule that statutes are to be construed together, and where different statutes bearing on the same subject matter exist they must be construed so as to give effect to all. *Isobe v. California Unemployment Ins. Appeals Bd.*, 116 Cal.Rptr. 376, 526 P.2d 528 (1974); *Cambell v. Superior Court In and For Maricopa County*, 18 Ariz.App. 287, 501 P.2d 463 (1972); *State ex rel. Dick Irvin, Inc. Anderson*, 525 P.2d 564 (Mont. 1974); *Goodman v. Bethel School Dist. No. 403*, 84 Wash.2d 120, 524 P.2d (1974); *State v. Ebert*, 10 Or.App. 69, 498 P.2d 792 (1972); *Wooley v. State Highway Commission*, 387 P.2d 667 (Wyo. 1963). The Idaho Code contains several pertinent sections which *must* be read, together with §31-2003, to determine legislative intent as to the hiring of assistants.

"§31-820. By-laws. (Board of Commissioners). — To make and enforce such rules and regulations for the government of their body, the preservation of order and the transaction of business as may be necessary."

§31-828. General and incidental powers and duties. (Board of Commissioners). — To do and perform all other acts and things required by law not in this title enumerated, or which may be necessary to the full discharge of the duties of the chief executive authority of the county government."

The statutes setting out each specific duty of the board of commissioners should be consulted for the express functions, such as supervision of county officers, elections, roads, bridges and ferries, property. *See* §31-802, *et seq.*, *Idaho Code*.

It is quite obvious, considering the repetition of the power to perform any acts or to make and enforce any rules necessary for the full discharge of their duties, that the *statutes* were not meant to hamper the county board except as to the appointing of a person who would be a *substitute* for a commissioner and act in his name with full legal effect. To further underscore the precise intent of the legislature should an elected commissioner be unable to carry on his duties, the Code provides:

“§31-847. Leave of Absence to Officers. — . . . provided, that before the granting of such leave of absence, the officer (*except county commissioners and probate judge*) must appoint a deputy to perform the duties of his office . . . be it further provided, that no leave of absence shall be granted to more than any one (1) county commissioner at the same time . . . ” (Emphasis added)

“§59-906. County offices — Vacancies, how filled. — . . . “except that of the county commissioners (who shall be appointed by the governor) . . . ”

Reading these two sections clearly shows that no one can substitute for a commissioner and that should a commissioner be unable to fulfill his duties, leaving the office vacant, no one may function in his name other than the person appointed by the governor.

Another Idaho case, *Prothero v. Board of County Commr's*, 22 Idaho 598, 127 P. 175 (1912), must be considered regarding the issue we face herein. The issue of that case was whether the board of commissioners had the authority to employ an accountant, in absence of an express provision in a statute giving the board such power. The Supreme Court allowed the employment saying that since the board had the jurisdiction and power to supervise county officers who dealt with county monies, by statute, it therefore had the authority to employ an accountant to examine the county accounts. Further, the court provided that when such a person is employed, there is a presumption that a necessity therefor existed and a showing to that effect makes a *prima facie* case that the necessity existed. Citing a California case, the court quoted:

“ ‘Power to accomplish a certain result, which evidently cannot be accomplished by the person or body to whom the power is granted, without the employment of other agencies, includes the implied power to employ such agencies; and in such case, when the law does not prescribe the means by which the result is to be accomplished, any reasonable and suitable means may be adopted.’ ” 22 Idaho at 602.

Were it not for the fact that the employment relationship contemplated by the Court in *Prothero* placed the board of county commissioners in the relationship of a principal to the independent contractor accountant which was hired (rather than creating an employer/employee relationship), we might logically extend the reasoning of that case to the general situation of hiring clerical and ministerial employees by utilizing the responsibilities of the board under Sections 31-820 to 31-828, *Idaho Code*. Unfortunately, however, the Idaho Supreme Court has not squarely considered a situation in which a board of county commissioners has hired such clerical or ministerial employees, as opposed to

independent contractors. Thus, we are left with the perplexing language of Art. 18, §6, regarding "clerical assistants" and no clear indication as to whether or not a board of county commissioners is *prevented* from hiring the same by the "*expressio unius*" doctrine.

In light of the more recent trend by the Idaho Supreme Court to avoid the harsh consequences of a literal application of the "*expressio unius*" doctrine, and in light of the fact that nowhere in Idaho law is there an express prohibition against the hiring of clerical and/or ministerial employees by a board of county commissioners, we must conclude that our Idaho courts would allow the hiring of the same so that such boards could faithfully discharge their duties in an efficient, thorough manner in today's complex, modern society. Such a conclusion, we feel, gains additional merit under the *Prothero* rationale whenever the person or persons so hired are hired to aid the board in the accomplishment of its statutory duties.

AUTHORITIES CONSIDERED: 1. Vol. 2 Idaho Const. Conv., p. 1803-1859; 2. Session Laws 1893; Session Laws 1912; 3. Revised Statutes, 1887; 4. Article 18, Section 6, *Idaho Constitution*; 5. §31-2003, *Idaho Code*; Chapter 8, Title 31, *Idaho Code*, §59-906, *Idaho Code*. 6. *Taylor v. Canyon County*, 7 Idaho 171, 61 P. 521 (1900); 7. *Clayton v. Barnes*, 52 Idaho 418, 16 P.2d 1056 (1932); *Prothero v. Board of County Commr's*, 22 Idaho 598, 127 P.175 (1912); *Oneida County Fair Bd. v. Smylie*, 86 Idaho 341, 386 P.2d 374 (1963); *Higer v. Hansen*, 67 Idaho 45, 170 P.2d 411 (1946); *Idaho Mut. Ben. Ass'n v. Robison*, 65 Idaho 793, 154 P.2d 156 (1944); *Noble v. Glenns Ferry Bank Limited*, 91 Idaho 364, 421 P.2d 444 (1966); *Amico v. Erie County Legislature* 36 A.D.2d 415, 321 N.Y.S. 2d 134; *State ex rel. Rusch v. Board of Commr's of Yellowstone County*, 121 Mont. 162, 191 P.2d 670; *State ex rel. Dunn v. Ayers*, 95 Mo.App. 660, 69 S.W. 596; *Foucht v. Hirni*, 57 Cal.App. 685, 208 Pac. 362 (1932); *Rio Grande Motor Way, Inc. v. Public Service Commission*, 21 Utah 2d 377, 445 P.2d 990 (1968); *Johnson v. General Motors Corp.*, 199 Kan. 720, 433 P.2d 585 (1967); *Knowles v. Holly*, 82 Wash.2d 694, 513 P.2d 18 (1973); *Isobe v. California Unemployment Ins. Appeals Brd.*, 116 Ca.Rptr. 376, 526 P.2d 528 (1974); *Campbell v. Superior Court In and For Maricopa County* 18 Ariz.App. 287, 501 P.2d 463 (1972); *State ex rel. Dick Irvin, Inc. v. Anderson*, 525 P.2d 564 (Mont. 1974); *Goodman v. Bethel School Dist. No. 403*, 84 Wash.2d 120, 524 P.2d 918 (1974); *State v. Ebert*, 10 Or.App. 69, 498 P.2d 792 (1972); *Wooley v. State Highway Commission*, 387 P.2d 667 (Wyo. 1963).

DATED This 26th day of January, 1976.

ATTORNEY GENERAL OF IDAHO

WAYNE L. KIDWELL

ATTORNEY GENERAL OPINION NO. 76-9

TO: B. R. Brown, Director
Department of Labor
and Industrial Services
Building Mail

Per Request for Attorney General Opinion

QUESTIONS PRESENTED:

1. Can the Department of Labor and Industrial Services retain jurisdiction to enforce the codes adopted by the Idaho Building Code Advisory Act, Chapter 41, Title 39, *Idaho Code* as far as schools and state buildings are concerned?
2. Can the Department of Labor and Industrial Services retain jurisdiction to check the plans of such buildings for compliance with these codes as is provided for in rule 07-30-113 of the rules of the Department?

CONCLUSION:

1. No.
2. Yes.

ANALYSIS:

The Idaho Building Code Advisory Act, Chapter 41, Title 39, *Idaho Code* was adopted in 1975 for the purpose of adopting national codes dealing with construction, safety and health.

The State of Idaho was given the primary duty of enforcing these codes within the State, 39-4104, *Idaho Code*. Local governments are required to comply with the enumerated codes and are given the option of enforcing the codes themselves in Section 39-4116(1), *Idaho Code*, which reads as follows:

"Local governments shall, effective January 1, 1976, comply with the codes enumerated in this act, and such codes, rules and regulations promulgated pursuant to this act, and such inspection and enforcement may be provided by the local government, or shall be provided by the department if such local government opts not to provide such inspection and enforcement, except that the department shall retain jurisdiction of inspection and enforcement of construction standards enumerated in Section 39-4109(1), *Idaho Code*, for mobile homes and recreational vehicles, and for inspection and enforcement of construction standards for manufactured buildings and commercial coaches."

It is clear that this section gives a local government unit the right to opt to enforce the enumerated codes. The only exclusion from this option given to the local governments are mobile homes, recreational vehicles, and construction standards for manufactured buildings and commercial coaches, which the State will continue to handle in all cases. There are not exemptions for schools

or state buildings specified in the statute. Therefore, the law would allow the local governments to opt to enforce the enumerated codes as to these buildings also. If the local governmental unit opts to enforce the codes, this would preclude the State of Idaho from doing so with the exception of the exclusions listed in 39-4116(1), *Idaho Code*. If the local government does not enforce the codes then the State may do so.

Section 39-4113, *Idaho Code*, deals with plan checking. This section places a duty upon the Director of the Department of Labor and Industrial Services to establish a program for plan checking should the Idaho Building Code Advisory Board require submission of the plans. This section indicates that plan checking is separate and distinct from the provisions of 39-4116, *Idaho Code*. While the local governments may opt to enforce the codes and may check the plans under 39-4113, *Idaho Code*, the state may also check the plans under the separate right created by 39-4113. The Board has required the Director to check the plans of schools and state buildings by approving rule 07-30-113 which has been adopted pursuant to the Building Code Advisory Act.

IDAHO AUTHORITIES CONSIDERED:

Sections 39-4101, 39-4104, 39-4109, 39-4113, 39-4116, *Idaho Code*

DATED This 29th day of January, 1976.

ATTORNEY GENERAL FOR IDAHO

WAYNE L. KIDWELL

ANALYSIS BY:

BRADLEY B. POOLE
Assistant Attorney General

ATTORNEY GENERAL OPINION NO. 76-10

TO: Honorable Bob J. Waite
County Clerk
County of Idaho
Grangeville, Idaho 83530

Per Request For Attorney General Opinion

QUESTION PRESENTED:

"How do the provisions of Section 34-1712(3), *Idaho Code* apply as to the number of votes cast in favor of a recall election of a county official, where the county official was appointed to the position instead of being elected at the last general election."

CONCLUSION:

This statute establishes two criteria for purposes of a successful recall. (1) A majority of the votes cast at the election must be in favor of recall. (2) The number of votes cast in favor of recall must equal or exceed the votes cast at the last general election for the officer in question. As this officer was appointed and not elected to office, the second criteria cannot be met. The first criteria remains operative and a reasonable construction of the statute is that recall is achieved by the casting of a majority of votes for recall at the special recall election.

ANALYSIS:

Article VI, Section 6, *Idaho Constitution* declares that every public official in the State shall be subject to recall. This provision is implemented by Section 34-1712, *Idaho Code*. In pertinent part, it reads:

To recall any officer, a majority of the votes cast at the special recall election must be in favor of such a recall, and additionally, the number of votes cast in favor of the recall must equal or exceed the votes cast at the last general election for that officer." (Section 34-1713(3), *Idaho Code*.)

This second criteria cannot be satisfied when the official in question is a vacancy appointee. He would not have been the successful candidate at the last general election. The issue then is "should the public's confidence in one official as expressed by his winning vote tally be applied arbitrarily for recall purposes to his successor?"

As the legislature has not addressed this question, one must surmise its intent. However it can be reasonably assumed that the legislature deemed there to be a public interest in insuring that no lessor number of majority voters be able to recall an official than the number of voters who elected the official in the first instance. This public interest is not present when the official in question is a vacancy appointee. Neither is this interest rationally served by arbitrarily applying the vote total of the appointee's predecessor for purposes of the

appointee's recall. Presumptively, it is the appointee's record, or lack thereof which subjects him to the recall election. The confidence expressed by the electorate in his predecessor typically bears no relationship to the performance of the appointee. When the reason behind the law ceases, the law itself ceases. *Phipps v. Boise Streetcar Company*, 61 Idaho 740, 107 P.2d 148 (1940). Therefore, the second criteria should not be applied as a criteria for recall of one appointed to office.

In awareness that the Idaho Constitution subjects all public officials to recall, failure of the second criteria should not be construed as to void the statute. If such a construction were to be adopted, the intent of the constitution would be negated. Rather, Section 34-1712(3) can be logically construed to authorize the recall of a vacancy appointee solely upon the affirmative vote of a majority of those voting at the recall election. This issue has not been addressed by the courts of our state. Should an appointee be recalled pursuant to the guidelines offered in the body of this opinion, the county should expect its recall procedure to be reviewed by the courts.

DATED This 6th day of February, 1976.

Wayne L. Kidwell
Attorney General
State of Idaho

Christopher D. Bray
Deputy Attorney General

IDAHO AUTHORITIES CONSIDERED:

1. Constitution-Article VI, Section 6
2. Statutes- Section 34-1712(3).
3. Caselaw- *Phipps v. Boise Streetcar Company*, 61 Idaho 740, 107 P.2d 148 (1940).

ATTORNEY GENERAL OPINION NO. 76-11

TO: John Bender, Director
Department of Law Enforcement
Building Mail

Per Request For Attorney General Opinion

QUESTION PRESENTED:

Whether any of the money collected and distributed to the "search and rescue fund" pursuant to Section 49-2608 (2), *Idaho Code* from fees generated under the "Snowmobile Numbering Act", Title 49, Chapter 26, of the *Idaho Code*, may be expended for search and rescue missions which do not require or involve the use of snowmobiles, as defined under the act.

CONCLUSION:

Monies collected and distributed to the "search and rescue fund" pursuant to Section 49-2608 (2), *Idaho Code* may be expended for all search and rescue missions, even though the mission may not involve snowmobiles.

ANALYSIS:

The Snowmobile Numbering Act, Section 49-2601, *Idaho Code*, was enacted by the Idaho legislature in 1969. The Act establishes requirements for registration of snowmobiles, provides for collection of fees for such registration, and contains other provisions relating to their ownership and use.

Section 49-2608, *Idaho Code*, specifies how monies collected under the Act shall be distributed. Eighty percent of the monies collected shall be retained by the county for snowmobile purposes. Fifteen percent is credited to the State motor vehicle fund. The remaining five percent is remitted by the county to the state treasurer for credit to a "search and rescue fund". The fund is itself created by this legislation.

Section 49-2608 (2) provides that the monies remitted to the search and rescue fund:

shall be used by the department for the purpose of defraying costs of search and rescue missions conducted by state and/or local authorities; provided that in no event shall more than one thousand dollars be expended from such fund for any single search and rescue mission.

This section does not limit the search and rescue fund to snowmobile purposes only. In our opinion, if the legislature had intended for the funds to be used only for search and rescue missions pertaining to snowmobiles, they would have placed language so limiting expenditure of this money within Section 49-2608(2). For example, in Section 49-2608(1), the legislature limited use of the funds retained by the counties to activities and developments specifically relating to snowmobiles. Absence of such language of limitation in Section

49-2608 (2) is indicative of an intent by the legislature to establish a fund for all search and rescue missions, whether they are related to snowmobile incidents or not.

AUTHORITIES CONSIDERED:

1. *Idaho Code*, Section 49-2608.

DATED This 17th day of February, 1976.

Attorney General of Idaho

WAYNE L. KIDWELL

ANALYSIS BY:

GUY G. HURLBUTT
Assistant Attorney General

ATTORNEY GENERAL OPINION NO. 76-12

TO: Senator Dane Watkins
Idaho State Senate
Statehouse Mail

Per Request for Attorney General Opinion.

QUESTION PRESENTED: You have asked this office whether or not the Idaho Constitution may be amended by an initiative of the people.

CONCLUSION: Although there is conflicting authority, our conclusion in the absence of an Idaho Supreme Court decision on the matter is that the Constitution may not be amended by initiative. There is some chance that logical extension of the case of *Smith v. Cenarrusa*, 93 Idaho 818, would allow such initiative. However, the rest of the case law on this matter would indicate that such an initiative is improper.

ANALYSIS: After the decision in *Smith v. Cenarrusa*, 93 Idaho 818, it is quite possible, by logical extension of that case, that the answer to your question could be "yes." But due to the decisions in certain California and Oregon cases cited in *Smith v. Cenarrusa*, supra., and the Idaho case of *McBee v. Brady*, 15 Idaho 176, there is considerable doubt as to whether this question can be answered "yes" in Idaho. We would therefore suggest that an authoritative answer to this question would require court decision. It is too close a question for this office to predict the result of such a court decision. See, Cooley, Constitutional Limitations, Vol. 1, pp. 82-96. Thus, due to the case law on the matter other than *Smith v. Cenarrusa*, supra., your question must at this time be answered in the negative.

We do, however, feel that there is an equally good argument which can be made on either side of the question.

There is no question that an initiative can propose any valid law other than a constitutional amendment. Perhaps a law could be initiated for your purpose rather than a constitutional amendment.

Basically the answer to your question would depend on a construction of and the interplay between Article 1, Section 2 of the Idaho Constitution, which reserves to the people the right to alter, reform and abolish government whenever they deem it necessary. Article 1, Section 21, which states that the enumeration of rights shall not be construed to impair or deny other rights retained by the people and the third paragraph of Article 3, Section 1 of the Idaho Constitution, relating to initiatives. Under this last section, the people reserve the right to propose "laws." They may initiate any desired "legislation." One of the main questions that the courts would have to decide would be whether the terms "laws" and "legislation" within this section include a constitutional amendment.

Unfortunately, there are quite a number of cases on both sides of this matter. See, "Laws" and "Legislation," 24A Words and Phrases.

AUTHORITIES CONSIDERED: *Smith v. Cenarrusa*, 93 Idaho 818; and cases cited therein; *McBee v. Brady*, 15 Idaho 176; Article 1, Section 2, Idaho Constitution; Article 1, Section 3, Idaho Constitution; 24A Words and Phrases; Cooley, Constitutional Limitations, Vol. 1, pp. 82-96.

DATED This 19th day of February.

ATTORNEY GENERAL OF IDAHO

WAYNE L. KIDWELL

ANALYSIS BY:

WARREN FELTON

Deputy Attorney General

ATTORNEY GENERAL'S OPINION NO. 76-13

TO: The Honorable Reed W. Budge
 Senator, District No. 32
 Building Mail

QUESTION:

Is it legal for a county commissioner to use county equipment for private construction work?

CONCLUSION:

No.

ANALYSIS:

No statute expressly prohibits a county officer from using county property for private purposes. However, Section 31-855, *Idaho Code* states:

Any commissioner who neglects or refuses, without just cause therefore, to perform any duty imposed upon him, or who wilfully violates any law provided for his government as such officer, or fraudulently or corruptly performs any duty imposed upon him, or *wilfully, fraudulently or corruptly attempts to perform an act, as commissioner, unauthorized by law, in addition to the penalty provided in the penal code, forfeits to the county \$500.00 for every such act.* (Emphasis added).

Presumptively a commissioner who takes county equipment for his private use is performing that taking as a commissioner. Were he acting solely in a private capacity, the issue of theft and/or conversion of county property would be presented. In the absence of any law that expressly authorizes a county commissioner to use county property for his private use this statute and its prohibition would then apply.

DATED This 19th day of February, 1976.

Wayne L. Kidwell
ATTORNEY GENERAL
STATE OF IDAHO

Christopher D. Bray
 Deputy Attorney General

IDAHO AUTHORITIES CONSIDERED:

1. Statutes- Section 31-855

ATTORNEY GENERAL OPINION NO. 76-14

TO: Gordon C. Trombley, Director
Department of Lands
Building Mail

Per Request For Attorney General's Opinion

QUESTION PRESENTED:

Does Section 58-603, *Idaho Code* authorize a right of way for a public park?

CONCLUSION:

No, a right of way is defined as a right of *passage* over another person's land, and passage does not include use and possession of the entire area for a public park.

ANALYSIS:

Section 58-603, *Idaho Code* states in part:

RIGHTS OF WAY FOR PUBLIC UTILITY LINES, HIGHWAY, AND OTHER PURPOSES. — The state board of land commissioners is hereby empowered to grant, over and upon any land owned or controlled by the state of Idaho, rights of way for railroad, telegraph, telephone and electric lines, pipelines for natural and manufactured gas, rights of way for highway purposes, and rights of way for any other public or private purpose or beneficial use. Application for such right of way must be accompanied by a map, in duplicate, showing the *course of such right of way* over each smallest legal subdivision of land, and the amount of land required for said right of way. . . . (Emphasis added)

A "right of way" has generally been defined as the right of passage over another man's ground. (*Black's Law Dictionary* Revised Fourth Edition (1968) at page 1489; *Almada v. Superior Court*, etc. 149 Pac. 2d 61 (Calif. (1944) at page 64). As pointed out in the above cited case:

Sometimes it is a right of way for a road, sometimes for a ditch, sometimes for a canal, but whatever the particular right of way may be for, it is a right of passage over another person's land, or, in other words, an easement to use the land of another for such particular purpose. (*Almada, supra* at page 64.)

This easement over another person's land does not divest the owner of the fee of the land, and he owns it for all other purposes except the right of way across his land.

Our statute, Section 58-603, *Idaho Code*, does not particularly define a right of way, but lists examples of rights of way such as a right of way for railroads, telegraph, telephone and electric lines, pipelines for gas, and rights of way for

highway purposes. The examples stated in this Code section parallel those examples listed in *Almada, Supra*, and which are generally described as rights of way in our case law. It is clear that a right of way only provides for passage across the owner's land, and does not include the use of the land for other purposes. This is emphasized by the statement that:

... Application for such right of way must be accompanied by a map, in duplicate, showing the *course of such right of way* over each smallest legal subdivision of land, and the amount of land required for said right of way ... Section 58-603, *Idaho Code*. (Emphasis added)

The phrase "rights of way for any other public or private purpose or beneficial use", as stated in Section 58-603, *Idaho Code* must be viewed in light of the definition and case interpretation of a right of way. The examples of a right of way in this statute are all for passage across a person's land, and therefore any additional right of way for either a public or private purpose or beneficial use must also be for passage across another person's land. The use of an area for a public park may meet the requirements of public purpose or beneficial use, but does not meet the definition of a right of way. The use of an area for a public park suggests the use and possession of the entire area, which is contrary to the definition of right of way which is only for *passage across* the area. Therefore, Section 58-603, *Idaho Code* cannot be interpreted to authorize a right of way for a public park.

As stated above, a public park envisions the use of an entire area for park purposes. If this use occurs on grant lands, the *Idaho Admission Bill* and the *Idaho Constitution* place certain restrictions on the use and disposal of such land. Section 5 of the *Idaho Admission Bill* states that grant lands can only be disposed of at public sale, and that these lands may not be leased for periods of more than ten years. Article IX, Section 8 of the *Idaho Constitution* again states that grant lands are subject to:

disposal at public auction for the use and benefit of the respective object for which said grants of land were made ...

In summary, grant lands can only be sold by public auction, and any lease of grant lands can only be issued for a period of ten years. A right of way for a public park issued under Section 58-603, *Idaho Code* would violate both of these provisions. A right of way of this nature would allow the use of the land without going through the proper constitutional procedure of sale or lease. In other words it would circumvent the ten year lease restriction or the public auction provision for sale.

Since a public park does not constitute a right of way as defined by case law, it can only exist by virtue of fee simple ownership of the land itself or a lease issued for the land. Therefore the State Board of Land Commissioners only has the authority to lease the land to the Park Department for ten years at a time, or put the land up for public auction with a sale to the highest bidder. The income of either the lease or the sale of the land should then go into the proper dedicated fund.

AUTHORITIES CONSIDERED:

1. *Idaho Code*, Section 58-603
2. *Idaho Constitution*, Article IX, Section 8
3. *Black's Law Dictionary* 1489 (4th ed. 1968)
4. Cases — *Almada v. Superior Court*, 149 Pac. 2d 61 (Calif. 1944)

Attorney General of Idaho

WAYNE L. KIDWELL

ANALYSIS BY:

URSULA KETTLEWELL
Assistant Attorney General

ATTORNEY GENERAL'S OPINION NO. 76-15

TO: The Honorable David H. Leroy
Ada County Prosecuting Attorney
103 Courthouse
Boise, Idaho 83702

QUESTION:

I. Is the "participation" prohibited by 67-6506 limited voting and/or discussion during proceedings while acting as an official of the governing board of which one is a member, or does it include such things as, (a) advocacy on behalf of others for a fee, (b) or arguing ones own application for property owned in whole or in part by the member, (c) before the governing board of which he is a member, (d) or before remote boards of which is not a member such as a split Planning or Zoning Commission or the Board of County Commissioners?

II. Given the fact that every planning or zoning decision has some "potential" "economic interest" on every landholder in the County, what reasonable legal standards should guide the member in disclosure and disqualification upon that ground?

CONCLUSION:

I

The language of Section 67-6506, *Idaho Code*, imposes a criminal sanction for violation of its terms. Strictly construed it prohibits a member/employee of a governing board or commission from acting in a public capacity when he has an economic interest in the proceeding or action. Following disclosure of that interest and voluntary disqualification from the performance of any public duty which would affect his economic interests, the member/employee may act as an advocate for his own or another's interest. However, such advocacy may so color the proceedings with the appearance of insider influence that our courts may be asked to invalidate those proceedings as a matter of public policy.

II.

A member/employee should disqualify himself from the performance of a public duty when the economic interest at issue is of an immediate nature, particular and distinct from the public interest.

ANALYSIS:

I.

The language of Section 67-6505, *Idaho Code*, reads:

Conflict of Interest Prohibited — The governing board creating a planning, zoning or planning and zoning commission, or joint commission shall provide that the area and interests within its jurisdiction are broadly represented on the commission. A member or employee of a governing board, commission or joint commission *shall not participate*

in any proceeding or action when the member or employee or his employer, business partner, business associate, or any person related to him by affinity or consanguinity within the second degree has an economic interest in the procedure or action. Any actual or potential interest in any proceeding shall be disclosed at or before any meeting at which the action is being heard or being considered. A knowing violation of this section shall be a misdemeanor. (Emphasis supplied.)

The term "participation" as stated within this statute is not expressly defined. As an aid to determining its proper meaning, our courts will be free to consider the effect and consequences that differing constructions of this term would have. *State v. Webb*, 76 Idaho 162, 279 P.2d 634 (1955). One such construction would be that taken in context, the phrase "shall not participate in any proceeding or action", indicated an expansive legislative intent. Pursuant thereto any member/employee of the enumerated boards or commissions would be prohibited from acting in either a public or private capacity if the member/employee has an economic interest in the proceeding or action. One acts in a public capacity by performing duties authorized or assigned by virtue of public office or employment. *Mosman v. Mathison*, 90 Idaho 76, 408 P.2d 450 (1965). Within the confines of the statute, one acts in a private capacity by advocating an economic interest, one's own or another's. Given broad scope, the statute would prohibit the member/employee from planning, counseling and/or voting on issues affecting his own economic interest. It would also prohibit his speaking as a private citizen on a personal economic issue. For example, assume that a member's/employee's neighbor applied for a conditional use permit which if granted would allow the neighbor to use his property, presently zoned as single-family residential, for commercial purposes. Assume further that the member's/employee's property would either increase or decrease in value as a consequence. Under these facts the member/employee could not speak as a neighbor and home owner at a proceeding, notwithstanding disclosure of his interest and voluntary disqualification from the performance of any public duty. The character of the economic interest is not of primary importance. Whether that interest be the value of a member's/employee's owned property or a fee received for advocating the interests of another, the member/employee would violate the law if he stood as an advocate for either. He would then be subject to the statutes criminal penalties.

The term "participation" may also be construed to solely refer to a member/employee acting in a public capacity. This limited construction is predicated upon a strict interpretation of the conflict of interest sought to be prohibited by the legislature. A conflict of interest is present when one's private interests impair or influence the performance of a public duty. *McRoberts v. Hoar*, 28 Idaho 163, 152 P. 1064 (1915). If the member/employee has no economic interest in the proceeding he has no conflict. Section 67-6506, *Idaho Code*. Conversely, can a member/employee who has an economic interest in the proceeding but no public duty to perform be in violation of the statute?

The statute requires disclosure of any actual or potential economic interest in a proceeding. Should a member/employee timely disclose his interest and voluntarily disqualify himself from performing any public duty, e.g., planning, counseling, or voting on the issue, he no longer has a public duty with which his

private interests can be in conflict. *Stigall v. City of Taft*, 25 Cal.Rptr. 441, 375 P.2d 289 (1962). It is nonetheless true that he may be in a position to influence those who will determine the action to be taken regarding the interest he represents. Certainly those who hire a member/employee to represent them before a commission or governing board have considered this "insider factor" in the selection of their advocate. The degree of influence is a question of fact, however, not of law. If the member/employee speaks in support of an application for reclassification of property and that application is denied, would the denial be evidence of influence such as to bring the member under the prohibition of the statute. If the application were approved one could argue that practical realities dictate that a commission is going to respond to an "insider" advocacy. As desirable as it may be to restrain such advocacy, this statute does not clearly do so. Following a member's/employee's disqualification of the performance of his public duties, it is only the contention of "insider" influence which can be termed a conflict of interest. Yet the existence of that influence is a question ultimately resolved by the actions of the commission, not the advocate.

The language of section 67-6506 invokes a criminal misdemeanor sanction for violation of its terms. Therefore, the statute must be strictly construed.

A statute defining a crime must be sufficiently explicit so that all persons subject thereto may know what conduct on their part will subject them to penalties . . . an act cannot be held as criminal under a statute unless it clearly appears from the language used that the legislature so intended. *State v. Hahn*, 92 Idaho 265, 267, 441 P.2d 714, 716 (1968).

It is not clear that the legislature intended to prohibit private advocacy by a member/employee given that an economic interest is present. However, under either construction no doubt exists that Section 67-6506 prohibits a member/employee from performing any public duty when he has an economic interest in the proceeding or action. Given this interpretation, our courts can give strength and vitality to the statute. *Ibid*; *State v. Gibbs*, 94 Idaho 908, 911, 500 P.2d 209, 212 (1972).

The preceding analysis is not meant to leave the question of insider influence unaddressed. A substantial body of caselaw stands for the proposition that as a matter of public policy, actions by planning and zoning commissions will be invalidated when those actions lack the appearance of fundamental fairness. This policy has as its premise the conviction that when an individual's free and unhampered use of property is to be restricted, the authority exercised must be implemented in a manner to engender public confidence. *Narrowview Preservation Association v. City of Tacoma*, Wash., 526 P.2d 897 (1974). Pursuant to this public policy, the motives of the members of commissions and governing boards who participate in the process of enacting zoning ordinances are subject to judicial review. *Moore v. Village of Ashton*, 36 Idaho 485, 211 P. 1082 (1922). A court may be required to determine whether an official improperly used his position to influence the decisions of his colleagues. *Low v. Madison*, Conn., 60 A2d 774 (1948). Judicial scrutiny of official misfeasance has encompassed the result of such conduct as a separate issue. Courts have perceived that the fabric of public acceptance of restrictions on individual

property rights is predicted upon confidence in official impartiality. Reviewing facts which suggest that members of commissions or governing boards have obtained a private advantage by virtue of their public office, the resulting ordinances have been stricken. *Josephson v. Planning Bd. of Stamford Conn.*, 199 A.2d 690, 10 ALR 3d 687 (1964); *Buell v. Bremerton*, Wash. 495 P.2d 1358 (1972). This judicial perception is embodied in the "appearance of fairness" doctrine. In *Buell v. Bremerton*, supra, the Washington Supreme Court held that it could invalidate the ordinance of a commission without reaching the decision that a member had an actual conflict of interest. Rather, it was only necessary that a member be shown to have had an interest which might have affected his judgment. *Ibid*, 495 P.2d at pp. 1361. Given such an interest, the court shifted its focus from the commission member to the commission itself.

It invalidated the zoning ordinance stating:

The self interest of one member of the planning commission to the city council infects the action of other members of the commission regardless of their disinterestedness. *Ibid*, 495 P.2d at p. 1362; quoted with approval in *Narrowview Preservation Association v. City of Tacoma*, supra, 526 P.2d at p. 901.

The impact of this decision is augmented by the fact that the decision of the planning commission served only as a recommendation to the city council; and that the action was authorized without the necessity of the affected member's vote. Neither fact negated the public's apprehension of inside influence, in as much as the member stood to gain financially by the enactment of the ordinance.

The "appearance of fairness" doctrine has not been expressly adopted in our state. It does afford our courts with an authoritative means of securing impartiality of result where favoritism by a commission is legitimately in issue.

II.

The legal standards which should guide a member/employee regarding disclosure of an economic interest and voluntary disqualification are whether the interest is immediate, particular, and distinct from public interest. 62 C.J.S. Municipal Corporations, Sec. 402. It is an economic interest which the member/employee does not hold in common with all other citizens. *Township Com. of Hazlet, Monmouth Co. v. Morales*, N.J. 289 A.2d 563, 565 (1972); *Hager v. State ex rel Te Vault*, Tex., 446 S.W. 2d 4350 (1969). It is not solely a personal interest, however. A member/employee:

shall not participate in any proceeding or action when . . . his employer, business partner, business associate, or any person related to him by affinity or consanguinity within the second degree has an economic interest in any procedure or action. Section 67-6505.

The decision reached in *Yetman v. Naumann*, Ariz., 49 P.2d 1252 (1972) is illustrative of those business relationships deemed to create impermissible conflicts of interest. The Supreme Court of Arizona was asked to apply a qualitative standard regarding the presence of an economic interest, i.e.,

whether the interest held was a *substantial* one. It answered in the affirmative on the following facts:

1. The public official was a member of the Arizona State Board of Health.
2. The Board was considering a petition for reduction of air quality standards filed by certain copper companies.
3. The public official was also chairman of the board of a construction company which had contracts with various copper companies.
4. The relaxation of air quality standards would increase the prospects of more contracts between the official's company and the copper companies.

In *Narrowview Preservation Association v. City of Tacoma*, supra, the decision of a zoning commission was invalidated on the grounds that the employer of one of the commissioners had an economic interest in the proceedings. The commissioner was employed by a local bank. The bank held a mortgage secured by certain property as collateral. The debtor applied to the commission for a zoning reclassification which if granted, would have substantially increased the value of that same property. Though the commissioner himself did not personally benefit from the reclassification, an undeniable benefit was conferred upon his employer. Given similar facts in our state, the member/employee should disclose the potential interest of his employer and disqualify himself.

The statute also prohibits a member/employee from performing public duties should persons related to him by affinity or consanguinity in the second degree have economic interests which could be thereby affected. The term "affinity" speaks to a family relationship through marriage; the term "consanguinity" to a family relationship through blood line. *State v. Hooper*, Kan. 37 P.2d 52, 63 (1934). Thus Section 67-6505 would require the member/employee to disclose the interest held by one related as a parent, grandparent, brother or sister, children or grandchildren by virtue of either blood line or marriage. *Barber v. Alexander*, 27 Idaho 286, 299, 148 P. 471, 475 (1915).

Each fact situation must necessarily be evaluated upon its own merits. Thus this opinion should be used as an aid though not a substitute for the independent analysis of appropriate counsel. The intent of the statute is to forbid official participation by a member/employee when he has economic interest of the character to influence the unbiased performance of his duties. The primary issue under any analysis will be whether the member/employee had knowledge of the economic interest in question. Absent proof of such knowledge, the criminal penalties of the statute may not be invoked. Section 67-6506.

DATED This 29 day of February, 1976.

WAYNE L. KIDWELL

Attorney General

CHRISTOPHER D. BRAY
Deputy Attorney General

ATTORNEY GENERAL OPINION NO. 76-16

TO: Joe R. Williams
State Auditor
Building Mail

Per request for Attorney General Opinion.

QUESTION PRESENTED: May the State of Idaho, through the State Auditor's Office, contract with a state employee to defer a portion of that employee's income and subsequently with the consent of the employee, fund a deferred compensation program for the employee, in the absence of specific legislation authorizing such contractual arrangements?

CONCLUSION: Yes, provided the program is especially approved by the State Board of Examiners.

ANALYSIS: In the analysis of this opinion, we have reconsidered Attorney General Opinion No. 74-174 which was issued May 17, 1974, regarding the same issue as presented herein. Inasmuch as the conclusion herein is contrary to the former opinion, this opinion will take precedence and, therefore, replace and supersede former Attorney General Opinion No. 74-174.

Our analysis of the question presented rests upon the interpretation of *Idaho Code* §59-503 which provides as follows:

"(1) Salaries of all State and district officers and employees whose salaries are paid from the State Treasury, shall be paid monthly, on or before the tenth day of the month following the month for which the salary is due, out of any money in the treasury not otherwise appropriated.

(2) From and after June 30, 1973, the State Auditor may prescribe pay periods different from the monthly pay period prescribed in Subsection (1) above, except that any such program shall insure that payment is made on or before the tenth day following the end of the pay period for which the salaries are due. The programs prescribed by the state auditor need not be uniform between or among agencies and departments." *Idaho Code* §59-503 (as amended in 1972).

Prior to amendment in 1972, *Idaho Code* §59-503 provided simply that the "salaries of all state and district officers whose salaries are paid from the state treasury shall be paid monthly, on the first day of each month, or if it be a holiday, on the following day, out of any money in the treasury not otherwise appropriated". Clearly the 1972 amendment was enacted to provide greater flexibility to the State Auditor in establishing pay periods other than one month for the payment of salaries and to provide that salaries need not be paid on the first day of each month. There does not appear to be any manifest legislative intent in *Idaho Code* §59-503 to prohibit the State Auditor from contracting with State officers and employees to defer a portion of said officer's or employee's salaries.

Our reading of *Idaho Code* §59-503(2) indicates that the State Auditor may prescribe pay periods different from the monthly pay period prescribed in *Idaho Code* §59-503(1) and the only requirement placed on the State Auditor is that the program (pay period) "shall insure that payment is made on or before the tenth day following the end of the pay period for which salaries are due." There is no requirement that the pay period correspond to the period over which an officer or employee of the State has rendered services, or that the State Auditor must prescribe pay periods for officers or employees which would cause their entire compensation to become due at once. However, it does appear that the two million dollar debt limitation provided for in Section 1, Article 8 of the *Idaho Constitution* would prohibit the Auditor from deferring State employees' salaries indefinitely without providing a funding vehicle. Although there is authority (*Stein v. Morrison*, 9 Idaho 426, pp 449-450, 75 Pac. 246 (1904)) which could indicate that Section 1, Article 8 does not apply to the payment of ordinary current expenses of state government, it does not appear that this case can be considered as precedent to permit incurring long term obligations in excess of which current revenues for a given year can readily cover. (See *Feil v. City of Coeur d'Alene*, 23 Idaho 32, 45, 129 Pac. 643 (1912)).

In determining whether *Idaho Code* §59-503 would prohibit the deferral of a State officer's or employee's compensation, one should also take into consideration *Idaho Code* §§67-1001(14) and 67-1022 which provide respectively as follows:

"Duties of Auditor. — It is the duty of the auditor: 1. 14. To draw warrants on the treasurer for the payment of moneys directed by law to be paid out of the treasury; but no warrant must be drawn unless authorized by law. Every warrant must be drawn upon the fund out of which it is payable, and specify the service for which it is drawn, and when the liability accrued." *Idaho Code* §67-1001(14). (Emphasis added.)

and

"Authority to recognize assignments of obligations owing by state. — The authority of the state auditor to recognize assignments of obligations owing by the state of Idaho is defined and limited as follows: The state auditor may recognize assignments for the purpose of paying or collecting federal excise taxes required to be collected by the state or any of its instrumentalities; assignments for the purpose of purchasing securities of the United States or of the state of Idaho in time of war for the benefit of the assignor, the United States or the state of Idaho; assignments to the state of Idaho in whole or partial retirement of any obligation to the state or any of its instrumentalities; and such other assignments as may be specially approved by the state board of examiners." *Idaho Code* §67-1022. (Emphasis added.)

Reading Sections 67-1022 and 67-1001(14) together indicates that the State Auditor may draw warrants on the treasurer for the payment of moneys directed or authorized by law to be paid out of the treasury. Also, the Auditor may recognize assignments of whatever obligations are owing by the State of Idaho (in addition to those specifically listed in *Idaho Code* §67-1022) as may be

specially approved by the State Board of Examiners. Clearly these two sections together provide ample authority for the State Auditor to contract with a state officer or employee to defer a portion of said officer or employee's income, and to recognize an assignment of the obligation due to said officer or employee to a deferred compensation plan which has received special approval from the State Board of Examiners pursuant to *Idaho Code* §67-1022. It appears by implication from the foregoing that the State Auditor has sufficient power to contract with a State officer or employee to defer a portion of that employee's income, and to fund a deferred compensation plan provided such plan has received the prior approval of the Board of Examiners.

"Where officers are intrusted with general powers to accomplish a given purpose, such powers include as well all incidental powers or those that may be deduced from the ends intended to be accomplished." *Cornell v. Harris*, 60 Idaho 87, 93, 88 P.2d 498 (1939).

and again

"Wherever a power is given by statute, everything lawful and necessary to the effectual execution of the power is given by implication of law." *Cornell v. Harris*, 60 Idaho 87, 93, 88 P.2d 498 (1939).

AUTHORITIES CONSIDERED:

1. *Idaho Code* Sections 59-503, 67-1001(14), and 67-1022.
2. *Idaho Constitution*, Article 8, Section 1.
3. Cases: *Stein v. Morrison*, 9 Idaho 426, pp 449-450, 75 Pac. 246 (1904); *Cornell v. Harris*, 60 Idaho 87, 93, 88 P.2d 498 (1939); *Feil v. City of Coeur d'Alene*, 23 Idaho 32, 45, 129 Pac. 643 (1912).
4. Attorney General Opinion No. 74-174.

DATED This 3rd day of March, 1976.

ATTORNEY GENERAL OF THE STATE OF IDAHO

WAYNE L. KIDWELL
Attorney General

ANALYSIS BY:

ROBERT M. JOHNSON
Assistant Attorney General
Department of Insurance

ATTORNEY GENERAL OPINION NO. 76-17

TO: Judge Glenn A. Phillips
Magistrates Division
Seventh Judicial District
Butte County Courthouse
Arco, Idaho 83213

Per request for Attorney General Opinion.

QUESTION PRESENTED:

Is a sheriff entitled to charge for a Return of Service when he serves a Notice of Claim from a Small Claims Court action?

CONCLUSION:

A sheriff who serves a Notice of Claim from a Small Claims Court action is entitled to charge the following fees: (1) \$5.00 for service of the Notice of Claim, (2) \$5.00 for the Return of Service, and (3) \$.25 for each mile traveled in going to the place of service. Thus, a sheriff who serves a Notice of Claim from a Small Claims Court action is entitled to charge for the Return of Service.

ANALYSIS:

Initially, it might be noted that there are no Idaho cases interpreting any of the statutes applicable to this question. In consequence, the applicable statutes provide the sole authority for this opinion.

In the chapter relating to the Small Claims Department of the Magistrate Division, I.C. §1-2303 provides that upon the filing of a complaint and the collection of a \$5.00 filing fee, the magistrate shall issue a Notice of Claim which must be served upon the defendant in the manner provided by law. I.C. §1-2304 then specifically states:

The officer serving such notice shall be entitled to receive from the plaintiff the same fees as are allowed for other service of process from the district court, which sum, together with the filing fee named in section 1-2303, shall be added to any judgment given the plaintiff. (Emphasis added.)

The general statute which sets forth sheriff's fees provides in pertinent part:

The sheriff is allowed and may demand and receive the fees hereinafter specified:

For serving summons and complaint, or any other process by which an action or proceeding is commenced, on each defendant.....\$5.00

For copy of and making return on any writ, process or other paper, when demanded or required by law\$5.00

For traveling to serve any summons and complaint, or any other

process by which an action or proceeding is commenced, notice, . . . for each mile actually and necessarily traveled, in going only.....\$.25

For all services arising in magistrates courts, the same fees as are allowed to constables for like services. . . . I.C. §31-3203. (Emphasis added.)

In sum, I.C. §1-2303 requires that in a Small Claims Court action personal service of process must be made in the manner provided by law, and I.C. §1-2304 provides that the officer serving such notice shall be entitled to receive the same fees as are allowed for other service of process from the District Court.

The questions then become, is a Return of Service required, by law, for service of a Notice of Claim from a Small Claims Court action? And, what constitutes such Return of Service?

Rule 4(g) of the Idaho Rules of Civil Procedure provides:

Proof of service of process *shall always be in writing* specifying the manner of service, the date and place of service and be made in one (1) of the following forms, *and* unless the parties served files an appearance the return *must be filed with the court*:

(1) If service is by a sheriff or his deputy anywhere within the state, *then by certificate* of the officer indicating service as required by these rules. . . . (Emphasis added.)

Thus, proof of service, evidenced by a written Return of Service, is required whenever process is served in any lawsuit, including service of a Notice of Claim from a Small Claims Court action. Further, any certificate endorsed by the sheriff indicating the manner and time of service constitutes a Return of Service, regardless of whether the certificate appears on the original Notice itself or appears on a separate paper. These conclusions are bolstered by I.C. §31-2202(9) which mandates that a sheriff, after serving any process or notice, must “(c)ertify under his hand upon process or notices the manner and time of service, or if he fails to make service, the reasons of his failure, and return the same without delay.” (Emphasis added.)

Based upon the foregoing, a sheriff who serves a Notice of Claim in a Small Claims Court action must make a Return of Service, and is entitled to receive the following fees: (1) \$5.00 for service of the Notice of Claim, (2) \$5.00 for making and endorsing the Return of Service, and (3) \$.25 a mile for travel to the place of service. Thus, a sheriff who serves a Notice of Claim from a Small Claims Court action is entitled to charge for the Return of Service.

AUTHORITIES CONSIDERED:

1. Sections 1-2303, 1-2304, 31-2202(9), and 31-2203, *Idaho Code*;
2. Rule 4(g), Idaho Rules of Civil Procedure.

OPINIONS OF THE ATTORNEY GENERAL

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76-17

DATED This 3rd day of March, 1976.

THE ATTORNEY GENERAL OF IDAHO

WAYNE L. KIDWELL

ANALYSIS BY:

JEAN R. URANGA

Assistant Attorney General

ATTORNEY GENERAL OPINION NO. 76-18

TO: Representative Harold Reid
Representative Carl Koch
House of Representatives
Statehouse Mail

Per Request for Attorney General Opinion

QUESTION PRESENTED:

You have asked this office to express an opinion as to the constitutionality and validity of HB 398 of the Second Regular Session of the Forty-Third Legislature. This bill would provide that the assessor of each county shall prepare an assessed value base for each resident, the assessed value base being the total assessed value of the taxpayers' real and personal property within the county and an adjusted gross income base from information supplied by the taxpayer to the county assessor which shall be the adjusted gross income of the taxpayer. The county assessor is then to certify these two tax rolls to the county commissioners by the second Monday in September of each year and the Board of County Commissioners are to fix a tax levy expressed in mills for the ad valorem taxes, or a levy from the income roll which shall be the higher of either the adjusted gross income tax base or the assessed value tax base of each taxpayer.

CONCLUSION:

This bill presents a serious constitutional problem. The tax it proposes would not be uniform. Such a law would require constitutional change or it would be invalid in Idaho.

ANALYSIS:

Article 7, Section 5 of the Idaho Constitution requires that all property taxes are to be uniform upon the same class of subjects within the territorial limits of the authority applying the tax and further that duplicate taxation of property during the same year is prohibited. It appears to this office to be quite certain that under the Idaho cases of *Idaho Gold Dredging Co. v. Balderston*, 58 Idaho 692; *Diefendorf v. Gallet*, 51 Idaho 619; and *W.W.P. Co. v. Kootenai County*, 270 F. 369, that this proposed bill would be invalid under the present Idaho Constitution because it lacks uniformity.

It does not take any great stretch of the imagination to see that if this bill passes, one individual may be taxed at a greater rate than another individual depending on property or income. This tax will, in effect, be a substitute for a property tax and would, in all likelihood, be held to be invalid under the above-cited cases and constitutional section.

This appears to be an unusual approach to taxation. It would certainly take a constitutional amendment to make it possible. There might, indeed, be a number of other objections to this novel approach to taxation. However, the objections already referred to appear to be so large that any mention of the

other problems becomes superfluous.

AUTHORITIES CONSIDERED:

1. Article 7, Section 5, Idaho Constitution.
2. *Idaho Gold Dredging Co. v. Balderston*, 58 Idaho 692; *Diefendorf v. Gallet*, 51 Idaho 619; *W.W.P. Co. v. Kootenai County*, 270 F. 369.

DATED This 5th day of March, 1976.

FOR THE ATTORNEY GENERAL OF IDAHO

WAYNE L. KIDWELL

ANALYSIS BY:

WARREN FELTON
Deputy Attorney General

ATTORNEY GENERAL OPINION NO. 76-19

TO: Jay H. Stout
City Attorney
City of Blackfoot
157 North Broadway
Blackfoot, Idaho 83221

Per Request for Attorney General Opinion

QUESTION PRESENTED:

You have asked whether the Board of Trustees of the Blackfoot City Library may, with the approval of the City Council, set aside one-half of the library's income each year into a building fund to be used for the purpose of building a library building.

CONCLUSION:

The Idaho Code allows city library boards, with the consent of the city council, to set aside up to one-half of their annual income to purchase a library building.

ANALYSIS:

Section 33-2604, *Idaho Code*, provides:

Said trustees shall, immediately after their appointment, meet and organize by the election of one of their number president, and by the election of such other officers as they may deem necessary. They shall make and adopt such by-laws, rules and regulations for their own guidance and for the government of the library and reading room as may be expedient.

They shall have the exclusive control of the expenditure of all moneys collected for the library fund, and the supervision, care, and custody of the room or buildings constructed, leased or set apart for that purpose; and such money shall be drawn from the treasury by the proper officers, upon properly authenticated vouchers of the board of trustees, without otherwise being audited. *They may, with the approval of the common council, lease and occupy, or purchase or erect on purchased ground, an appropriate building: provided, that no more than one-half (½) of the income in any one (1) year can be set apart in said year for such purchase of building.* They may appoint a librarian and assistants, and prescribe rules for their conduct. (Emphasis supplied).

Although there have been no Idaho supreme court cases containing the section, we read the section to allow the library trustees, with the consent of the city council, to set aside one-half of their annual income into a building fund for the purchase of a library building. The purchase of the building could be either by out right purchase of a completed facility or by the purchase of a site and

subsequent erection of a building thereon.

Such a reading of section 33-2604 would appear to promote city libraries and thus the purposes of the City library law. Therefore, this reading is in conformity with section 73-102, *Idaho Code*, and Idaho Supreme Court cases construing that section. Section 73-102, *Idaho Code* provides:

The rule of the common law that statutes in derogation thereof are to be strictly construed, has no application to these compiled laws. The compiled laws establish the law of this state respecting the subjects to which they relate, and their provisions and all proceedings under them are to be liberally construed, with a view to effect their objects and to promote justice.

Summarizing, we believe that a fair reading of section 33-2604, *Idaho Code*, would allow the library board, with the consent of the City Council, to set aside up to one-half of its annual income to provide a building fund with which to purchase land and construct a building.

IDAHO AUTHORITIES CONSIDERED:

Section 33-2604, *Idaho Code*.

Section 73-102, *Idaho Code*.

DATED This 8th day of March, 1976.

ATTORNEY GENERAL OF IDAHO

Wayne L. Kidwell

ANALYSIS BY:

David G. High
Assistant Attorney General

ATTORNEY GENERAL OPINION NO. 76-20

TO: Marjorie Ruth Moon
State Treasurer
Statehouse
Boise, Idaho 83720

Per request for Attorney General Opinion.

QUESTION PRESENTED:

Whether the state treasurer should continue to require both husband's and wife's signature as endorsements on the back of state warrants issued as income tax refunds where the names of both are shown as payees.

CONCLUSION:

Where the tax refund is community property, either spouse has full right to manage and control the community property. The spouse may endorse the state warrant for himself and as the authorized representative of the other spouse. However, where the warrant cannot be identified as a tax refund warrant or the refund as community property, a requirement that both the husband and the wife endorse the warrant is not improper.

ANALYSIS:

Idaho Code §32-912 provides as follows:

"32-912. Control of community property. — Either the husband or the wife shall have the right to manage and control the community property, and either may bind the community property by contract, except that neither the husband nor wife may sell, convey or encumber the community real estate unless the other joins in executing and acknowledging the deed or other instruments of conveyance, by which the real estate is sold, conveyed or encumbered, and any community obligation incurred by either the husband or the wife without the consent in writing of the other shall not obligate the separate property of the spouse who did not so consent; provided, however, that the husband or wife may by express power of attorney give to the other the complete power to sell, convey or encumber community property, either real or personal. All deeds, conveyances, bills of sale, or evidences of debt heretofore made in conformity herewith are hereby validated."

The provisions of the Uniform Commercial Code relating to commercial paper are also relevant. *Idaho Code* §28-3-403 provides as follows:

"28-3-403. Signature by authorized representative. — (1) A signature may be made by an agent or other representative, and his authority to make it may be established as in other cases of representation. No particular form of appointment is necessary to establish such authority.

(2) An authorized representative who signs his own name to an instrument

(a) is personally obligated if the instrument neither names the person represented nor shows that the representative signed in a representative capacity;

(b) except as otherwise established between the immediate parties, is personally obligated if the instrument names the person represented but does not show that the representative signed in a representative capacity, or if the instrument does not name the person represented but does show that the representative signed in a representative capacity.

(3) Except as otherwise established the name of an organization preceded or followed by the name and office of an authorized individual is a signature made in a representative capacity."

To the extent that the refund is community property, therefore, it would appear that either spouse may endorse the warrant as the agent for the other. A problem, of course, may arise since it may not be readily apparent on the fact of the warrant whether or not some or all of the amount payable may be the separate property of one spouse or the other. As a practical matter, almost all such refunds will be community property. It is possible, however, for refunds issued on joint returns to be, all or in part, separate property of one spouse or another. Since the management authority granted to either spouse by §32-912 is limited only to community property, the other spouse may have no authority to endorse a warrant on behalf of the other spouse where some of the refund is separate property, unless that authority is founded in an independent source such as a power of attorney. Since as a general rule of agency law an agent cannot bind a principal beyond the scope of his authority, a conservative and precautionary policy of requiring both the husband and the wife to sign the warrant in such instances is not improper.

IDAHO AUTHORITIES CONSIDERED:

Idaho Code §§32-912; 28-3-403.

DATED This 8th day of March, 19 6.

ATTORNEY GENERAL OF THE STATE OF IDAHO

Wayne L. Kidwell

ANALYSIS BY:

THEODORE V. SPANGLER, JR.
Deputy Attorney General

ATTORNEY GENERAL'S OPINION NO. 76-21

TO: The Honorable Jerry D. Reynolds
Magistrate
District Court of Fremont County
St. Anthony, Idaho 83445

Per request for Attorney General's Opinion

QUESTION:

What is the law in Idaho regarding the right of a criminal defendant in a misdemeanor case to seek the service of a non-lawyer to represent him in lieu of an attorney?

CONCLUSION:

The answer to your question is to be found in Section 3-104, *Idaho Code*. Therein no person may represent another without having been licensed to practice law except for an appearance in the magistrate division of district court on a claim that does not exceed \$300.00. In addition to this statute, the sixth amendment of the United States Constitution guarantees that an accused may represent himself. Neither the Supreme Court of the United States nor the Idaho Supreme Court have been asked to decide whether an accused has a similar constitutional right to be defended by a layperson of one's choice. Until that question is resolved, Section 3-104, is the law in our state and should be followed.

ANALYSIS:

Section 3-104, *Idaho Code*, reads:

PRACTICING WITHOUT LICENSE A CONTEMPT — EXCEPTION. — If any person shall practice law or hold himself out as qualified to practice law in this state without having been admitted to practice therein by the Supreme Court and without having paid all license fees now or hereafter prescribed by law for the practice of law he is guilty of contempt both in the Supreme Court and district court for the district in which he shall so practice or hold himself out as qualified to practice. Provided, that any person may appear and act in a magistrate's division of a district court as representative of any party to a proceeding therein so long as the claim does not total more than \$300, and so long as he or his employer has no pecuniary interest in the outcome of litigation, and that he shall do so without making a charge or collecting a fee therefor.

Careful review of this statute indicates that the only time one may have a non-lawyer as a representative in court is in an action where the "claim does not total more than \$300.00". The term "claim" indicates a civil action, not a criminal or penal one. Thus on its face, Section 3-104 would appear to prohibit the appearance of a lay-person to serve as a counsel for a defendant in a misdemeanor action.

Your question raises the issue of the scope of the guarantee found within the sixth amendment to the United States Constitution which states that an accused shall have the right "... to have the Assistance of Counsel for his defense". As presently interpreted by the United States Supreme Court, "Assistance of Counsel" means assistance given by an attorney at law. *Powell v. Alabama*, 287 U.S. 45, 77 L.Ed. 158, 53 S.Ct. 55 (1932); *Gideon v. Wainwright*, 372 U.S. 335, 9 L.Ed.2d 799, 83 S.Ct. 792 (1963). The Supreme Court has also recognized that implicit to the sixth amendment guarantee of the right to counsel, is the right to waive the assistance of such counsel. *Faretta v. California*, — U.S. —, 45 L.Ed.2d 562, 95 S.Ct. 2525 (1975). Thus an accused has a constitutional right to be represented by an attorney and a right to represent himself. *Lockard v. State*, 92 Idaho 813, 451 P.2d 1014 (1969). Unresolved by *Faretta* is whether an accused has a constitutional right to the assistance of lay-advisors of his choice. There is some intimation in the *Faretta* decision that the sixth amendment's right to "Assistance of Counsel" may encompass non-lawyers aiding an accused. The Court stated:

The first lawyers were personal friends of the litigant, brought into Court by him so that he might "take 'counsel' with them" before pleading. 1. Pollock & Maitland, *History of English Law* 211 (1909). Similarly the first 'attorneys' were personal agents, often lacking any professional training who were appointed by those litigants who had secured royal permission to carry on their affairs through a representative, rather than personally. *Id.*, at 212-213. See *Faretta v. California*, *supra*, at n.16, 95 S.Ct. at 2534, 45 L.Ed.2d at 573.

One federal case has been heard on this issue since *Faretta*. In *United States v. Scott*, the accused had three laymen assisting him in presenting his defense. They sat at the counsel table during the trial. They argued constitutional issues and discussed jury instructions on the accused's behalf. They planned strategy and assembled cases and documents in his defense.

"In short, they performed functions typically reserved to members of the bar." *United States v. Scott*, 521 F.2d 1188, 1199 (1975) dissenting opinion.

Their participation was not offered as a matter of law, but rather at the discretion of the trial judge. *Ibid.*

In summary, neither the United States Supreme Court nor the Idaho Supreme Court has spoken directly to the issue of lay-representation on behalf of an accused in a misdemeanor action. Until one court or the other is presented with this question, Section 3-104, *Idaho Code* remains the law in this State and should be followed. The only proper alternative to compliance with this statute is to challenge its validity in a court of law or ask the legislature to appropriately amend the statute.

DATED This 11 day of March, 1976.

IDAHO ATTORNEY GENERAL

Wayne L. Kidwell

Christopher D. Bray

Deputy Attorney General

ATTORNEY GENERAL OPINION NO. 76-22

TO: Thomas B. Campion
Prosecuting Attorney for
Blaine County, State of Idaho
P. O. Box 756
Hailey, ID 83333

Per request for Attorney General Opinion

QUESTIONS PRESENTED:

(1) Whether dwellings permanently affixed to land, which are owned separately from the land, and which constitute a separate and distinct estate from the land, are assessable as real or personal property?

(2) Whether condominiums are assessable as real or as personal property?

CONCLUSION:

Such buildings are assessable as real property.

ANALYSIS:

Section 63-108, *Idaho Code*, defines real property as follows:

"Real property defined. — Real property for the purposes of taxation shall be construed to include land, and all standing timber thereon, including standing timber owned separately from the ownership of the land upon which the same may stand, and all buildings, structures and improvements, or other fixtures of whatsoever kind on land, including water ditches constructed for mining, manufacturing or irrigation purposes, water and gas mains, wagon and turnpike toll roads, and toll bridges, and all rights and privileges thereto belonging, or in anywise appertaining, all quarries and fossils in and under the land, and all other property which the law defines, or the courts may interpret, declare and hold to be real property under the letter, spirit, intent and meaning of the law, for the purposes of taxation: provided, that land included in public highways, as defined by sections 40-101 and 40-103, shall not be subject to assessment for taxation."

Section 63-109, *Idaho Code*, defines personal property as follows:

"Personal property defined. — Personal property for the purposes of taxation shall be construed to embrace and include, without especially defining and enumerating it, all goods, chattels, stocks and bonds, equities in state lands, easements, reservations, and all other matters and things of whatsoever kind, name, nature or description, which the law may define or the courts interpret, declare and hold to be personal property under the letter, spirit, intent and meaning of the law, for the purposes of taxation, and as being subject to the laws and under the

jurisdiction of the courts of this state.”

The Idaho State Tax Commission has promulgated a regulation interpreting §63-108, *supra*, which reads in relevant part as follows:

“Art. 108. Real Property Defined.

“Real property includes:

“1. Land itself is the original or nonreproducible, indestructible, immobile part of real property. It includes such items or additions thereto as dirt fill, grading, leveling and drainage.

“2. Buildings, structures, improvements and equipment and fixtures are real property when affixed to land, or improvements on the land . . .

“b. Such items shall *not* be considered as affixed when they are owned separately from the real property unless the lease agreement specifically provides that such items are to be considered as part of the real property and are to be left with the real property when the tenant vacates the premises. . . .”

The foregoing regulation applies an ownership test for the purpose of determining whether buildings are real or personal property. If the buildings are owned separately from the land, such as a home built upon leased land, the regulation requires the assessor to assess the property as personal property unless the lease provides that they are to be assessed as real property. Your question calls into doubt the reasonableness of this regulation, which regulation must be a proper interpretation of the statutes and which cannot be ignored by the assessor. §63-202A, *Idaho Code*.

Section 63-110, *Idaho Code*, defines ‘improvements’ as follows:

“Improvements defined. — By the term ‘improvements’ is meant all buildings, structures, fixtures and fences erected upon or affixed to the land, and all fruit, nut-bearing and ornamental trees or vines not of natural growth, growing upon the land, except nursery stock.”

Thus buildings permanently affixed to land are defined as improvements and improvements are defined as real property. Moreover, buildings on land are specifically defined as real property. §63-108, *supra*.

Throughout the statutes dealing with taxation of real and personal property in Idaho runs the concept that the owner of the property is the person to be considered as the taxpayer. But the determination of ownership is not related to the definition of real property. There is no statutory reason why the taxpayer who owns the building, but does not own the land upon which it is permanently affixed, should have the building treated as personal property simply because he or she does not own the land upon which the building rests. The legislature was aware at the time these statutes were enacted that normally improvements on real estate become a part of the realty and expressed the awareness in the

statutes. *Russett Potato Company v. Board of Equalization of Bingham County*, 93 Idaho 501, 506, 465 P.2d 625 (1970).

There are statutory exceptions to the general rule that buildings and other improvements become real property for tax purposes. Examples of these statutory exceptions are improvements on government or state land, and improvements on railroad rights-of-way owned separately from the rights-of-way. However, since §63-108, *supra*, specifically states that buildings and other improvements are real property, they must be taxed as real property where not specifically defined as personal property, even where the buildings are owned separately from the land upon which they are permanently affixed. *United States v. Erie County*, 31 Fed. Supp. 57 (D.C., 1939); *Union Compress Company v. State*, 41 S.W. 52 (Ark., 1897); *Russell v. New Haven*, 51 Conn. 259 (1883); *Oskaloosa Water Company v. Board of Equalization*, 51 N.W. 18 (Iowa, 1892); *Portland Terminal Company v. Hinds*, 39 A.2d 5, 154 A.L.R. 1302 (Maine, 1944); *People ex rel Hudson River Day Line v. Franck*, 177 N.E. 312 (N.Y. 1931); *Shields v. Department of Revenue*, 513 P.2d 784, 789 (Ore., 1973); *Russett Potato Company v. Board of Equalization of Bingham County*, *supra*.

With respect to condominiums, the legislature has specifically defined them as real property as follows:

“55-101B. ‘Condominium’ defined. — A condominium is an estate consisting of (i) an undivided interest in common in real property, in an interest or interests in real property, or in any combination thereof, together with (ii) a separate interest in real property, in an interest or interests in real property, or in any combination thereof.”

The legislature has also provided that property taxes constitute a lien upon each condominium and not upon the group of condominiums as a whole. It is even more apparent that condominiums are real property for purposes of property taxation, because a condominium consists of a building affixed to the land, which land and building are owned by the taxpayer. A condominium consists of an estate in land and the building thereon. §55-1509, *Idaho Code* §55-1514, *Idaho Code*; §63-108, *supra*.

It may be that there are difficulties inherent in taxing condominiums and dwellings, which dwellings are separately owned from the land, as real property. Such difficulties no doubt prompted the adoption of the aforementioned tax Commission regulation. But the regulation must fall in the face of §63-108, *supra*, because such statute defines real property to include buildings, whether separately owned, or not separately owned, and it is the legislature which must correct possible shortcomings in the present law. *Portland Terminal Company v. Hinds*, *supra*.

AUTHORITIES CONSIDERED: *Idaho Code*, Sections 63-108, 63-109, 63-110, 63-202A, 55-101B, 55-1509, 55-1514.

(2) Idaho cases: *Russett Potato Company v. Board of Equalization of Bingham County*, 93 Idaho 501, 506, 465 P.2d 625 (1970).

DATED this 12 day of March, 1976.

ATTORNEY GENERAL OF THE STATE OF IDAHO

WAYNE L. KIDWELL

ANALYSIS BY:

J. MICHAEL KINSELA
Assistant Attorney General

ATTORNEY GENERAL OPINION NO. 76-23

**TO: Steven W. Bly, Director
Department of Parks & Recreation
Building Mail**

Per Request For Attorney General Opinion

QUESTION PRESENTED:

Whether Indian tribes are eligible to participate in programs under the Land and Water Conservation Fund Act, 16 USC §460(1) 1-11(1965) in the state of Idaho.

CONCLUSION:

Indian tribes do not qualify for participation in programs under the Land and Water Conservation Fund Act. Qualification of Indian tribes under this legislation may only take place upon amendment of that Act by the United States Congress.

ANALYSIS:

In 1965, the United States Congress enacted the Land and Water Conservation Fund Act, 16 US Code, Section 460(1) 1-11 (1965). The primary thrust of this legislation is to provide monetary incentives for recreational development. Fifty percent is federal funding. The remainder comes from the applicant agency or entity. In the language of the Act:

Payments for all projects shall be made by the Secretary to the Governor of the state or to a state official or agency designated by the Governor or by state law having authority and responsibility to accept and to administer funds paid hereunder for approved projects. If consistent with an approved project, funds may be transferred by the state to a political subdivision or other appropriate public agency. (16 USC §460 (1)-8(f))

The applicable portion of the Act, for purposes of this opinion, provides that:

(i)f consistent with an approved project, funds may be transferred by the state to a political subdivision or other appropriate public agency.

Obviously, an Indian tribe is not a "political subdivision" of the state. Therefore, whether the tribe qualifies for participation in the program depends upon whether it qualifies as an "appropriate public agency" within the meaning of the Act.

Initially, it should be recognized that this question has been considered by at least two governmental authorities with two totally opposite conclusions. In 1967, the Office of the Solicitor, Department of the Interior, issued Opinion No. M-36709 (August 1, 1967). This opinion addressed a ruling by the Director of the Bureau of Outdoor Recreation which allowed participation by Indian tribes.

The Solicitor agreeing with this interpretation, said:

This conclusion is correct, we think, and in accord with a number of decisions by the department holding that Indian tribes are public agencies or comparable entities under several other federal statutes involving participation by local public agencies in federal programs.

On September 25, 1975, the Attorney General of the state of Arizona issued an opinion on the same issue. This opinion disagreed with Solicitor's opinion number M-35709, concluding that Indian tribes could not be considered an "appropriate public agency" under the Act.

Research of the case law in this regard discloses no judicial interpretation in the area. The legislative history of the Act is also silent on this particular point, although the general history could be used to support either result. Consequently, we are faced with interpreting the language of the Act with no help other than two conflicting opinions from Arizona and the federal government.

Although there are no clear cut guidelines from judicial or other authorities, we are persuaded that a better view is the one established by the Attorney General of Arizona in his opinion of September 25, 1975. It is certainly true that Indian tribes within the state of Idaho are organizational structures having semi-governmental capacities. Further, members of those tribes are American citizens, and in that capacity they have certain rights and privileges available to all Americans. For example, they may vote, they may use state courts, and, in some instances they receive services from state government. See *e.g.* sections 67-5101 and 5102, *Idaho Code*. Still, the Indian tribes are not part of state government, and, as the Arizona Attorney General points out, they are not truly *public* agencies.

The United States Supreme Court, in the case of *United States v. Kagama*, 118 US 375 (1889), made this clear. The Court in that case said that:

(t)he relation of the Indian tribes living within the border of the United States . . . (is) an anomalous one and of a complex character . . . They were and always have been, regarded as having semi-independent position when they preserved their tribal relations; not as states, not as nations, not as possessed of the full attributes of sovereignty but as a separate people, with the power of regulating their internal and social relations, and thus far not brought under the laws of the Union or of the State within whose limits they resided. 118 US at 381-382.

There are numerous reasons why monies from the Land and Water Conservation Fund Act cannot go through the states to the Indian tribes. First of all, Indian lands are normally not open to the public in the same manner as lands under the jurisdiction of state or local government. Thus, the requirement in the Land and Water Conservation Fund Act that the money be distributed only to divisions of state government or *public* agencies cannot be met. Furthermore, due to the limited jurisdiction of the state on the Indian reservations, it would be impossible for the state to fulfill its obligations under the regulations passed pursuant to the Land and Water Conservation Fund Act. For example, under these regulations, or Guidelines, as they are called, the Bureau of

Outdoor Recreation, United States Department of the Interior, requires that the states shall:

- (a) Monitor the project and submit performance reports as to the progress of the project;
- (b) Adhere to the Property Management Standards prescribed by Attachment M of OMB Circular No. A-102;
- (c) Adhere to the statutory requirements of the Land and Water Conservation Fund of 1965, as amended;
- (d) prepare a comprehensive outdoor recreation plan for the entire state;
- (e) Before approval of projects under Section 5(f) of the Act, give written assurance 'that the State has the ability and intention to finance its share of the cost of the particular project, and to operate and maintain by acceptance standards, at state expense, the particular properties or facilities acquired or developed for public outdoor recreation use'

The State simply lacks the necessary powers on Indian reservations to enforce many of the requirements laid down in the Bureau of Outdoor Recreation Guidelines, and it is doubtful that the State would have the necessary financial ability to meet some of these requirements.

In addition to the reasons cited above, there are other problems with a decision which would allow participation by Indian tribes under the Land and Water Conservation Fund Act. For instance, although State monies normally would not be directly involved in the project on the Indian reservation, monies would, at the very least, be involved indirectly. This is because only so much money is allocated each year by the federal government to each state for programs under the Act. Therefore, if there were too many applications by state and local agencies for financial assistance under the Act for various programs, and some of the applications included those of Indian tribes, approval of projects on the Indian reservations would necessarily mean disapproval of some of the projects requested by state and local government. Thus, if the state or local entity wished to proceed with the project, it would have to do so by absorbing all of the expense involved instead of fifty percent of the expense which would be required if monies were allocated under the Act.

Finally, there is also a problem with possible liability resulting from the project. Although the question apparently has been unanswered to date, it is certainly conceivable that the state could be joined in a suit as co-defendant with the Indian tribe if a project which was approved under the Land and Water Conservation Fund Act resulted in injury or other damage to some individual. This is because the state is charged with affirmative duties under the Act and guidelines passed pursuant thereto, which raises at least the threat of possible liability in case of injury or damage resulting from the project.

In summary, we are persuaded that the reasoning of the state of Arizona on this matter is correct, and we are forced to disagree with the opinion of the Solicitor of the United States Department of Interior in this regard. It is our view that Indian tribes may be allowed to participate in such programs providing an appropriate amendment is made to the Land and Water Conservation

Fund Act by the United States Congress. Otherwise, in light of the clear language of the Act, and because of the responsibilities placed upon the state by the guidelines passed pursuant to that Act, it is apparent that the state cannot allocate monies to Indian tribes for projects pursuant to this federal legislature. In closing, it should be observed that we are familiar with the authority granted by Sections 67-5101 and 5102, *Idaho Code*. However, in view of the foregoing, we do not believe that these code sections provide any additional authority which would overcome the problems which have been explained.

AUTHORITIES CONSIDERED:

1. *Idaho Code*, Sections 67-5101, and 5102.
2. Land and Water Conservation Fund Act, 16 USC, Section 4601, 1-11 (1965).
3. *United States v. Kagama*, 118 US 375 (1886).
4. *United States Department of the Interior*, Solicitor's Opinion Number M-36709 (August 1, 1967).
5. Opinion of the Arizona Attorney General to Mr. Roland H. Sharer, dated September 25, 1975.

DATED This 23rd day of March, 1976.

Attorney General of Idaho

WAYNE L. KIDWELL

ANALYSIS BY:

GUY G. HURLBUTT
Assistant Attorney General

ATTORNEY GENERAL OPINION NO. 76-24

TO: Mr. John W. Barrett, Secretary
Judicial Council, State of Idaho

Per request for Attorney General Opinion

QUESTIONS PRESENTED:

a. May a lay person be legally "qualified" in a sense required for his or her name to be submitted by the Judicial Council to the Governor for appointment to the Supreme Court?

b. May a lay person legally serve as Justice of the Supreme Court if appointed by the Governor?

CONCLUSION: Historical, legal and practical considerations effectively preclude the nomination or appointment of a lay person as justice of the Idaho Supreme Court.

ANALYSIS: Resolution of either question begins with an analysis of Article V, of the Idaho Constitution. Therein, Section 6 establishes the number and terms of office of those who serve as justices of the Supreme Court. No qualifications are established for such service by this section or any other section of our Constitution. Qualifications for certain other judicial offices are established however. These officers are District Judges (Article V, Section 23), District Judge Pro Tempore (Article V, Section 12), and Prosecuting Attorneys (Article V, Section 18). Respectively, these offices are to be filled by persons who are "learned in the law", "a member of the bar", and "a practicing attorney of law". One might infer thereby that the absence of a similar qualification for Justices of the Supreme Court implies that there shall be no such qualification. *Kivett v. Mason*, 185 Tenn. 558, 206 S.W.2d 789 (1947), holding expressly restricted by *LaFever v. Ware*, 365 S.W.2d 44 (Tenn. 1963); *State v. Benson*, 14 Utah 2d 121, 378 P.2d 669 (1963).

Careful review of the recorded Constitutional Convention debate by the drafters of Article V, Section 6 finds no language to support this inference. Rather, our constitutional framers contemplated that lawyers would be serving as Justices of the Supreme Court. II, *Proceedings And Debates of the Constitutional Convention of Idaho 1889* (1912), pp. 1500-1522. It is nonetheless clear that no qualifications of any nature were formally incorporated into the language of this provision. *Ibid*, pp. 1581, 1643.

Given the absence of Constitutional qualifications, express or implied, generally accepted rules of construction are relied upon to determine the intent of Article V, Section 6.

First, the Idaho Constitution is a limitation of legislative power, not a grant thereof. *Standlee v. State*, 96 Idaho 849, 852, 538 P.2d, 778, 781 (1975). The legislature therefore may enact any law not expressly or implicitly prohibited by the Idaho or Federal Constitutions. *Ibid*, *Boughton v. Price*, 70 Idaho 243, 251, 215 P.2d 286 (1950). Insofar as statutes create reasonable qualifications for

the election of Justices to the Idaho Supreme Court, they are valid exercises of legislative authority. *Ibid.*, *In re Bartz*, 47 Wash. 161, 287 P.2d 119 (1955); *State v. Welch*, 198 Ore. 670, 259 P.2d 112 (1953).

Second, the fundamental object to be sought in construing a constitutional provision is to fulfill the intent of the framers and the people, not to defeat it. *Haile v. Foote*, 90 Idaho 261, 409 P.2d 409 (1965). Evidence of that intent may be derived from the construction afforded Article V, Section 6, by the legislature, the executive department, and as accepted by the people. *La Fever v. Ware*, *supra*.

The history of the judiciary in Idaho as reflected in judicial appointments and elections to the Idaho Supreme Court is that every Justice of the Court has been a lawyer. The requirement that an elected Justice be an attorney, licensed in Idaho has been established since 1933. Section 34-702, *Idaho Code*, (S.L., 1933, ch 16, sec 2 p. 18), repealed by S.L. 1970, ch. 140, sec, 298; Section 34-615 (S.L. 1970, ch. 140, sec 95, p. 351).

As enacted, Section 34-615(3), *Idaho Code*, specifies that no person shall be elected to the office of Justice of the Supreme Court unless that person be thirty (30) years of age, a citizen of the United States, two (2) year resident of Idaho, and licensed to practice law in this State. These qualifications are not expressly incorporated into Section 1-2102(3), *Idaho Code*, which requires the Judicial Council to nominate "qualified" persons to fill judicial vacancies. In the absence of express legislative direction, one may contend that the Council has complete discretion to determine the necessary qualifications. This argument finds no restriction from the language of Article IV, Section 6, *Idaho Constitution*. Thereby, the Governor is empowered to fill a judicial vacancy by appointment, such power to be exercised "as provided by law". If Section 1-2102(3), *Idaho Code*, may be read as conferring the responsibility upon the Council to determine what qualifications are requisite for purposes of appointment, then it would be legally possible for the Council to nominate and the Governor to appoint a lay person to the Court. The practical result would be that such an appointee would be a lame-duck justice, statutorily prohibited from being elected to the same office. Section 34-615(3), *Idaho Code*.

The better reasoned construction would be to hold that qualifications articulated by Section 34-615(3), *Idaho Code*, implicitly define the duty of the Council to nominate "qualified" persons. Thereby, those qualifications would be effective as conditions for service on as well as election to the Supreme Court. *Bradfield v. Avery*, 16 Idaho 769, 776, 102 Pac. 687, 690 (1909); *Strecker v. Smith*, 66 Idaho 593, 596, 164 P.2d 192, 194 (1945); *Tway v. Williams*, 81 Idaho 1, 7, 336 P.2d 115, 118 (1959).

A final issue, persuasive for its practical impact upon the county must be considered. The United States Supreme Court has recently held that a defendant's fundamental right to a fair trial extends to *all* criminal trials. *Argersinger v. Hamlin*, 407 U.S. 25, 92 S.Ct. 2006, 32 L.Ed.2d 530 (1972). Further, a defendant's fundamental right to effective counsel is guaranteed regardless of the severity of the punishment to be faced upon conviction. *Ibid*. Expanding *Argersinger*, the California Supreme Court has held:

. . . that the failure to provide a judge qualified to comprehend and utilize counsel's legal arguments likewise must be considered a denial of due process. *Gordon v. Justice Court For Yuba J.D. of Sutter Cty.*, 115 Cal. Rptr. 632, 525 P.2d 72, 76 (1974).

The judge in *Gordon* was a non-attorney judge of the Yuba City Justice Court, presiding over a misdemeanor trial involving a potential jail sentence. Given the possibility of a defendant's incarceration, this court concluded that an attorney judge must preside over the proceedings unless the defendant knowingly elected to waive his right for a qualified judge. *Ibid.*, 525 P.2d at 79. The identical issue is presently before the United States Supreme Court in *North v. Russell*, No. 74-1409, October Term 1975 (argued but not decided), wherein a Kentucky layman Police Judge imposes a jail sentence on the defendant. Given the tenor of the present United States Supreme Court and the emphasis given by Chief Justice Warren Burger to upgrading the quality of the legal and judicial system in the United States, there is every reason to believe that the Court's eventual decision in *Russell v. North* will support the holding in *Gordon* that whenever a jail term is possible only a lawyer-judge may sit on the bench.

The necessity to provide justices who are qualified to comprehend and utilize counsel's legal arguments is no less vital at the appellate level than at the trial itself. Given the volume and predominance of criminal cases presently on appeal to the Idaho Supreme Court, the probability exists that a non-attorney justice or justices would be required to be absent from all appeals where lawful incarceration is at issue unless a specific "waiver" is made in each such appeal. The spectre of revolving justices, sitting only upon civil appeals absent a defendant's waiver was surely not contemplated by the legislature in its enactment of Sections 1-2102(3) and 34-615(3), *Idaho Code*.

The questions you raise can and should be resolved independently of knowledge of the identities of those seeking the vacancy nomination. The questions can and should be resolved independently of philosophical preferences for either a lay or attorney justice. Rather, considerations both legal and practical should guide your deliberations.

Therefore, in conclusion, it is the advisory opinion of this office that the historical, legal and practical considerations, effectively preclude the nomination or appointment of a lay person as justice of the Idaho Supreme Court.

ATTORNEY GENERAL FOR IDAHO

WAYNE L. KIDWELL

ANALYSIS BY:

PETER E. HEISER, JR.
Chief Deputy Attorney General

CHRISTOPHER D. BRAY
Deputy Attorney General

IDAHO AUTHORITIES CONSIDERED:

1. Constitution — Article V, Sections 6, 12, 18, 23; Article IV, Section 6.
2. Statutes — Section 34-615(3); Section 1-2102(3); Section 34-702, repealed.
3. Cases—*Standee v. State*, 96 Idaho 849, 538 P.2d 778 (1975); *Boughton v. Price*, 70 Idaho 243, 215 P.2d 286 (1950); *Haile v. Foote*, 90 Idaho 261, 409 P.2d 409 (1965); *Bradfield v. Avery*, 16 Idaho 769, 102 P. 687 (1909); *Strecker v. Smith*, 66 Idaho 593, 336 P.2d 115 (1959). *Tway v. Williams*, 81 Idaho 1, 336 P.2d 115 (1959).
4. Reports — II, Proceedings and Debates of the Constitutional Convention of Idaho 1889 (1912).

ATTORNEY GENERAL OPINION NO. 76-25

TO: Charles M. Rountree
State Coordinator
Bureau of Disaster Service
Statehouse Mail

Per Request for Attorney General's Opinion

QUESTIONS PRESENTED:

1. Do current laws in Idaho permit State or local government to provide temporary housing sites or disaster emergency?
2. May local zoning ordinances be waived in designation and use of temporary housing sites for disaster emergency?
3. What funds are available for use in providing temporary housing sites?

CONCLUSION:

1. Current laws of the State of Idaho permit State and local government to plan for and provide temporary housing sites for disaster emergencies in accordance with the requirements of the Federal Disaster Relief Act of 1974, P.L. 92-288.
2. The State may not disregard local zoning ordinances in establishing temporary housing sites.
3. No special fund exists for establishment of temporary housing sites, and funding for these sites must be requested from the Idaho Legislature.

ANALYSIS:

In order to plan for and control unexpected catastrophic damage in this country, congress enacted the Disaster Relief Act of 1974, 42 U.S.C. §5121 (n) P.L. 93-288. The Act creates a cooperative system involving federal, state and local government. On May 28, 1975, final regulations for implementing this legislation were promulgated by the Federal Disaster Assistance Administration. See 40 Fed. Reg. 23252 (1975).

The Federal Regulations for disaster assistance create certain requirements for temporary housing sites. 24 C.F.R. §2205.45 (1975) contains the following provisions:

“(a) temporary housing may be provided, either by purchase or lease, for those who, as a result of a major disaster, require temporary housing.

(h) any mobile home or readily fabricated dwelling shall be placed on a site complete with utilities *provided either by the State or local government* or by the owner or the occupant of the site who was

displaced by the major disaster, without charge to the United States,”

This regulation, in effect, requires the State or local entity to plan for future disaster by having available housing sites for victims who have lost their homes.

Following passage of the Federal law, the State enacted the Idaho Disaster Preparedness Act of 1975, Section 46-1001, et. seq., *Idaho Code*. This Act establishes procedures for coping with natural and man-made disasters before and after they occur. In our opinion, the subject of this legislation, disaster preparedness, is well within the limits of police power jurisdiction, which allows the State to protect the public health, safety and welfare. Since temporary emergency housing sites are specifically designed to protect the public health, safety and welfare, such designation is well within the authority of the State providing the legislation permits such designation.

A reading of the Disaster Preparedness Act of 1975 discloses at least two provisions authorizing use and designation of temporary housing sites. In Section 46-1006 (6) (d), *Idaho Code*, the Bureau of Disaster Services (created by the Act) is authorized to “plan and make arrangements for the availability and use of any private facilities, services and property and, if necessary and if in fact used, provide for payment for use under terms and conditions agreed upon.” This language encompasses temporary housing sites. In addition, under this provision, payments may be made if the site is *used* in any way. In our opinion, the word “use” applies to occupancy of the site prior to the disaster. This would include placement of utilities on the site, for example. Therefore, from our reading of this provision, a person or entity providing such a site to State or local government could be reimbursed providing the site is equipped with utilities or used in some other fashion. However, as a word of caution, your attention is called to Section 46-1012, *Idaho Code*, establishing criteria for payment of compensation.

The Act also permits temporary housing site planning through Section 46-1008 (5) (i), *Idaho Code*. This Section, which describes the powers of the governor, includes the following provision:

“(5) in addition to any other powers conferred upon the governor by law, he may:
(i) make provisions for the availability and use of temporary emergency housing.”

Thus, pursuant to the Act, the governor has specific authority to provide and plan for temporary emergency housing. This language obviously includes planning and designation of temporary housing sites in advance of disaster emergency.

It is also apparent that local government does have the authority to cooperate with the State in designating and using temporary emergency housing sites. First of all, counties are required to cooperate with the State in preparing for disaster emergencies. See Section 46-1009, *Idaho Code*. Also, designation of such sites should be well within the authority of the county government. Under

Section 31-604 *Idaho Code*, counties have the power to purchase and hold lands within their boundaries. Therefore, ample authority exists for designation of temporary housing sites by county government.

Your second question concerns the possibility of waiving local zoning ordinances when temporary housing sites are designated. Of course, when a disaster actually occurs, State and local governments have powers which extend beyond those ordinarily conferred upon them. It is important to recognize, however, that these very broad powers do not necessarily extend to planning in advance of possible disaster emergency. At the county level, the proper way of handling this problem would be recognition of designated emergency housing sites in the zoning ordinance. This could be done by weaving the sites into the zoning ordinances or through amendments to those ordinances when the site has been designated. Counties should not be allowed to waive their own zoning ordinances, however, in designating temporary housing sites. As far as the State is concerned, the law does not permit a disregard of local zoning ordinances. The Local Planning Act of 1975, Section 67-6501, et seq., *Idaho Code*, requires State cooperation with local governments concerning their planning and zoning ordinances. Section 67-6528, *Idaho Code* provides that:

"The State of Idaho, and all its agencies, boards, departments, institutions and local special purpose districts, shall comply with all plans and ordinances adopted under this chapter unless otherwise provided by law."

We can find no law that exempts the Bureau of Disaster Services from this requirement. In our view, this problem can be readily handled through cooperation with the county government involved. This should be no problem in view of Section 46-1009, *Idaho Code*, which establishes methods of cooperation and duties between the State and local governments.

Your third question concerns available funding for temporary housing sites. Funds are not specifically authorized in the Disaster Preparedness Act. In Chapter 21, Idaho Session Laws (1974), the legislature created a Disaster Relief Fund in the State treasury. In Chapter 44, Idaho Session Laws (1974), one million dollars were appropriated to the Disaster Relief Fund. However, in Senate Bill 1551, passed by this legislature, Chapters 21 and 44 were repealed. Therefore, there is no more Disaster Relief Fund. Since there is no specific fund available for designation of temporary housing sites and other disaster preparedness measures, money for these programs would be obtained in the usual manner by requesting funding from the Idaho legislature. It is apparent from a reading of the Federal regulations pertaining to the Federal Disaster Relief Act of 1974 that such sites must be paid for by state or local government. No federal funds are available in this particular instance. See 24 C.F.R. Section 2205.45 (h) (1975).

In conclusion, the Idaho Disaster Preparedness Act of 1975 creates the necessary authority for designation of temporary emergency housing sites as required by Federal law. Such designation and use is well within the police powers of the State. County government, under the Act, and under the general powers granted to counties by the Idaho legislature, may participate in desig-

nation and use of these sites. However, local zoning ordinances may not be bypassed by State or county government unless a disaster emergency has, in fact, occurred. In this latter event, broad powers reserved for such emergencies may come into effect. However, simply planning such emergencies would not invoke this unusual and seldom used authority. Finally, since no Federal or State funds are available for designation of temporary housing sites, funding for these sites would necessarily come through appropriation by the Idaho legislature in the usual manner.

DATED This 29th day of April, 1976.

Respectfully submitted,

Wayne L. Kidwell
Attorney General
State of Idaho

ANALYSIS BY:

GUY G. HURLBUTT
Assistant Attorney General

AUTHORITIES CONSIDERED:

1. Disaster Relief Act of 1974, 42 U.S.C. §5121(n) P.L. 93-288
2. 40 Fed.Reg. 23252 (1975).
3. 24 C.F.R. Section 2205.45 (1975).
4. Idaho Disaster Preparedness Act of 1975, Section 46-1001, et seq., *Idaho Code*.
5. Section 31-604, *Idaho Code*.
6. Local Planning Act of 1975, Section 67-6501, et seq., *Idaho Code*.
7. Chapter 21, Idaho Session Laws (1974).
8. Chapter 44, Idaho Session Laws (1974).
9. Senate Bill No. 1551, Second Regular Session 43rd Legislature.

ATTORNEY GENERAL OPINION NO. 76-26

TO: Honorable Monroe C. Gollaher
Director of Insurance
Room 206 Statehouse

Per request for Attorney General Opinion.

QUESTION PRESENTED: Does the broker's bond requirement of *Idaho Code* Section 41-1054 apply to individuals who have qualified for licensure as brokers, and who are named in a firm or corporation's broker's license or registered to the Director of Insurance as to a firm or corporation's broker's license?

CONCLUSION: No, the broker's bond requirement of *Idaho Code* Section 41-1054 does not apply to individuals who have qualified for licensure as brokers and who are named in a firm or corporate broker's license, or registered to the Director of Insurance as to a firm or corporate broker's license, unless such individuals are also individually licensed as brokers apart from the firm or corporation's license.

ANALYSIS: In the analysis of this opinion, we have reconsidered Attorney General Opinion No. 73-90 which was issued December 18, 1972, regarding the same issue as presented herein. Inasmuch as the conclusion herein is contrary to the former opinion, this opinion will take precedence and, therefore, replace and supersede former Attorney General Opinion No. 73-90. The section of the *Idaho Code* here under consideration which provides for the bonding of brokers reads:

Broker's bond.

(1) *Prior to issuance of license as broker, every person who has otherwise qualified for such license shall file with the commissioner (director) and thereafter maintain in force while so licensed a bond in favor of the state of Idaho executed by an authorized surety insurer. The bond shall be conditioned upon full accounting and due payment to the person entitled thereto of funds into the broker's possession through transactions under the license. The bond may be continuous in form and aggregate liability on the bond shall be limited to payment of not less than ten thousand dollars (\$10,000).*

(2) *The bond shall remain in force until released by the commissioner (director), or until cancelled by the surety. Without prejudice to liability previously incurred thereunder, the surety may cancel the bond upon thirty (30) days advance written notice to both the broker and the commissioner (director)." Idaho Code §41-1054. (Emphasis added.)*

Title 41, Chapter 10 of the Idaho Insurance Code contains provisions for the licensing of either individuals of firms and corporations as agents, brokers, and consultants, (*Idaho Code* Section 41-1034, 41-1035 and 41-1036). The pertinent provisions for the licensing of corporations and firms as brokers reads as follows:

"Licensing of firms, corporations.

(1) A firm or corporation shall be licensed only as an agent, broker, or consultant, resident or nonresident.

(2) Each general partner and individual to act for the firm, and each individual to act for the corporation, shall be named in the license or registered with the commissioner (director) as to the license, *and shall qualify as though he were an individual licensee*. The commissioner (director) shall charge and there shall be paid as to the licensee a full license fee for each respective individual in excess of one named in the license or registered with the commissioner (director) as to the license.

(3)

(4)

Idaho Code §41-1036. (Emphasis added.)

The provisions for the licensing of individuals as brokers reads insofar as pertinent to this opinion as follows:

"Qualifications- Agents, brokers, solicitors.

For the protection of the people of this state, the commissioner (director) shall not issue, continue, or permit to exist any agent, broker or solicitor license except in compliance with this chapter, *or as to any individual not qualified* therefore as follows:

(1) through (8) (listing qualifications)

Idaho Code §41-1034. (Emphasis added.)

Since both "corporations" and "firms" as such are artificial entities, they can function only through individuals. Section 41-1036, therefore, requires that the individuals who are to exercise the license powers of the firm or corporation be identified in or in connection with the license and have the same qualifications as to age, passing of examination, trustworthiness, etc., as though they themselves were individual licensees. It seems clear, however, through examining the portions of *Idaho Code* Sections 41-1036 and 41-1034 we have quoted (*supra*), that it is not required that an individual actually be licensed as a broker to be named in a firm or corporation's broker's license or to be registered with the director as to the firm or corporation's license. All Section 41-1036 requires is that each individual who is to act for the firm or corporation qualify as though he were an individual licensee. In support of this position, we note that special provision is made in Section 41-1036 (2) to charge a full license fee to the corporate licensee for each individual in excess of one named in the license or registered with the commissioner (director) as to the license in order to protect the revenues to the state as to individuals who have qualified and who are acting under the firm or corporate license, but who are not licensed themselves.

We make a further observation that there is no provision in *Idaho Code*

Sections 41-1034 and 41-1036 which would prohibit an individual from also being individually "licensed" as well as named or registered with the director as to a firm or corporate license should an individual so choose.

In conclusion, it appears from the foregoing analysis that the broker's bond requirement of *Idaho Code* §41-1054 applies only to those "persons" (individuals, firms and corporations) as a condition of licensure and must be maintained only while the license is in force. Individuals who are otherwise qualified for licensure, but who are not "licensed", but rather are only named in a firm or corporate license, or who are registered with the director as to the firm or corporate license, are not required to be bonded under the provisions of *Idaho Code* §41-1036.

AUTHORITIES CONSIDERED: *Idaho Code* Sections 41-1034, 41-1035, 41-1036.

DATED This 14th day of May, 1976.

ATTORNEY GENERAL OF THE STATE OF IDAHO

WAYNE L. KIDWELL
Attorney General

ANALYSIS BY:

ROBERT M. JOHNSON
Assistant Attorney General

ATTORNEY GENERAL'S OPINION NO. 76-27

TO: David H. Leroy
Prosecuting Attorney
103 Courthouse
Boise, Idaho 83702

Per Request for Attorney General's Opinion

QUESTION PRESENTED:

Do the provisions of *Idaho Code* Section 67-6504 (a) which prohibit more than one-third (1/3) of the members of any Planning and Zoning Commission from residing from within an incorporated city apply to the members of a Commission:

(a) Appointed prior to July 1, 1975, and still serving those terms and,

(b) Appointed pursuant to the membership provisions of Zoning Ordinances still in effect now and which existed prior to the effective date of the Act, as permitted by the *Idaho Code* Section 67-6514?

CONCLUSION:

Section 67-6504, *Idaho Code*, provides that a legally authorized planning, zoning or planning and zoning commission existing prior to July 1, 1975, shall be considered duly constituted under the Local Planning Act of 1975 and any replacement appointments should be made to comply to the extent possible with the provisions of the new Act.

ANALYSIS:

On March 28, 1975, the Idaho Legislature passed Senate Bill 1094, commonly referred to as the Local Planning Act of 1975. This new planning legislation went into effect on July 1, 1975, and at that time the previous planning and zoning legislation codified in Chapters 11 and 12, Title 50, *Idaho Code*, and Chapter 38, Title 31, *Idaho Code* was repealed.

Section 67-6504 of the planning act deals with the creation of planning and zoning commissions, and Section 67-6504(a) deals with the membership requirements of these commissions. One of these requirements states:

"Not more than one-third (1/3) of the members of any commission appointed by the chairman of the board of county commissioners may reside within the incorporated city in the county."

Prior to July 1, 1975, many counties had established planning and zoning commissions pursuant to Chapter 11, Title 50, *Idaho Code*. The ordinances enacted establishing these commissions do not necessarily meet the requirements of the new Local Planning Act. Section 67-6504 of the new Act provides that:

"Legally authorized planning, zoning, or planning and zoning commissions existing prior to enactment of this Chapter *shall be considered to be duly constituted* under the statute unless changed in accordance with the notice and hearing procedure provided in Section 67-6509, *Idaho Code.*" (emphasis added)

As stated above, any planning and zoning commission established before July 1, 1975, may continue as legally constituted after the effective date of this Act, *whether or not* it meets the requirements of Section 67-6504(a). Therefore, members appointed to that commission prior to July 1, 1975, may continue to serve their terms, even though the membership as a whole violates the one-third (1/3) limitation of Section 67-6504(a).

The Local Planning Act provides in Section 67-6514, *Idaho Code*, that all zoning ordinances enacted before July 1, 1975 be reviewed and if necessary, amended, to be in compliance with the provisions of the Act by January 1, 1978. If the membership provisions of the planning and zoning commission are set out in a zoning ordinance, then this ordinance must be reviewed, and amended before January 1, 1978, in order to meet the requirements of Section 67-6504(a).

However, the Local Planning Act does not state how vacancies should be filled and replacement appointments made prior to January 1, 1978 if the membership requirements of an ordinance are less restrictive than those set out in Section 67-6504(a). If Section 67-6514, *Idaho Code* applies to the situation, it appears that the less restrictive provisions could be followed. This procedure would create very undesirable results. It is much more difficult to alter the composition of an existing planning and zoning commission than it is to amend the membership provisions of an existing ordinance. Therefore, it would be much more desirable to bring the membership of a commission in compliance with the terms of the Act as soon as possible. Whenever a vacancy is filled or a replacement appointment made, the new member should be appointed in accordance with the provisions of Section 67-6504(a), and eventually the one-third (1/3) limitation for county commissions and other residency requirements will be met. If this procedure is followed, all commissions can be in full compliance with Section 67-6504(a) by January 1, 1978 and no drastic, last minute changes need be made.

DATED this 14th day of May, 1976.

ATTORNEY GENERAL FOR IDAHO

WAYNE L. KIDWELL

ANALYSIS BY:

URSULA KETTLEWELL
Assistant Attorney General

ATTORNEY GENERAL OPINION NO. 76-28

TO: Mary Kautz, Clerk
Auditor and Recorder
Washington County
256 East Court Street
Weiser, ID 83672

Per request for Attorney General Opinion.

QUESTION PRESENTED:

The 1976 Session of the Idaho Legislature enacted House Bill 535 which amended *Idaho Code* §31-3201A to increase the filing fee in certain civil cases from \$16 to \$24. The statute became law when signed by the Governor on April 1, 1976, but Section 4 provides a retroactive date to January 1, 1976. Does this statute mean that county clerks must require an additional fee from plaintiffs who have filed effected actions after January 1, 1976, but who have not paid the entire \$24 filing fee?

CONCLUSION:

That part of House Bill 535 which increases the \$16 filing fee previously provided in *Idaho Code* §31-3201A(a) to \$24 became effective at midnight March 31 and applies to all lawsuits filed on and after April 1, 1976. It is the position of this office that the time within which the Governor had to either sign or veto bills expired at midnight March 31 at which time the act became law. If, however, this office's interpretation of Article IV, Section 10, of the Idaho Constitution is overturned in the pending action of *Cenarrusa v. Andrus* then the act became effective at the time it was signed by the Governor — 9:00 A.M. April 1, 1976. The clerk has an affirmative duty to collect the fee and may properly refuse to accept papers for filing in such an action until the fee is paid.

ANALYSIS:

House Bill 535 amended *Idaho Code* §31-3201A as follows:

"The clerk of the district court in addition to the fees and charges imposed by Chapter 20, Title 21, Idaho Code, and in addition to the fees levied by Chapter 2, Title 73, Idaho Code, shall charge, demand and receive the following fees for services rendered by him in discharging the duties imposed upon him by law:

(a) a fee of ~~\$16.00~~ \$24.00 for filing a civil case of any type in the district court or in the magistrates division of the district court including cases involving the administration of decedent's estates, whether tested or intested, and conservatorships of the person or of the estate or both with the following exceptions: * * * (exceptions omitted)"

Section 4 of House Bill 535 provides:

"An emergency existing therefor, which emergency is hereby declared to exist, this act shall be in full force and effect on and after its passage and approval, and retroactively to January 1, 1976."

The bill also creates a district court fund, provides for the payment of fees, fines and forfeitures into the district court fund, the funding of the operation of the district courts from the district court fund and the levy of a two mill tax for the purpose of the district court fund. Other problems relating to the creation and administration of the district court fund and the two mill tax levy will be addressed in a separate opinion.

There is no ambiguity in the statute. The filing fee is increased and the entire act is specifically given a retroactive effective date.

There can be no question that the Idaho legislature has power, in appropriate cases, to enact retroactive legislation. The relevant provision of the Idaho Constitution is Article 3, Section 22, which provides:

"No act shall take effect until sixty days from the date of the session at which the same shall have been passed, except in cases of emergency, which emergency shall be declared in the preamble or in the body of the law."

(This rule is modified by *Idaho Code* §67-510 providing that in the absence of an emergency clause, a bill shall become effective on the first day of July of the year it passed or sixty days after the end of the session whichever is later.)

Our Constitution is, of course, one which limits rather than grants power. *Standler v. State*, 96 Idaho 849 (1975); *Boughton v. Price*, 70 Idaho 243 (1950). Article 3, Section 22, must be viewed as a limitation upon the power of the legislature. The effect of the limitation is that, in order to cause an act to take effect on a date sooner than a date sixty days after the end of the session, an emergency must exist and emergency must be declared by the legislature in the preamble or in the body of the bill. The existence or nonexistence of the emergency is a matter for the legislature to determine. *Johnson v. Diefendorf*, 56 Idaho 620 (1936). It is generally held in other states whose constitutions have similar emergency clauses that a court may not inquire into the factual question of whether an emergency declared by the legislature actually exists. See, for example, *Washington Suburban Sanitary Commission v. Buckley*, 197 Md. 203, 67 A.2d 638 (1951), in which it was stated:

"It is the declaration of an emergency which produces the effect of putting the act in force at once, and not the actual question of whether or not an emergency exists."

See also *Russell v. Treasurer and Receiver General*, 331 Mass. 505, 120 N.E. 2d 388 (1954); *Bennett Trust Company v. Sengstacken*, 58 Ore. 333, 113 P.863 (1911); *Joplin v. Ten Brook*, 124 Ore. 36, 263 P. 893 (1928). There is, however, some authority to the contrary. *Inter City Fire Protection District of Jackson County v. Gambrell*, 360 Mo. 924, 231 S.W.2d 193 (1950). It appears to be the general rule that where the legislature has declared an emergency to exist, courts (and by necessary extension administrative and executive authorities) are without

power to make independent inquiry into the existence of such an emergency.

Where an emergency is declared and no specific date for the effect of the statute is provided, then the act becomes effective on the date it is approved by the Governor. *State v. Cleland*, 43 Idaho 803, 248 P.831. Although the Idaho cases regarding retroactive legislation evidence a very strong bias on the part of our courts against such legislation, it is clear that the bias is relevant only in cases where questions of doubtful interpretation of the statute are present. The rule has been expressed that a statute will be construed as having retroactive operation only where the intention is clearly expressed and otherwise it will be applied prospectively only. See *Peavy v. McCombs*, 26 Idaho 143, 140 P.965; *Bellevue State Bank v. Lilya*, 205 P. 893, 35 Idaho 270; *Cook v. Massey*, 220 P. 1088, 38 Idaho 264; *McCoy v. Krengel*, 17 P.2d 547, 52 Idaho 626; *Kelley v. Prouty*, 30 P.2d 769, 54 Idaho 225; *In re Pahlke*, 53 P.2d 1177, 56 Idaho 338; *Winans v. Swisher*, 194 P.2d 357, 68 Idaho 368; *Wanke v. Ziebarth Construction Company*, 202 P.2d 384, 69 Idaho 64; *Application of Boyer*, 248 P.2d 540, 73 Idaho 152; *Ford v. City of Caldwell*, 321 P.2d 589, 79 Idaho 499; *Application of Forde L. Johnson Oil Company*, 372 P.2d 135, 84 Idaho 288; *Unity Light & Power Company v. City of Burley*, 445 P.2d 720, 92 Idaho 499; *Kent v. Idaho Public Utilities Commission*, 469 P.2d 745, 93 Idaho 618. (See also *Idaho Code* §73-101). It is clear from these cases that when a statute is subject to interpretation a construction in favor of prospective application only is favored. Each of these cases contain a limitation that when the legislative intention to retroactively apply an enactment is clearly stated within the act itself the act will apply retroactively. There can be no question that in House Bill 535 the legislature has clearly and unambiguously stated that the fee increase shall be effective retroactively to January 1, 1976.

It is our opinion, therefore, that under the Idaho Constitution and judicial authority, the legislature can, by declaring an emergency, cause statutes to apply retroactively. If there is a limitation upon this authority of the Idaho legislature, that limitation must be found in the United States Constitution.

The Federal Constitution does not expressly prohibit the enactment of retroactive laws. It does, however, limit that authority in four generally recognized categories. See 2 *Sutherland, Statutory Construction*, §41.03. Two of these categories, the prohibitions against *ex post facto* laws and bills of attainder, are solely criminal in nature and not relevant here. *Calder v. Bull*, 3 Dallas (3 U.S.) 386 (1798). The Federal Constitution also prohibits the states from impairing the obligation of contract. This constitutional provision may have some effect in regard to litigation concerning contract rights, but probably would not apply to many other cases subject to the increased filing fee such as actions for divorce or personal injury. The fourth and most common constitutional limitation upon a legislature's power to pass retroactive legislation is when the retroactive effect is so unfair as to violate the due process guarantees of the Fifth and Fourteenth Amendments. 2 *Sutherland*, supra., at §41.03.

The test developed by many courts for determining whether a retroactive enactment is invalid on constitutional due process grounds is whether the retroactivity impairs or destroys a "vested right." The Idaho Supreme Court has applied this test in *Ford v. City of Caldwell*, 79 Idaho 499, 321 P.2d 589. The court there stated:

"A statute will not be given a retroactive construction by which it will impose liabilities not existing at the time of its passage (citations omitted).

"Appellant asserts that respondent has no vested right to a defense based upon governmental immunity in the present case since the accident occurred after March 12, 1955, the effective date of Sess. Law 1955, c. 146, i.e., on April 20, 1955, before respondent's policy of liability insurance expired on May 1, 1955.

"The provision of the Act waiving governmental immunity becomes effective only if the political subdivision, at its option, procures liability insurance after the effective date of the Act, in which event the insurance extends to both its proprietary and its governmental functions. In the absence of insurance coverage of its governmental functions the immunity is not waived. Such is the situation here. *Hence respondent has a vested right in the defense of immunity. Here it is not a matter of procedure but one of the substantive right.*" (citations omitted). (Emphasis added.)

See also *Ohlinger v. U.S.*, (U.S.D.C. — Idaho, 1955) 135 F.Supp. 40. The number of decisions applying this vested rights test is very large and it seems unnecessary to cite them here. They may be found compiled in 2 *Sutherland*, supra., §41.06 in note 1.

What becomes apparent is that the question resolves itself to a determination of whether a plaintiff in an action commenced prior to April 1, 1976, can be said to have possessed a vested right which would be impaired or destroyed by a retroactive requirement that he pay an increased filing fee.

There is a general rule that statutes affecting remedial or procedural rights which do not create, enlarge, diminish or destroy contractual or vested rights but relate only to remedies or modes of procedure are not within the general rule against retroactive operation. e.g., *Ohlinger v. United States*, (U.S.D.C. — Idaho, 1955) 135 F.Supp. 40. For example, a statute requiring a plaintiff to post security to secure the defendant's costs can be applied to lawsuits already pending at the time the statute became effective. *Cohen v. Beneficial Industrial Loan Corporation*, 337 U.S. 541 (1949). A large number of cases affirm retroactive application of statutes affecting only remedy. See, for example, *Grummitt v. Sturgeon Bay Winter Sports Club of Sturgeon Bay Wisconsin*, 354 F.2d 564 (1965); *Bagsarian v. Parker Metal Company*, 282 F.Supp. 766 (1968); and *United States v. Haughton*, 290 F.Supp. 422. There is authority, however, for the proposition that a failure of a party to pay a proper filing fee is not merely a procedural or remedial matter. Of the relatively few courts having occasion to consider the issue, the majority rule appears to be that failure of the plaintiff to pay a proper filing fee is a failure of a jurisdictional prerequisite. For example, in *Turkett v. United States*, 76 F.Supp. 769, the plaintiff filed his complaint prior to the time the statute of limitations expired but failed to submit the required filing fee until after the statute had expired. The court there reasoned:

"The language of the rules and statutes above referred to are too plain to leave any doubt that an action should be deemed to be commenced

by the filing of a complaint (citation omitted). The language also indicates clearly that a prerequisite of the filing is the payment of the clerk's fees. Any other construction would open the door to actions without merit by irresponsible parties, and make the clerk a credit man, whose accountability might result in his personal loss."

The court in *Turkett* was interpreting Rule 3 of the Federal Rules of Civil Procedure and 28 U.S.C.A. 1914. These statutes are analogous to Idaho Rules of Civil Procedure, Rule 3 and Idaho Code §31-3201A. The *Turkett* decision was cited with approval by the United States Court of Claims in *Anno v. United States*, 113 F.Supp. 637 (1953). In that case, a petition received by the clerk of the U.S. Court of Claims without payment of a filing fee was returned by the clerk upon grounds that the court had no jurisdiction to hear the action. The court there found that the failure to pay a proper filing fee was a jurisdictional failure. See also *Oil Well Supply Company v. Wickwire*, 52 F.Supp. 921 and *Mondakota Gas Company v. Montana-Dakota Utilities Company*, 194 F.2d 705. The holdings in the cases just cited are modified by the ruling of the United States Supreme Court in *Parisi v. Telechron, Inc.*, 348 U.S. 860, which permit a court, by the device of a *nunc pro tunc* order, to accept a filing fee which is delinquently tendered. It would not, however, seem to change the basic ruling that failure to pay a filing fee is a jurisdictional defect. Since it appears that the payment of a filing fee is jurisdictional, we think that the retroactive application of the statute surpasses merely effecting a remedial or procedural right. We can find no cases either supporting or refuting the proposition that a legislative action may retroactively divest a court of jurisdiction in an action already pending. The closest factual and legal circumstance would appear to be *Cohen v. Beneficial Industrial Loan Corporation*, supra., where the legislature required the plaintiff in a shareholder's derivative action to post security to secure a defendant against costs in the event costs were awarded to the defendant. The statute expressly applied to actions then pending. The plaintiff in *Cohen* was required to post such security and, when he refused to do so, the court declined to act further. *Cohen* appealed and the United States Supreme Court ruled that the requirement that the plaintiff post security was not unconstitutionally retroactive. In so ruling, however, the court presumed that the New Jersey statute would be so construed that the security required to be posted could only be made to apply to defendant's expenses incurred after the enactment of the statute. The court does not so rule but the strong implication is that any other construction would render the statute unconstitutional. The Idaho Supreme Court ruling in *Unity Light & Power Company v. City of Burley*, 92 Idaho 499 (1963) should also be noted. There the Idaho court refused to apply amendments made to the condemnation statute to litigation in process at the time of the amendment's effective date, partly because such changes were substantive.

For these reasons, we think that to apply House Bill 535 to require that actions filed after January 1, 1976, but before April 1, 1976, would be to retroactively divest the Idaho courts of jurisdiction to hear cases then pending and, therefore, to deprive the plaintiffs in such actions of vested interests. This would be especially true where a statute of limitation may have expired. Such a deprivation would be an unconstitutional violation of the due process rights guaranteed by the Fifth and Fourteenth Amendments of the Federal Constitution.

While House Bill 535 cannot constitutionally increase fees applying to actions filed prior to April 1, 1976, we see no limitation upon the authority of the Idaho legislature to increase filing fees effective immediately upon the act's becoming law. The legislature has declared that an emergency requires application of the act prior to the normal effective date. As we have previously concluded, this declaration is an exercise of legislative power and cannot be independently examined by a coordinate branch of government.

House Bill 535 was signed by the Governor at 9:00 A.M. on April 1, 1976. It is the position of this office that the bill became law without the Governor's signature at midnight March 31, 1976. A bill submitted to the Governor becomes law without the Governor's signature ten days after adjournment (Sundays excepted) if not vetoed by the Governor within that time. This office has taken the position that that time expired at midnight on March 31, 1976. This determination is currently subject to litigation in an action entitled *Cenarrusa v. Andrus*, currently pending in the District Court of Ada County. In fairness, we must point out that should the court determine that our position on this issue is erroneous, then our conclusion as to the precise effective time of the increase in filing fees will necessarily be slightly altered. In that instance, the increase will become effective at 9:00 A.M. on April 1 and will apply to all actions filed after that time. The general rule regarding fractions of a day is stated at 2 *Sutherland*, supra., §33.10 as follows:

"When a statute is to take immediate effect the rule that the law takes no notice of fractions of a day has largely been abrogated in determining the precise time of its taking effect."

There appear to be no Idaho cases on this particular subject. However, the great weight of American decisions is to the effect that a statute which is to take immediate effect is operative from the exact instant of its becoming law. See, for example, *Burgess v. Salmon*, 97 U.S. 381 (1878); *Louisville v. Portsmouth Savings Bank*, 104 U.S. 469; *United States v. Casson*, 434 F.2d 415 (D.C. Cir., 1970); *People ex rel Campbell v. Clark*, 1 Cal. 406 (1851); *Brainard v. Bushnell*, 11 Conn. 16 (1835); *Savage v. State*, 18 Fla. 970 (1882); and 33 N.C. Law Review 617 (1955). The weight of the American authority is consistent with the well-established English common law rule stated by Lord Mansfield in *Combe v. Pitt*, 3 Burr. 1423, 97 Eng. Rep. 907 (1723). The common law of England, where not inconsistent with our statutes or the state or federal constitution, is the law of Idaho (*Idaho Code* §73-116.)

The mandatory language of *Idaho Code* §31-3201A places an affirmative duty upon the clerk of the court to collect the filing fee. It is well established that a clerk need not accept papers for filing where the prerequisite fee is not paid. See *Turkett v. U.S.*, supra; *Williamson-Dickie Manufacturing Company v. Mann Overall Company*, 359 F.2d 450 (1966); and *Montakota Gas Company v. Montana-Dakota Utilities Company*, supra. The clerk has an obligation to collect the increased fees for those cases filed after April 1, 1976, and as an aid to collecting those fees may properly decline to file further papers in the action until such fees are paid in full.

A question has been raised regarding those actions where a final judgment has been entered but an insufficient fee was paid. The plaintiff in such an action

should be billed for the increase, but there appears to be no practical remedy available to the clerk for the collection of the fee. Since this opinion is intended to provide guidance to clerks and their deputies, we express no opinion on the question of whether a final judgment or decree may be challenged as void for lack of the court's jurisdiction because of the nonpayment of the filing fee.

DATED this 14th day of May, 1976.

ATTORNEY GENERAL OF THE STATE OF IDAHO

WAYNE L. KIDWELL

ANALYSIS BY:

THEODORE V. SPANGLER, JR.
DEPUTY ATTORNEY GENERAL

AUTHORITIES CONSIDERED:

1. Idaho Constitution, Article 3, Section 22; Article 4, Section 10.

2. *Idaho Code* §§31-3201A; 67-510; 73-101; 73-116.

3. Idaho Cases: *Cenarrusa v. Andrus*; *Stundler v. State*, 96 Idaho 849 (1975); *Boughton v. Price*, 70 Idaho 243 (1950); *Johnson v. Diefendorf*, 56 Idaho 620 (1936); *State v. Cleland*, 42 Idaho 803, 248 P. 831; *Peavy v. McCombs*, 26 Idaho 143, 140 P. 965; *Bellevue State Bank v. Lilya*, 205 P. 893, 35 Idaho 270; *Cook v. Massey*, 220 P. 1088, 38 Idaho 264; *McCoy v. Krengel*, 17 P. 2d 547, 52 Idaho 626; *Kelley v. Prouty*, 30 P.2d 769, 54 Idaho 225; *In re Pahlke*, 53 P.2d 1177, 56 Idaho 338; *Winans v. Swisher*, 194 P.2d 357, 68 Idaho 368; *Wanke v. Ziebarth Construction Company*, 202 P.2d 384, 69 Idaho 64; *Application of Boyer*, 248 P.2d 540, 73 Idaho 152; *Ford v. City of Caldwell*, 321 P.2d 589, 79 Idaho 499; *Application of Forde L. Johnson Oil Company*, 372 P.2d 135, 84 Idaho 288; *Unity Light & Power Company v. City of Burley*, 445 P.2d 720, 92 Idaho 499; *Kent v. Idaho Public Utilities Commission*, 469 P.2d 745, 93 Idaho 618; *Ohlinger v. U.S.* (U.S.D.C. — Idaho, 1955) 135 F.Supp. 40.

4. Other Cases: *Washington Suburban Sanitary Commission v. Buckley*, 197 Md. 203, 67 A.2d 638 (1951); *Russell v. Treasurer and Receiver General*, 331 Mass. 505, 120 N.E.2d 388 (1954); *Bennett Trust Company v. Sengstacken*, 58 Ore. 333, 113 P. 863 (1911); *Joplin v. Ten Brook*, 124 Ore. 36, 263 P. 893 (1938); *Inter City Fire Protection District of Jackson County v. Gambrell*, 360 Mo. 924, 231 S.W. 2d 193 (1950); *Calder v. Bull*, 3 Dallas (3 U.S.) 386 (1798); *Cohen v. Beneficial Industrial Loan Corporation*, 337 U.S. 541 (1949); *Grummitt v. Sturgeon Bay Winter Sports Club of Sturgeon Bay Wisconsin*, 354 F.2d 564 (1965); *Bagsarian v. Parker Metal Company*, 282 F.Supp. 766 (1968); *United States v. Haughton*, 290 F.Supp. 422; *Turkett v. United States*, 76 F.Supp. 769; *Anno v. United States*, 113 F.Supp. 637 (1953); *Oil Well Supply Company v. Wickwire*, 52 F.Supp. 921; *Mondakota Gas Company v. Montana-Dakota Utilities Company*, 194 F.2d 705; *Parisi v. Telechron, Inc.*, 348 U.S. 860; *Burgess v. Salmon*, 97 U.S. 381 (1878); *Louisville v. Portsmouth Savings Bank*, 104 U.S. 469; *United States v. Casson*, 434 F.2d 415 (D.C. Cir., 1970); *People ex*

rel Campbell v. Clark, 1 Cal. 406 (1851); *Brainard v. Bushnell*, 11 Conn. 16 (1835); *Savage v. State*, 18 Fla. 970 (1882); *Combe v. Pitt*, 3 Burr. 1423, 97 Eng. Rep. 907 (1723); *Williamson-Dickie Manufacturing Company v. Mann Overall Company*, 359 F.2d 450 (1966).

5. Texts: 2 *Sutherland, Statutory Construction*, §§41.03; 41.06; 33.10; 33 N.C. Law Review 617 (1955).

ATTORNEY GENERAL OPINION NO. 76-29

TO: Terrence R. White
Attorney for the City of Nampa
112 9th Avenue South
Nampa, Idaho 83651

Per request for Attorney General Opinion

Section 72-1428, *Idaho Code* provides that after January 1, 1975, no entry level fireman may be employed who has not met height and weight standards prescribed by the Director of the State Insurance Fund.

After extensive consultation with the Idaho State Council of Firefighters, the Director of the State Insurance Fund prescribed a minimum height of 5'8" and a maximum height of 6'6" for newly employed firemen.

Subsequently the City of Nampa employed a firefighter shorter than the regulation allowed. Therefore, the Director of the State Insurance Fund notified the City of Nampa that the fireman was not eligible for employment.

QUESTION PRESENTED:

Is a state regulation legally valid which forbids hiring of all applicants for the position of fireman who are under 5'8" in height?

CONCLUSION:

The Civil Rights Act of 1964 prohibits such minimum height regulations in employment unless those regulations can be shown to be related to job performance and justified by a genuine business need.

ANALYSIS:

The relevant portion of the Civil Rights Act of 1964, provides at 42 USC §2000e-2:

(a) It shall be an unlawful employment practice for an employer . . .

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex or national origin.

This provision was made applicable to governments, governmental agencies, and political subdivisions in 1972. Public Law 92-261, Section 2(1).

Griggs v. Duke Power Co., 401 U.S. 424, 28 L.Ed.2d 158, 91 S.Ct. 849 (1971) is the leading case construing the act as it relates to standards imposed which have an incidental effect of adversely affecting minorities and women.

In that case the U.S. Supreme Court considered an employment policy of

Duke Power Co. which required any employee of any of its operating departments to have a high school education and to pass two professionally prepared aptitude tests. The record showed that the requirements tended to favor white applicants. For example, 34% of white males in the area had completed high school vs. only 12% of Negro males. The court held that such standards were invalid where the employer did not prove that the standards were significantly related to job performance. As the court said at 401 U.S. 431:

The Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited.

The court also made it clear that once a plaintiff makes a showing that a requirement works to the disadvantage of a protected minority, the burden of justifying the requirement shifts to the employer. As the court said at 401 U.S. 432:

More than that, Congress has placed on the employer the burden of showing that any given requirement must have a manifest relationship to the employment in question.

Several Federal courts have considered height requirements in employment discrimination cases. The First Circuit considered the validity of a 5'7" height requirement for Boston Policemen in the case of *Castro v. Beecher*, 459 F.2d 725 (1972). Relying on *Griggs v. Duke Power*, *supra*, the court said that upon a showing that a standard has a racially disproportionate impact, the employer must demonstrate that the requirement "is in fact substantially related to job performance". 459 F.2d at 732. In that case, however, the court pointed out that no data was presented concerning the average height of Spanish-surnamed males as compared with other males. Therefore, the court refused to employ a rigorous standard of review as to the requirement on the basis of mere supposition that the classification had a discriminatory impact.

Several Federal District courts have considered height requirements imposed for employment as police officers. *Peltier v. City of Fargo*, 396 F. Supp. 710 (S.C. No. Dak. 1975); *Officers for Justice v. Civil Service Comm. San Francisco*, 395 F. Supp. 378 (N.D. Cal. 1975); *Smith v. City of East Cleveland*, 363 F. Supp. 1131 (N.D. Ohio 1973). In each case statistical data was presented showing that the average height requirement excluded a disproportionate percentage of a protected class, thereby establishing a *Prima Facie* case. In each case the requirement was found to be discriminatory against females. In *Officers for Justice v. Civil Service Comm. San Francisco*, *supra*, the requirement was also found to discriminate against Asians and Latins. In each case, the employer was unable to establish a sufficient justification for the requirement. For example, in *Officers for Justice v. Civil Service Comm., San Francisco*, *supra*, the employer introduced in evidence a survey regarding the relationship between height and resisted arrests. The court said at 395 F. Supp. 381:

While the data tends to indicate that the height of officers is inversely

related to the frequency and severity of resistance to their arrest attempts, it is too inconclusive and inconsistent to support a finding for either position.

Several conclusions may be drawn from the above cases. A proper plaintiff (an Asian, Latin, or female) would presumably be successful in establishing a *prima facie* case against a 5'8" height requirement. Thereafter, the employer would be required to make a substantial showing that the requirement related to the job performance and was justified by business necessity.

Whether or not the 5'8" height requirement in this case is justified by business necessity is not a legal question. Rather it is a factual question which depends for its answer upon a thorough understanding of the job demands of professional fire fighters. Our office, of course, has no expertise in evaluating the job demands of fire fighters. Further, the information we have received as to the necessity of the height requirement is contradictory.

The Fire Chief for the City of Nampa has indicated that he can see no reason for the requirement, that the employee in question has performed well, that there are many capable firemen shorter than 5'8", and that in certain situations a smaller individual is a definite asset to a fire fighting team.

On the other hand, the President of the Idaho Paid Firemen's Pension Ass'n. indicated that the requirement, together with various other medical standards is essential to fulfill the legislative purpose of upgrading the efficiency and effectiveness of fire fighting teams. He stressed the fact that firemen work as a team. He said, for example, that if four people carry a piece of equipment at shoulder height, a shorter person in the group may be required to carry the object at head level thereby increasing the stress on him and diminishing the efficiency of the team. Likewise, he noted an Illinois study of stress which compared stress involved upon a 5'3" fireman vs. a 6' fireman. That study found that in a two-man ladder raise the smaller individual was required to lift 150% of his body weight vs. 107% for the larger individual. The study cited a number of other situations in which the smaller individual is at a significant disadvantage.

The Idaho Paid Fireman's Pension Ass'n. President also indicated that a good deal of deliberation occurred prior to adopting the regulation. A law or regulation, properly adopted after such deliberation, gives rise to a presumption of validity. Therefore, in view of the essentially conflicting nature of the evidence we have seen, we must presume that the regulation is valid.

Thus, we recommend that the City of Nampa abide by the regulation. We also recommend that the Director of the State Insurance Fund review the regulation in light of the conflicting evidence to determine if any amendments would be desirable.

Dated this 19th day of May, 1976.

ATTORNEY GENERAL OF IDAHO

WAYNE L. KIDWELL

ANALYSIS BY:

DAVID G. HIGH

Assistant Attorney General

IDAHO AUTHORITIES CONSIDERED:

1. Statutes — Title VII, Civil Rights Act of 1964, Pub.L. 88-352 Section 716, 42 USCA 2000e-2 Pub.L. 92-261 Section 2(1), 42 USCA 2000e.

2. Cases—*Griggs v. Duke Power Co.*, 401 U.S. 424, 28 L.Ed.2d 158, 91 S.Ct. 849 (1971); *Castro v. Beecher*, 459 F.2d 725 1972; *Peltier v. City of Fargo*, 396 F. Supp. 710 (S.D. No. Dak. 1975); *Officers for Justice v. Civil Service Comm., San Francisco*, 395 F. Supp. 378 (N.D. Cal. 1975); *Smith v. City of East Cleveland*, 363 F. Supp. 1131 (N.D. Ohio 1973).

ATTORNEY GENERAL OPINION NO. 76-30

TO: Honorable Pete T. Cenarrusa
Secretary of State
Statehouse Mail

and
Mr. Clyde Koontz, C.P.A.
Legislative Auditor
Statehouse Mail

Per request for Attorney General Opinion

QUESTION PRESENTED: Can the Secretary of State legally sell compilations purchased in addition to those authorized by Sections 73-206, *Idaho Code*.

CONCLUSION: The Secretary of State, as agent of the State of Idaho, is prohibited by Section 73-211 from selling any compilations purchased by his office. Purchases by that office for the specific purpose of ultimate distribution to the various agencies and executive departments of the State of Idaho do not assume the character of a "sale" even though these entities reimburse the Secretary for the expense incurred by his office in the purchase of the compilations from the publisher. Rather these transactions are of the nature of a bailment. Absent a sale, the issue of whether Section 73-206, *Idaho Code* implicitly refers to a finite number of compilations is thus rendered moot.

ANALYSIS: The prohibition against the selling of *Idaho Codes* by the Secretary of State is found in the language of Section 73-211, *Idaho Code*. It reads:

Sale by state. — The state of Idaho shall not sell any of the compilations purchased by it, but may exchange the same with exchange libraries of other states and territories.

The term "compilation" is further defined to mean the *Idaho Code* as authorized and published pursuant to the Sessions Laws of 1947, Chapter 224. Section 73-202, *Idaho Code*. In awareness that the office of the Secretary of State has distributed sets of the *Idaho Code* to various agencies and executive departments of the State, and has received reimbursement for expenses incurred, one must ask whether these transactions are in violation of the statutory prohibition. A violation would occur if these transactions were properly identified as "sales".

As defined by the Uniform Commercial Code a "sale" occurs when title to goods is passed from the seller to the buyer for a price. Section 28-2-106(1) *Idaho Code*. Under the present facts title passes only between The Bobbs-Merrill Company, Inc., publisher and the state of Idaho as represented by its agent, the Secretary of State. However, title is taken in the hand of the State of Idaho, not the Secretary of State. Thereafter, this state property is distributed by one agent of the State to its other agencies and departments.

The nature of this transaction is similar to that of a bailment. Bailment is defined as:

A delivery of goods or personal property, by one person to another, in trust for the execution of a special object upon or in relation to such goods, beneficial either to the bailor or bailee or both, and upon a contract, express or implied, to perform the trust and carry out such object and thereupon either to redeliver the goods to the bailor or otherwise dispose of the same in conformity with the purpose of the trust. *Black's Law Dictionary* 4th Ed. Rev. (1975).; quoted with approval in *Loomis v. Imperial Motors, Inc.*, 88 Idaho 74, 78, 396 P.2d, 469 (1964).

The purchase and delivery of sets of the *Idaho Code* by the Secretary of State is a service function performed for the benefit of the respective agencies and executive departments. The specific purpose of this service is to timely satisfy the needs of the requisitioning entities for sets of the Code. This trust is perpetually honored so long as these Codes are used by agents of the state in performance of their official functions.

In conclusion no "sale" within the meaning of Section 73-211 *Idaho Code* occurs when sets of the *Idaho Code*, purchased by the Secretary of State, are distributed to agencies and executive departments of the State for cost reimbursement. Similar transactions whose recipients are private persons would be prohibited by the statute.

Dated this 24 day of May, 1976.

WAYNE L. KIDWELL

Attorney General

Analysis by:

CHRISTOPHER D. BRAY
Deputy Attorney General

IDAHO AUTHORITIES CONSIDERED:

1. Statutes — Section 73-206; Section 73-211; Section 28-2-106(1).
2. Cases — *Loomis v. Imperial Motors, Inc.*, 88 Idaho 74, 396 P.2d 467 (1964).

ATTORNEY GENERAL OPINION NO. 76-31

TO: Mr. Donald L. Deleski
Executive Secretary
Idaho State Board of Medicine
411 West Bannock
Boise, Idaho 83702

Per Request for Attorney General Opinion.

QUESTION PRESENTED:

Does House Bill 489 apply to medical malpractice lawsuits which have been filed, or will have been filed, prior to the effective date of the legislation, but which will not have gone to trial?

CONCLUSION:

House Bill 489 should not be construed to apply retrospectively, and thus, would not apply to medical malpractice lawsuits which have been filed, or which may be filed, prior to the effective date of House Bill 489, but which will not yet have gone to trial.

ANALYSIS:

House Bill 489, enacted by the 1976 Legislature, provides for the establishment of hearing panels to conduct informal, prelitigation hearings on the merits of all medical malpractice claims. After declaring the public interest in assuring that a liability insurance market is available to physicians and hospitals, Section 1, House Bill 489 provides:

It is, therefore, further declared to be in the public interest to encourage nonlitigation resolution of claims against physicians and hospitals by providing for prelitigation screening of such claims by a hearing panel as provided in this act.

House Bill 489 becomes effective on July 1, 1976.

Although both pro and con arguments can be made in response to the question presented, it is the position of the Attorney General that House Bill 489 does not apply to medical malpractice lawsuits which have been filed, or will be filed, prior to the effective date of the legislation. There are several reasons for this position.

I.C. §73-101, a general statute relating to statutory construction, provides: "No part of these compiled laws is retroactive, unless expressly so declared." Thus, no Idaho statute will be applied retroactively absent a clear indication of legislative intent to that effect. *Johnson v. Stoddard*, 96 Idaho 230, 526 P.2d 835 (1974); *Edwards v. Walker*, 95 Idaho 289, 507 P.2d 486 (1973); *Kent v. Idaho Public Utilities Commission*, 93 Idaho 618, 469 P.2d 745 (1970). By way of definition:

A retroactive or retrospective law, in the legal sense, is one that takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability in respect of transactions or considerations already passed. *Ohlinger v. United States*, 135 F.Supp. 40, 42 (D.C.S.D. Idaho 1955).

See also, *Frisbie v. Sunshine Mining Co.*, 93 Idaho 169, 457 P.2d 408 (1969).

It is the opinion of the Attorney General that House Bill 489 fits within the prohibition against retroactive laws for the reason that it creates a new obligation and imposes a new duty. The act provides that prelitigation screening of medical malpractice claims by a hearing panel "shall be informal and nonbinding, but nonetheless compulsory as a condition precedent to litigation." Section 2, House Bill 489. That is to say, House Bill 489 creates a new jurisdictional requirement regarding medical malpractice claims. If such were applied retrospectively, the effect would be to undermine the jurisdiction of all medical malpractice lawsuits filed prior to the effective date of the act.

Thus, unless the Legislature has declared otherwise, House Bill 489 cannot operate retrospectively. A review of the legislation reveals no such express declaration of legislative intent.

In addition, as previously noted, the effective date of House Bill 489 is July 1, 1976. This is the date upon which all new legislation will become effective, unless the Legislature has, pursuant to legal authorization, declared an emergency. Idaho Constitution, Article 3, §22; I.C. §67-510. The question which arises is: If the Legislature intended House Bill 489 to apply retrospectively, why didn't they declare an emergency and create an immediately effective date?

Furthermore, in the declaration of legislative intent and throughout the act, reference is made to "prelitigation screening" and "prelitigation consideration." "Litigation" refers to the entire act or process of litigating or commencing, maintaining and finalizing a lawsuit. 25A Words and Phrases, Litigation (1975 Supp.); Black's Law Dictionary; Webster's Third New International Dictionary. In contrast, "trial" encompasses only a specific segment of litigation. "Trial" refers to the actual presentation of evidence and final submission of the case to the trier of fact for decision. *Molen v. Denning & Clark Livestock Co.*, 56 Idaho 57, 50 P.2d 9 (1935); Webster's Third New International Dictionary. In sum, litigation is commenced as soon as a lawsuit is filed, and by adopting the terms "prelitigation screening" rather than "pretrial screening," the Legislature apparently did not intend to include lawsuits which had already been filed, or which might be filed, prior to the effective date of the Legislation.

Based upon the foregoing, it is the opinion of the Attorney General that House Bill 489 should not be construed to apply retrospectively, and thus, would not apply to medical malpractice lawsuits which have been filed, or which may be filed, prior to the effective date of House Bill 489, but which will not yet have gone to trial.

AUTHORITIES CITED:

1. Idaho Constitution, Article 3, §22.
2. Idaho Code §§67-510 and 73-101.
3. House Bill 489.
4. *Ohlinger v. United States*, 135 F.Supp. 40 (D.C.S.D. Idaho 1955).
5. *Johnson v. Stoddard*, 96 Idaho 230, 526 P.2d 835 (1974).
6. *Edwards v. Walker*, 95 Idaho 289, 507 P.2d 486 (1973).
7. *Kent v. Idaho Public Utilities Commission*, 93 Idaho 618, 469 P.2d 745 (1970).
8. *Frisbie v. Sunshine Mining Co.*, 93 Idaho 169, 457 P.2d 408 (1969).
9. *Molen v. Denning & Clark Livestock Co.*, 56 Idaho 57, 50 P.2d 9 (1935).
10. 25A Words and Phrases, Litigation (1975 Supp.)
11. Black's Law Dictionary.
12. Webster's Third New International Dictionary.

DATED This 24 day of May, 1976.

ATTORNEY GENERAL OF IDAHO

WAYNE L. KIDWELL
Attorney General

ANALYSIS BY:

JEAN R. URANGA
Assistant Attorney General

ATTORNEY GENERAL OPINION NO. 76-32

TO: Mr. Jim V. Fehling
Chief of Police
Office of Chief of Police
P.O. Box 789
Post Falls, Idaho 83854

Per Request for Attorney General Opinion

QUESTION PRESENTED:

May a juvenile give his or her consent to be searched on school property when he is under investigation for criminal conduct?

CONCLUSION:

Yes, if under all the facts and circumstances the juvenile freely and voluntarily consents to the search.

ANALYSIS:

At the outset, it should be noted that no federal case appears to analyze the precise question of a juvenile's right to consent to be searched without a warrant. There are, however a number of decisions regarding the effectiveness of a juvenile's confession to a crime. Although the concepts of "confession" and warrantless consent searches" involve different protections within the criminal process, for purposes of analyzing the question in this opinion, the two concepts are similar in nature. Both involve a factual determination that the decision by the suspect or accused was made freely and voluntarily.

It is clear that in considering the admissibility of confessions or admissions by a juvenile the fact that the person making them is a minor does not by itself render the statement inadmissible, in the absence of a statutory provision to the contrary. *Haley v. Ohio*, 332 U.S. 596, 92 L.Ed.2d 224, 68 S.Ct. 302 (1948); *Dias De Souza v. Barber*, 263 F.2d 470 (9th Cir. 1959), *cert. den.*, 359 U.S. 989, 3 L.Ed.2d 978, 79 S.Ct. 118; *Gallegos v. Colorado*, 370 U.S. 49, 8 L.Ed.2d 325, 82 S.Ct. 1209, 87 A.L.R.2d 614 (1962), *rehearing denied*, 370 U.S. 965, 8 L.Ed.2d 835, 82 S.Ct. 1579; *United States v. Lovejoy*, 364 F.2d 586 (2nd Cir. 1966), *cert. den.*, 386 U.S. 974, 18 L.Ed.2d 135, 87 S.Ct. 1168; *Mossbrook v. United States*, 409 F.2d 503 (9th Cir. 1969).

Additionally, many state courts have come to a similar conclusion that age alone is insufficient to render inadmissible an otherwise voluntary and freely given confession. *See*, Annot. 87 A.L.R.2d 624-633.

In testing the voluntariness of a person's consent to be searched, there is no single criteria or determining factor that can be used. The United States Supreme Court has held that the voluntariness of such consent is to be determined by the totality of the facts and circumstances of each case to resolve the ultimate question of whether the consent was freely and voluntarily given, and not the result of duress or coercion. *Schneckloth v. Bustamonte*, 412 U.S. 218, 36 L.Ed.2d 854, 93 S.Ct. 2041 (1973).

Although *Schneckloth* did not involve a minor's consent to be searched, and because age alone is not the critical factor in determining voluntariness, the case illustrates the federal standards on the subject of non-custodial consent searches. These standards are applicable in answering the question of this opinion. The Court noted that the cases on this issue yield no mechanical definition of the term "voluntariness." The test is unconstrained choice by its maker, in determining which the Court must assess the totality of the surrounding circumstances.

"We hold only that when the subject of a search is not in custody and the State attempts to justify a search on the basis of his consent, the Fourth and Fourteenth Amendments require that it demonstrate that the consent was in fact voluntarily given, and not the result of duress or coercion, express or implied. Voluntariness is a question of fact to be determined from all the circumstances, and while the subject's knowledge of a right to refuse is a factor to be taken into account, the prosecution is not required to demonstrate such knowledge as a prerequisite to establishing a voluntary consent." *Schneckloth*, 36 L.Ed.2d at 875.

The significance of the preceding cases is that none of the cases rely solely on the presence or absence of a single controlling criterion — each reflects a careful scrutiny of all the surrounding circumstances in determining the question of voluntariness.

Reviewing more closely the precise question concerning a juvenile's consent to be searched, there are two state cases which provide guidance. First, in the case of *In Re Ronny*, 242 NYS2d 844 (N.Y. 1963), the court held that a fifteen year old boy unlawfully possessed a quantity of contraband drugs, and that a search conducted by a New York Correctional Officer was lawful due to the fact that there was no conflict in the evidence relating to the voluntary nature of the consent to search. It is apparent from the case that the decision was based on the facts and circumstances surrounding the consent showing that the boy willingly complied with the officer's request for the contents of his pockets which revealed both pills and money. In addition, the boy willingly gave the officer a full explanation.

In the second case, *State v Evans*, 533 P.2d 1392 (Ore. 1975), the court affirmed the conviction for first degree robbery of a seventeen year old youth and held that under the totality of the circumstances the confession and consent to be searched were both voluntary. The court noted the youth's age but went on to mention that he had had previous contacts with police under circumstances which had given him considerable familiarity with his rights in criminal matters and that he had spoken with his attorney on those previous occasions.

In reviewing the cases on the subject of voluntariness, many factors can be used in examining the ultimate issue of whether the consent was voluntary. Among the factors are the following: (1) youth of the accused or suspect; (2) lack of education; (3) low intelligence; (4) nature of the requests to search; (5) mental capacity to understand the nature of his act; (6) whether the subject of search was in custody; (7) assertion by person making search of any claim on the right to conduct a search; (8) any evidence of a timid character or lack of experience

in dealing with law enforcement officials; (9) any facts regarding coercion, duress, or threats; (10) length of detention or questioning; and (11) whether there was any deception by state officials in procuring consent to search.

These principles of consent are applicable in all cases, and the determination does not turn on whether the consent was obtained on school grounds or otherwise.

In conclusion, the age of the youth is only a factor to be considered in answering the more important question of whether, in relation to all the facts and circumstances, the consent was freely and voluntarily given without coercion or duress.

AUTHORITIES CONSIDERED:

1. *Haley v. Ohio*, 332 U.S. 596, 92 L.Ed.2d 224, 68 S.Ct. 302 (1948)
2. *Dias De Souza v. Barber*, 263 F.2d 470 (9th Cir. 2959), *cert. den.*, 359 U.S. 989, 8 L.Ed.2d 978, 79 S.Ct. 1118
3. *Gallegos v. Colorado*, 370 U.S. 49, 8 L.Ed.2d 325, 82 S.Ct. 1209, 87 A.L.R.2d 614 (1962), *rehearing denied*, 370 U.S. 965, 8 L.Ed.2d 835, 82 S.Ct. 1579
4. *United States v. Lovejoy*, 364 F.2d 586 (2nd Cir. 1966), *cert. den.*, 386 U.S. 974, 18 L.Ed.2d 135, 87 S.Ct. 1168
5. *Mossbrook v. United States*, 409 F.2d 503 (9th Cir. 1969)
6. Annot. 87 A.L.R.2d 624-633
7. *Schneckloth v. Bustamonte*, 412 U.S. 218, 36 L.Ed.2d 854, 93 S.Ct. 2041 (1973)
8. *In Re Ronny*, 242 NYS2d 844 (N.Y. 1963)
9. *State v. Evans*, 533 P.2d 1392 (Ore. 1975)

DATED This 24th day of May, 1976.

ATTORNEY GENERAL FOR IDAHO

WAYNE L. KIDWELL

ANALYSIS BY:

James F. Kile
Assistant Attorney General
Criminal Justice Division

ATTORNEY GENERAL OPINION NO. 76-33

TO: Don C. Loveland
Commissioner
Idaho State Tax Commission
P.O. Box 36
Boise, Id 83722

Per request for Attorney General Opinion.

QUESTIONS PRESENTED:

(1) Is the establishment of the district court fund provided in House Bill 535 mandatory on the part of the county?

(2) Is the two mill tax levy for the purpose of supporting the district court fund mandatory?

(3) The bill provides a retroactive date of January 1, 1976. Must all fees, fines and forfeitures which are transferred to the district court fund be transferred retroactively to January 1, 1976?

(4) If the moneys deposited into the district court fund from fees, fines and forfeitures is insufficient to operate the district court, what steps can be taken to insure that the courts are funded?

CONCLUSION:

(1) The establishment of the district court fund is mandatory.

(2) The two mill district court levy is not mandatory.

(3) Yes

(4) There are at least five options available to the county. The county may, if proper steps are followed, transfer funds from the current expense fund. The county may make an emergency appropriation. Alternatively, the county may seek from the district court authorization to make expenditures in excess of appropriations. Additionally, procedures relating to the issuance of registered warrants and tax anticipation notes are available.

ANALYSIS:

(1) Section 2 of the bill enacts a new Idaho Code section designated 31-876 which relates to a special levy for courts. That section provides in pertinent part:

“ . . . All revenues collected from such special tax shall be paid to the ‘district court fund,’ which is hereby created, and the board may appropriate otherwise unappropriated moneys into the district court fund.”

Section 1 of the bill provides that fines, fees and forfeitures previously paid into the current expense fund shall be paid into the district court fund. Similarly, Section 3 relating to court fees charged by the clerk of the court provides that these previously paid into the current expense fund shall be paid into the district court fund.

The mandatory language of the statute requires the clerk to pay these fees, fines and forfeitures into the district court fund. There is no longer statutory authority permitting this revenue to be paid into the current expense fund. Since there is no choice on the part of the counties except to pay this money into the district court fund, it is necessary and mandatory that the counties create a district court fund in order to receive it.

(2) Section 2 of House Bill 535 speaks to the levy. It provides in pertinent part:

"The board of county commissioners of each county in the state *may* levy annually upon all taxable property in its county a special tax not to exceed two (2) mills for the purpose of providing for the functions of district court and the magistrate division of the district court within the county." (Emphasis supplied)

Since the legislature has used a permissive "may" instead of a mandatory "shall," the question of whether to levy the two mills for the district court fund is a matter of discretion with the board of county commissioners in each county.

(3) In our previous opinion relating to House Bill 535 (Opinion No. 76-28) and to the problem of retroactively increasing the district court filing fees, we have analyzed the law regarding retroactive application of legislation. As we noted in that opinion, the Idaho legislature has the power, upon declaration of an emergency, to give an act a retroactive effective date unless prohibited from doing so by some constitutional limitation. It is not a function of either the executive or judicial branch of government to make independent inquiry into the existence of the emergency declared by the legislature. In our earlier opinion, we examined in detail the constitutional limitations upon retroactive application of a statute. As we observed, there are four general constitutional limitations upon the power of the legislature to legislate retroactively. Two of these relating to *ex post facto* laws and bills of attainder apply only to criminal matters. Neither of the other two limitations apply to the internal accounting of county government. The bill does not impair the obligations of contract nor destroy any person's vested rights without due process of law. Accordingly, the statute must be applied as written. The funds referred to must be deposited into the district court fund effective July 1, 1976, and the costs of administering the district court must be paid from that fund effective on that date.

We recognize that the county's fiscal period begins on the second Monday of January (January 12, 1976). By providing a retroactive date for House Bill 535, the legislature has necessarily required that the county reopen its books for the previous fiscal period and establish the fund for that period between January 1 and January 11, 1976. The legislature must be presumed to have been aware of the existing statute at the time it enacted House Bill 535. We observe in passing, however, that since there is no limitation upon the authority of the legislature in

1976 to retroactively modify the county's accounting system, there would also appear to be no limitation upon the power of the next session of the Idaho legislature to remedy any errors which may have been made by the preceding session.

(4) *Idaho Code* §63-1502 provides the circumstances under which money may be transferred from one fund to another. That section provides:

"The board must not transfer any money from one fund to another, nor in any manner divert the money in any fund to other uses, except in cases expressly provided and permitted by law . . ."

House Bill 535 expressly provides for such a transfer. The new *Idaho Code* §31-867 created by Section 2 of the bill expressly provides that "the board may appropriate otherwise unappropriated moneys into the district court fund." Under House Bill 535, the expenses of the district court must be paid from the district court fund. Therefore, the money in the current expense fund which had previously been budgeted and appropriated for the operation of the district court becomes unappropriated money in the current expense fund. Since the money is unappropriated, it may, as provided in the statute, be transferred to the district court fund.

A second alternative method is available to the county. An emergency may be declared under §31-1608 by a unanimous vote of the county commissioners. Under §31-1608, an emergency may be caused by a need "to meet mandatory expenditures required by law." The maintenance of the district courts by the county is a mandatory requirement of law which must be paid, under House Bill 535, from the district court fund. If there is insufficient money in that fund appropriated to meet the expenses of the district court, the commissioners may, by strictly following the procedures outlined in §31-1608, make an emergency appropriation for that purpose.

The third option available to the county is outlined in *Idaho Code* §31-1607 providing for expenditures in excess of appropriations. That section provides in pertinent part:

"The county auditor shall issue no warrant and the county commissioners shall approve no claim for any expenditure in excess of said budget appropriations or as revised under the provisions hereof, except upon an order of a court of competent jurisdiction, or on emergencies as hereinafter provided."

Therefore, where it becomes necessary to make an expenditure in excess of money appropriated into the district court fund in order to support the courts, an order may be sought from the court authorizing that expenditure.

It should be noted that the declaration of an emergency provided in §31-1608 has been held to be judicially reviewable as a question of fact. *Reynolds Construction Company v. Twin Falls County*, 92 Idaho 61 (1968). The third alternative may therefore, be preferable to the second.

In the event of a shortage of funding, two additional devices available to the county would be the issuing of registered warrants or tax anticipation notes. In either event, the statutory procedures relating to registered warrants and tax anticipation notes should be followed.

AUTHORITIES CONSIDERED:

1. *Idaho Code* Sections 31-867, 31-1607, 31-1608, 63-1502.
2. Idaho case: *Reynolds Construction Company v. Twin Falls County*, 92 Idaho 61 (1968).

DATED This 5th day of June, 1976.

ATTORNEY GENERAL OF THE STATE OF IDAHO

WAYNE L. KIDWELL

ANALYSIS BY:

**THEODORE V. SPANGLER JR.
DEPUTY ATTORNEY GENERAL**

cc: Idaho Supreme Court
Supreme Court Law Library
Idaho State Library

ATTORNEY GENERAL OPINION NO. 76-34

TO: Representative Walter E. Little
New Plymouth, Idaho 83655
Senator Reed Budge
Soda Springs, Idaho 83276
Per Request for Attorney General Opinion.

QUESTIONS PRESENTED:

1. In view of the provisions of Section 67-5718, *Idaho Code*, which appear to require that expenditures of over \$5,000 be made through a bidding process, has there been compliance with statutory requirements in the Governor's recent acquisition of an airplane? (Representative Little)

2. With regard to the recent purchase by the governor of an airplane costing \$169,000:

(a) What funds were used to purchase the aircraft?
Amounts?

(b) Was the proper bidding procedure followed?

(c) Was this a proper use of State funds?

(d) From whom was the purchase made?
(Senator Budge)

CONCLUSIONS:

Pursuant to Idaho's Disaster Preparedness Act, enacted by the Idaho State Legislature in 1975, the Governor of Idaho can legally suspend the statutory bidding requirements and utilize funds appropriated to other state agencies for the purchase of any equipment that he determines to be essential to cope with a disaster emergency. Thus, based upon the Governor's stated position that he found it absolutely necessary to purchase an airplane to cope with the disaster emergency, his action in doing so appears to be within the scope of the authority given to him by the Idaho Legislature.

It should be noted that absent a disaster emergency, the purchase of the airplane in question would be contrary to Idaho law because of non-compliance with Idaho's bidding statutes and the Idaho law providing for standardizing means for inter-agency pooling of state funds.

RECOMMENDATION:

As part of this formal opinion, we are recommending to the Idaho State Legislature that legislation be prepared and considered that would more adequately establish guidelines governing emergency acquisitions by the Chief Executive of the State under a disaster situation. Further, that the Legislature consider enacting an orderly procedure for the speedy review of significant

acquisitions by the State Board of Examiners and that would provide a criteria for eventual disposition, if appropriate, of the property upon termination of the disaster emergency.

ANALYSIS:

Due to the similar nature of the two opinion requests, we shall answer both requests in one opinion. Regarding the actual procedure followed in the purchase of the airplane, the Office of the Governor states the following facts:

1. In fact, bids were obtained as a matter of good practice irrespective of legal requirements. The Department of Transportation, Division of Aeronautics, contacted two aircraft dealer/brokers — one in Boise, the other in Salt Lake. Information and quotations on about a dozen airplanes were gathered. A (Piper) Navajo Chieftain was settled upon as meeting the State's needs. Prices of \$160,000 and \$169,000 were quoted on this model aircraft. The plane costing \$169,000 was selected since it was a new aircraft, had less time on the engines, and included a radar and other equipment not on the older Chieftain.

2. Since a number of state agencies needed this kind of transportation to deal with the Teton Dam Disaster and its aftermath, monies were transferred from the following agencies into the Governor's Emergency Fund using DA-8's:

Department of Health and Welfare \$55,000
 Department of Transportation 50,000
 Public Utilities Commission 50,000
 Office of the Governor 15,000

for a sum total of \$170,000. The monies were allotted to a capital outlay classification within the Emergency Fund. A DA-8 was executed for \$169,000 by the Office of the Governor. A warrant was authorized and drawn by the State Auditor.

The airplane was purchased from Industrial Systems International, Inc., an Idaho corporation with its registered office in Boise, Idaho. Notwithstanding that there may have been informal "bids" on the part of one or more vendors in quoting prices on certain planes, it is clear that the statutory bidding process was avoided, but this office does not conclude that such avoidance was illegal.

As a general rule, all property purchased for state agencies, unless the agency is specifically excluded, must be purchased by the Administrator of the Division of Purchasing, and may be acquired only after competitive bidding if the property to be acquired is expected to cost in excess of \$5,000. I.C. §§67-5717 and 67-5718. I.C. §67-5716(15) then defines a state agency as follows;

(15) Agency. All officers, departments, divisions, bureaus, boards, commissions and institutions of the state, including the Public Utilities Commission, but *excluding the governor*, the lieutenant-governor, the secretary of state, the state auditor, the state treasurer, the attorney

general and the superintendent of public instruction. (Emphasis added.)

Applying these principles to the Governor's recent purchase of an airplane, the existence of the Teton Dam Disaster may offer legal support for both the method of obtaining funds and the method of purchase. The State Disaster Preparedness Act grants the Governor broad powers in dealing with disaster emergencies. More specifically, I.C. §46-1008(5) provides:

In addition to any other powers conferred upon the governor by law, he may:

(a) suspend the provisions of any regulations prescribing the procedures for conduct of public business that would in any way prevent, hinder, or delay *necessary action* in coping with the emergency;

(b) utilize all resources of the state and the political subdivisions *if he deems necessary* to cope with the disaster emergency; . . . (Emphasis added.)

Based upon the foregoing, it appears that when a disaster emergency exists the Governor may legally both suspend the statutory bidding requirements and utilize funds appropriated to other state agencies to cope with a disaster emergency. Of course, the factual questions of whether suspensions of the bidding requirements, whether utilization of funds appropriated to other state agencies and ultimately whether the purchase of an airplane were necessary or appropriate to cope with the Teton Dam disaster emergency cannot properly be determined by the Attorney General, since a clear abuse of discretion has not been demonstrated.

Such factual determinations should be addressed to the legislature or a fact-finding committee thereof, or to the courts. (Emphasis supplied.)

In further support of the Governor's possible emergency power to purchase the airplane, as noted above, I.C. §67-5716(15) exempts the Governor from use of the statutory bidding procedures. Thus, assuming the funds appropriated to other state departments were properly transferred to the Governor's Office under the above-quoted emergency, quasi-sequestered powers provided to the Governor in I.C. §46-1008(5), the purchase of an airplane by the governor with the use of such quasi-sequestered funds is arguably exempt from the statutory bidding requirements.

It must be noted that the Legislature has vested in the Governor a grant of emergency powers which are practically unfettered in the scope. We believe that the desirability of such legislation should be re-examined, and that amendment to the State Disaster Preparedness Act may be appropriate. We would particularly recommend that the Legislature adopt guidelines which more adequately define an emergency, more adequately define the Governor's jurisdiction and fiscal powers in such an emergency, and more adequately set forth standards which would aid in determining whether there is an abuse of discretion by the Governor in the fulfillment of his emergency duties. To discourage potential abuse, such legislation might also provide

criteria for the disposition, if appropriate, of property acquired by the Governor to deal with an emergency disaster which gave rise to its acquisition, or upon termination of the need of such property to aid in mitigating the effects of the particular disaster or emergency; and such legislation might create a means by which the Board of Examiners may speedily review and/or approve significant emergency expenditures, and/or take immediate steps to void or rescind a contract entered into in violation of Idaho law.

In a non-disaster situation, it is the opinion of the Attorney General that the Governor could not utilize funds appropriated to other agencies, or purchase the airplane, in the same manner which was used. Article 7, §13 of the Idaho Constitution states: "No money shall be drawn from the treasury, but in pursuance of appropriations made by law." A review of the statutes relating to legislative appropriations provides the following pertinent information. I.C. §67-3508(1) reads in pertinent part:

Excepting where the legislature expressly departs from the classification hereinafter set forth in any appropriation bill, all appropriations made by the legislature, and all estimates hereafter made for budget purposes, and all expenditures hereinafter made from appropriations or funds received from other sources, shall be classified and standardized by items as follows:

(a) Personnel costs . . .

(b) Operating expenditures . . .

(c) Capital outlay, which, when used in an appropriation act, shall include . . . machinery, apparatus, equipment and furniture including additions thereto, which will have a useful life or service substantially more than two (2) years, . . .

(d) Trustee and benefit payments, . . .

Under these standard classifications, the purchase of an airplane is clearly a capital outlay expenditure.

Once funds are appropriated according to the standard classifications, I.C. §67-3511 limits the transfer of appropriations between classes and programs. I.C. §67-3511(1) prohibits the transfer of appropriations between classes, except with the consent of the State Board of Examiners. In addition, I.C. §67-3511(2) states that when appropriations have been made to a specific program, no transfers can be made to another program within the budgeted agency without the approval of the State Board of Examiners and the Administrator of the Division of Budget, Policy Planning and Coordination, and the requested transfer may not be more than a ten per cent (10%) cumulative change from the appropriated amount. Finally, I.C. §67-3511(3) specifically provides that any monies appropriated for capital outlay may be used only for that purchase and not for any other purpose.

At this point, it might be noted that there are no Idaho statutes, Division of Purchasing regulations, or cases which deal specifically with commingling of

departmental appropriations or inter-departmental purchases. Notwithstanding the lack of express provisions, I.C. §67-2510 provides: "... All departments shall, so far as practicable, cooperate with each other in the employment of services and the use of quarters and equipment" In addition, I.C. §§67-2326 through 67-2333 encourage public agencies to combine their powers and cooperate to their mutual benefit, but such joint exercise of powers requires a written agreement setting forth the specific terms and provisions of the joint undertaking. I.C. §67-2328. Notwithstanding, such agreements may not extend the powers or privileges of any of the participating agencies beyond the powers or privileges which any of said agencies would have if acting alone. I.C. §67-2328(a). Regarding funding of any such joint undertakings, I.C. §67-2331 allows that any public agency entering into a joint agreement may appropriate funds to the operation of the joint undertaking "as may be within its legal power to furnish."

In sum, under non-disaster circumstances, it appears that various state departments could pool their funds for the joint purchase of an airplane, but such joint purchase would be subject to three major limitations. First, the agencies would have to enter into a written agreement setting forth the specific terms and provisions of the joint undertaking. Second, if any of the participating agencies is subject to statutory bidding requirements, any joint purchase would have to comply with such requirements. In the present situation, since three of the four agencies participating in the purchase of the airplane are subject to the statutory bidding requirements, compliance with such requirements would be necessary. Third, if in order to fund the joint undertaking it is necessary for any of the participating agencies to transfer their legislative appropriations from one standard classification to another, or from one program to another, such approval would first have to be obtained from the State Board of Examiners, and possibly the Administrator of the Division of Budget, Policy Planning and Coordination.

AUTHORITIES CONSIDERED:

1. Article 7, Section 13, Idaho Constitution;
2. I.C. §§46-1008; 67-2326 through 67-2333; 67-2510; 67-3508; 67-3511; 67-5716 through 67-5718.

DATED This 9th day of July, 1976.

ATTORNEY GENERAL OF IDAHO

WAYNE L. KIDWELL

ANALYSIS BY:

PETER HEISER, JR.
RUDOLF D. BARCHAS
JEAN R. URANGA

ATTORNEY GENERAL OPINION NO. 76-35

QUESTIONS PRESENTED:

On April 13, 1976, the Idaho State Building Authority, pursuant to legislative authorization, authorized up to one million dollars in bond anticipation notes, to be issued in one or more series, to defray costs for state office buildings to be constructed in Lewiston, Idaho Falls and Boise, Idaho. The State Building Authority has asked for an opinion as a condition precedent to delivery of the notes addressing the following points:

1. Whether fee simple title to real property in the Capitol Mall Complex in Boise, Idaho was legally acquired by the State Building Authority through grant from the State Board of Land Commissioners.
2. Whether the Authority, through grant and contracts of purchase, legally acquired title to sites for new office buildings in Lewiston, and Idaho Falls, Idaho.
3. Whether the Agreement of Lease, dated April 1, 1976, between the State of Idaho and the State Building Authority is valid and enforceable under law to permit construction of state office buildings in Lewiston, Idaho Falls and Boise, Idaho.
4. Whether legislative approval and the Senate Concurrent Resolutions authorizing construction of facilities are sufficient to comply with the Idaho Building Authority Act and the Idaho Constitution.

CONCLUSIONS:

1. The real property in the Capitol Mall Complex in Boise, Idaho granted to the Authority by the State Board of Land Commissioners, not being endowment or trust lands of the state, was legally conveyed to the Authority in fee simple pursuant to Idaho constitutional and statutory law.
2. The Authority has the power under the Idaho State Building Authority Act to acquire through grant, contract or otherwise, real property for construction of state office buildings from all sources including private and corporate entities and legal subdivisions of the State of Idaho. Thus, real property title acquired by the Authority in Lewiston and Idaho Falls, Idaho is sufficient within the law if the conveyances were made pursuant to the general requirements of the law of real property.
3. The Agreement of Lease, dated April 1, 1976, though not a valid and enforceable lease in its present form, is arguably sufficient to allow the authority to provide state facilities pursuant to section 67-6410, *Idaho Code*.
4. Legislative approval, required as a condition precedent to financing facilities pursuant to §67-6410, *Idaho Code*, appears to be satisfied by Senate Concurrent Resolutions 138 and 56. Although absence of dollar and square footage limitations in SCR 138 raises a possible question of improper delegation of power, and although there could arguably be a conflict in limitations for the

Capitol Mall Complex building between SCR 138 and 56, these problems do not bear directly on the issue of legislative approval pursuant to law and thus were not considered as within the scope of this opinion.

ANALYSIS:

The answers to the questions considered by this opinion hinge necessarily on the legal status of the Authority within the framework of Idaho constitutional and statutory law. Over the years, the State Supreme Court has considered the legal status of statutorily created bodies similar to the Building Authority. This line of cases has been recently summarized and discussed by the Court in *State Board of County Commissioners of Twin Falls County vs. Idaho Health Facilities Authority*, 96 Idaho 498 (1975). The Health Facilities Authority was created by the Idaho Legislature as a public entity that could make tax exempt revenue bond financing available to public and private non-profit hospitals within the State of Idaho. The Health Facilities Authority, therefore, is similar in scope and purpose to the Building Authority. The court held that although the Health Facilities Authority was neither a private corporation nor an agency of state government, it was a legally created entity serving a public purpose. In so holding, the court said that:

“The Authority has not run afoul of the strictures of (the United States Constitution), first, because the monies it expends are not tax monies, and secondly, because the monies it expends are for a public purpose.”

The court also held that there was no violation of article III of the Idaho Constitution. Further, in considering the funding mechanisms for the Health Facilities authority, the court said that:

“We have already considered this issue, . . . , in analogous situations and have concluded that the obligations of the kind involved in this case, where the public entity created has no power to tax or encumber the assets of the body creating it, are not violative of the constitutional requirements of article VIII, Idaho Constitution.”

The same holding would no doubt apply in the case of the Building Authority.

Other constitutional hurdles were also overcome by the court in the Health Facilities Authority case. Article III, section 19, Idaho Constitution, which provides that the legislature shall not pass local or special laws creating a corporation, and article XI, section two, Idaho Constitution, which prohibits granting of charters of incorporation by special law to certain organizations, were not violated by the Health Facilities Authority Act. The court, citing *State ex rel. Williams vs. Musgrave*, 84 Idaho 77 (1962), said that organizations such as the Health Facilities Authority “are state-created entities which are neither corporations or state agencies subject to all the restrictions of the state constitution.” In holding that the Health Facilities Authority was an “independent public body politic and corporate” as opposed to an unconstitutional corporation, the court, citing several cases, said the distinguishing factors were that (1) there were no private parties with the right to control or manage the authority, and (2) there were no private parties which could change the fundamental

structure and public purpose of the authority. Finally, the court found no improper delegation of power under article II, section one and article III, section one, Idaho Constitution. The court cited *Boise Redevelopment Agency vs. Yick Kong Corporation*, 94 Idaho 876 (1972) for the proposition that:

"(The legislature) can empower an agency or an official to ascertain the existence of the facts or conditions upon which the law becomes operative . . . The legislature must itself fix the condition or event on which the statute is to operate, but it may confide to some suitable agency the fact-finding function as to whether the condition exists or the power to determine, or the discretion to create, the stated event. The nature of the condition is, broadly, immaterial."

Comparison of the Building Authority with the Health Facilities Authority convinces us that the holdings of the State Supreme Court in the Health Facilities case apply equally to the constitutionality of the Building Authority. The conclusion may appropriately be drawn that the Building Authority is neither a private corporation nor an agency of the state, but serves in the capacity of a quasi-state agency legally constituted by Idaho law. The requirement of the State Supreme Court that such an entity have a public purpose is met in the Act creating the authority. Section 67-6404, *Idaho Code* states that:

"It is hereby further declared that the foregoing are public purposes and uses for which public monies may be borrowed, expended, advanced, loaned or granted, and that such activities serve a public purpose in improving or otherwise benefiting the people of this state; that the necessity of enacting the provisions hereinafter set forth is in the public interest and is hereby so declared as a matter of express legislative determination."

As the court said in the Health Facilities Authority case, a "legislative declaration of public purpose is entitled to the utmost consideration . . ." There seems to us little question that the Idaho Courts would hold that the Building Authority was created for a valid public purpose.

In summary, although the Courts of Idaho have not had occasion to address the legality of the Building Authority, we believe that, given the opportunity, the Courts, applying prior Idaho case law, would find that the Authority passes legal muster. With this conclusion in mind, we may consider the specific requests.

THE LAND BOARD TRANSACTION CONCERNING REAL PROPERTY

Bearing in mind the strong presumption of constitutionality of legislation and considering the cases referred to above in this opinion, we believe that the State of Idaho may constitutionally transfer fee simple title to state owned lands to the Building Authority in the form of a grant. Article IX, section seven, Idaho Constitution and section 58-104(1), *Idaho Code* give the State Board of Land Commissioners authority to control and dispose of public lands of the state.

In the normal situation, state land is administratively controlled by an agency or department of state government with title being vested in the state under the

control of the Board of Land Commissioners. Usually, when an agency finds that real property is no longer useful to it, it transfers that property through the Land Board pursuant to the Idaho Surplus Real Property Act, section 58-33, *Idaho Code*, et seq. However, assuming that the Idaho Building Authority Act is constitutional, which we believe it is, two separate sections of that act take land grants from the State of Idaho to the Building Authority out of the Idaho Surplus Real Property Act. Section 67-6423, *Idaho Code* reads as follows:

"Neither this act nor anything herein contained is or shall be construed as a restriction or limitation upon any powers which the authority might otherwise have under any laws of this state, and this act is cumulative to any such powers. This act does and shall be construed to provide a complete, additional and alternative method for the doing of things authorized thereby and shall be regarded as supplemental and additional to powers conferred by other laws."

The above quoted language standing alone could be interpreted to supplant the Idaho Surplus Real Property Act for purposes of conveyance of the land to the Building Authority which is no longer to be used by a state agency or department. Further, section 67-6424, *Idaho Code* reads:

"Insofar as the provisions of this act are inconsistent with the provisions of any other law, general, specific, or local, the provisions of this act shall be controlling."

It is apparent from these two statutes that the legislature intended that the Idaho State Building Authority Act stand alone. Thus, the Surplus Real Property Act is not applicable in this case.

Finding no specific statutory authority that would prevent the Board of Land Commissioners from granting state owned land to the Building Authority and further taking into account the two above quoted statutes, it would appear that there is no legal impediment to the Board of Land Commissioners grant of the old St. Alphonsus Hospital and grounds to the State Building Authority. The act itself in section 67-6421, *Idaho Code* states that:

"The state may make grants of money or *property* to the Authority for the purpose of enabling it to carry out its corporate purposes and for the exercise of its powers, including, but not limited to deposits to the reserve fund. This section shall not be construed to limit any other power the states may have to make such grants to the Authority." (Emphasis added).

Therefore, the Act itself states that the grant may be made from the state to the Authority. Finding no constitutional provisions which would prevent this action, we believe that the Board of Land Commissioners may grant fee simple title to the Building Authority of state owned lands. It should be borne in mind, of course, that the lands transferred were not endowment or other trust lands of the state. If the latter were true, a different question may be presented.

STATUS OF REAL PROPERTY IN LEWISTON AND IDAHO FALLS

This office has been informed that real property in the cities of Lewiston and Idaho Falls, Idaho is being obtained by the Authority through grant and contracts of sale. Since the documents in question, and the deeds involved are not before us at this time, and because we have conducted no title search relating to these lands, we cannot give an opinion concerning title to this specific real property under the general requirements of Idaho Property Law. However, we can say without hesitation that the authority has the power under the Idaho State Building Authority Act to acquire through grant, contract or otherwise, real property for construction of state office buildings from all sources including private and corporate entities and legal subdivisions of the State of Idaho. This is authorized by section 67-6409, *Idaho Code*.

THE AGREEMENT OF LEASE

On April 1, 1976, an Agreement of Lease was entered into between the Building Authority and the State of Idaho. Whether this agreement is a valid and enforceable "lease" is seriously open to question. A review of the agreement reveals questions concerning amount of rental, number of buildings to be constructed, size of buildings, completion dates, occupancy dates, precise location of buildings, and additional problem areas. In short, this document does not have the flavor of a "lease" as that term is generally considered. However, at this point, whether or not the agreement rises to the level of a "lease" is substantially immaterial. The question at issue presently is whether or not this document is an "agreement" sufficient to comply with the requirements of the Idaho Building Authority Act. Section 67-6410, *Idaho Code*, states as follows:

"Notwithstanding any other provision of this act, the Authority is not empowered to finance any facility pursuant to section 67-6409 unless: (a) a state body has entered into an agreement with the Authority for the Authority to provide a facility; (b) the Authority finds that the building development or building project to be assisted pursuant to the provisions of this act, will be of public use and will provide a public benefit. No state body may enter into an agreement pursuant to (a) above without prior legislative approval."

It can be seen from the above quote that no building may be financed until there has been some agreement between the Authority and the State of Idaho. What this "agreement" must be is not spelled out in the Act. There is nothing in this section or any other part of the Act requiring a lease before financing of construction may begin. Viewed literally, the term "agreement" could be construed loosely to mean any form of oral or written understanding between the state and the Authority concerning construction of buildings. Before us for consideration is a 40 page document entitled "Agreement of Lease Between the State Building Authority and the State of Idaho, acting through the Department of Administration." Certainly, it can be argued that this agreement is the kind contemplated by section 67-6410, *Idaho Code*. Although a court of law could take a contrary position, we feel that a liberal interpretation of the term "agreement" clearly encompasses the document presented to us for our review. Consequently, the question as to whether the April 1, 1976 Agreement of Lease is valid and enforceable under law to permit construction of state office buildings in Lewiston, Idaho Falls and Boise must be answered in the

affirmative based on the foregoing analysis.

LEGISLATIVE APPROVAL

Section 67-6410, *Idaho Code* requires legislative approval as a condition precedent to financing of facilities pursuant to the act. It is certainly arguable that this required approval has been granted pursuant to Senate Concurrent Resolutions 138 and 56. SCR 138, passed by the 1976 Legislature reads in part as follows:

"NOW, THEREFORE, BE IT RESOLVED by the second regular session of the forty-third Idaho Legislature, the House of Representatives and the Senate concurring therein, that House Concurrent Resolution No. 28 as adopted by the first regular session of the forty-third Idaho Legislature, the House of Representatives and the Senate concurring therein and titled "A CONCURRENT RESOLUTION PROVIDING LEGISLATIVE AUTHORIZATION FOR THE IDAHO STATE BUILDING AUTHORITY TO CONSTRUCT FIVE BUILDINGS WITHIN THE STATE OF IDAHO TO HOUSE STATE AGENCIES." is hereby repealed and declared null and void.

BE IT FURTHER RESOLVED that the administrator of the Division of Public Works of the Department of Administration of the State of Idaho is authorized to enter into year-to-year lease agreement or agreements with the Idaho State Building Authority, upon such terms and conditions as he deems reasonable and necessary, for the purpose of providing sufficient office space for offices of the State of Idaho within the cities of Idaho Falls, Lewiston, Pocatello, Coeur d'Alene, Twin Falls and within the Capitol Mall area in Boise, and shop and office space within the vicinity of Boise, Idaho.

BE IT FURTHER RESOLVED that the concurrent resolution shall for all purposes constitute prior legislative approval, in accordance with section 67-6410, *Idaho Code*, with respect to the lease agreement or agreements and the facilities referred to in section II hereof."

A similar resolution relating to the "1902" portion of the original St. Alphonsus Building exists through S.C.R. 56, passed by the 1976 Legislature. It can certainly be argued that these two resolutions provide the "legislative approval" required by section 67-6410, *Idaho Code*.

It should be observed that S.C.R. 138 repealed former resolution No. 28, which contained dollar and square footage limitations for construction of buildings. Therefore, there are presently no square footage or dollar limitations contained for the buildings referred in S.C.R. 138. The effect of this is to possibly place considerable latitude in the Authority to select the location, size and cost for future state office buildings. This could raise the question of possible improper delegation of legislative authority. On this point, it is instructive that DAVIS ON ADMINISTRATIVE LAW sections 200 through 216 concludes that the legal doctrine prohibiting delegation of legislative functions is probably on the way out. He feels that it should and will be replaced by a doctrine of fairness and due process and that the administrative agencies

involved should take the steps necessary to see that fairness is followed. However, whether or not there are any problems concerning improper delegation of authority has not been considered by this office since it was not determined to be within the scope of the present opinion.

Another potential problem that was peripherally uncovered during our review of the resolutions concerns a possible conflict between S.C.R. 136 and 56. The former resolution repealed S.C.R. 28, thus doing away with any dollar and square footage limitations for buildings therein referred to. On the same day, S.C.R. 56 was passed for the St. Alphonsus building in Boise. This latter resolution reads in part as follows:

"Be it further resolved that the authorization to the Department of Administration, State of Idaho, to enter into lease agreements with the Idaho State Building Authority for the provision of approximately 100,000 square feet at a projected cost of \$4,000,000.00 within the Capitol Mall area is hereby *extended* to include renovation and incorporation of that portion of the original St. Alphonsus building referred

to as the "1902" portion at a projected cost of not to exceed \$300,000.00." (Emphasis added).

When compared with the language in S.C.R. 138, it is not clear what this latter provision does to the dollar and square footage limitations for the Capitol Mall Building in Boise, Idaho. Once again, however, since this question was considered collateral to the issue before us, it was not researched or considered to completion. We would simply recommend that these two areas be considered cautiously in the future as plans for the building proceed.

CONCLUSION:

A summary of the answers to questions presented reveals, overall, favorable conclusions for the Authority to proceed pursuant to the Senate Concurrent Resolutions. Research of the Idaho case law substantiates the constitutionality of the Idaho Building Authority as a quasi-state agency with powers to enter into the type of transactions being contemplated here. From the documents now before us, it is evident that real property acquired by the Authority was done so pursuant to Idaho Constitutional and Statutory law. Therefore, absent any specific problems under general Idaho Law of Real Property, the Authority has fee simple title to the lands in question. Also, the Agreement of Lease dated April 1, 1976, though perhaps not a valid lease, should be sufficient to comply with the requirements of the Idaho Building Authority Act. Finally, the Senate Concurrent Resolutions referred to in this opinion appear to serve as the necessary "legislative approval" required by Section 67-6410, *Idaho Code*.

It should be observed in conclusion that this opinion was not contemplated to address every possible problem concerning the Idaho Building Authority in the present transaction. Ideally it appears that the Idaho Building Authority Act contemplates proposal by a state body to the Building Authority for construction of a state office building. Technically, the Authority should make a "finding" pursuant to section 67-6410(b), *Idaho Code* that the project will be of public

use and will provide a public benefit. The legislature should then be approached for approval of the project. After such approval has been obtained from the legislature, an agreement would be entered into as a condition precedent for financing and construction of the building. It is obvious that this procedure was not followed to the letter in the present transaction. However, the Idaho Building Authority Act is quite broad and certainly could yield to the argument that the procedure which was used was sufficient to comply with the terms of the law.

Ideally, also, as pointed out above, a dollar and square footage limitation for future state office buildings by the Idaho Legislature would certainly assume that the wishes of the legislature were being carried out by the Building Authority. However, absence of these limitations in the resolutions does not in itself require a finding of illegality. The argument could well be made that the legislature gave authority for consideration of specific buildings, and will be able to control expenses for those buildings through future appropriations. We would simply caution that this problem has not been considered in this opinion. The same holds true for the possible conflict between S.C.R. 138 and 56, and on whether or not the "Agreement of Lease", dated April 1, 1976 is sufficient to constitute a valid and enforceable "lease".

AUTHORITIES CONSIDERED

1. Article III, VIII, XI, II, Idaho Constitution.
2. Section 67-6401, et seq., *Idaho Code*.
3. *State Board of County Commissioners of Twin Falls County vs. Idaho Health Facilities Authority*, 96 Idaho 498 (1975).
4. *State ex rel. Williams vs. Musgrave*, 84 Idaho 77 (1962).
5. *Boise Redevelopment Agency vs. Yick Kong Corporation*, 94 Idaho 876 (1972).
6. Senate Concurrent Resolutions 138 and 56.

DATED This 12th of July, 1976.

WAYNE L. KIDWELL
Attorney General

Analysis By:

WARREN FELTON
Deputy Attorney General

GUY G. HURLBUTT
Deputy Attorney General

TERRY COFFIN
Deputy Attorney General

ATTORNEY GENERAL OPINION NO. 76-36

TO: Don Johnson
Third Vice-President A.I.C.
City Councilman
Coeur d' Alene, Idaho 83814

Per Request for Attorney General Opinion

QUESTION PRESENTED:

You have asked whether Section 72-1428, *Idaho Code*, should be interpreted such that no fireman over the age of 34 who moves to Idaho from another state is eligible for employment in the State of Idaho as a paid fireman.

CONCLUSION:

Section 72-1428, *Idaho Code* should not be interpreted so as to deny employment to all out-of-state firemen over the age of 34 who seek employment as paid firemen in Idaho. Such an interpretation would be incorrect since it would result in violation of the privileges and immunities clause of the *United States Constitution*, Article IV, Section 2.

ANALYSIS:

Section 72-1428(2) provides in pertinent part:

From and after January 1, 1975, no paid fireman as defined in Section 72-1402(A), *Idaho Code*, may be employed until he:

(c) is at least nineteen (19) years of age and has not reached the age of thirty-four (34) at the time of appointment . . .

Section 72-1428(6) provides:

Nothing in this section shall apply to paid firemen who are employed as such on or before December 31, 1974, as long as they continue in such employment; nor to promotional appointments after becoming a member of a fire department of any employer nor to the reemployment of a paid fireman by the same or a different employer within six (6) months after the termination of his employment, nor to the reinstatement of a paid fireman who has been on military or disability leave, disability retirement status, or leave of absence status. (Emphasis added)

Thus, the statute clearly indicates that the age limitation is not to be applied to the reemployment of a paid fireman by another employer within six (6) months of his previous employment. Interpreted very strictly, however, this exemption arguably does not include out-of-state firemen in view of the definition of "paid fireman" contained in Section 72-1402(A), which provides:

The words "paid fireman" mean any individual, excluding office sec-

retaries employed after July 1, 1967, who is on the payroll of any city or town or fire district in the state of Idaho and who devotes his or her principal time of employment to the care, operation, maintenance or the requirements of a regularly constituted fire department of such city or fire district in the state of Idaho.

Since a paid fireman is an individual "on the payroll of any city or town or fire district in the state of Idaho", it could be argued that the exemption granted in Section 7, 1428(6), *Idaho Code*, for the "reemployment of a paid fireman" is limited exclusively to firemen on the payroll of a fire department in Idaho. However, we believe that such a strict interpretation was not intended since such an interpretation would lead to an irrational result and would deprive citizens of privileges and immunities guaranteed by the *United States Constitution*.

Such a strict interpretation would result in an absolute ban on hiring of 34 year old experienced firemen from outside Idaho without regard to their qualifications. On the other hand, a 34 year old fireman could be hired from any other fire department in Idaho. The Idahoan would not be required to meet any of the minimum medical and health standards adopted by the state so long as he was reemployed within 6 months. Thus, the statute so applied would have the effect of discriminating against out-of-state firemen without regard to their qualifications.

Section 73-102, *Idaho Code*, provides that the provisions of the code "are to be liberally construed, with a view to effect their objects and to promote justice". In view of this legislative direction, we believe that Section 72-1428, *Idaho Code*, should be interpreted so as to avoid unnecessary discrimination against out-of-state firemen who seek employment in Idaho.

More importantly, an interpretation which would deny employment to qualified out-of-state firemen applicants over 34 years old while not denying employment to similarly qualified in-state applicants would violate the privileges and immunities clause of the *United States Constitution*, Article IV, Section 2. The right to follow any of the ordinary callings in life is one of the privileges of a citizen of the United States. *Toomer v. Witsell*, 334 U.S. 385 (1947); *Colgate v. Harvey*, 296 U.S. 404 (1935), over ruled on another point in *Madden v. Kentucky*, 309 U.S. 83 (1939); *Maxwell v. Bugbee*, 250 U.S. 525 (1919); *LaTourette v. McMaster*, 248 U.S. 465 (1918).

In the recent case of *Doe v. Bolton*, 410 U.S. 179 (1973), the court reaffirmed the rule and extended it to strike down a Georgia statute which had the effect of denying abortions to non-residents of Georgia. The court said at 410 U.S. 200:

Just as the Privileges and Immunities Clause, Const. Art. IV, §2, protects persons who enter other States to ply their trade, (citations omitted), so must it protect persons who enter Georgia seeking medical services that are available there.

The case of *Toomer v. Witsell*, 334 U.S. 385 (1947), recognized the constitutional right to do business in another state on terms of substantial equality with citizens of that state. The court went on to say at 334 U.S. at 396:

But it (the Privileges and Immunities Clause) does not preclude disparity of treatment in the many situations where there are perfectly valid independent reasons for it. *Thus the inquiry in each case must be concerned with whether such reasons do exist and whether the degree of discrimination bears a close relation to them.* (Emphasis supplied)

While there may be valid reasons for the state to impose additional requirements, it is difficult to conceive of any state interest which would justify a total ban on hiring out-of-state firemen while imposing no similar ban on hiring in-state firemen. For example, the state may have an interest in testing out-of-state firemen applicants to see that they can meet minimum medical and health standards. Such testing may not be necessary as to most Idaho firemen applicants since they may have been required to meet minimum standards in the past. Thus, there may be justification for additional testing of out-of-state firemen applicants. However, an absolute ban on employment of out-of-state applicants would be unnecessary and overly broad discrimination. Again, as the Court said in *Toomer v. Witsell*, *supra*:

Thus the inquiry in each case must be concerned with whether such reasons (for discrimination) do exist and whether the degree of discrimination bears a close relation to them.

Therefore, Section 72-1428 should not be interpreted so broadly as to deny employment to all out-of-state firemen over the age of 34 who seek employment as paid firemen in Idaho. Such an interpretation would lead to an unconstitutional denial of privileges and immunities of United States citizens.

Section 72-1428(6) provides:

Nothing in this act shall apply . . . to the reemployment of a paid fireman by the same or a different employer within six (6) months after the termination of his employment . . .

To be constitutional, the final word "employment" quoted above must mean "employment as a fireman of any fire department". This reading of the statute would be consistent with Idaho Supreme Court cases which have considered the proper interpretation of such statutes. As the court said in *Leonardson v. Moon*, 92 Idaho 796, 451 P.2d 542 (1969) and restated in *Williams v. Swenson*, 93 Idaho 542 at 544, 467 P.2d 1 (1970):

When a statute is susceptible to two constructions, one of which would render it invalid and the other would render it valid, the construction which sustains the statute must be adopted by the courts.

IDAHO AUTHORITIES CONSIDERED:

United States Constitution, Article IV, Section 2

U.S. Supreme Court Cases:

Doe v. Bolton, 410 U.S. 179 (1973)

Toomer v. Witsell, 334 U.S. 385 (1947)

Colgate v. Harvey, 296 U.S. 404 (1935)
Madden v. Kentucky, 309 U.S. 83 (1939)
Maxwell v. Bugbee, 250 U.S. 525 (1919)
LaTourette v. McMaster, 248 U.S. 465 (1918)

Idaho Code, Sections 72-1402, 72-1428, 73-102

Idaho cases:

Leonardson v. Moon, 92 Idaho 796, 451 P.2d 542 (1969)
Williams v. Swenson, 93 Idaho 542, 467 P.2d 1 (1970)

DATED this 14th day of July, 1976.

ATTORNEY GENERAL FOR THE STATE OF
IDAHO

Wayne L. Kidwell

ANALYSIS BY:

David G. High
Assistant Attorney General

ATTORNEY GENERAL OPINION NO. 76-37

TO: Dennis L. Albers
Grangeville City Attorney
Grangeville, ID 83530

Per request for Attorney General Opinion.

QUESTIONS PRESENTED:

(1) Whether Attorney General Opinion No. 14-75 was intended to foreclose the city of Grangeville from receiving revenue from the sales tax fund pursuant to §63-3638(g), *Idaho Code*, for construction and maintenance of roads and bridges within the city of Grangeville taxing district, which revenue is presently being remitted by the county commissioners of Idaho County to the Grangeville Highway District pursuant to §40-2709(1), *Idaho Code*?

(2) If the city of Grangeville is entitled to receive these funds, which have been withheld by Idaho County pursuant to Attorney General Opinion No. 14-75, for what years must the county compensate the city for such funds wrongfully withheld?

(3) Whether Idaho County can lawfully withhold one and one-half percent of the sales tax revenue paid to it pursuant to §63-3638(g), *supra.*, as a fee for collecting such tax?

(4) If Idaho County has wrongfully withheld one and one-half percent of the sales tax revenue paid to it pursuant to §63-3638(g), *supra.*, for what period of time must Idaho County compensate the city of Grangeville for such funds wrongfully withheld?

CONCLUSION:

The city of Grangeville is entitled to receive revenue from the sales tax fund in the same proportion to which it previously received revenue pursuant to §40-2709(1), *supra.*, prior to the enactment of §63-105Y, *Idaho Code*, and if the Idaho county commissioners have withheld these funds, the city of Grangeville may demand that the county pay them over. Nor can Idaho County withhold one and one-half percent of the sales tax revenue paid to it as a fee for collecting such revenue, and if Idaho County has withheld one and one-half percent from the amount paid over to taxing districts within Idaho County, such taxing districts can make demand upon Idaho County for such revenue.

ANALYSIS:

On February, 28, 1975, the Clerk of the District Court and ex officio auditor and recorder for the county of Idaho requested an Attorney General's opinion on the question of whether the county commissioners for Idaho County are required to apportion the county's share of the proceeds from the sales tax fund to the city of Grangeville pursuant to §63-3638(g) and §40-2709(1), *Idaho Code*. Attorney General Opinion No. 14-75 answered the question in the negative, basing its conclusion on the premise that, since the city of Grangeville does not

levy any tax for the purpose of receiving revenue pursuant to §40-2709(1), *supra*, the city is not entitled to receive money from the sales tax fund in the same proportion to which the city receives revenue from the Grangeville Highway District for the purpose of constructing and maintaining roads and bridges within the city of Grangeville. Opinion No. 14-75 is herewith withdrawn and this Opinion is substituted therefor.

It was the intent of the legislature that taxing districts are to receive money from the sales tax fund in the same proportion to which they receive revenues from ad valorem taxation. Nowhere in the statute is there any mention of a requirement that the revenue received from ad valorem taxation must be received pursuant to a levy made by the taxing district which receives the funds.

Section 40-2709, *supra*, authorizes the Grangeville Highway District to levy a highway tax of \$1.00 for each \$100 of assessed valuation within the city of Grangeville, but requires the Highway District to remit to the city of Grangeville 50% of the revenue derived from the levy upon assessed valuation located within the city. The result is that the Highway District taxes property within the city, while the city in return receives 50% of the revenue derived from the levy. The Highway District is, therefore, the city's agent for purposes of collecting a 50% portion of the road tax levied by the Highway District upon property located within the city. There is no question that this 50% portion is revenue derived from ad valorem taxation and should be considered by the county commissioners in making their determination as to the portion of the sales tax fund to be apportioned to the city of Grangeville pursuant to §63-3638(g) (1), *supra*, otherwise the city would be unable to apply the funds it receives from the sales tax fund "in the same manner and in the same proportion as revenues from ad valorem taxation." §63-3638(g) (1), *supra*.

In additional support of this conclusion is the fact that the sales tax fund was created to compensate local taxing districts for the loss of revenue which resulted from the exemption of business inventory from ad valorem taxation by the legislature commencing in 1971. §63-105Y, *supra*; *Leonardson v. Moon*, 92 Idaho 796, 451 P.2d 542 (1969).

The city of Grangeville suffered a loss of revenue derived pursuant to §40-2709(1) *supra*, when §63-105Y, *supra*, was enacted, and the city should, therefore, be compensated for the loss of revenue pursuant to §63-3638(g), *supra*, the Grangeville Highway District being in existence in 1965, 1966 and 1967. The fact that the city of Grangeville, a taxing district, did not itself levy the tax authorized by §40-2709, *supra*, makes no difference for purposes of computing the city's portion of the sales tax fund, since the city derived revenue from this source which it has lost by reason of the enactment of §63-105Y, *supra*. *Leonardson v. Moon*, *supra*.

A very early Idaho case, *City of Genesee v. Latah County*, 4 Idaho 141, 36 P. 701 (1894), would seem to be a point in this matter. In that case, the law required the county to levy all of the road taxes for the entire county. The law also provided that at least 25 percent of the road taxes so levied by the county were to be expended in each of the Districts where levied. Other law provided that cities and villages were each separate road districts with exclusive powers over

their streets and alleys. It was held that the county must hold the 25 percent of the road taxes for the cities and villages. The 25 percent, at least, of the road taxes must be paid to the proper city or village on demand. That case is quite similar to this situation. The cities did not levy; the county made the levy, but the cities were held to have a right to the funds upon demand, and the counties were said to hold the funds represented by the 25 percent of the taxes for the cities or villages. See also, *Potlatch Lumber Co. v. Board of County Commissioners*, 29 Idaho 399, 16 P. 256 (1916).

It, therefore, appears that the county commissioners for Idaho County have erroneously apportioned the city of Grangeville's share of the sales tax fund since sometime after March 13, 1975, the date Attorney General Opinion No. 14-75 was issued, and that this improper apportionment resulted in insufficient revenue being paid the city of Grangeville from the fund by the Idaho County auditor. This shortage of funds constitutes a claim for taxes against Idaho County and must be paid by the Board of County Commissioners upon demand. Further, the three year statute of limitations upon liabilities created by statute does not begin to run until such demand is made. *Village of Mountainhome v. Elmore County*, 9 Idaho 410, 415, 75 P. 65 (1904).

The next question asked is whether Idaho County may lawfully withhold one and one-half percent of the sales tax fund paid by the county auditor to the taxing districts within the county pursuant to §63-918, *Idaho Code*. Said statute authorizes the deduction of one and one-half percent of all taxes collected by the county on behalf of taxing districts having treasurers as compensation for collecting the taxes by the county. However, it is apparent that the legislature has authorized the deduction only from taxes which are levied and certified to the county by the taxing districts within the county on whose behalf the county collects the tax. Stating the matter differently, the county is only authorized to withhold a percentage of the *ad valorem* tax it collects on behalf of taxing districts within the county. §63-918, *supra*.

Again, if the county has withheld one and one-half percent of the sales tax fund apportioned to the city of Grangeville, it has done so wrongfully and the amount so withheld can be the object of a demand upon the county, the statute of limitations not commencing to run until the demand is made. *Village of Mountainhome v. Elmore County*, *supra*.

AUTHORITIES CONSIDERED:

- (1) Idaho Code, Sections 63-3638(g), 40-2709, 63-105Y, 63-918.
2. Idaho Cases: *Leonardson v. Moon*, 92 Idaho 796, 451 P.2d 542 (1969); *City of Genesee v. Latah County*, 4 Idaho 141, 36 P. 701 (1894); *Potlatch Lumber Co. v. Board of County Commissioners*, 29 Idaho 399, 16 P. 256 (1916); *Village of Mountainhome v. Elmore County*, 9 Idaho 410, 415, 75 P. 65 (1904).

DATED this 21st day of July, 1976.

ATTORNEY GENERAL OF THE STATE OF IDAHO

Wayne L. Kidwell

ANALYSIS BY:

**J. MICHAEL KINSELA
ASSISTANT ATTORNEY GENERAL**

ATTORNEY GENERAL OPINION NO. 76-38

TO: Honorable Melvin Hammond
State Representative
District 28
Rexburg, ID 83440

Per request for Attorney General Opinion.

QUESTION PRESENTED:

Whether Idaho law provides for the abatement of ad valorem taxes, interest or penalty for the year 1976 upon real and personal property which has lost all or a portion of its value by reason of flood devastation.

CONCLUSION:

There is no provision in the statutes of Idaho which permits abatement or cancellation of ad valorem taxes by reason of a decrease in value after the assessment date has passed.

ANALYSIS:

Your question is directed toward finding a solution to one of the myriad problems created by the Teton Dam disaster, problems which are complicated by a lack of precedent in Idaho history and law. This deficiency in resources may necessitate action by the forthcoming legislature, but present opinion must be dictated by the law in force at this time.

The county board of equalization meets at least once in every month of the year up to the fourth Monday of June for the purpose of equalizing assessments within the county. From the fourth Monday of June to the second Monday of July the board must meet from day to day for the purpose of equalizing values on the assessment roll. Since the flood occurred on June 5, 1976, the equalization process in several counties was necessarily interrupted. However, the equalization process, itself, does not include the reduction in assessments upon property devastated by the flood. Equalization is the process by which assessments are examined as a whole to determine whether they are relatively equal as between different parts of the district within which the tax is levied. Equalization in this sense does not include the review of assessments upon particular property. *Cooley*, Sec. 1194.

Whether the taxes may be abated upon property because of its decrease in value due to the flood requires a review of the valuation placed upon the particular property the tax upon which abatement is sought. Idaho law provides that the county commissioners cannot reduce an assessment upon particular property unless the taxpayer makes the proper application therefor. The commissioners are prohibited from unilaterally decreasing an assessment upon a particular parcel. §63-405, *Idaho Code*.

Your question, therefore, involves a determination as to whether the assessments upon flood damaged property for 1976 have been legally made.

· §63-102, *Idaho Code*, provides that property subject to assessment shall be assessed annually as of 12:01 a.m. on the first day of January in the year in which the taxes are levied. The status and value of property on that date controls for purposes of assessment and nothing that happens thereafter can alter the assessment, assuming it was correct as of January 1, 1976. *Winton Lumber Co. v. Shoshone County*, 50 Idaho 130, 135, 294 P. 529 (1930); *Preston A. Blair Company v. Jensen*, 49 Idaho 118, 125, 286 P. 366 (1930).

Since Idaho law does not provide for the abatement of the taxes which were correct as of the assessment date, the only source of tax relief upon flood damaged property is by means of a claim for exemption. The only exemption provided by the legislature which appears to be applicable in this situation is §63-105BB, *Idaho Code*. The exemption statute provides that property of an amount of \$15,000 of market value belonging to persons who should be exempt because of unusual circumstances affecting ability to pay shall be relieved from paying the tax if the board of equalization determines such persons have suffered undue hardship. §63-105BB, *supra*.

Many persons affected by the flood may have been unable to appear before the board of equalization before the second Monday of July, as required by §63-107, *Idaho Code*, to make a proper claim for the hardship exemption. If the Idaho State Tax Commission determines that a substantial number of persons, who may qualify for the exemption, have filed to make a timely claim, because of hardship suffered, caused by the flood, it may reconvene the board of equalization pursuant to §63-513(9), *Idaho Code*, for the purpose of receiving hardship exemption claims.

Nor is there any provision in Idaho law for the abatement of penalty or interest. And it follows that, since the taxes on flood damaged property were correctly assessed in the first instance, if they become delinquent, penalty and interest must be added pursuant to §63-1102, *Idaho Code*.

AUTHORITIES CONSIDERED:

1. *Idaho Code*, Sections 63-405, 63-102, 63-105BB, 63-107, 63-513(9), 63-1102.
2. Idaho cases: *Winton Lumber Co. v. Shoshone County*, 50 Idaho 130, 135, 294 P. 529 (1930); *Preston A. Blair Company v. Jensen*, 49 Idaho 118, 25, 286 P. 366 (1930).
3. Other authorities: *Cooley*, Sec. 1194

Dated this 23rd day of July, 1976.

ATTORNEY GENERAL OF THE STATE OF IDAHO

Wayne L. Kidwell

ANALYSIS BY:

J. MICHAEL KINSELA
ASSISTANT ATTORNEY GENERAL

ATTORNEY GENERAL OPINION NO. 76-39

The Honorable Cecil D. Andrus
Governor State of Idaho
Statehouse
Building Mail

QUESTIONS PRESENTED:

On July 12, 1976, this Office issued Attorney General Opinion No. 76-35, which answered four questions raised as a condition precedent to issuing bond anticipation notes by the Idaho State Building Authority for construction of state office buildings in various locations in Idaho. Two additional related questions have now been asked concerning the Authority:

1. Does Senate Concurrent Resolution 138 (1976, Second Regular Session, 43rd Idaho Legislature), which constitutes prior legislative approval of the agreement entered into between the Building Authority and the Department of Administration pursuant to Section 67-6410, *Idaho Code*, improperly delegate legislative authority?
2. What square footage and dollar limitations, if any, now exist for the Capitol Mall project as a result of Senate Concurrent Resolution 138 (1976, Second Regular Session, 43rd Idaho Legislature) and House Concurrent Resolution 56 (1976, Second Regular Session, 43rd Idaho Legislature)?

CONCLUSION:

1. Senate Concurrent Resolution 138 (1976, Second Regular Session, 43rd Idaho Legislature) does not constitute an improper delegation of authority by the Idaho Legislature.
2. No square footage or dollar limitations are placed on the Capitol Mall project by Senate Concurrent Resolution 138 (1976, Second Regular Session, 43rd Idaho Legislature) and House Concurrent Resolution 56 (1976, Second Regular Session, 43rd Idaho Legislature) except that the renovation of the "1902" portion of St. Alphonsus Hospital is limited to \$300,000.00 by the H.C.R. 56.

ANALYSIS:

The Idaho State Building Authority is created by statute as a quasi-state agency designed to finance and lease office buildings to the state. See Idaho State Building Authority Act, Section 67-6401 et seq., *Idaho Code*. Before office buildings are constructed and financed by the Authority, the provisions of section 67-6410, *Idaho Code* must be complied with. This section provides:

"Notwithstanding any other provision of this act, the Authority is not empowered to finance any facility pursuant to section 67-6409 unless:
(a) a state body has entered into an agreement with the Authority for the Authority to provide a facility;
(b) the Authority finds that the building development or building project to be assisted pursuant to the provisions of this act, will be of

public use and will provide a public benefit. *No state body may enter into "an agreement pursuant to (a) above without prior legislative approval."* (Emphasis added).

Senate Concurrent Resolution 138 (1976, Second Regular Session, 43rd Idaho Legislature) (hereinafter referred to as S.C.R. 138) specifically provides the required approval for office buildings in Idaho Falls, Lewiston, Pocatello, Coeur d'Alene, Twin Falls and Boise, Idaho. This resolution, taken in proper context, satisfies the requirements of §67-6410, *Idaho Code* and is not an improper delegation of authority by the Idaho Legislature.

An earlier resolution, House Concurrent Resolution 28 (1975, First Regular Session, 43rd Idaho Legislature) (hereinafter referred to as H.C.R. 28) similar to S.C.R. No. 138, placed square footage and dollar limitations on the buildings above referred to. These limitations were removed by Senate Concurrent Resolution No. 138, which repealed H.C.R. 28. Although the repealer was noted in Attorney General Opinion No. 76-35, the ramifications of dropping building limitations in S.C.R. 138, if any, were not considered in that opinion.

Significantly the act contemplates a lease arrangement between the State of Idaho and the Building Authority whereby the Building Authority finances the building and serves as the lessor. The lease term is year to year, and after the bond redemption period, ownership of the buildings is intended to transfer to the state. However, the agencies occupying the building do so on a lease from year to year with rental payments coming from annual appropriations from the Idaho Legislature.

Viewed in this context, we do not believe that S.C.R. 138 delegates any improper power to the Building Authority or state agencies. This is true for two reasons. First, each agency depends on annual appropriations from the Legislature in order to make the rental payment for occupancy of the building. There is no obligation on the legislature to provide the monies required through appropriation. In this regard, the Building Authority stands in a position similar to that of other lessors of buildings leased by the state. Control of the rental payments on a year to year basis is, therefore, clearly maintained in the Idaho Legislature which has the power to consider the leasing arrangement with the Building Authority on a year to year basis.

The second reason indicating improper delegation of authority is that state agencies now have the power to obtain office space by lease, providing that they stay within their appropriations, and there is no requirement that the agency first appear before the legislature for square footage, location and dollar approval. The Idaho Building Authority Act does not create any requirement for dollar and square footage limitations by the Legislature when the Authority is to be the lessor. The Act does require prior approval for agreements with the Authority, and this requirement was met directly in S.C.R. 138.

In summary, the act permits the state to lease office space from the Building Authority subject to prior approval by the legislature. Rental payments are the responsibility of each agency, and they obtain their funds for this purpose from the Idaho Legislature. S.C.R. 138 is designed to provide the approval required by section 67-6410, *Idaho Code*, and it does not create improper delegation of

legislative authority.

The second question raised concerns dollar and square footage limitations, if any, now in existence for the Capitol Mall project as a result of the House and Senate concurrent resolutions. This question arises because of apparent discrepancies in language between S.C.R. 138 and House Concurrent Resolution 56 (1976), Second Regular Session, 43rd Idaho Legislature) (hereinafter referred to as H.C.R. 56) As discussed above, S.C.R. 138 provided authority for state agencies to enter into leasing agreements with the Building Authority for state office space around the state. It specifically repealed H.C.R. 28, by eliminating square footage and dollar requirements. At approximately the same time, the legislature passed H.C.R. 56, reading in applicable part as follows:

"Be it further resolved that the authorization to the Department of Administration, State of Idaho, to enter into lease agreements with the Idaho State Building Authority for the provision of approximately 100,000 square feet at a projected cost of \$4,000,000.00 within the Capitol Mall area is hereby extended to include renovation and incorporation of that portion of the original St. Alphonsus Building referred to as the '1902' portion at a projected cost of not to exceed \$300,000.00."

On its face, it could be argued that this language extends the dollar and square footage limitations contained in H.C.R. 28, which are 100,000 square feet and \$4,000,000.00 in cost, despite the repealer of all dollar and square footage limitations in S.C.R. 138. However, viewed within the time frame in which these resolutions passed the Idaho Legislature, we believe that H.C.R. 56 did not breathe new life into the limitations contained in H.C.R. 28.

Review of the legislative history relating to these two resolutions reflects that H.C.R. 56 passed the Senate on March 10 and was filed March 12, 1976. On the other hand, S.C.R. 138 was passed by the House March 15 and was filed March 18, 1976. Therefore, H.C.R. 56 was passed prior to the passage of S.C.R. 138. H.C.R. 56 merely refers to the limitations in then existing H.C.R. 28. However, the entire thrust of H.C.R. 56 was to provide authority for renovation and construction pertaining to the St. Alphonsus Hospital Building within the mall complex. It did not repeal or effect any of the other office buildings. Senate Concurrent Resolution 138, passed subsequent to House Concurrent Resolution 56, was clearly designed to remove all square footage and dollar limitations which were present in H.C.R. 28. To say that the blanket removal of these limitations in S.C.R. 138 was circumvented for the Capitol Mall complex by H.C.R. 56 would take a strained interpretation, and we do not believe that was the intent of the Idaho Legislature, particularly when viewed in the time sequence involved.

Therefore, the only limitation now in existence for the Capitol Mall Complex in so far as dollars and square footage are concerned is the \$300,000.00 limit for the "1902" portion of St. Alphonsus Hospital as provided in H.C.R. 56. The 100,000 square foot and \$4,000,000.00 limitation for the Capitol Mall area which appeared in S.C.R. 28 was repealed specifically by S.C.R. 138.

DATED This 28th day of July, 1976.

ATTORNEY GENERAL OF IDAHO

WAYNE L. KIDWELL

Analysis By:

GUY G. HURLBUTT
Deputy Attorney General

AUTHORITIES CONSIDERED:

1. §67-6401 *et seq.*, *Idaho Code*.
2. S.C.R. 138 (1976, 2nd Regular Session, 43rd Idaho Legislature).
3. H.C.R. 56 (1976, 2nd Regular Session, 43rd Idaho Legislature).
4. H.C.R. 28 (1975, 1st Regular Session, 43rd Idaho Legislature).

ATTORNEY GENERAL OPINION NO. 76-40

The Honorable William D. Jordan
Magistrate
Magistrates Division District Court
Third Judicial District
Payette, Idaho 83661

QUESTION PRESENTED:

Is garnishment of a city employee's salary prohibited by section 50-1016, *Idaho Code*, as amended by H.B. 514, ch. 47, page 146, 1976 Idaho Session Laws?

CONCLUSION:

Garnishment of a city employee's salary, otherwise proper under law, is not prohibited by section 50-1016, *Idaho Code*, as amended.

ANALYSIS:

The law of attachment and garnishment in the State of Idaho is codified generally in section 8-501, to section 8-538, *Idaho Code*. Section 8-507, *Idaho Code*, extends garnishment to public as well as private corporations. Municipal corporations are also included under that section. The term "garnishment" is defined in section 11-206, *Idaho Code* as follows:

" 'garnishment' means any legal or equitable procedure through which the earnings of any individual are required to be withheld for payment of any debt."

It should be noted that nothing in the general law of attachment and garnishment as codified, or in the statutes pertaining to enforcements of judgments, section 11-201, et seq., exempt earnings of city employees from the garnishment procedure. Therefore, garnishment of such funds seems appropriate unless prevented by section 50-1016, *Idaho Code* as amended by H.B. 514, ch. 47, page 146, 1976 Idaho Session Laws. This section, as amended, reads as follows:

"Any city may deduct, upon written approval of the individual employee, sums certain from said employee's salary or wages for the purpose of paying such sums for premiums on group life, health, accident, disability, hospital and surgical insurance, or any other purposes approved by the city council. Any city may pay all or any part of such deductions as approved by the council.

Any city may adopt a city retirement and pension plan for the benefit of its employees and for that purpose may deduct, upon written approval of the individual employee, sums certain from said employee's wages as a contribution to said plan and any city may pay all or any part of such premiums as approved by the council and may make such

other contributions as may be required to make such plan actuarially sound.”

A reading of this section does not disclose to us any language expressing an intent of the Idaho Legislature to exempt city employees' salaries from lawful garnishment proceedings. It is obvious that this section was intended to permit *voluntary* withholding of income by the employer for various employee benefits. It should be observed that in each instance mentioned in section 50-1016, *Idaho Code*, “written approval of the individual employee” is required. This certainly would not blend in with the involuntary nature of garnishment proceedings pursuant to judicial decree.

Of course, in reaching this conclusion we assume that the garnishment proceedings are otherwise proper. See generally section 8-501 et seq. and section 11-201, et seq. *Idaho Code*. However, we do feel that a writ of garnishment appropriately presented to the city clerk is not in any way affected by section 50-1016, *Idaho Code* as amended.

ATTORNEY GENERAL STATE OF IDAHO

WAYNE L. KIDWELL

ANALYSIS BY:

GUY G. HURLBUTT
Deputy Attorney General

AUTHORITIES CONSIDERED

1. Section 8-501, et seq., *Idaho Code*.
2. Section 11-201, et seq., *Idaho Code*.
3. Section 50-1016, *Idaho Code* as amended by H.C. 514, ch. 487, page 146, 1976 Idaho Session Laws.

ATTORNEY GENERAL OPINION NO. 76-41

Dr. Darrell Manning, as Director
of the Transportation Department

QUESTION:

May the Department of Transportation provide printing services for the Idahy Federal Credit Union through an agreement whereby the Credit Union reimburses the Department at normal print shop rates?

CONCLUSION:

Providing printing services to the Idahy Federal Credit Union, a non-profit corporation under Idaho Law, is not within the scope of powers granted to the Department of Transportation by Section 40-120, *Idaho Code*, and possibly violates the Idaho Constitution since no clear cut public purpose is served.

ANALYSIS:

The Idahy Federal Credit Union is a non-profit corporation under Idaho law and serves employees of the State Departments of Transportation and Law Enforcement. Under current agreement, the Department of Transportation provides printing services for the Credit Union for which it is reimbursed at usual print shop rates.

Although the Credit Union is a creature of Idaho statutory law (Section 26-2129 et seq., *Idaho Code*), it is not in any way an entity of State Government. According to Section 26,2129, *Idaho Code*:

"A Credit Union is a cooperative, non-profit association, incorporated in accordance with the provisions of this act for the purpose of encouraging thrift among its members and of creating a source of credit at fair and reasonable rates of interest."

Credit unions in Idaho are not limited in membership to government employees. The only prerequisites are that membership include at least seven residents of the state who are of legal age and who share some common bonds between them. See §26-2130, *Idaho Code*. In the case of the Idahy Federal Credit Union, the "common bond" referred to in the Act is that members are — or were — employees of Idaho State Government. Families of such persons also are included in membership. However, once a member, always a member. Consequently, persons no longer employed by the state may continue their membership. Thus, not all members of the Credit Union are state employees.

In our opinion, print shop service to this type of organization should be discounted. The primary reason for this is that such services simply are not referred to directly or by implication in the appropriate legislation. Powers and duties of the Transportation Board — and hence the Department — are found in Section 40-120, *Idaho Code*. The authority granted is closely woven to transportation in the State of Idaho. Print shop services are in no way referred to, and they do not appear related to the mission of the Department. Thus, we

believe that these services, which are rendered to an organization outside of state government, are beyond the authority granted by law to the Department.

Additionally, this practice may conflict with article 8, section 2, Idaho Constitution, providing that:

"The credit of the state shall not, in any manner, be given or loaned to, or in aid of any individual, association, municipality or corporation; nor shall the state directly or indirectly, become a stockholder in any association or corporation, provided, that the state itself may control and promote the development of the unused waterpower within this state."

One of the tests under this section is whether the services involved provide a "public purpose". Although this term is not subject to a concrete definition, it generally requires public — as opposed to private — benefit. See *Nielson vs. Marshall*, 94 Idaho 726 (1972); *Board of Trustees, etc. vs. Board of County Commissioners*, 83 Idaho 172 (1961). Incidental private gain does not in itself defeat the "public purpose" nature of a state undertaking, but the enterprise must be largely for the benefit of the public.

In the present situation, the services are performed for the Idaho Federal Credit Union. This is not an agency of state government, some members are employed by the state and some are not, the services performed do not foster transportation, and it is difficult to find the public purpose required.

Of course, it could be argued that the credit of the state is not involved because there is total reimbursement. However, there is no guarantee that funds received equal those expended. Salaried employees' time and state equipment are expended in this service. Even if the state is compensated completely, the practice could offend article 8, section 2, Idaho Constitution by being an enterprise beyond the powers of the state. For example, the State Supreme Court long ago held unconstitutional an Act which authorized the state and local governments to enter the railroad business, saying that:

"Acts inconsistent with the spirit of the constitution are as much prohibited by its terms as are acts specifically enumerated and forbidden therein. This position is reinforced by the further fact that railroad building is not within itself an exercise of governmental power, but is purely a business enterprise and must be justified, if at all, under the proprietary powers of the state or political subdivision . . . It is clear from the context and the language employed in section 2, 3, and 4, article 8, and section 4, article 12, (Idaho Constitution), that it was never contemplated that the counties or other political subdivisions would or could go into railroad building. . . ." *Atkinson vs. Board of Commissioners*, 18 Idaho 282 (1910).

In light of the fact that we do not see this type of service enumerated directly or by implication in the statutory authority of the Department, and because of the constitutional problems involved, we think that printing services to the Idaho Federal Credit Union should be discontinued.

ATTORNEY GENERAL STATE OF IDAHO

WAYNE L. KIDWELL

Analysis By:

GUY G. HURLBUTT
Deputy Attorney General

AUTHORITIES CONSIDERED

1. Article, 8, section 2, Idaho Constitution.
2. Section 40-120, *Idaho Code*.
3. Section 26-2129, et seq., *Idaho Code*.
4. *Nielson vs. Marshall*, 94 Idaho 726 (1972).
5. *Board of Trustees, etc. vs. Board of County Commissioners*, 83 Idaho 172 (1961).
6. *Atkinson vs. Board of Commissioners*, 18 Idaho 282 (1910).

ATTORNEY GENERAL'S OPINION NO. 76-42

TO: Garth S. Pincock
Prosecuting Attorney
850 East Center- Suite "E"
P.O. Box 4986
Pocatello, Idaho 83201

Per Request for Attorney General's Opinion.

QUESTION PRESENTED:

Does the prosecuting attorney of a county have the responsibility of providing legal services for:

- a. County Planning and Zoning Commission;
- b. County Hospital Board;
- c. County Fairboard;
- d. If so, do the various boards have a right to hire counsel outside of the prosecuting attorney's office.

CONCLUSION

Section 31-2604, *Idaho Code* requires a prosecuting attorney to give legal advice to these county boards. This requirement would not prohibit the various boards from hiring counsel outside of the prosecuting attorney's office. However, in all matters of litigation which involve the county, the prosecutor is required to represent the county.

ANALYSIS

Section 31-2604, *Idaho Code* provides in part:

It is the duty of the prosecuting attorney: 1. To prosecute or defend all actions, applications or motions, civil or criminal, in the district court of his county in which the people, or the state, or the county, are interested, or are a party; and when the place of trial is changed in any such action or proceeding to another county, he must prosecute or defend the same in such other county . . .

3. To give advice to the board of county commissioners, and other public officers of his county, when requested in all public matters arising in the conduct of the public business entrusted to the care of such officers . . .

The prosecutor must, therefore, give advice to the "public officers" of his county. The term "public officers" would include the members of county boards and commissions appointed by the County Commissioners in view of the enumeration of county officers in Sections 31-2001 and 31-2002, *Idaho Code*. Section 31-2001, *Idaho Code*, lists various county officers. Section 31-2002, *Idaho Code*, provides:

The other officers of the county are one (1) constable, and such other

inferior and subordinate officers as are provided for elsewhere in this code or by the board of commissioners.

County Planning and Zoning Commissions, county hospital boards and county fairboards are specifically provided for by statute and are created by order of the board of county commissioners of a county. Each of these boards acts as an arm of county government and performs a specialized function on behalf of the county. Thus, it seems clear that members of these boards come within the definition of "other county officers" contained in Section 31-2002, *Idaho Code*. They are therefore entitled to legal advice pursuant to Section 31-2604(3), *Idaho Code*.

In addition to advising these boards, the prosecutor must prosecute or defend all actions in which the county is interested or is a party pursuant to Section 31-2604 (1), *Idaho Code*, quoted above.

There is no provision in the Idaho Code which would prohibit the boards you have listed from hiring private counsel so long as litigation was not involved. Boards of county commissioners are specifically permitted to employ counsel pursuant to Article 18, §6, *Idaho Constitution*. Thus, the prosecutor is not required to be the sole legal advisor of the county, except when litigation is involved.

The extent to which private counsel should be involved in providing legal services to county agencies is essentially a policy matter. It would be advisable in most cases for the county commissioners to develop a county policy which addresses this issue. If, for example, the commissioners prefer to have all legal services provided by the prosecutor as a policy matter, the salary of the prosecutor and the staff provided should be commensurate with the responsibility. In this regard, a formal policy would be preferable to an informal one, in that it would put candidates for the position of prosecutor on notice of the requirements of the office.

DATED This 31st day of July, 1976.

ATTORNEY GENERAL OF IDAHO

Wayne L. Kidwell

ANALYSIS BY:

David G. High
Assistant Attorney General

IDAHO AUTHORITIES CONSIDERED:

Article 18, Section 6, *Idaho Constitution*

Sections 31-2001, 31-2002, 31-2604, *Idaho Code*

ATTORNEY GENERAL OPINION NO. 76-43

The Honorable Pete T. Cenarrusa
Secretary of State
State of Idaho

QUESTION PRESENTED:

Whether proposed reciprocal agreements between the Idaho Department of Labor and Industrial Services and the States of Arizona and Washington concerning mutual recognition and acceptance of plan approvals and inspection of recreational vehicles meet the requirements of the United States Constitution and Idaho Constitutional and Statutory Law.

CONCLUSION:

The reciprocal agreements entered into by the Idaho Department of Labor and Industrial Services with the States of Washington and Arizona pursuant to section 39-4007, *Idaho Code* and section 67-2326, et seq., *Idaho Code* are in compliance with constitutional and statutory law.

ANALYSIS:

The proposed reciprocal agreements considered in this opinion are intended to provide mutual recognition of plan approvals and inspection of recreational vehicles by anyone of the three states involved. Section 39-4007, *Idaho Code*, which specifically authorizes the type of reciprocal agreement involved, reads in part as follows:

"If the director (of the Department of Labor and Industrial Services) determines that standards for mobile homes or recreational vehicles which have been adopted by the statutes or regulations of another state are at least equal to the standards adopted by the director, he may so provide by regulation. Any mobile home or recreational vehicle which such other state has approved as meeting its standards, shall be deemed to meet the standards adopted by the director."

In this instance, the director of Labor and Industrial Services has made a finding that the standards in Washington and Arizona for recreational vehicles are at least as stringent as those in this state. Therefore, these proposed agreements comply with section 39-4007, *Idaho Code*.

Reciprocal agreements between agencies of this state and other states are generally permitted by section 67-2326, et seq., *Idaho Code*. However, this legislation establishes certain requirements that must be met before a reciprocal agreement may go into effect. These requirements, which include an Attorney General's Opinion, are found in sections 67-2328 and 67-2329, *Idaho Code*. Each of the requirements has been satisfied in these proposed agreements. Section 67-2328, *Idaho Code* requires that the state with whom Idaho is agreeing must also have laws allowing exercise of joint power. We have examined the laws of Washington and Arizona and find that such legislation exists in both instances.

Finally, we find nothing in these two agreements which is repugnant to either the Idaho or United States Constitution. Therefore, it is our opinion that the proposed reciprocal agreements between the Department and the States of Washington and Arizona comply with the requirements of constitutional and statutory law.

DATED This 4th day of August, 1976.

ATTORNEY GENERAL
STATE OF IDAHO

WAYNE L. KIDWELL

ANALYSIS BY:

GUY G. HURLBUTT
Deputy Attorney General

AUTHORITIES CONSIDERED

1. Section 67-2326, et seq., *Idaho Code*.
2. Section 39-4007, *Idaho Code*.

ATTORNEY GENERAL OPINION NO. 76-44

TO: Reid K. Larsen
Prosecuting Attorney
Bingham County Courthouse
Blackfoot, ID 83221

Per request for Attorney General Opinion.

QUESTION PRESENTED:

"Under Idaho Code §63-105T the statement is made that 'facilities, installations, machinery or equipment attached or unattached to real property' (are exempt from property tax). Does this definition include the former agricultural (land) purchased and used exclusively for the elimination and control of water pollutants?"

CONCLUSION:

The exemption provided by *Idaho Code* §63-105T does not include land.

ANALYSIS:

The statute in question provides as follows:

"Property exempt from taxation — Facilities for water or air pollution control. — The following property is exempt from taxation: Facilities, installations, machinery or equipment, attached or unattached to real property, and designed, installed and utilized in the elimination, control or prevention of water or air pollution, or, in event such facilities, installations, equipment or machinery shall also serve other beneficial purposes and uses, such portion of the assessed valuation thereof as may reasonably be calculated to be necessary for and devoted to elimination, control or prevention of water or air pollution. The state tax commission or county assessor shall determine such exempt portion, and shall not include as exempt any portion of any facilities which have value as the specific source of marketable by-products.

If any water corporation, as defined by section 61-125, Idaho Code, regulated by the Idaho public utilities commission is or has been ordered by the state board of health or the Idaho public utilities commission to install equipment designed and utilized in the elimination, control or prevention of water pollution, the Idaho public utilities commission shall notify the Idaho state tax commission of the percentage such property bears to the total invested plant of the company and said portion shall be exempt for ad valorem taxation. Said percentage reported to the Idaho state tax commission by the Idaho public utilities commission may be contested by any person or party at a public hearing held before the Idaho state tax commission."

As we understand the matter, certain business entities including but not limited to potato processing plants have purchased agricultural land and have pumped

waste water on the land for the purpose of evaporation and control of water pollutants. This opinion is directed to the question of whether the land itself is entitled to an exemption under §63-105T.

As you have noted, the exemption extends to "facilities, installations, machinery or equipment attached or unattached to real property." There appear to be no Idaho cases which provide direct guidance in interpreting this language. There is, however, a generally established rule of statutory construction that tax exemption statutes will be strictly construed in favor of revenue and against the taxpayer claiming the exemption. See *North Idaho Jurisdiction of Episcopal Churches, Inc. v. Kootenai County*, 94 Idaho 644 (1972); *Immaculate Heart of Mary High School, Inc. v. Anderson*, 96 Idaho 226 (1974); and *Idaho Code* §63-101.

The language and the context evidences an intent to exempt tangible personal property and improvements upon the land but not the land itself. If the section intended to exempt land upon which pollution control facilities, installation, machinery or equipment were placed, it seems that the legislature would necessarily have had to address the common circumstances where such equipment is installed in an existing plant or factory and becomes a part of the improvements to the real property but where the land so improved also contains improvements not directly related to pollution control. We think, therefore, that the statute more reasonably lends itself to a construction which excludes an exemption for land than it does to a construction which includes an exemption for land. This, of course, is consistent with the established rule of statutory construction relating to tax exemption statutes.

We conclude that if the legislative intention was to include land within the exemption that intention has not been expressed with sufficient clarity to be effective. The land should, therefore, be treated as taxable.

AUTHORITIES CONSIDERED:

Idaho Code §§63-101 and 63-105T.

North Idaho Jurisdiction of Episcopal Churches, Inc. v. Kootenai County, 94 Idaho 644 (1972); *Immaculate Heart of Mary High School, Inc. v. Anderson*, 96 Idaho 226 (1974).

DATED this 6th day of August, 1976.

ATTORNEY GENERAL OF THE STATE OF IDAHO

WAYNE L. KIDWELL

ANALYSIS BY:

THEODORE V. SPANGLER, JR.
Deputy Attorney General

ATTORNEY GENERAL OPINION NO. 76-45

TO: Pete T. Cenarrusa
Secretary of State
Statehouse Mail

Per Request for Attorney General Opinion

QUESTIONS PRESENTED:

1. If a candidate files a declaration of candidacy and is nominated at the election for one political party and at the same election receives enough write-in votes to qualify as a candidate in another party can such an individual be listed under both party names in the general election?

2. Using the same facts stated in number one above, if this individual refuses to accept the write-in nomination by not paying the required filing fee, does this create a vacancy which can be filled according to the provisions of Section 34-715, *Idaho Code*?

3. In light of the provisions of Section 34-704, *Idaho Code*, can an individual who has filed a declaration of candidacy in one party and is defeated at that party's primary, run as a candidate of another party in which he receives the proper number of write-in votes in the same election?

CONCLUSION:

1. A candidate who files a declaration of candidacy and is nominated at the primary election for one political party but who also receives enough write-in votes to qualify as a candidate for another party may be listed under only one party name at the general election.

2. Considering the same facts as in number one above, if the individual refuses to accept the write-in nomination and does not pay the filing fee no vacancy is created under Section 34-714, *Idaho Code*.

3. An individual who has filed a declaration of candidacy as an affiliate of one political party and who is defeated in the primary election may not run as the candidate of another political party in the general election.

ANALYSIS:

1. An individual who files his declaration of candidacy must specifically state his political party affiliation at the time of filing. Section 34-704, *Idaho Code* as amended, states in pertinent part:

"Any person legally qualified to hold such office is entitled to become a candidate and file his declaration of candidacy . . . *All political party candidates shall declare their party affiliation in their declaration of candidacy, . . .*" (Emphasis supplied)

By declaring his party affiliation in the declaration of candidacy the individual

has made it clear which party he intends to represent if he prevails in the primary election. The statute speaks to "a party affiliation" and does not contemplate a dual situation. As a matter of public policy, I believe it is beneficial to the voter to keep matters clear by restricting the candidate to his original choice of party affiliation. In the particular situation with which we are here faced, specifically, the opposing parties having no candidate of their own, the individual will not be threatened. As seen below the opposing parties cannot name a person to fill the vacancy and the candidate in question will therefore run unopposed in the general election.

2. Section 34-714(1), *Idaho Code*, as amended, contemplates a situation where the vacancy in the slate "existed" before the primary election. The language particularly pertinent here states:

"Vacancies that exist or occur prior to the primary election in the slate of candidates of any political party may be filled only in one of the following manners, each process being mutually exclusive: (1) vacancies that exist in the slate of political party candidates at the time notification to the proper central committee is made as provided by Section 34-706, *Idaho Code*, solely because no political party candidate declared for nomination as provided in this section . . . may be filled by the proper central committee within ten days of the date of notification by the county clerk or the secretary of state, as the case may be. If the proper central committee does not submit the name of a candidate for nomination during such ten (10) day period no names may thereafter be submitted either for the primary ballot or the general election ballot."

The vacancy on the slate in this situation "existed" prior to the election and was not filled by the opposing party. I am of the opinion that that party cannot now take advantage of an individual's legal inability to capitalize on a write-in victory. Section 34-715 refers to a vacancy which *occurs* ten days before or after the primary election. No vacancy can *occur* in the situation under consideration because the individual receiving the write-in votes must take the affirmative step of depositing a filing fee before he becomes a "candidate". If he fails to become a candidate, no vacancy "occurs" and the party is not entitled to appoint another individual to fill out their slate. It is important here to note the use of the word "exist" in Section 34-714(1) and the word "occur" used in Sections 34-714(2) and 34-715. "Exist" is used in the sense of "having been in being" while "occur" is used in the sense of the happening of an event. This dichotomy becomes important in considering whether a vacancy "existed" or "occurred".

3. Discussion of the third question is limited by Section 34-704, *Idaho Code*, as amended, which states in pertinent part:

"Candidates who file a declaration of candidacy under a party name and are not nominated at the primary election *shall not be allowed to appear on the general election ballot under any other political party name, nor as an independent candidate.*" (Emphasis supplied)

The emphasized language in the passage cited above plainly precludes a defeated primary candidate from appearing on the general election ballot.

AUTHORITIES CONSIDERED:

Idaho Code Sections 34-704, 34-714, and 34-715.

DATED This 18th day of August, 1976.

ATTORNEY GENERAL OF THE STATE OF IDAHO

Wayne L. Kidwell

ANALYSIS BY:

ROBERT M. MACCONNELL
Deputy Attorney General

ATTORNEY GENERAL OPINION NO. 76-46

TO: Robert L. Salter
Assistant Director
IDAHO FISH AND GAME DEPARTMENT
Post Office Box 25
Boise, Idaho 83707

Per request for Attorney General Opinion

QUESTIONS PRESENTED:

1. Under the provisions of the Standing Rules of Order of the Fish and Game Commission, the provisions of chapter 1, title 36, *Idaho Code*, and the provisions of chapter 52, title 67, *Idaho Code*, may a Commission member delegate his vote by proxy to another Commission member in event of his absence from the Commission meeting?
2. If proxy votes are allowable, what is the proper procedure for such delegation?
3. If proxy votes are not allowable, what is the status of any Commission action which may have been approved by such proxy vote?

CONCLUSIONS:

1. Members of State Boards and Commissions may cast a vote by proxy if such procedure is specifically allowed by rule or regulation and if the member is aware of the facts involved prior to casting his vote. Although the present standing orders of the Fish and Game Commission do not authorize use of proxy voting, the practice may be instituted by an amendment to these rules.
2. An absentee member wishing to vote by proxy should include his vote and his designee in writing for the record.
3. If prior proxy votes were cast without authority, the decisions reached at the meetings where such votes were used will not be overturned unless the vote was made in bad faith or was arbitrary and capricious.

ANALYSIS:

Whether a member of a governmental board or commission has the power to delegate his vote by proxy is an issue not yet considered by the Supreme Court of Idaho. In fact, research reveals no case in any federal or state jurisdiction precisely on this point. There are, of course, decisions concerning corporate votes by private proxy. For corporations, the law is expressed as follows:

“At common law it was required that all votes at corporate meetings should be given in person; and this is still the rule, with respect to both non stock and stock corporations, in the absence of express provisions to the contrary. A stockholder or member of a corporation cannot give a proxy or power of attorney to another to represent him and vote at a

corporate meeting, unless the right to do so is given by the charter or a general constitutional or statutory provision, or by a valid by-law." *Fletcher Cyc. Corp. (Perm. Ed.)*, volume 5, section 2050, p. 229.

Thus, for a private corporation, a proxy vote is legal if permitted by a constitutional or statutory provision or by the corporate charter or by-laws. We feel that this rule would extend to state boards and commissions, and if proxy votes are provided for by some express authority, the practice should be considered as being within the law. The Idaho Constitution and Statutory laws are silent on proxy votes for State Boards and Commissions. Therefore, in order to be proper, the practice must be permitted by rule or regulation.

The rules and regulations for the Fish and Game Commission are found in "STANDING RULES OF ORDER AND ORDER OF BUSINESS AND DEPARTMENT REGULATIONS OF THE FISH AND GAME COMMISSION OF THE STATE OF IDAHO," dated May 2, 1939. According to rule 13, "the rules contained in Robert's Rules of Order shall govern the commission in all cases to which they are applicable, and in which they are not inconsistent with the rules of order of the commission." Thus, since nothing in the rules addresses proxy voting, the matter must be determined by Robert's Rules of Order.

Proxy votes are not favored by Robert's Rules of Order. As therein stated:

"A proxy is the power of attorney given by one person to another to vote in his stead. It is also used to designate the person who holds the power of attorney. It is unknown to a strict deliberative assembly and is in conflict with the idea of the equality of members, which is a fundamental principle of deliberative assemblies. It is allowed only when authorized by the by-laws or charter." *Robert's Rules of Order*, section 46, p. 200.

From this analysis we must conclude that your rules do not at present authorize voting by proxy. However, this does not mean that you cannot grant this authority to members of the commission. It may be done by amendment to your present standing rules, keeping in mind the restrictions referred to below.

We believe that a necessary requirement prior to voting by proxy is that the member sufficiently understand the facts involved in the matter requiring his vote. Consequently, if the vote requires further fact finding, deliberation, or public input, we do not believe that the member can vote by proxy until he is made aware of these considerations. For example, in *Seabolt vs. Moses*, 247 SW.2d 24 (Ark. 1952), the court upheld a situation where an absentee councilman was called upon a tie vote, and he voted upon the proposition after it was fully explained to him. The rule that a member can cast a vote even though not present at a meeting if he understands the record or facts involved is supported in Davis, *Administrative Law Treatise*, section 11.04. See also *Johnson vs. Grays Harbor County Board of Adjustment*, 541 P.2d 1232 (Washington 1975), which concerned an action of a County Board of Adjustment. The court said that:

"Even if a unanimous Board vote had been required, rather than a simple majority, an administrative decision will not be invalid because

an officer who participated in the decision was absent during presentation of evidence, provided he subsequently familiarized himself with the evidence before voting." 541 P.2d at 1237.

Allowing absent members to participate in decisions was also approved by the United States Court of Appeals for the District of Columbia in *Braniff Airways vs. Civil Aeronautics Board*, 379 F.2d 453 (D.C. Cir. 1967). In that case, which concerned a decision by the Civil Aeronautics Board, the Court said that the Board could reach decisions with its members acting separately, in various offices, rather than jointly in conference.

Idaho has taken a similar position where contested cases are involved. The State Administrative Procedure act in §67-5211, *Idaho Code*, permits officials to take part in decisions even though they were not present at the hearing providing they are briefed on the issues and positions prior to rendering a decision. See also *Turner v. Boise Lodge No. 310, Etc.*, 295 P.2d 256 (Idaho 1956), where the State Supreme Court upheld a decision issued by all three members of the Industrial Accident Board in a case where only two of the members participated in the hearing. Cases on this point are collected and discussed in Annot., 18 A.L.R. 2d 606 (1951). Although not precisely on our question, these cases offer persuasive authority that administrative officers, when informed of the facts, may make decisions in instances where they are not present at the formal proceedings.

In short, we believe that proxy voting can be allowed by rules or regulation providing there is a requirement that the member sufficiently understands the facts of the matter prior to casting his vote. As reflected by the above cases, it does not matter whether the member becomes aware of the facts prior to or following the meeting, but he must have them in mind at the time he casts his vote.

We would also caution that use of a proxy vote must not be considered in establishing a quorum. Otherwise, this would probably conflict with section 36-102(f), *Idaho Code*, which states that:

"A majority of the commissioners shall constitute a quorum for the transaction of any business, for the performance of any duty, or for the exercise of any power."

In our view, the quorum should consist of members physically present at the meeting.

Your second question asks the procedure for casting a vote by proxy. We are not aware of any hard and fast procedural requirements. However, we do recommend that the delegation and the vote be expressed through a letter addressed to the designee. The letter would inform the designee that he has the absent member's power of attorney to vote at the meeting. The vote which is desired should also be spelled out, and the letter should become a part of the record of the meeting.

Your final question asks the effect of prior vote by proxy. We have concluded that your rules do not now permit a member to vote by proxy, but we do not

think that this will affect prior votes which were cast. If your use of this procedure was made in good faith, a court of law will no doubt accept the decision which was reached. Since proxy voting is a well-recognized practice there will certainly be no implied lack of good faith in its use. The following quotation from 73 C.J.S., Public Administrative Bodies and Procedure, section 39 is instructive in this regard:

"Where the performance of official duty requires an interpretation of the law which governs that performance, the interpretation placed by the officer on the law will not be interfered with by the courts unless it is clearly wrong and the official action arbitrary and capricious; but the interpretation must be a legal and reasonable one and not directly contrary to the mandate of legislative acts . . . In the absence of fraud or bad faith, the courts may not dictate to such an agency how and in what manner it shall conduct its business, or interfere with details of administration."

In summary, we are of the opinion that you may amend your rules to permit members to vote by proxy providing the requirements outlined herein are followed. We encourage limitation of its use, however, in order to avoid frustration of the deliberative process, and we recommend that the power only be exercised in writing as a part of the record. While we do not think your current rules authorize a proxy vote, its use in the past should cause no problem for you.

DATED This 12th day of August, 1976.

ATTORNEY GENERAL
STATE OF IDAHO

WAYNE L. KIDWELL

ANALYSIS BY:

GUY G. HURLBUTT
Deputy Attorney General

AUTHORITIES CONSIDERED

1. Title 36, chapter 1, *Idaho Code*.
2. Title 67, chapter 52, *Idaho Code*.
3. 73 C.J.S., Public Administrative Bodies and Procedure, section 39.
4. Robert's Rules of Order, section 36, p. 200.
5. *Fletcher Cyc. Corp. (Perm. Ed.)*, volume 5, section 2050, p. 229.
6. Davis, *Administrative Law Treatise*, section 11.04.
7. Annot., 18 A.L.R. 2d 606 (1951).

8. *Seabolt vs. Moses*, 247 SW.2d 24 (Ark. 1952).
9. *Johnston vs. Grays Harbor County Board of Adjustment*, 541 P.2d 1232 (Washington 1975).
10. *Braniff Airways vs. Civil Aeronautics Board*, 379 F.2d 453 (D.C. Cir. 1967).
11. *Turner v. Boise Lodge No. 310, Etc.*, 295 P.2d 256 (Idaho 1956).

ATTORNEY GENERAL OPINION NO. 76-47

TO: Honorable Cecil D. Andrus
Governor of Idaho
Statehouse
Boise, Idaho 83720

Per request for Attorney General Opinion.

QUESTIONS PRESENTED:

1. If compensatory time is granted for overtime, is it to be granted on a 1 to 1 basis or 1½ to 1 basis? If compensatory time is later cashed out, must that be done on a 1 to 1 or 1½-1 basis?
2. Within state government, what are the "executive, administrative and professional classes" referred to in the second paragraph of Section 67-5329, *Idaho Code*?
3. Because of disaster emergency, because of the unconstitutionality of the Fair Labor Standards Act, or for any other reason, may a state department pay cash overtime to "executive, administrative and professional classes" of employees?

CONCLUSIONS:

1. Compensatory time granted in lieu of cash compensation for overtime should be granted on a 1½-to-1 basis. If and when such compensatory time is later cashed out, such cash out should also be on a 1½-to-1 basis.
2. "Executive, administrative and professional classes" referred to in section 67-5329, *Idaho Code*, are to be defined for purposes of state law by reference to the Federal Fair Labor Standards Act of 1938, as amended.
3. Under no circumstances may "executive, administrative and professional classes" of state employees initially receive cash compensation for overtime worked. Only after the expiration of six (6) months after such overtime is earned and under circumstances wherein such employees have had no opportunity to avail themselves of the compensatory time allowed for such overtime may they be paid cash compensation for their remaining overtime entitlement.

ANALYSIS:

At the outset, it should be noted that the questions presented may be answered by referring to sections 56-5326 *et seq.*, *Idaho Code*, and the definitional references from federal law provided for therein.

Section 67-5326, *Idaho Code*, declares state policy regarding overtime pay to be as follows:

"It is hereby declared to be the policy of the legislature of the state of Idaho that *all employees* of the several departments of the state gov-

ernment shall be treated equally with reference to hours of employment, holidays, and vacation leave. The policy of this state as declared in this act shall not restrict the extension of regular work hour schedules on an overtime basis in those activities and duties where such extension is necessary and authorized, provided that overtime work performed under such extension is compensated for as hereinafter provided. (Emphasis supplied.)

A "department" of state government is defined in section 67-5327(c), *Idaho Code*, as "any department, agency, institution or office of the state of Idaho." "Overtime work" is defined in section 67-5327(e), *Idaho Code*, as "time worked in excess of forty (40) hours in a period of one hundred sixty-eight (168) consecutive hours". (Further reference in subsection (e) of §67-5327, *I.C.*, to covered employees under the provisions of the Federal Fair Labor Standards Act of 1938, as amended, are deleted and rendered moot by the recent United States Supreme Court decision in the case of *National League of Cities v. Usery*, No. 74-878 (U.S.S.Ct., decided June 24th, 1976), in which application of said Federal Act to state employees was declared unconstitutional.)

It is clear that work performed in response to the Teton Dam disaster emergency would authorize utilization of state employees for overtime work on two separate grounds. Section 67-5328, *Idaho Code*, in pertinent part, provides that:

The appointing authority of any department shall determine the necessity for overtime work and shall provide for cash compensation for such overtime work for employees who:

(a) In times of critical emergency involving danger to person or property are directed to work hours in excess of those set forth herein as normal work days or work weeks; or

(d) Are required and directed to work in addition to their assigned hours of the work day or work week.

Though said section, enacted in 1971, and unchanged to date, refers solely to "cash compensation", more recent enactments of the Idaho Legislature have provided an alternative means for compensation which, when utilized, would in our opinion modify the stricture relating to cash compensation as a sole means of compensation as provided by the above-quoted section.

In 1975, the Idaho Legislature amended sections 67-5329 and 67-5330, *Idaho Code*, relating, respectively, to compensatory time in lieu of cash compensation for overtime hours worked and the rate at which cash compensation for overtime shall be paid. (1975 Session Laws, ch. 164, §§ 9 and 10, p. 434.) Section 67-5329, *Idaho Code*, declares: Unless specifically exempted by provisions of this act, employees shall be entitled to payments in cash for overtime work performed." Next, section 67-5330, *Idaho Code*, provides that: "Cash compensation for overtime shall be at one and one half (1½) times the hourly rate for that employee's grade, class, and step contained in the established compensation schedule of the Idaho personnel commission." Clearly, the quoted provisions of these two sections of the Idaho Code relate only to cash compensation

and only to those employees who are "classified" under the compensation schedule of the Idaho personnel commission. Arguably, departments whose employees who are exempt from the compensation schedule of the Idaho personnel commission would be allowed to negotiate on a contractual basis the rate of cash compensation which would be paid any such "exempt" employee who performed overtime work, but in lieu of any such contracted-for rate of pay the expressed legislative intent set forth in §67-5330 that cash compensation be paid at the rate of 1½ times the hourly rate of pay for that employee should be followed.

As previously noted §67-5329 contemplates that some employees of state government would be exempted from the cash compensation provisions of Idaho's statutes relating to overtime pay. The pertinent exemption is contained in the last paragraph of said §67-5329, as follows:

"Executive, administrative and professional classes as determined by the (Federal) Fair Labor Standards Act of 1938, as amended, shall receive compensatory time credit but shall not receive overtime payments in cash." The reference in this paragraph to the definitions of the federal act are unaffected by the United States Supreme Court decision relating to the constitutionality of said Act as applied to state employees inasmuch as the Idaho Legislature has decided to use definitions in said Act to aid in interpretation of Idaho's statutes rather than deeming that state employees are necessarily bound by all provisions of such federal Act. (See also, for example, §48-618, *Idaho Code*, which declares that the Idaho Consumer Protection Act shall be construed uniformly with federal law and regulations and in compliance with statutes administered by the Federal Trade Commission.) Thus, the definitions of executive, administrative and professional classes of employees who are not entitled to cash compensation for overtime work but are, instead, entitled only to compensatory time for such overtime work are to be supplied by applicable federal definitions as contained in the Fair Labor Standards Act of 1938, as amended. It is quite proper for one statute to refer to another and incorporate all or a part of it by reference. Rules of statutory construction relating to such referred-to statutes are set forth in 2A Sutherland Statutory Construction §51.08, p. 324 (Sands 4th ed., Callaghan & Co. 1973), as follows:

A statute of specific reference incorporates the provisions referred to from the statutes as of the time of adoption without subsequent amendments, unless the legislature has expressly or by strong implication shown its intention to incorporate subsequent amendments with the statute. In the absence of such intention subsequent amendment of the referred statute will have no effect on the reference statute. Similarly, repeal of the statute referred to will have no effect on the reference statute unless the reference statute is repealed by implication with the referred statute. In a statute of specific reference only the appropriate parts of the statute referred to are taken. (Footnotes omitted.)

Applying these statutory construction rules to the statutory reference to the Federal Fair Labor Standards Act of 1938, as amended, definitions of certain categories of personnel, the properly applicable definitions of "executive", "administrative", and "professional" classes of employees are those which

were in effect on July 1, 1975, the date when the most recent amendment to §67-5329 became effective. The applicable definitions are continued in Federal Register, Vol. 38, No. 87, pp.11390-11391 (May 7, 1973). The definitions of such personnel under said federal law are appended hereto as Exhibit "A".

The issue of compensatory time in lieu of cash compensation either as mandated by the statutory exemption from cash compensation or as provided by a department of state government as an alternative means of handling overtime for state employees, does not have the rate of compensation specifically delineated by the Idaho Legislature. A cardinal rule of statutory construction is that of giving effect to the leading idea or purpose of the whole statutory scheme. In 2A Sutherland Statutory Construction §46.05, p.56 (Sands 4th ed., Callaghan & Co. 1973), it is stated:

A statute is passed as a whole and not in parts of sections and is animated by one general purpose and intent. Consequently, each part or section should be construed in connection with every other part or section so as to produce a harmonious whole. Thus it is not proper to confine interpretation to the one section to be construed.

"It is always an unsafe way of construing a statute or contract to divide it by a process of etymological dissection, and to separate words and then apply to each, thus separated from its context, some particular definition given by lexicographers and then reconstruct the instrument upon the basis of these definitions. An instrument must always be construed as a whole, and the particular meaning to be attached to any word or phrase is usually to be ascribed from the context, the nature of the subject matter treated of, and the purpose or intention of the parties who executed the contract or of the body which enacted or framed the statute or constitution." "Neither clinical construction nor the letter of the statute nor its rhetorical framework should be permitted to defeat its clear and definite purpose to be gathered from the whole act, compared part with part." (Footnotes omitted.)

It is our opinion that compensatory time must be allowed on the basis of one and one half (1½) hours for each hour worked in excess of a forty (40) hour week. This conclusion is primarily predicated on that portion of section 67-5329, *Idaho Code*, which provides that: "Compensatory time which has been earned but not taken within six (6) months of the time that it was earned shall be paid in cash compensation not later than the end of the first payroll period following the expiration of the sixth (6) month herein described. (Emphasis supplied.) Referring, again, to section 67-5330, *Idaho Code*, it will be noted that the key words "cash compensation" are used in establishing that the rate of pay for overtime shall be at one and one half (1½) times the hourly rate of pay for such employee. To conclude that "compensatory time" allowed for overtime work in lieu of "cash compensation" for such work would be handled on a 1-to-1 basis rather than a 1½-to-1 basis would lead to the ridiculous conclusion that at the end of a six month period an employee who had been given compensatory time on a 1-to-1 basis would be compensated in cash for that time on a 1½-to-1 basis. We feel that such an interpretation could easily lead to excess and abuses of the manifested legislative intent provided in the overall statutory scheme relating to overtime compensation. In conclusion, therefore, in order to maintain consis-

tency among all types of compensation, cash or compensatory time, for overtime pay it is our conclusion that all overtime pay should be provided for on the basis of one and one half-to-one (1½-to-1).

As previously noted, the last paragraph of Section 67-5329, *Idaho Code*, proscribes payment of cash for overtime worked to certain executive, administrative, or professional state employees. Yet, this sentence, at the expiration of six (6) months after the time overtime compensation was earned, creates a potential conflict with the basic text of said §67-5329 which mandates:

Compensatory time which has been earned but not taken within six (6) months of the time it was earned shall be paid in cash compensation not later than the end of the first payroll period following the expiration of the six (6) months herein described.

We feel that this potential conflict may be resolved by referring to the policy statement contained in Section 67-5326, *Idaho Code*, which establishes overall state policy that "*all employees of * * * state government shall be treated equally.*" (Emphasis supplied.) Referring to 2A Sutherland Statutory Construction §54.03, p.355 (Sands 4th ed., Callaghan & Co 1973), it is noted:

An extended or restricted interpretation (of statutory language) may be reconciled, for example, on the ground that "the intent prevails over the letter"; that "the reason of the statute controls the letter"; that the literal meaning of the statute is subject to its "object," "aim," or "real intent"; or that "that implied is as much a part of the statute as that expressed."

The spirit of an act has been found to render its meaning "clear and unmistakable" even though "its language is capable of more than one meaning." (Footnotes omitted.)

Thus we discern an overriding legislative intent that, at the end of the six (6) month period those state employees who by law may initially be compensated for overtime worked solely by allowing compensatory time-off who have, for one reason or another, been unable to use up their compensatory time hours within the six (6) month period after said hours were earned shall be treated equally with all other state employees and that *all* such state employees shall then be paid in cash for the "unused" compensatory time entitlement. The alternative to our conclusion would create an unfair situation whereby those employees who, by law, are *only* entitled to "compensatory time" for overtime hours worked would be deemed to have lost entirely their entitlement for such overtime by the mere expiration of a six (6) month period after such overtime entitlement was earned. Recognizing that such personnel are often, through no fault of their own, thrust into demands upon their time which make it impossible for them to use their compensatory time within the six (6) month period, we believe that overriding legislative intent mandates that said state employees are entitled to cash compensation for any unused hours after the six (6) months have expired. Of course, if said employee had an opportunity to use in full the compensatory time entitlement during the six (6) month period and failed so to do, such failure could be construed to be a waiver of his right to ultimate cash compensation.

AUTHORITIES CONSIDERED:

1. Idaho statutes: Sections 67-5326, 67-5327(c) and (e), 67-5328(a) and (d), 67-5329, and 67-5330, *Idaho Code*.
2. Other statutes: Federal Fair Labor Standard Act of 1938, as amended.
3. Other authorities: 2A Sutherland Statutory Construction §§46.05, 51.08, and 54.03 (Sands 4th ed., Callaghan and Co. 1973).

DATED this 16th day of August, 1976.

ATTORNEY GENERAL OF THE STATE OF IDAHO

WAYNE L. KIDWELL

ANALYSIS BY:

PETER E. HEISER, JR.
Chief Deputy Attorney General

ATTORNEY GENERAL OPINION NO. 76-48

TO: Faber F. Tway
Legal Counsel
Idaho Transportation Department
P.O. Box 7129
Boise, Idaho 83707

Per request for Attorney General Opinion.

QUESTION PRESENTED:

In view of current laws, can the Personnel Commission reallocate classes in pay grade, without legislative approval, which have been found to be misplaced in the pay plan and which initiated a grievance prior to the effective dates of the 1975-1976 session laws regarding personnel action.

CONCLUSION:

The Personnel Commission may only reallocate classes in pay grade, after an initial allocation has been made, with legislative approval as required by section 67-5309B(d), *Idaho Code*.

ANALYSIS:

Initially it must be noted that the grievance before the Personnel Commission which gave rise to the question presented was dismissed by the hearing officer on the 25th day of February, 1976, after the appellant-employees requested that their grievances be withdrawn. There is nothing on file to indicate that the appellants filed an amended appeal within the 20 day period to amend or appeal. This would make the issue presented moot since any action on the grievance had ended.

In the event that there is an ongoing grievance or appeal therefrom, the outcome would result in a similar conclusion based on the following analysis.

Whether the Personnel Commission may reallocate job classifications in light of the Idaho 1975-1976 session laws in this area presents an issue not yet considered by the Idaho Supreme Court and an area of law with little precedent in United States Case law.

Each department or agency of the State of Idaho is to adopt an employee grievance procedure which may include classification grievances. Section 67-5309A, *Idaho Code*.

Section 67-5316, *Idaho Code* allows the Personnel Commission to hear and resolve appeals from review proceedings (grievance hearings) of state employees. The District Court in the county where any party resides has the power to enforce the decision and order of the Personnel Commission.

In 1975 C.164 '75 Session Laws added, in part, the following to §67-5309(b), *Idaho Code*:

"A prevailing rate salary adjustment shall not be made except as a portion of compensation plan as herein provided. Before such a comprehensive plan can be made effective it must be approved by the administrator, . . . , acting for the governor. The compensation schedule in the plan is to be presented to the legislature for approval."

The above language was stricken in 1976 by C.367 '76 Session Laws which added §67-5309B(d), *Idaho Code* requiring that "after the initial allocation of a job classification to a pay grade in the salary schedule, reallocation of job classifications within the salary schedule by the Commission shall not be effective, except upon the approval of the . . . legislature."

This language of §67-5309B(d), *Idaho Code* requiring legislative approval of reallocation of job classifications after an initial allocation of the class has been taken apparently modifies §67-5316, *Idaho Code* which gives the Idaho Personnel Commission the authority to hear and resolve appeals from grievance hearings from the state's various commissions.

Since the old and new provisions of the statute cannot be interpreted so that they do not conflict, the new provision, i.e. §69-5309B(d), should prevail as the latest declaration of the legislature's will. *Sutherland, Statutory Construction*. §22.34.

Section 67-5309(d), *Idaho Code* as controlling the area of job reallocation must be construed in light of any possible vested rights the state employees could have obtained by the proceedings which took place prior to its passage and effective date of July 1, 1976. §67-510, *Idaho Code*.

The Oregon Court of Appeals decided a case similar in facts to the case you raise in your question in *Personnel Division of Executive Dep't v. St. Clair*, Or. App. 498 P.2d 809, (1972). The Court held that an employment relationship between the state and its civil service employees does not arise out of or result in a contract between the parties and that a change of rule providing for consideration of salary increases for employees after six months in a job to require 12 months service before such consideration did not impair any vested contractual rights of the employees who had not completed six months service under the old rule at the time of change.

State employees from the foregoing case have no vested interest in salary, as well as job allocation or in the Commission's grievance procedure as applied to reallocation of job classification and by virtue of §67-5309(d) the Commission must submit such reallocations to the legislature for its approval, as set out in that section prior to such reallocations taking effect.

AUTHORITIES CONSIDERED:

1. *Idaho Code*, Sections 67-510, 67-5309 A, 67-5309 (b), 67-5309(d), 67-5316.
2. Other authorities: *Personnel Division of Executive Dep't v. St.Clair*, Or. App. 498 P.2d 809 (1972), *Sutherland, Statutory Construction*, §22.34.

DATED This 30th day of August, 1976.

Attorney General
State of Idaho

WAYNE L. KIDWELL

ANALYSIS BY:

GUY G. HURLBUTT
Deputy Attorney General

THOMAS VANDERFORD
Legal Intern

Likewise with the reallocation of job classification where grievances commence prior to legislation requiring legislative approval after the initial job allocation had been determined the employees inure to no vested right that their grievance appeal be determined under law existing previous to the passage of §67-5309(d), *Idaho Code*.

The Court in *St. Clair*, supra, states the rationale behind its holding on public employees vested rights at p. 811:

(3) It is fundamental law that there is no vested right to employment in the public service. Likewise a public officer or employee has no "vested right" in a specific term of office or employment, or to the compensation attached to that office or employment. (Citations omitted.)

"* * * Where an employee of the state, under civil service, accepts a position, he does so with knowledge of the fact that his salary, and indeed, his conduct, are both subject to the law governing such matters, as set forth in the statute and the rules and regulations of the commission * * * (Citations omitted.)

"* * * It is well settled that public employees have no vested right in any particular measure of compensation or benefits, and that these may be modified or reduced by the proper statutory authority * * * (Citations omitted.)

Our opinion that state employees have no vested right to have their grievance proceedings and appeal determined under legislation prior to changes requiring the legislative approval of reallocation is further supported by the Oregon Court in *St. Clair*, supra, at p. 818:

"Again as the Minnesota Supreme Court observed in *Halek v. City of St. Paul*, 227 Minn. 477, 480-481, 35 N.W.2d 705, 707 (1949):

"* * * (Civil service rights of public employees granted by law are neither contractual nor vested, and because that is true, not only such rights, but the remedies for enforcement thereof may be abolished by the authority which created them.)"

The Idaho Legislature likewise by its enactment of §67-5309B(d), *Idaho Code* is preempting the grievance procedure and appeals process of the Personnel Commission with respect to reallocation of job classifications requiring legislative approval of such action. The *St. Clair* Court felt that such action is well within the legislative authority stating that:

"(4) From the foregoing authorities we conclude that where a public employer, because of shortage of funds, budgeting requirements, changes in programs or other sufficient reason, decides to modify its previously adopted rules pertaining to granting salary increases it may do so, in the absence of specific prohibition, without infringing the rights of its employees, so long as the governing body has statutory authority to make such changes and follows the procedure prescribed by statute in doing so." *St. Clair*, supra, p. 812.

ATTORNEY GENERAL OPINION NO. 76-49

TO: Michael Kunz
Clerk, Franklin County
Box 231
Preston, Idaho 83263

Per request for Attorney General opinion.

QUESTIONS PRESENTED:

1. Who has the responsibility for making a budget request for the new "District Court Fund".
2. Who is responsible to check and authorize payment for expenditures from that fund.
3. Can this fund include the cost of the public defender contract.

CONCLUSION:

1. and 2. We do not find any language in C.307, §2, 1976 Idaho Session Laws altering the present budget procedure for county government. Thus, in our opinion, this new Code provision does not modify the system already in effect under Title 31, *Idaho Code*.
3. The election under §19-859, *Idaho Code* to provide representation by public defender's contracts is a county expense payable out of general county funds appropriated annually under §19-862, *Idaho Code*.

ANALYSIS:

C.307 '76, §2, Idaho Session Laws, establishing the "District Court Fund", is supplementary legislation to title 31, ch. 8 on "powers and duties of the Board of Commissioners". The section allows a maximum levy of 2 mills, which is to provide a fund, for the costs of the district court within the county.

Sutherland, Statutory Construction, in defining supplementary acts states at §22.24 that:

"Supplementary acts are not amendments within the constitutional limitation that no act shall be amended by mere reference to its title. A supplementary or supplemental act, or a supplement, for the purpose of compliance with this limitation is an act not purporting to amend but which makes an addition to a prior statute without impairing any existing provision thereof. *It is that which supplies a deficiency, adds to, or completes, or extends that which is already in existence without changing or modifying the original. It need not state that it is supplementary.*" (Emphasis added.)

C.307 '76 §2, Session Laws in enacting §31-867, *Idaho Code* is not specifying any specific procedure for budgeting or authorization of monies from the fund

and establishes no authority for deviating from procedures set out in the code for budgeting and authorization of county funds. The section acts as supplementary legislation to county funding and budgeting law requiring only that a "District Court Fund" be established with the expenses of the district court being paid out of such fund.

To the extent that the new section does speak on authority under the section it speaks only of authority in the Board of County Commissioners in the following language: "The *Board of County Commissioners* of each county in this state *may levy . . .* and the *board may appropriate.*" (Emphasis added.) The above coupled with the fact the legislature included the new section under title 31, ch. 8 of the *Idaho Code* on the powers and duties of the Board of Commissioners indicates that the legislation intention was to delineate duties and powers of the Board of County Commissioners.

In our view, C.307, §2, 1976 Idaho Session Laws does not amend or modify current budget procedure under Title 31, *Idaho Code*. The thrust of this legislation is to create a special fund for the district courts and to allow an additional 2 mill levy to sustain this fund. It also authorizes the county commissioners to appropriate certain monies into the fund. We do not find any language in this legislation which would support an argument that a new budget system is contemplated. Since there is no authority in C.307, §2, Idaho Session Laws for deviation from the procedures for budgeting and authorization of payments for district court purposes, we believe that current procedures continue undisturbed by this legislation.

Turning to the matter of public defender contracts, we do not believe that costs for this program were contemplated in C.307, §2, Idaho Session Laws. This section, outside of excluding courthouse construction or remodeling and salaries of the deputy district court clerks does not specify what is a district court expense. §19-862, *Idaho Code* requires the county commissioners to annually appropriate enough money to administer whatever type of public representation is elected under §19-859. Currently public defender contracts are funded as an expense payable out of general county funds. A continued practice of paying the county public defender out of general funds would not be in derogation of §31-867, *Idaho Code* and there appears within the section nothing requiring a change of the current practice since the section is a supplementary one.

AUTHORITIES CONSIDERED:

1. *Idaho Code*: §19-862, §31-867.
2. Other authority: *Sutherland, Statutory Construction*, §22.34.

Dated this 30th day of August, 1976.

ATTORNEY GENERAL OF THE
STATE OF IDAHO

WAYNE L. KIDWELL

ANALYSIS BY:

GUY G. HURLBUTT
Deputy Attorney General

THOMAS VANDERFORD
Legal Intern

ATTORNEY GENERAL OPINION NO. 76-50

TO: Representative T.W. Stivers
Legislative District No. 25
114 North Juniper
Twin Falls, Idaho 83301

Per request for Attorney General's Opinion.

QUESTION PRESENTED:

To what extent does the Idaho Building Code Advisory Act, *Idaho Code* §39-4101, *et seq.*, apply to existing structures?

CONCLUSION:

The Idaho Building Code Authority Act applies to existing structures in two general situations:

- (1). Insofar as the codes enumerated and adopted therein so provide, in order that life and property shall be protected and;
- (2). When existing buildings are reconstructed, altered, demolished, converted or repaired.

ANALYSIS:

The primary thrust of the Idaho Building Code Advisory Act is directed towards new construction, envisioning a standardization of construction methods and use of materials. However, *Idaho Code* §39-4101, provides that nother intent of the Act was to "promote the health, safety and welfare of the occupants or users of buildings and structures and the general public."

Pursuant to the Act, §39-4109, a number of building and safety codes were adopted for the State of Idaho, and it should be noted that several of these codes contain provisions relating to existing structures, to accomplish ends similar to those set out in *Idaho Code* §39-4101(2) (a). An examination of such provisions will show that their application to existing structures is quite limited, generally only to protect life or property, and thus are consistent with the intent of the Building Code Advisory Act.

The Uniform Fire Code, 1973, provides as follows:

"(t)he provisions of the Code shall apply to existing conditions as well as conditions arising after the adoption thereof, except that conditions legally in existence at the adoption of this Code and not in strict compliance therewith shall be permitted to continue only if, in the opinion of the Chief, they do not constitute a hazard to life or property."

The thrust of this section, then, is that the Uniform Fire Code will be applied to existing structures in Idaho only insofar as such structures constitute a hazard

to life or property.

The Uniform Building code of 1973 and the Uniform Housing Code of 1973 also contain various provisions relating to existing structures. Both §103(a) of the Housing Code and §104(g) of the Building Code provide for a continuation of existing occupancy provided that such occupancy was legal at the time of the adoption by the code and provided that such continued use is not dangerous to life. Section 1313 of the Uniform Building Code also sets out certain standards for apartment houses and hotels, providing that existing structures of that nature shall have 18 months to bring themselves into compliance with such standards.

The Uniform Mechanical Code of 1973 provides for the continued use of equipment installed prior to the effective date of the Code, provided that its use is in accordance with the original design and location and is "not a hazard to life or property."

Finally the Life Safety Code of 1973 by its terms applies to existing structures. Section 1-4112 of that Code provides that "(e)xisting buildings and structures shall not be occupied or used in violation of the provisions of this Code applicable thereto". Two sections of the Code, however, qualify the above provision somewhat. Section 1-4113 provides that the authority having jurisdiction may modify the above rule if the occupancy is the same as it was prior to the adoption of the Act and the requirements in question are "clearly impractical". Section 1-6111 of the Code gives the authority with jurisdiction the power to grant exceptions from the Code in cases of "practical difficulty" or "unnecessary hardship".

The codes enumerated in the Building Code Advisory Act also apply to existing structures when some change is made in the structure itself. *Idaho Code* §39-4103 provides that the Act shall cover all construction in the State of Idaho, except for certain exempted construction, and *Idaho Code* §39-4105(6) defines construction as "... the erection, fabrication, reconstruction, demolition, alteration, conservation, or repair of a building (other than in-kind), or the installation of equipment therein normally a part of the structure.

AUTHORITIES CONSIDERED:

1. §39-4101, *et seq*, *Idaho Code*.

DATED this 30th day of August, 1976.

ATTORNEY GENERAL OF THE
STATE OF IDAHO

WAYNE L. KIDWELL

ANALYSIS BY:

THOMAS H. SWINEHART
Assistant Attorney General

ATTORNEY GENERAL OPINION NO. 76-51

Mr. Tom D. McEldowney
Director
Department of Finance
State of Idaho

Per Request for Attorney General Opinion.

QUESTION PRESENTED:

Is it possible for a bank to stop payment on a cashier's check? If it can be done, under what specific conditions?

CONCLUSION:

The general rule of law is a cashier's check is not subject to a stop payment order.

ANALYSIS:

A cashier's check is not an ordinary check. The customer does not draw a cashier's check on his account; the bank draws it on itself. The bank does this in return for cash or evidence of a promise that the customer will pay for the cashier's check, such as a personal check or a promissory note. A cashier's check is a bill of exchange drawn by the bank upon itself. Normally, with a personal check, the instrument is written on an account and negotiated to another party who then presents it to the bank for acceptance and payment, either directly or indirectly, through the check collection process. A cashier's check, however, is accepted by the bank at the time of issuance by the mere fact that it was issued. Once it has been issued by the bank, the cashier's check becomes the primary obligation of the bank, not the customer. It is evidence that the payee is authorized to demand and receive payment from the bank upon presentation. As such, it is the equivalent of the money it represents. See *Scharz v. Twin City State Bank*, 441 P2d 897 (Kansas 1968); and *Meador v. Ranchmart State Bank*, 517 P2d 123 (Kansas 1973).

The transaction itself is a purchase and sale. Once the customer and the bank have made the exchange, the transaction has been executed. There is nothing more that need be done, except the actual presentment. After the issuance the transaction is completed; the bank has no right to countermand a cashier's check.

This general proposition of law is supported by both case law and statutory law. *Scharz*, supra, *Meador*, supra, *Munson v. American National Bank & Trust Co. of Chicago*, 484 F2d 620 (CA7 1973); *State of PA v. Curtiss Nat. Bank of Miami Springs, Fla.*, 427 F2d 395 (CA5 1970); *International Firearms Co., LTD. v. Kingston Trust Co.*, 160 NE2d 656 (New York 1959); *Malphrus v. Home Savings Bank of City of Albany*, 254 NYS2d 980 (1965); *Ruskin v. Central Federal Savings & Loan Association of Nassau County*, 3 UCC Reporting Service 150 (New York 1966); *Wertz v. Richardson Heights Bank & Trust*, 12 UCC Reporting Service 719 (Texas 1973); *National Newark & Essex Bank v.*

Giordano, 268 A2d 327 (New Jersey 1970); *Gillespie v. Riley Management Corporation*, 319 NE2d 753 (Illinois 1974); and *Citizens & Southern Nat. Bank v. Youngblood*, 219 SE2d 172 (Georgia 1975).

The *Citizens & Southern Nat. Bank* case, *supra*, involves a situation in which a bank wished to stop payment on a cashier's check after it had been issued to the customer. In that instance, Crawford delivered a personal check to Youngblood pursuant to a contract they had. Youngblood went to the bank and cashed it. Instead of receiving cash, he asked for and was issued a cashier's check. Afterwards Crawford stopped payment on his personal check which the bank had taken. The bank then asked Youngblood to return the cashier's check. He refused and presumably cashed the check elsewhere. The bank brought suit alleging unjust enrichment against Youngblood since he got the bank's money for nothing. The court found that the issuance of a cashier's check in return for Crawford's check was the same as issuing cash. The bank had the opportunity to inquire about Crawford's check in the first place. Not having done so, the bank must bear the consequences, not Youngblood.

National Newark & Essex Bank v. Giordano, *supra*, presents us with another typical situation. The defendant wished to purchase two trucks and went to the bank. In return for an installment sale security agreement, the bank issued the defendant a cashier's check with which to purchase the trucks. Later the defendant asked a stop payment order be placed on the cashier's check because the trucks were defective. The bank refused claiming it could not do so. The defendant offered to post a bond to protect the bank but it did not change matters. The defendant did not make his payments and the bank had to repossess the trucks. Suit was brought to recover the deficiency from the defendant.

The court narrowed the issue down to whether a bank may stop payment on its own check (cashier's check) and concluded that a bank cannot. The issuance of a cashier's check is a sale of credit by the bank to the purchaser and it is an executed rather than an executory transaction. The bank being both drawer and drawee accepts the cashier's check for payment at the time it is issued. The bank cannot countermand what it has done, for to do so would be inconsistent with the representation the bank makes at the time of issuance.

In *Gillespie v. Riley Management Corporation*, *supra*, the bank did stop payment on its cashier's check. The plaintiff and the Corporation, pursuant to contract, agreed to set up an escrow account. To save money, the Corporation, instead of placing funds in an actual escrow account, purchased a cashier's check naming both the Corporation and the plaintiff as payees. The idea was that both signatures would be needed at presentment, therefore it effectively functioned as an escrow. Later the Corporation returned to the bank and said the form of escrow was not working as expected and asked the bank to accept the return of the check on its signature only, and issue two new cashier's checks both naming the Corporation as payee. The bank did this. The plaintiff subsequently discovered what had happened and brought suit against the bank. The bank defended arguing that as purchaser of the instrument the Corporation had a right to return it and have it cancelled. The plaintiff cited Section 3-116(b) of the Uniform Commercial Code and claimed her signature was required also. The court agreed with the plaintiff. Once the cashier's check

was issued it was an executed transaction which could not be countermanded. The court understood that a purchaser may return an item purchased and the same holds true with cashier's checks. It would pose a heavy burden upon the purchaser to have to receive the endorsement of the payee in order to return a cashier's check. The principal that a purchaser of a cashier's check may return it for reimbursement applies only in an instance where the check has not yet reached the stream of commerce. It can be presumed that if the purchaser still has the instrument that it has not yet entered the stream of commerce. However, the circumstances were such in this case to place a duty on the bank to make further inquiry. Funds from both the plaintiff and the Corporation were collected to pay for the cashier's check; therefore, the bank had a duty of inquiry.

The case points out that up until a cashier's check enters the stream of commerce it may be returned by the purchaser or purchasers. Once it has reached the stream of commerce, though, the bank may not countermand the cashier's check.

A distinction exists between the bank stopping payment on a cashier's check on its own initiative and the bank stopping payment pursuant to a customer's request. *Gillespie* demonstrated the purchaser may return a cashier's check as long as it had not yet entered the stream of commerce. Other than that, the purchaser cannot place a stop payment order on a cashier's check. The transaction has already been completed and there is legally nothing to stop. The bank, although facing the situation differently, operates under the same principal: once the transaction has been completed with the purchaser, it has been executed and cannot be called back. The case of *Wertz v. Richardson Heights Bank & Trust*, *supra*, is illustrative. Baker, owing money to American National Insurance Co., gave a personal check to Wertz, agent for American National. Baker placed a timely stop payment order but Wertz succeeded in cashing the check notwithstanding. A cashier's check was requested instead of cash and the bank issued one. Shortly thereafter, Wertz was notified by the bank that a stop payment order had been placed on the check.

The bank argued that a cashier's check is like an ordinary check in that it is executory and revocable anytime before payment. The court did not agree. The court said that a cashier's check is accepted by the bank at the time of issuance and therefore the contract is executed and cannot be revoked.

There is some question regarding this principal of law in an instance where the consideration given for the cashier's check fails as in this instance. The case was subject to a dissent which pointed out "the text writers agree that a bank may properly refuse to pay its cashier's check to the payee on the ground of failure of consideration or fraud." *supra* at 724. The dissent argued the principle should be that a bank could properly refuse to pay a cashier's check when the consideration fails as long as it was still in the hands of the original payee and he had not materially changed his position in reliance thereon, and there was no holder in due course involved. The agent, Wertz, was the original payee and had not materially changed his position, hence the bank should be allowed to stop payment.

The majority of the court did not agree with the dissent and hence the bank

could not properly stop payment or countermand the cashier's check. Much of the reason for this holding was the statutory law applicable to the situation. This brings us to the Uniform Commercial Code found under Title 28, *Idaho Code*.

The court noted:

"Since a cashier's check is accepted when issued, §4.303 (U.C.C.) has the effect of preventing a bank to stop payment on a cashier's check once it has been issued." *supra* at 722.

Section 4-303, UCC, states a stop payment order is ineffective if received after the bank has accepted or certified the item, or paid the item in cash. The bank accepts the item at the time of issuance as it is both drawer and drawee, therefore this section operates to preclude the bank from effecting a stop payment order.

Section 4-403 deals directly with the customer's right to stop payment. Basically, a customer has a right to stop payment on an item written on his account. However, the person stopping payment must be a customer. A bank may be a customer if it has an account at another bank, Section 4-104(e), but not when drawing a cashier's check, because the check is written on itself. It appears the right to stop payment does not exist when a bank writes an item on itself. Indeed, the official comment number five following Section 4-403 indicates there is no right to stop payment after certification of a check or other acceptance of a draft. Section 3-410 contains the definition of acceptance:

"Acceptance is the drawee's signed engagement to honor the draft as presented. It must be written on the draft, and may consist of his signature alone. It becomes operative when completed by delivery or notification."

Comment five to Section 4-403 continues to say:

"The acceptance is the drawee's own engagement to pay, and he is not required to impair his credit by refusing payment for the convenience of the drawer."

In summary, it may be said that purchasing a cashier's check is comparable to exchanging twenty one dollar bills for a twenty dollar bill. The purchaser gives the bank cash, or an acceptable instrument representing cash, and receives in return a bill of exchange termed a cashier's check. The instrument itself is a draft drawn by the bank on itself which effectively operates as a note. (see Section 3-119(a)) Once the exchange of cash for the cashier's check is completed, the transaction is executed. There is nothing else to be done other than the actual payment of money to the payee. If the purchaser has in no manner placed the instrument into the stream of commerce, he may return to the bank and ask that the transaction be rescinded. If the instrument has been placed in the stream of commerce, such a request would not be timely and the purchaser has no standing to ask that a stop payment order be placed upon it. Suppose the customer after receiving a twenty dollar bill from the bank gave it to a third party and subsequently wanted it back for some reason. He would

have no right to ask that the bank go get it for him. The same principle holds true if it were a cashier's check involved rather than a twenty dollar bill. Once the transaction has been executed and the instrument placed in the stream of commerce, the purchaser may not properly ask the bank to stop payment.

When a bank issues a cashier's check, it is selling its credit. In exchange for the face amount and a small fee, the bank issues an instrument which is an absolute promise to pay the payee the face amount. This promise is a substitute for cash. Once it has been made the bank cannot revoke it. In a situation where the consideration given for the cashier's check fails and the instrument has not yet been negotiated or no one has materially changed his position, the courts do not all come to the same conclusion. Legal principles dictate, notwithstanding the failure of consideration, the bank must pay the item when presented, for it has already accepted the item and has promised to pay it. This can possibly lead to an inequitable result and hence the legal principles may be relaxed from time to time to prevent an unjust result. This is the only circumstance in which a bank may stop payment on a cashier's check. The law, though, is not settled and a bank may be subject to a claim in court as a result of a stop payment.

One final note is that technically a stop payment order may never be issued against a cashier's check. Sections 4-303 and 4-403, UCC, both indicate a stop payment order could not properly be placed against a cashier's check, a bill of exchange the bank draws on itself. A customer does have the right to place a timely stop payment order on an item drawn on his account, but a bank is not a customer when it draws a bill of exchange on itself, and in any event, the bank accepts the item at the time of issuance, which effectively precludes the placing of a stop payment order against the instrument. A stop payment order should not be confused with a refusal to pay. The only recourse available to the bank after a cashier's check has been issued is to simply refuse payment. Although the result is the same as far as the person attempting to cash the check is concerned, they are not the same thing. There are no firmly established legal grounds for refusing payment; hence to do so may lead to legal action against the bank. A court may accept the failure of consideration argument, depending on the circumstances and the unjustness of the result; but such a defense has not been established and a bank would not depend on it.

In our opinion, under most situations, the general principle of law applicable is a bank may not stop or refuse payment on a cashier's check once it has been issued.

AUTHORITIES CONSIDERED:

CASES:

1. *Scharz v. Twin City State Bank*, 441 P2d 897 (Kansas 1968).
2. *Meador v. Ranchmart State Bank*, 517 P2d 123 (Kansas 1973).
3. *Munson v. American National Bank & Trust Co. of Chicago*, 484 F2d 620 (CA7 1973).
4. *State of PA v. Curtiss Nat. Bank of Miami Springs, Fla.*, 427 F2d 395 (CA5

1970).

5. *International Firearms Co., LTD. v. Kingston Trust Co.*, 160 NE2d 656 (New York 1959).

6. *Malphrus v. Home Savings Bank of City of Albany*, 254 NYS2d 980 (1965).

7. *Ruskin v. Central Federal Savings & Loan Association of Nassau County*, 3 UCC Reporting Service 150 (New York 1966).

8. *Wertz v. Richardson Heights Bank & Trust*, 12 UCC Reporting Service 719 (Texas 1973).

9. *National Newark & Essex Bank v. Giordano*, 268 A2d 327 (New Jersey 1970).

10. *Gillespie v. Riley Management Corporation*, 319 NE2d 753 (Illinois 1974).

11. *Citizens & Southern Nat. Bank v. Youngblood*, 219 SE2d 172 (Georgia 1975).

UNIFORM COMMERCIAL CODE:

1. Section 4.303, UCC.
2. Section 4.403, UCC.
3. Section 4.104(e), UCC.
4. Section 3.410, UCC.
5. Section 3.119(a), UCC.

DATED This 31st day of August, 1976.

ATTORNEY GENERAL STATE OF IDAHO

WAYNE L. KIDWELL

ANALYSIS BY:

JAMES P. KAUFMAN
Assistant Attorney General

ATTORNEY GENERAL OPINION NO. 76-52

TO: The Honorable David H. LeRoy
Ada County Prosecuting Attorney
103 Courthouse
Boise, Idaho 83702

Per request for Attorney General Opinion

QUESTION:

Are the durational residency requirements for medical assistance specified in Sections 66-356 and 31-3404, *Idaho Code*, in contravention of the Equal Protection Clause of the Fourteenth Amendment of the Constitution of the United States?

CONCLUSION:

The United States Supreme Court in *Shapiro v. Thompson*, 394 U.S. 618, 22 L.Ed.2d 600, 89 S.Ct. 1322 (1969), held that residency requirements created a classification which constituted an invidious discrimination denying such residents equal protection of the laws in violation of the Equal Protection clause of the Fourteenth Amendment. The Supreme Court reaffirmed and expanded *Shapiro* in *Memorial Hospital v. Maricopa County*, 415 U.S. 250, 39 L.Ed.2d 306, 94 S.Ct. 1076 (1974). Unless a compelling state interest in retaining the residency requirements of 66-356 and 31-3404, *Idaho Code*, as a condition of eligibility for medical care to the indigent can be shown, it is probable that these statutes would be considered unconstitutional by the court. Therefore, due to the possibility of Federal Court suit if the statutes are enforced, we suggest that the statutes in question not be utilized.

ANALYSIS:

In pertinent part, 31-3404, *Idaho Code*, states:

" . . . provided, however, except in the case of an emergency or extreme necessity no person shall receive the benefit of this chapter who shall not have been a resident of the state of Idaho for at least one (1) year and of the county at least six (6) months next preceding the application for county aid."

66-356, *Idaho Code*, states that:

" . . . the term 'residence' where used in either act shall mean one (1) year's actual residence of the patient within the state of Idaho immediately prior to commitment."

Considering similar statutes, the Supreme Court in *Shapiro v. Thompson* held unconstitutional state statutory provisions denying welfare assistance to residents who had not resided within the state's jurisdiction for at least one year immediately preceding their applications for such assistance. The Court held that statutory prohibitions of welfare benefits to residents of less than a year

created a classification constituting an individual discrimination denying them equal protection of the laws. It was stated that a statutory purpose of inhibiting migration by needy persons into a state is constitutionally impermissible. According to the Court, the state would have to show that the discrimination was justified by a compelling governmental interest.

The *Shapiro* decision was reaffirmed and expanded by the Supreme Court in *Memorial Hospital v. Maricopa County*. In considering a statute nearly identical to 31-3404, *Idaho Code*, the Court held that a twelve-month county residency requirement for availability of free medical care to the indigent was constitutionally impermissible. The Court traced *Shapiro* by holding that such a requirement created an invidious classification, impinging on the right of interstate travel by denying the basic necessities of life which cannot be sustained in the absence of a showing by the state of a compelling state interest in such a classification. The state argued that it had a compelling state interest in deterring persons from entering a county solely to obtain free medical care, in facilitation of the administration of medical aid programs, in budgetary planning, in preventing fraud, and in protecting longtime state taxpayers thereby sustaining the challenged statute. Not one of the arguments was accepted by the Court.

After reviewing the above cited cases as they relate to Sections 31-3404 and 66-356, *Idaho Code*, it would appear that these statutes violate the Equal Protection clause of the Fourteenth Amendment to the Constitution of the United States. Both statutes appear to constitute invidious discrimination between those needy persons who have met the residency requirements and those who have not. The statutes further appear to impinge on the right to interstate travel. Free medical aid is of such fundamental importance that the State cannot condition its receipt upon long-term residence. Absent a compelling state interest in these durational residency requirements, it is doubtful these statutes can withstand constitutional scrutiny.

We must emphasize, however, that the office of the Attorney General of the State of Idaho cannot, by issuing our opinion regarding the constitutionality of a statute, strike the statute from the record books. Only the Idaho Legislature may remove or repeal the statutes; only the Idaho Courts may invalidate a statute for constitutional or other infirmities. We do suggest that these statutes not be followed or enforced due to the reasoning contained herein inasmuch as adherence to the statutory provisions we deem constitutionally infirm could easily subject any person attempting to enforce the same to civil penalty for money damages in Federal Court under the Civil Rights Act of 1871 (42 U.S.C.A. §1983: right of civil action where a person has denied another person of a constitutionally protected civil right). We further suggest that you present this dilemma to a responsible organization of which you or the County are a member for the purpose of sponsoring remedial legislation to the next session of the Idaho Legislature.

AUTHORITIES CONSIDERED:

1. *Shapiro v. Thompson*, 394 U.S. 618, 22 L.Ed.2d 600, 89 S.Ct. 1322 (1969).
2. *Memorial Hospital v. Maricopa County*, 415 U.S. 250, 39 L.Ed.2d 306, 94

S.Ct. 1076 (1974).

3. *Idaho Code*, Sections 31-3404 and 66-356.

4. 42 U.S.C.A. §1983.

DATED this 9th day of September, 1976.

ATTORNEY GENERAL
STATE OF IDAHO

WAY E L. KIDWELL

ANALYSIS BY:

BILL F. PAYNE
Deputy Attorney General

ATTORNEY GENERAL OPINION NO. 76-53

TO: Mr. Larry G. Looney, Commissioner
Idaho State Tax Commission

Per request for Attorney General Opinion.

QUESTION PRESENTED:

Are the following taxable under the transfer and inheritance tax laws of the State of Idaho:

1. Life insurance proceeds to a named beneficiary with a right to change beneficiary;
2. Life insurance proceeds payable to a named beneficiary with the right to change beneficiary waived; and
3. Life insurance proceeds payable to the estate of the deceased.

CONCLUSION:

1. Life insurance proceeds to a named beneficiary with retention of right to change beneficiary are not taxable under the transfer and inheritance tax laws of the State of Idaho.
2. Life insurance proceeds payable to a named beneficiary with the right to change beneficiary waived are not taxable under the transfer and inheritance tax laws of the State of Idaho.
3. Life insurance proceeds payable to the estate of the deceased are taxable under the transfer and inheritance tax laws of the State of Idaho.

ANALYSIS:

1. The Idaho Transfer and Inheritance Tax Act is intended to tax transfers by will or the intestate laws of the State. *Idaho Code* §14-402 states in part:

“Transfers of property subject to tax — Determination of market value. — A tax shall be and is hereby imposed upon the transfer of any property, real, personal, or mixed, or of any interest therein or income therefrom in trust or otherwise, to persons, institutions or corporations, not hereinafter exempted, to be paid to the state tax commission, said taxes to be upon the market value of such property at the rates hereinafter prescribed and only upon the excess over the exemptions hereinafter granted, in the following cases:

1. When the transfer is by will or by the intestate or homestead laws of this state, from any person dying seized or possessed of the property while a resident of the state, or by any order of court setting apart property and/or making and granting extra or family allowances pursuant to law.

2. When the transfer is by will or intestate laws of property within this state, and the decedent was a nonresident of the state at the time of his death, or by any order of court setting apart property and/or making and granting extra or family allowances pursuant to law."

Proceeds from insurance policies are not considered transfers by will or intestate succession laws of the state. Although Idaho does not have any case law concerning the subject, other jurisdictions with comparable inheritance tax laws have ruled that the proceeds of insurance policies are affected by virtue of contract rather than by laws of succession or will. See *In re Gagan's Estate*, 42 Wash. 2d 520, 256 P.2d 836; *In re Welfer*, 110 C.A. 2d 262, 242 P.2d 655; *In re Jones' Estate*, 10 Ariz. 480, 460 P.2d 16.

2. In addition to levying a tax on the transfer of the property of the decedent by will, by laws of intestate succession, the Idaho Code provides for inheritance tax on gifts made in contemplation of death. *Idaho Code* §14-402(3) provides:

3. When the transfer is of property made by a resident, or by a nonresident when such nonresident's property is within this state, by deed, grant, bargain, sale, assignment or gift, made without valuable and adequate consideration (i.e., a consideration equal in money or in money's worth to the full value of the property transferred):

- a. In contemplation of the death of the grantor, vendor, assignor or donor, or,
- b. Intended to take effect in possession or enjoyment at or after such death;

When such person, institution or corporation becomes beneficially entitled in possession or expectancy to any property or the income therefrom, by any such transfer, whether made before or after the passage of this act."

There are no Court determinations in Idaho as to the taxability of life insurance where the right to change the beneficiary is waived. However, the majority view is that transfers in contemplation of death do not apply to the receipt of the proceeds of a life insurance policy. See *Oklahoma Tax Commission v. Harris*, 455 P.2d 61; *Garos vs. State Tax Commission*, 99 N.H. 319, 109 A.2d 844; *Tyler v. Treasurer & Receiver General*, 226 Mass. 306, 115 NE 300. The theory of the Courts is that the purpose of the clause concerning gifts in contemplation of death is to prevent the evasion of the tax which is levied on transfers of property of the decedent by will or intestate succession. Since the proceeds of life insurance policies are by virtue of contract rather than by will of succession, the inclusion of such life insurance proceeds as a gift in contemplation of death would be taxing property that would not otherwise be included in the estate.

3. Proceeds of an insurance policy payable to the estate of the deceased are part of the estate. Such proceeds pass by will or intestate laws of property and are subject to the transfer and inheritance tax under *Idaho Code* §14-402. The Court rulings in other jurisdictions are clear that proceeds from insurance

policies payable to the estate of the decedent are subject to inheritance tax. *In re Gagan's Estate*, 42 Wash. 2d 520, 256 P.2d 836; *Oklahoma Tax Commission v. Harris*, 445 P.2d 61; *In re Jones' Estate*, 10 Ariz. 480, 460 P.2d 16.

Where the transfer and inheritance tax laws do not specifically include the proceeds from life insurance policies, such proceeds are not subject to the transfer and inheritance laws of the state. However, where proceeds of life insurance policies are payable to the estate of the deceased, then such proceeds are taxable under the transfer and inheritance tax laws of the state of Idaho.

AUTHORITIES CONSIDERED:

1. *Idaho Code* §14-402(1), (2), (3).
2. Cases: *In re Gagan's Estate*, 42 Wash. 2d 520, 256 P.2d 836; *In re Welfer*, 110 C.A. 2d 262, 242 P.2d 655; *In re Jones' Estate*, 10 Ariz. 480, 460 P.2d 16; *Oklahoma Tax Commission v. Harris*, 455 P.2d 61; *Garos v. State Tax Commission*, 99 N.H. 319, 109 A.2d 844; *Tyler v. Treasurer & Receiver General*, 226 Mass. 306, 115 NE 300.

DATED this 14th day of September, 1976.

ATTORNEY GENERAL OF THE STATE OF IDAHO

WAYNE L. KIDWELL

ANALYSIS BY:

DEAN W. KAPLAN

ASSISTANT ATTORNEY GENERAL

ATTORNEY GENERAL OPINION NO. 76-54

TO: Roy E. Truby
State Superintendent of Public Instruction
Department of Education
Building Mail

Per Request for Attorney General Opinion.

QUESTIONS PRESENTED:

1. Must every child of school age be enrolled when presented for enrollment without regard to the parent's residency?
2. Can a school board establish a policy denying enrollment of all non-resident pupils?

CONCLUSIONS:

1. A school board need not enroll any child of school age regardless of residency where the board can determine that the child is unacceptable within the meaning of the law.
 - a. A school board may deny admission to a non-resident student otherwise acceptable where the presence of that student results in or worsens overcrowded conditions in the schools.
2. A school board can establish a policy denying enrollment of all non-resident pupils so long as enrollment of any pupil would further—or result in—overcrowding of the schools, or where such enrollment would result in a detriment to the health and safety of all students enrolled in the school. Enrollment can also be denied for the reasons specified in Conclusion One above, and where the person responsible for the child's education *refuses to agree to* payment of tuition. However, aside from these factors, blanket denial of enrollment is not permissible.

ANALYSIS:

As with most issues at law, your questions arise as a result of a change in the statutes. Prior to the 1976 Session of the Forty-third Legislature, the transfer of a student from a school in a district in which the student's parent or guardian was a resident to the school in a district in which the parent or guardian was not a resident was governed by Section 33-1402, *Idaho Code*.

I

It is elementary, but perhaps worth pointing out, that Article 9, Section I of the Constitution of the State of Idaho, imposes the duty on the legislature "to establish and maintain a general, uniform and thorough system of public, free common schools." In response to that mandate, the legislature has established a system of districts, the boards of trustees of which are vested by law with certain required and discretionary functions. These districts are all a part of the

State system of public, free common schools; they are not autonomous, sovereign entities. The district "is a mere agency of the state." *Independent School District v. Common School District*, 56 Idaho 426, 55 P.2d 144. "The organization and maintenance of school districts are purely matters of administrative convenience in the execution of the constitutional mandate contained in" Article 9, Section 1 of the Constitution of the State of Idaho. *American National Bank v. Joint Independent School District No. 9*, 61 Idaho 405, 102 P.2d 826.

Local control and operation of the public schools, however, provides the substantial fabric of our educational structure. This has been recognized by the State Supreme Court as well as the United States Supreme Court. For example, in *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973), the court, after reviewing the Texas constitution which required that "the legislature shall establish free schools throughout the state . . ." said that:

The Texas system of school finance is responsive to these two forces. While assuring a basic education for every child in the state, it permits and encourages a large measure of participation in and control of each district's schools at the local level. In an era that has witnessed a consistent trend towards centralization of the functions of government, local sharing of responsibility for public education has survived.

See also, *Thompson v. Engelking*, 537 P.2d 635 (Idaho 1975). The thrust of the court decisions is to encourage and sanction control of public education at the local level.

In our opinion, the constitution of the State of Idaho guarantees a free education to acceptable school age persons of this state. *Paulsen v. Minidoka County School District No. 331*, 93 Idaho 469, 463 P.2d 935. While this provision establishes a right to an education at a free school, we do not believe it extends to any free school of the pupil's choice.

The legislature has set up a system of districts to provide schools to be available to persons of the State. It also has provided for those persons to whom the services of the public schools must be made available and those persons who are required to attend those schools, unless educated by other comparable means. Section 33-201, *Idaho Code*, requires "The services of the public schools of this state are extended to any acceptable person of school age." School age is defined as any person between the ages of 5 and 21. Section 33-202, *Idaho Code*, requires "the parent or guardian of any child resident in this state" and who is between the ages of 7 and 16 to cause that child to be educated in the public schools, unless comparably educated otherwise, as determined by the board of trustees.

Not only has the legislature provided for the system of schools, to whom those schools shall be opened, and those who may be required to attend, but the legislature has also provided that certain persons of school age may be denied the services of the public schools of this State. Section 33-205, *Idaho Code*, authorizes the board of trustees to deny attendance to any student, through expulsion or suspension, who is an habitual truant, or who is incorrigi-

ble, or whose conduct, in the judgment of the board, is such as to be continuously disruptive of school discipline, or of the instructional effectiveness of the school, or whose presence in the public school is detrimental to the health and safety of other pupils. Further, this section also requires a hearing by the board of trustees where expulsion of a student is contemplated or by the superintendent or principal where a suspension from school is contemplated.

Before the repeal of Section 33-1402, *Idaho Code*, the test to determine whether or not a student could transfer from his home district to attend an out-of-district school was whether or not it was in the best interest of the child to make that transfer. Because of the cumbersome procedure, it was impossible for a district board of trustees to measure the best interest of the child, as opposed to the best interest of either the home district or the receiving district.

The test now appears to be whether or not the school age person is "acceptable." Section 33-201, *Idaho Code*. However, under neither test is the best interest of the receiving or home district controlling, except where the conduct of the student renders him or her "unacceptable," or where the presence of the student is detrimental to the health and safety of other pupils. Section 33-205, *Idaho Code*.

Clearly, a student who is "unacceptable" within the meaning of law may be denied enrollment whether he is a resident or not. Denial of enrollment based upon the conduct listed in Section 33-205, *Idaho Code*, is clear. However, it is important to recognize that, in addition to these detrimental traits, a student otherwise acceptable may still be denied enrollment when his "presence in a public school is detrimental to the health and safety of other pupils." This provision, we feel, bears further analysis.

In our view, mere presence of a student may be detrimental to the health and safety of other pupils when: (1) A student himself is in some way detrimental to the health and safety of other pupils, as when he has a highly contagious disease, or (2) When the presence of the pupil worsens — or results in — overcrowded conditions. Under (1) above, we believe that resident and non-resident students alike may be excluded based upon presence alone. However, when presence merely results in — or worsens — overcrowded conditions, we believe a valid distinction can be made between residents and non-residents of the district.

As discussed above, Article 9, Section 1, Idaho Constitution, grants to acceptable school age persons of the State education at a free school. Thus, we believe that there is an obligation upon the district to provide a free education for every "acceptable" student of that district, even though the result may be overcrowded schools. However, given the proposition that no student in this State is entitled to a free education at the school of his choice, we think that non-residents can be excluded when their presence would continue — or result in — overcrowded conditions in the receiving district. Denial on this ground would not be based on mere status alone, since it is based on a rational foundation which is not discriminatory within the framework of our state and federal constitutions. A non-resident pupil excluded from the district, if he is otherwise acceptable, still may be educated in a free school within his home district.

These are factual issues to be determined by the board of trustees. However, by now it should be universally accepted that where a school board exercises its judgment, as in determining whether a student is acceptable or not, it must do so with reason. Its findings may not be arbitrary, unreasonable or capricious. *Murphy v. Pocatello School District No. 25*, 94 Idaho 32, 480 P.2d 878.

While we believe that a student may be denied enrollment for any of the reasons specified in the *Idaho Code*, we do not believe that a district may pass a blanket resolution excluding all non-residents from consideration for enrollment. Such a policy would necessarily crumble in all cases where the legislature had required education of a non-resident pupil. As indicated earlier, paramount control is in the legislature, not in the individual school district. Also, such a blanket denial would prevent continuation of the many interdistrict and interstate agreements relating to education of pupils.

What is not allowable, in our opinion, is denial of enrollment of a non-resident pupil on mere non-residency status alone. This type of exclusion has consistently been held suspect by the state and federal courts. Examples would be where the student is denied admission because of race, creed, national origin, or sex. Also, for example, denial would be improper if that denial is based on the belief that one applicant is more popular or desirable than another.

II

Contrary to apparent belief held by some, school districts as entities still exist with all the rights, privileges, duties and obligations, whatever they were prior to the repeal of Section 33-1402, *Idaho Code*, still intact. District boards of trustees may still impose tuition on those non-resident parents or guardians whose children attend school or enroll in the schools of the district. Section 33-1406, *Idaho Code*. The issue, then, is not whether a board of trustees has the authority to impose tuition, but rather whether a board of trustees can deny admission of an acceptable school age person until the tuition is paid or expel a student, i.e., deprive him of the educational services, as a method of collecting tuition from the non-resident parent or guardian. We have advised you earlier that this is a very questionable practice.

Section 33-205, *Idaho Code*, vests a board of trustees with authority to deny the services of the school to certain students. The reasons for denial set out therein are based upon the conduct of the *student*, or where the presence of the *student* is detrimental to the health and safety of others. Nowhere is there any legislative indication that a reason for denying a student the educational services of the school is the action or inaction of the *parent or guardian*. The duty or obligation to pay tuition is the duty or obligation of the non-resident parent or guardian. Section 33-1407, *Idaho Code*, authorizes the district to bring suit against the non-resident parent or guardian to recover the tuition that is due and owing.

We do not deny that to expel a student because his parent or guardian has not paid the billed tuition or deny the student, otherwise acceptable, the educational services of the district is probably a very effective, efficient and inexpensive method of collecting money. But we would point out that the student does not owe the district the money; the non-resident parent or guardian has that

obligation. The student is made the victim of a situation over which he has no control and very likely is not of his own making.

Expulsion must come as a result of a hearing, where notice is given and an opportunity provided "to contest the action of the board to deny school attendance." Section 33-205, *Idaho Code*, as amended by Chapter 86, '76 Session Laws, 293 (H.B. 517). Expulsion and suspension are disciplinary acts, which, before either can be used to discipline a student, require that the *student* has been charged with doing something or failing to do something which is required of the *student*. Further, the "procedure must conform to minimal due process." We fail to see how the due process requirements can be met where a student is suspended or expelled for action or inaction of his parent or guardian.

There is a clear and adequate remedy at law to collect the tuition. Section 33-1407, *Idaho Code*. Therefore, a district may not circumvent this statutory process by developing its own collection process which denies the educational services to a third party, the student.

We invite your attention to *Paulsen v. Minidoka County School District No. 331*, supra, where the Idaho Supreme Court held that a district may not withhold the product of a student's education, i.e., a transcript, as a method "to coerce payment" of the fees imposed by the district. If the district may not withhold the product of an education as a method of collecting the fee, then it is certainly questionable whether the district can withhold the educational services as a method of collecting tuition.

This office is not unmindful of the potential effect the status of the law could conceivably have on the movement of students from one district to another. History, however, has not shown that there has been or is any great move among parents to enroll their children in non-resident schools, especially where the receiving district imposes tuition. Further, you have indicated no such facts presently.

We trust we have been of assistance.

AUTHORITIES CONSIDERED:

1. Article 9, Section 1, Idaho Constitution.
2. *Idaho Code*, Sections 33-201, 33-202, 33-205, 33-1402, 33-1403, 33-1406, 33-1407.
3. Chapter 85, '76 Session Laws, p.290 (H.B. 467).
4. Chapter 87, '76 Session Laws, p.293 (H.B. 517).
5. *Independent School District v. Common School District*, 56 Idaho 426, 55 P.2d 144.
6. *American National Bank v. Joint Independent School District No. 9*, 61 Idaho 405, 102 P.2d 826.

7. *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973).
8. *Thompson v. Engelking*, 537 P.2d 635 (Idaho 1975).
9. *Paulsen v. Minidoka County School District No. 331*, 93 Idaho 469, 463 P.2d 935.
10. *Murphy v. Pocatello School District No. 25*, 94 Idaho 32, 480 P.2d 878.

DATED This 22nd day of September, 1976.

ATTORNEY GENERAL OF IDAHO

WAYNE L. KIDWELL

ANALYSIS BY:
JAMES R. HARGIS
Deputy Attorney General

ATTORNEY GENERAL OPINION NO. 76-55

TO: Michael Kennedy
Madison County Prosecuting Attorney
P.O. Box 354
Rexburg, Idaho 83440

Per request for Attorney General Opinion.

QUESTIONS PRESENTED:

Is there any provision of Idaho law that would allow Madison County, under disaster circumstances to pay a County officer beyond his authorized salary for services rendered in his official capacity? If so what law and what procedure should be followed?

If there any provision of Idaho law that would allow Madison County under disaster circumstances to pay a County employee that is not a County officer as defined in *Idaho Code*, §31-2001, and the Idaho Constitution, Art. 18, §6, beyond his authorized salary for services rendered in his capacity as a County employee? If so, what law and what procedure should be followed?

Is there any provision of law that would allow Madison County under disaster circumstances to pay a Civil Defense Director beyond his normal and authorized salary for services rendered in his official capacity? If so, what law and what procedure should be followed?

CONCLUSION:

The Idaho Constitution prohibits the payment of additional compensation beyond fixed annual salaries to county officers and deputies for services rendered in their official capacity. No provision in Idaho law has been found to permit a variance from the constitutional directive under emergency circumstances. However, the Idaho Constitution does not preclude county *employees* from receiving additional compensation; and since the Madison County Civil Defense Director is herein defined as a county employee, the Idaho Constitution does not prevent the Madison County Civil Defense Director from receiving added payment for extra work.

ANALYSIS:

Attorney General opinion No. 72-75 concluded that "the Idaho Constitution prohibits a county officer from receiving payment beyond his authorized salary for services rendered in his official capacity. Article XVIII, §7 of the Idaho Constitution provides:

"County Officers—Salaries. All County officers and deputies when allowed, shall receive, as full compensation for their services, fixed annual salaries, to be paid monthly out of the county treasury, as other expenses are paid."

Madison County has in effect asked whether circumstances of disaster would alter the conclusion of Attorney General opinion No. 72-75. The Idaho constitutional provision cited above is silent in regard to disaster circumstances. Moreover, no other provision in Idaho constitutional, statutory, or case law has been found which would authorize a change under disaster circumstances from the specific constitutional mandate that annual salaries paid by the county to county officers and deputies are to be the "full compensation for their services."

Furthermore, Attorney General opinion No. 72-75 noted the following:

"In construing Art. XVIII, §7, Idaho Constitution, the Idaho Supreme Court has consistently held that the annual salary of county officials is the only compensation allowed for services they render while acting in their official capacity, *regardless of whether the services are ordinary or extraordinary. This is true regardless of whether the extra services provided are required by law.* *McRoberts v. Hoar*, 28 Idaho 163, 152 P. 1046 (1915); *Givens v. Carlson*, 29 Idaho 133, 156 P. 1120 (1916); *Nez Perce County v. Dent*, 53 Idaho 787, 27 P.2d 979 (1933); . . ." (emphasis added)

See also *Idaho Code*, §31-3101.

It would be proper, however, for officers and deputies to request from the County Commissioners an increase in their fixed annual salaries. Cf. *Idaho Code*, §31-816. Any increases in annual salaries must be consistent with county budget constraints. *Idaho Code*, §31-1606.

It should be reiterated that *deputies* are included in Art. XVIII, §7 of the Idaho Constitution, so that county deputies too are limited to the compensation received from fixed annual salaries.

Madison County has asked whether *employees* which are neither officers nor deputies may receive additional compensation for disaster labors beyond their fixed salaries. The answer to this question requires a definition of the terms officers, deputies, and employees.

The Idaho Constitution, Art. XVIII, §4, enumerates the following positions as county officers: Commissioners, Sheriff, Treasurer, Probate Judge, Assessor, Coroner, Surveyor, and Clerk of the District Court. *Idaho Code*, §31-2001, adds Prosecuting Attorney to this list of county officers. Additionally, *Idaho Code*, §2002, lists other county officers: "The other officers of a county are one (1) constable, and such other inferior and subordinate officers as are provided for elsewhere in this code or by the board of commissioners."

The above citations from the Idaho Constitution and the *Idaho Code*, expressly enumerate county officers. *Idaho Code*, §31-2002, refers to other officers provided for elsewhere in the code or by the board of commissioners. The only other code section relevant to this opinion is *Idaho Code*, §46-1009(2). That section reads as follows:

(2) Each county shall maintain a disaster agency or participate in an

intergovernmental disaster agency which, except as otherwise provided under this act, has jurisdiction over and serves the entire county, or shall have a liaison officer appointed by the county commissioners designated to facilitate the cooperation and protection of that subdivision in the work of disaster prevention, preparedness, response and recovery.

(3) The chairman of the board of county commissioners of each county in the state shall notify the bureau of the manner in which the county is providing or securing disaster planning and emergency services. The chairman shall identify the person who heads the agency or acts in the capacity of liaison from which the service is obtained, and furnish additional information relating thereto as the bureau requires.

Idaho Code, §46-1009, subsections (2) and (3), provide the county with three choices for organization regarding disaster preparation: maintain a disaster agency, participate in an intergovernmental disaster agency, or designate a liaison officer to facilitate the cooperation and protection of that subdivision. The literal language of paragraph (2) designates only the person selected liaison as an officer. The individual who directs the disaster agency is designated in paragraph (3) merely as a *person*. Madison County has not expressly designated its Civil Defense Director as the liaison officer, but rather has consistently recognized this person as a director or coordinator of disaster and emergency preparedness within Madison County. Thus, the Madison County Civil Defense Director is not an officer within the constitutional or statutory provisions enumerated above.

The other category, deputy, generally means one who acts officially for another, a substitute for an officer, and one who has the authority of an officer. *Words and Phrases*, "Deputy" Vol. 12, pp.296-304. Although a deputy may be an assistant to an officer, the position of *deputy* is generally regarded as different in authority and function than an *assistant*. *Id.*, p.299.

Employees are those individuals who are not officers or deputies. They include administrative staff, maintenance laborers, clerical staff, and numerous others similarly assigned. It might well be concluded that all of those not enumerated as officers in chapter 20 of Title 31, or elsewhere in the *Idaho Code*, are *employees*, unless expressly designated and authorized as an officer or deputy.

The Madison County Civil Defense Director has not been expressly designated nor authorized as a county deputy. The only conclusion is that the Madison County Civil Defense Director constitutes a county employee, and not a county officer or deputy.

In summary, no provision in Idaho law has been found which under a disaster circumstance would authorize an exception to the constitutional directive in Art. XVIII, §7, Idaho Constitution, whereby county officers and deputies are to receive as their sole compensation fixed annual salaries. Since county officers are enumerated in the Constitution and the *Idaho Code*, and deputies are generally authorized to act on behalf of an officer, all those county personnel who are not expressly designated by Constitution, statute, or county boards

of commissioners as county officers or as county deputies, therefore constitute county employees. Consequently, the Madison County Civil Defense Director is not a county officer or deputy but rather a county employee. As such the Madison County Civil Defense Director, and all other county employees, are not subject to the limitations of the Idaho Constitution and *Idaho Code*, in regard to receiving extra compensation. Moreover, county officers and deputies may properly seek an increase in their fixed annual salary by making a request directly to the county commissioners. The only constraint found in Idaho law to increases in fixed annual salaries for county officials and deputies, and for additional compensation for county employees, is that of budget appropriation.

AUTHORITIES CONSIDERED:

1. Attorney General opinion No. 72-75.
2. Idaho Constitution, Art. XVIII, §§6 and 7.
3. *Idaho Code*, §§31-1605, 31-1606, 31-1608, 31-2001, 31-2002, 46-1009(2).
4. *Words and Phrases*, "Deputy", Vol. 12, pp.296-304.
5. *McRoberts v. Hoar*, 28 Idaho 163, 152 Pac. 1046 (1915).
6. *Gwens v. Carlson*, 29 Idaho 133, 156 Pac. 1120 (1916).
7. *Nez Perce County v. Dent*, 53 Idaho 787, 27 P.2d 979 (1933).

DATED This 4th day of October, 1976.

ATTORNEY GENERAL FOR IDAHO

WAYNE L. KIDWELL

ANALYSIS BY:

L. MARK RIDDOCH
Assistant Attorney General
Environment & Lands Division

ATTORNEY GENERAL OPINION NO. 76-56

TO: Mr. E. M. Walker
Chief Deputy
Latah County Sheriff's Department
Moscow, Idaho 83843

Per request for Attorney General Opinion.

QUESTIONS PRESENTED:

Under the recently-enacted amendments to the Alcoholism and Intoxication Treatment Act, House Bill No. 411,

Paragraph (a) of §39-307A provides that a person who appears to be intoxicated in a public place and to be in need of help and consents, may be taken to his home or an approved private treatment facility or health facility by a law enforcement officer.

QUESTION:

1. Is compliance to a request of this nature binding upon law enforcement or is this a matter of discretion left to the individual officer?
2. What is the officer's liability if request is denied?

Paragraph (b) of §39-307A provides that an officer will take an incapacitated person into protective custody and forthwith bring him to an approved treatment facility for emergency treatment and, if no facility is readily available, subject can be transported to an approved treatment center, but in no event to exceed twenty four (24) hours. It goes on to say an officer may take reasonable steps to protect himself but also states the officer must make all reasonable effort to protect the subject's health and welfare.

QUESTION:

- (A) Legal Definition: What is to be considered incapacitated?
- (B) What degree of blood alcohol would be necessary to protect law enforcement from false imprisonment?
- (C) What judicial authority will law enforcement have to protect itself from false imprisonment without an arrest?
- (D) What liability does law enforcement have in refusing to comply with section (B) of 39-307A?
- (E) If an officer attempts "protective custody" and is resisted or attacked by the intoxicated person, can he use the same force as required to effect an arrest?

(F) In effecting protective custody the subject assaults the officer and the officer injures the subject, what is the officer's liability without the power of arrest?

(G) If a "breach of peace" is involved by the intoxicated person, will drunkenness be a valid defense?

In short, how will a peace officer take into custody a drunk that is a threat to life, limb and property and be within the legal limits of his jurisdiction?

CONCLUSION:

The provisions within §39-307A, Idaho Session Laws, 1976, Ch. 98, p.416, which are effective January 15, 1977, permit an officer to use reasonable steps to protect himself when taking an incapacitated person into protective custody. What are "reasonable" measures by the officer will depend upon the factual circumstances of each situation and the conclusions drawn by the officer using his judgment and discretion. The officer will have to assess each situation for potential injury and danger to his safety and determine what degree of force and measure of precaution is necessary to protect himself from injury.

Using reasonable steps in protecting himself and complying with the other provisions of §39-307A, the law enforcement officer will be acting in the course of his official duties and will be entitled to an immunity from criminal and civil liability.

ANALYSIS:

In describing the general legal limits in which an officer may protect himself from intoxicated and incapacitated persons within his custody, the answers to specific questions listed in the request for an opinion illustrate the scope of authority given to law enforcement officers under §39-307A.

QUESTION: Is compliance to a request of this nature binding upon law enforcement or is this a matter of discretion left to the individual officer?

The language within §39-307A indicates that a law enforcement officer "may" assist a person appearing to be intoxicated and in need of help if that person consents to the proffered assistance. Such wording indicates that the action by the officer is discretionary.

It should be pointed out that the statute does not place upon the law enforcement officer a duty to assist an intoxicated person merely upon the request for help by that person. The officer must determine from the facts and circumstances of the situation whether the functioning of the person is so impaired by the intake of alcohol that the intoxicated person is in need of assistance. Should the officer determine that assistance is necessary and, as a result, extends an offer to help the person, consent for assistance must be given by the intoxicated person. If consent is not given then the officer has no legal duty or responsibility to assist the intoxicated person unless he is incapacitated by alcohol and, therefore, subject to protective custody under provisions of §39-307A(b).

Should consent be given to the officer's offer of help and the consent is not made by an incapacitated person or in jest, it would seem reasonable that the officer is then under an obligation by virtue of his public position to render assistance. This obligation would be similar to any other response by an officer to a situation where a citizen is in distress and in need of help. The officer must evaluate the situation and determine from the facts and circumstances the condition and need of the person intoxicated by alcohol.

QUESTION: What is the officer's liability if request is denied?

Although eleven states, including Idaho, have passed either the Uniform Alcoholism and Intoxication Treatment Act or similar provisions as contained within the Uniform Act, no case law has yet developed which interprets the scope of liability to which a law enforcement officer may be subjected for failure to provide assistance to a person intoxicated by alcohol. It would appear that the unjustified failure to assist an intoxicated person in need of help and consenting to the proffered offer of assistance by the officer may subject the officer to criminal liability for omission of a public duty or to civil liability for negligence.

QUESTION: Legal Definition: What is to be considered incapacitated?

Under provisions of §39-302(7), Idaho Session Laws 1975, Ch. 149, p.376, a person incapacitated by alcohol is one who is unconscious or has his judgment otherwise so impaired that he is incapable of realizing and making a rational decision with respect to his need for treatment.

QUESTION: What degree of blood alcohol would be necessary to protect law enforcement from false imprisonment?

Protection from a claim of false imprisonment is not conditioned upon a measurement showing a certain percentage of alcohol within the blood stream. In essence, the officer must use his judgment in determining the condition of a person under the influence of alcohol. As the first phrase of this section indicates, the officer is called upon to evaluate the situation from the appearance of the person and any other factual information gained from observations and questioning of the subject. If the officer reasonably concludes that the person is incapacitated by alcohol, the law permits the officer to take that person into protective custody and detain him for a period of time while treatment is afforded. The new legislation provides that the officer must make every reasonable effort to protect the subject's health and safety and may take reasonable steps to protect his own safety. Section 39-307A(f) affords legal protection for the officer if he acts in compliance with the provisions of this new law.

QUESTION: What judicial authority will law enforcement have to protect itself from false imprisonment without an arrest?

As §39-307A(b) provides, protective custody is not accomplished by arresting the incapacitated person. An arrest is not authorized except in circumstances within provisions of §39-310, Idaho Session Laws 1975, Ch. 149, p.380. Judicial

authority to protect the officer from a false imprisonment charge is therefore unnecessary as a result of the language within §39-307A(f). Compliance with the provisions of the statute will insulate the law enforcement officer from false imprisonment claims.

"Protective custody under (b) is similar to the way in which the police provide emergency assistance to other ill people, such as those in accidents or those who have sudden heart attacks. It is a civil procedure and no arrest record or record which implies a criminal charge is to be made. Since the police officer may sometimes have to decide whether a man who refuses help appears to be incapacitated by alcohol or because of some other reason, (§39-307A(f)) protects the policeman should his conclusion, made in good faith, be incorrect. It provides that he cannot be held criminally or civilly liable for false arrest or imprisonment as long as he is acting in compliance with this section. Willful malice or abuse, however, would not be considered to be in compliance with this section of the Act." Official Comments, Uniform Alcoholism and Intoxication Treatment Act, *Handbook of the National Conference of Commissioners on Uniform State Laws*, pp.168-169 (1971).

QUESTION: What liability does law enforcement have in refusing to comply with section (B) of 39-307A?

Paragraph (f) of that section provides that an officer complying with this section is deemed to be acting in the course of his official duties and is not criminally or civilly liable. By implication, therefore, the converse of that section provides that an officer refusing to comply is not acting in the course of his official duties and is not immune from criminal or civil liability. The extent of liability is not easily definable because the question of liability will depend upon the facts of each situation. There are, however, some general observations that can be made. Should the officer refuse to comply with provisions within paragraph (b) of §39-307A, the officer may be subjected to potential criminal charges of omission of a public duty, false imprisonment, assault, and battery. Within the civil law, claims of false imprisonment, assault, battery, violation of civil rights, and negligence are potential areas of liability.

QUESTION: If an officer attempts "protective custody" and is resisted or attacked by the intoxicated person, can he use the same force as required to effect an arrest?

Yes. Under §19-610, *Idaho Code*, an officer may use all necessary means to effect the arrest of a person fleeing or forcibly resisting an arrest. Under Idaho case law, however, that statute has been interpreted to mean that an officer making an arrest must not subject the person arrested to any more force or restraint than is necessary for the arrest and detention of the subject. *Anderson v. Foster*, 73 Idaho 340, 252 P.2d 199 (1953). Under the Alcoholism and Intoxication Treatment Act, an officer taking an incapacitated person into protective custody may use reasonable steps to protect himself.

Under both provisions, the facts and circumstances of the situation will determine which measures and degree of force will be necessary to effectuate

an arrest or protect the officer from injury. Therefore, the same standard for measuring "reasonableness" will apply in each situation.

QUESTION: In effecting protective custody the subject assaults the officer and the officer injures the subject, what is the officer's liability without the power of arrest?

Whether the officer will become legally responsible for injuring the subject will depend upon the specific action taken by the officer to protect himself and whether that action was reasonable under the circumstances. As stated before, the officer is permitted to use reasonable means to protect himself. If this action is determined to be reasonable, it would seem by the language of the statute that no criminal or civil action could be maintained against the officer for those injuries sustained by the incapacitated person. Should the officer's action be unreasonable, however, the statutory protections from legal responsibility would be destroyed. The potential liability from civil or criminal actions is difficult to enumerate but, as previously discussed, several types of actions may be sources of potential liability such as false imprisonment, assault, violation of civil rights, etc.

QUESTION: If a "breach of peace" is involved by the intoxicated person will drunkenness be a valid defense?

Generally voluntary intoxication is no defense to a criminal act. Section 18-116, *Idaho Code*. Intoxication has a bearing on criminal responsibility only when the trier of fact determines that the defendant was unable to form the requisite intent to commit the criminal offense. *State v. Gomez*, 94 Idaho 323, 487 P.2d 686 (1971).

In conclusion, the Alcoholism and Intoxication Treatment Act requires a law enforcement officer to judge the condition of a person under the influence of alcohol and determine if that person needs assistance to his home or treatment facility or needs protective custody for treatment. The officer's determination should be based upon reason and sound judgment, and his actions should be in accordance with provisions of the recent legislation. Compliance with the statute will protect the officer from both criminal and civil liability for his acts done in the course of his official duties.

AUTHORITIES CONSIDERED:

1. Idaho Session Laws 1976, Ch. 98, pp.416-419.
2. Idaho Session Laws 1975, Ch. 149, pp.376 and 380.
3. Section 18-116, *Idaho Code*.
4. Section 19-610, *Idaho Code*.
5. *Anderson v. Foster*, 73 Idaho 340, 252 P.2d 199 (1953).
6. *State v. Gomez*, 94 Idaho 323, 487 P.2d 686 (1971).

7. Official Comments, Uniform Alcoholism and Intoxication Treatment Act, *Handbook of the National Conference of Commissioners on Uniform State Laws*, pp.168-169 (1971).

DATED This 7th day of October, 1976.

ATTORNEY GENERAL FOR IDAHO

WAYNE L. KIDWELL

ANALYSIS BY:

JAMES F. KILE
Assistant Attorney General
Criminal Justice Division

ATTORNEY GENERAL OPINION NO. 76-57

TO: Jenkin L. Palmer, Chairman
Idaho State Tax Commission
P. O. Box 36
Boise, ID 83722

Per request for Attorney General Opinion.

QUESTION PRESENTED:

Can the Idaho State Tax Commission require an Indian retailer, selling cigarettes to non-Indians on reservation lands, to pre-collect the tax imposed on the use and consumption of cigarettes by non-Indians pursuant to *Idaho Code* §63-2503?

CONCLUSION:

Under the present language of the Idaho cigarette taxing statute, the Idaho State Tax Commission cannot require Indians, selling cigarettes to non-Indians on reservation lands, to pre-collect the tax imposed on the use and consumption of cigarettes by non-Indians pursuant to *Idaho Code* §63-2503.

ANALYSIS:

The first cigarette tax in Idaho was enacted by the legislature in 1945. The tax first imposed was levied upon, "the retail sale of cigarettes." In 1973, the Idaho Supreme Court decided *Mahoney v. State Tax Commission*, 96 Idaho 187, 524 P.2d 187 (1973). The Court confronted the issue of whether the Tax Commission could levy the state's cigarettes sales tax upon on-reservation cigarette sales by Indians to non-Indians. The Court, citing Article I, Section 8, Clause 3 of the United States Constitution, held that the Commerce Clause precluded the imposition of this tax. In its rationale, the court concluded the state was attempting to impose a tax on the *sales* (emphasis added) occurring within the boundaries of the Indian reservation, an assumption of power by the state the Justices felt was precluded by the Commerce Clause.

Following the *Mahoney* decision, the legislature in 1974 completely revised the cigarette taxing statute. The law was amended to include not only a tax upon the retail sale of cigarettes but also on "the storage, use, consumption, handling, distribution or wholesale sale of cigarettes." The 1974 amendments made other substantive changes. Prior to 1974, every wholesaler and retailer was responsible for the administration and collection of the cigarette tax. The Tax Commission imposed it by selling stamps to each providing compensation to both for the work incurred in affixing the stamps to the individual cigarette packages. The 1974 amendments, however, changed the method of collection. Under §63-2502, qualified wholesalers were exclusively designated to affix the tax stamps and held solely responsible for the ultimate collection and payment of the tax revenues to the Commission. All retailers were specifically excluded from administration and collection of this tax. Accordingly, when the 1974 amendments broadened the definition of the word "tax" to include use and consumption, it narrowed the collection procedure by requiring only

wholesalers to collect the tax.

§63-2503 of the revised statute prohibits wholesalers from selling or delivering cigarettes to retailers who are not properly licensed to distribute cigarettes under the act. This provision is unenforceable when applied to Indians, however, who must be characterized as "retailers" under the definition contained in §63-2502. Indians who sell or purchase cigarettes on reservation land are clearly exempt from the imposition of any cigarette or licensing tax. The state lacks jurisdiction to impose such a tax upon reservation Indians under the United States Supreme Court rulings in *McClanahan v. Arizona State Tax Commission*, 411 U.S. 164, 93 S.Ct. 1257 (1973); and *Kennerly v. District Court*, 400 U.S. 423, 91 S.Ct. 480 (1971). The Court in *McClanahan, supra.*, quoted with approval "a leading text on Indian problems" as summarizing "the relevant law."

State laws generally are not applicable to tribal Indians on an Indian reservation except where Congress has expressly provided that state law shall apply. It follows that Indians and Indian property on an Indian reservation are not subject to state taxation except where Congress has expressly provided that state law shall apply. It follows that Indians and Indian property on an Indian reservation are not subject to state taxation except by virtue of express authority inferred upon the state by act of Congress. U.S. Department of Interior, *Federal Indian Law*, 845 (1958) 411 U.S. at page 170-174.

While Idaho has assumed limited civil jurisdiction over some reservation Indians in enacting §67-5101, et al., the power to impose cigarette and licensing taxes is not among the categories of assumed civil jurisdiction by the state.

With this background in mind, it must be determined whether the Tax Commission can now require Indians, as retailers selling cigarettes to non-Indians on reservation lands, to precollect taxes imposed on the use and consumption of cigarettes by non-Indians pursuant to *Idaho Code* §63-2503.

The United States Supreme Court recently reviewed a Montana case wherein the District Court had held that the Montana taxing authorities could require Indian retailers to precollect the taxes imposed upon the consumption of cigarettes by non-Indians. The Court in *Moe, et. al. v. Confederated Salish & Kootenai Tribes of the Flathead Reservation*, et al., 44 USLW 4535 (April 27, 1976), found the state's requirement that Indian tribal sellers collect the tax validly imposed on non-Indians to be a minimal burden designed to avoid the likelihood that in its absence non-Indians purchasing from the tribal seller would avoid payment of a concededly lawful tax. The Court said:

We therefore agree with the district court that to the extent that the smoke shops sell to those upon whom the state has validly imposed a sales or excise tax with respect to the article sold the state may require the Indian proprietor simply to add the tax to the sales price and thereby aid the state's collection and enforcement thereof. *Id.*, at page 4541.

The tax collection procedure reviewed by the Montana District Court and

upheld by the Supreme Court was markedly different than the procedure contained in the revised Idaho cigarette taxing statute enacted in 1974. 84-5606 R.C.M. 1947 provides in part:

(1) All taxes paid pursuant to the provisions of this section shall be conclusively presumed to be direct taxes on the retail consumer pre-collected for the purpose of convenience and facility only. When the tax is paid by any other person (Indians) such payment shall be considered an advance payment and shall be added to the price of the cigarette and recovered from the ultimate consumer or user. (Emphasis added)

Further, 84-5606.10 R.C.M. 1947 stated:

The tax inferred in this act shall mean the tax imposed by §64-5606 R.C.M. 1947. The full face value of the insignia or tax shall be added to the cost of the cigarette and recovered from the ultimate consumer or user. (Emphasis added)

Unlike the Idaho statute, Montana's law specifically required Indian retailers to collect the tax and add it to the cost of cigarettes sold to the non-Indian consumer. Idaho's law, quite to the contrary, specifically excludes retailers from imposing and collecting the sales or excise tax, but rather, requires all wholesalers to precollect and pay the tax by virtue of §63-2506 from all retailers to whom it sells under §63-2503.

The real issue presented by the wording of our taxing structure becomes whether the Tax Commission can require a wholesaler to precollect taxes on cigarettes he sells to Indians who have established retail sales to non-Indians on reservation lands. Since Indians are exempt from cigarette sales and licensing taxes for cigarettes sold and purchased by Indians on reservation lands under *Mahoney, supra.*, and the language of the recent *Moe* decision, too, such a requirement would, in reality, require Indians to distinguish between sales made to Indians and non-Indians before the sales were, in fact, consummated. This would be an unwarranted administrative burden impossible to comply with since no method could be devised to accurately measure what percentage of cigarettes sold at the wholesale level to retailer Indians would ultimately be sold and consumed by non-Indians.

By simply requiring an Indian seller to collect the tax from non-Indian users who purchase cigarettes, the state would not be imposing a tax burden on Indians residing on the reservation; nor would it infringe in any way upon tribal self-government. It is also quite reasonable to infer that the smoke shops we are most concerned with in resolving this issue were established primarily to sell cigarettes to prospective customers passing by the reservation on adjacent highways and others arriving from neighboring communities seeking to purchase cigarettes at a cost substantially below the retail price of others selling off the reservation. It would, however, be unreasonable to conclude that all cigarette sales in the smoke shops resulted in purchases by non-Indians living off the reservation.

The Supreme Court in *Moe, supra.*, recognized that without the simple requirements of having the Indian retailer collect the sales tax from non-Indian

purchasers there would result wholesale violations of the law, virtually unchecked by those falling into the class. But there must be some statutory authority requiring the precollection at retail level before the state can expect and demand Indians within its jurisdiction to collect and pay over the imposed tax on the use and consumption of cigarettes they sell to non-Indians.

Prior to 1974, Idaho law specifically authorized retailers to administer and collect the cigarette sales tax. The subsequent amendments, however, specifically excluded the retailer from imposing and collecting this tax. Without specific language, the Tax Commission cannot now order one segment of the retail class to impose and collect the tax simply because it *believes* that to be the will and desire of our legislature when it expanded the definition of the word "tax" to include use and consumption.

Because of the Supreme Court's holding in *Moe, supra.*, there is no longer doubt as to a state's right to tax the use and consumption of cigarettes sold by Indians to non-Indians on reservation lands and to require that the Indian retailer be responsible for its collection. The Idaho Statute, however, lacks necessary, specific language to allow the Tax Commission to require this collection by Indian retailers.

Nor is this opinion in conflict with the Washington case, *Tonasket v. State of Washington*, 84 Wash. 2d 164, 525 P.2d 744 (1974). There, the Washington Supreme Court held its Tax Commission could extend existing civil excise laws to Indian retailers who sold to non-Indian purchasers. In so holding, the Court emphasized that section of the Washington statute which stated in part:

It is the intent and purpose of this chapter that *the tax shall be imposed at the time and place of the first taxable event occurring within this state.* (Emphasis added) Revised Code of Washington, 82.24.080, *Id.* at page 7 4.

The Court went on to note:

It would appear logically to conclude that the first taxable event would be the resale of cigarettes to a non-Indian at which time Mr. Tonasket could be required to affix the tax stamp and collect the amount of tax from the non-Indian consumer. *Id.*, at page 7 4.

Unlike the Washington statute, the Idaho law is silent as to when the excise tax is actually imposed. Arguably, it could be advocated that the legislature intended to impose the cigarette tax upon the retailer when he purchased his cigarette supply from the wholesaler with the intent to resell them to the consumer. But with respect to Indian retailers, again, there is no method to determine which cigarettes the wholesaler must impose the tax upon because, at this point, the Indian retailer is unable to state with any degree of accuracy which cigarettes of the total purchased will be sold to non-Indians subject to the tax or Indians living on reservations and allowed a total tax exemption. For the state of Idaho to require the payment of excise taxes levied on the use and consumption of cigarettes by Indian retailers selling to non-Indian consumers on reservation land, the statute must be amended.

The statute as drafted enables the many inequities acknowledged by the Supreme Court in *Moe, supra.*, to go unchecked. Non-Indians avoid payment of a lawfully imposed tax without the Indian retailer collecting the tax; it encourages violation of the excise tax law by non-Indian consumers. The Indian seller profits from increased sales at the expense of non-Indian retailers who must pay the imposed tax when purchasing his supply of cigarettes from the wholesaler. The fact that the statute is inequitable does not, however, provide authority for requiring Indian collection of excise taxes.

AUTHORITIES CONSIDERED:

1. *Idaho Code* §§63-2503; 63-2506, as amended in 1972.
2. Idaho cases: *Mahoney v. State Tax Commission*, 96 Idaho 59, 524 P.2d 187 (1973).
3. Other cases: *McClanahan v. Arizona State Tax Commission*, 411 U.S. 164, 93 S.Ct. 1257 (1973); *Kennerly v. District Court*, 400 U.S. 423, 915 S.Ct. 480 (1971); *Tonasket v. State of Washington*, 84 Wash. 2d 164, 525 P.2d 744 (1974); *Moe, et al. v. Confederated Salish & Kootenai Tribes of the Flathead Reservation, et al.*, 44 USLW 4535 (April 27, 1976).
4. Revised Code of Montana, 1947, Sections 84-5606; 84-5606.10.

DATED this 12th day of October, 1976.

ATTORNEY GENERAL OF THE STATE OF IDAHO

WAYNE L. KIDWELL

ANALYSIS BY:

CLINTON E. JACOB
ASSISTANT ATTORNEY GENERAL

ATTORNEY GENERAL OPINION NO. 76-58

TO: Mrs. Mary Kautz
Clerk of the District Court
Washington County
256 East Court Street
Weiser, Idaho 83672

Per Request for Attorney General Opinion.

QUESTIONS PRESENTED:

You have asked for an opinion concerning the following matter. In July, 1976, petitions were presented to your county with signatures thereon representing fifty-one percent (51%) of those voting in the last gubernatorial election relating to an area for which there was a request to form a library district under Section 33-2722, *Idaho Code*. These signatures were checked by your office to see that the persons petitioning were registered voters in the area involved and it was found that there were registered voters petitioning for the formation of the district representing fifty-one percent (51%) of the persons voting in the last gubernatorial election in relation to the area involved. The Board of County Commissioners then held a hearing upon the matter. A day or two after the hearing, the board of county commissioners made a resolution describing the boundaries of the proposed district, finding that the proposed district would be in keeping with the declared public purpose stated in Section 33-2701, *Idaho Code*. Further, the County Commissioners resolved and found that due to the ambiguity and uncertainty of statutory requirements and questions raised at the public hearing, an election was to be held as to formation of the proposed library district under Section 33-2705, *Idaho Code*. You request an opinion as to whether or not it is legal in this situation for the County Commissioners to hold an election to determine whether the library district shall be formed or not, since the library district petition was made under Section 33-2722, *Idaho Code*.

CONCLUSION:

Section 33-2722, *Idaho Code*, as it has read since 1967, provides for filing of petitions and then refers back to Section 33-2704A(a), (b), and (c), *Idaho Code*, and provides for public hearing as set forth in Section 33-2704A, *Idaho Code*. This section provides for notice of hearing and that any interested persons may appear at the hearing and be heard in regard to the petition and all other matters in regard to the creation of a library district. It then goes on to say that the Board of County Commissioners shall make an order within five (5) days either with or without modification based upon the public hearing and their determination of whether the proposed district could be in keeping with the declared public policy of the library district law. This provision thus provides for discretionary action by the board of county commissioners in relation to the formation of the district. It provides, in effect, that they may modify the petition and either form or not form the district.

Because of the deletion of the wording as it originally appeared in Section 33-2722, *Idaho Code*, providing that formation of a district under that section was to be without an election, it is not clear since the 1967 amendment as to

whether a district may be formed without an election. The county commissioners may order an election in regard to the formation of a library district.

ANALYSIS:

In 1965, the Idaho legislature provides in Chapter 255 of the 1965 Idaho Session Laws, section 5, page 651, 652, and 653, as follows:

Section 5. That Chapter 27 of Title 33, Idaho Code, be, and the same is hereby amended by adding two new sections thereto following Section 33-2721, to be known and designated as Section 33-27322 and Section 33-2723, and to read as follows:

33-2722. Alternative Methods of Organizing a Library District. — (In lieu of organizing a library district by election as hereinbefore authorized, a library district may be established, without an election, in any area of a county, excluding the area of any governmental unit maintaining a tax-supported public library,) ((by resolution of the board of county commissioners adopted by a majority affirmative vote of such board at a regular or special meeting;)) or the organization of a library district may be initiated upon a petition or petitions, signed by resident electors equal in number of fifty-one per cent (51%) of those voting in the last gubernatorial election in the area involved. (Brackets added for purposes of this opinion.)

Each petition shall be verified by an elector, which verification shall state that the affiant knows that all of the parties whose names are signed to the petition are electors of the proposed district and that their signatures to the petition were made in his presence. The verification may be made before any notary public.

Each petition shall give the name of the proposed district and describe the boundaries thereof.

On the filing with the clerk of the board of county commissioners of the county in which the proposed district is located, of such petition or petitions requesting the creation of a library district, the board of county commissioners shall thereupon by resolution declare that a petition to create a library district has been filed with the board and shall direct the clerk to give notice by publication in a newspaper of general circulation printed within the county, once a week for not less than two weeks, to the effect that a hearing on the petition to create a library district within the stated boundaries will be held by the board of county commissioners on a date named in such notice. The date of the hearing shall be not less than three weeks, nor more than six weeks, from the date of the first publication of such notice.

The board shall meet on the day fixed, and canvass the petition or petitions for the purpose of determining if such petition or petitions have been signed by the required number of electors, at which time any elector residing within the area concerned may appear and object to the content of the petition or the genuineness of the signatures, or

object on the ground that the required number of electors has not signed the petition, or may make any other objections as to the legality of the proceedings of the board.

After considering the petitions and hearing and considering the objections, if any, the board shall, if it deems the petitions in proper form and signed by the requisite number of electors, create a library district by an order duly spread upon its minutes.

Within five days from entry of the order creating a library district, the board of county commissioners shall appoint the members of the first board of trustees, who shall serve until the next annual election of trustees and until their successors are elected and qualified.

A library district established under this section shall in all succeeding matters function in accordance with provisions regarding the government of library districts as prescribed in this chapter.

There were then no further changes in Section 33-2722, *Idaho Code*, until the regular session of 1967, although there had been three or four extraordinary sessions of the Legislature between 1965 and 1967. By Chapter 93 of the 1967 Idaho Session Laws, pages 200, 201, and 202, Section 33-2722, *Idaho Code*, was amended to read as follows:

SECTION 4. That Section 33-2722, Idaho Code, be, and the same is hereby amended to read as follows:

33-2722. Alternate Method Of Organizing a Library District. — *An alternate method of* — organization of a library district may be initiated upon a petition or petitions, signed by resident electors equal in number to fifty-one per cent (51%) of those voting in the last gubernatorial election in the area involved.

Each petition shall be verified by an elector which verification shall state that the affiant knows that all of the parties whose names are signed to the petition are electors of the proposed district and that their signatures to the petition were made in his presence. The verification may be made before any notary public.

Each petition shall give the name of the proposed district and describe the boundaries thereof.

On the filing with the clerk of the board of county commissioners of the county in which the proposed district is located, of such petition or petitions requesting the creation of a library district, the board of county commissioners shall thereupon by resolution declared that a petition to create a library district has been filed with the board and shall ~~thereupon comply with subparagraphs a. and b., section 33-2704A. direct the clerk to give notice by publication in a newspaper of general circulation printed within the county, once a week for not less than two (2) weeks, to the effect that a hearing on the petition to create a library district within the stated boundaries will be held by the board of~~

~~county commissioners on a date named in such notice. The date of the hearing shall be not less than three (3) weeks, nor more than six (6) weeks, from the date of the first publication of such notice.~~

~~The board shall meet on the fixed, and canvass the petition or petitions for the purpose of determining if such petition or petitions have been signed by the required number of electors, at which time any elector residing within the area of concerned may appear and object to the content of the petition or the genuineness of the signatures, or object on th (sic) ground that the required number of electors has not signed the petition or may make any other objections as to the legality of the proceedings of the board.~~

Upon the date fixed for the hearing the board of county commissioners shall canvass the petition or petitions for the purpose of determining that such petition or petitions have been signed by the required number of resident electors. The county commissioners shall make, after the hearing, a resolution in compliance with subparagraph c, section 33-2704A; such resolution shall be duly recorded and complete the creation of the district.

~~After considering the petitions and hearing and considering the objections, if any, the board shall, if it deems the petitions in proper form and signed by the requisite number of electors, create a library district by an order duly spread upon its minutes.~~

Within five (5) days from entry of the order creating a library district, the board of county commissioners shall appoint the members of the first board of trustees, who shall serve until the next annual election of trustees and until their successors are elected and qualified.

A library district established under this section shall in all succeeding matters function in accordance with provisions regarding the government of library districts as prescribed in this chapter.

You will notice that the material appearing in single brackets from the 1965 enactment of Section 33-2722, and the material appearing in double brackets in the same law was all deleted in the 1967 amendment to Section 33-2722, *Idaho Code*, but that the only crossed-out words appearing in the 1967 amendment are the words "or the." The title of Chapter 93 of the 1967 Session Laws is not of much help in this matter. The pertinent portion reads as follows:

... AMENDING SECTION 33-2722, IDAHO CODE, RELATING TO ALTERNATIVE METHODS OF ORGANIZING A LIBRARY DISTRICT, BY DELETING THE FIRST ALTERNATIVE METHOD SET FORTH IN SAID SECTION, AND BY PROVIDING IN THE ALTERNATE METHOD REMAINING, FOR NOTICE, PUBLIC HEARING, CANVASS OF PETITIONS AND RESOLUTION BY THE COUNTY COMMISSIONERS AS PROVIDED IN SECTION 33-2704A; ...

The title only spells out that the first method of organizing a district is to be

deleted, not that material relating to the fact that no election needed to be held. The alternate method allowed the county commissioner themselves to form a district without petition or election. It appears that the beginning phrase of Section 33-2722, *Idaho Code*, as it was originally enacted in 1965 which reads as follows:

In lieu of organizing a library district by election as hereinbefore authorized the library district may be established, without an election, in any area of the county, excluding the area of any governmental unit maintaining a tax-supported public library, . . .

which related to and specifically spelled out that this alternative method for forming a district did not include an election. Since that material has been left out as well as the first method of forming a district, it becomes somewhat unclear as to whether or not since 1967 a library district may be formed without an election. A question is raised under the Idaho Constitution, Article 3, Section 16, as to whether this deletion is expressed in the title of the Bill. It could be argued that because of this, those words included in single brackets are still part of this section.

Section 33-2722, *Idaho Code*, refers back to a new provision passed in 1967 which is Section 33-2704A, *Idaho Code*. Section 33-2704A(a), *Idaho Code*, provides first for notice of a public hearing to be held by the commissioners in relation to the formation of a library district. Subdivision (b) of that section provides that the notice is to state that a library district is proposed and give the boundaries and the name of the district and provide that the resident electors may appear and be heard at the hearing in regard to the form of the petition, the genuineness of the signatures on the petition, the legality of the proceedings and *any other matters in regard to the creation of the library district*. Subdivision (c) of that section provides that within five (5) days after the hearing, the board of county commissioners are to make an order in relation to the formation of the library district, *with or without modification of the petition based upon the public hearing and their determination of whether the public policy of the State of Idaho will be furthered by the formation of such a district*. Section 33-2705, *Idaho Code*, which was also extensively amended in the 1967 amendment to this Chapter, provides as follows:

Conduct of election. — Upon the county commissioners having made the order referred to in subparagraph c, section 33-2704A, the clerk of the board of county commissioners shall cause to be published a notice of an election to be held for the purpose of determining whether or not the proposed library district shall be organized under the provisions of sections 33-2704 and 33-2704A. The date of this election shall be not later than sixty (60) days after the issuance of the above mentioned order. Whenever more than one petition is presented to the county commissioners calling for an election to create library districts, the first presented shall take precedence. Notice of said election shall be given, the election shall be conducted, and the returns thereof canvassed as provided for elections for the consolidation of school districts. The ballot shall contain the word "(Name) Library District—Yes" and "(Name) Library District—No," each followed by a box wherein the voter may express his choice by marking a cross "X." The board of

boards of election shall make returns and certify the results to the boards of county commissioners within three (3) days after the election, and said board shall, within seven (7) days after the election, canvass the returns. If a majority of all votes cast be in the affirmative, the board shall enter an order declaring the library district established and designating its boundaries and name.

As you can see from Section 33-2705, *Idaho Code*, it is provided that after the commissioners have made the order referred to in Section 33-2704A, *Idaho Code*, they shall cause to be published a notice of election to be held for the purpose of determining whether or not the proposed library district shall be organized under Sections 33-2704, *Idaho Code*, and 33-2704A, *Idaho Code*. Because of Section 33-2705, *Idaho Code*, it could be seriously argued that there must be an election after the hearing held under Section 33-2704A, *Idaho Code*. Thus, two questions arise. The first one is as to the propriety of leaving out the single bracketed material from Sections 33-2722, *Idaho Code*, as originally enacted without having placed it into the law and crossed it out as required by the rules of the Idaho Legislature. The bracketed material relates to the whole section, not just the first alternative method of formation of a library district, and not providing for this deletion in the title of the 1967 act. The second question is as to whether or not the formation of the library district under Section 33-2722, *Idaho Code*, has required an election or not since 1967 when the section was amended. Both of these questions are open to considerable debate and no cases exactly in point have been found regarding them. For these reasons, it is suggested: (1) that the county commissioners, since they have discretion in this matter for formation of a district, may required an election, the law being silent as to whether they may do so under the alternate method of formation of a district, and (2) we feel that it may be wise in this situation because of the doubts in the law to hold an election before the formation of such a district.

The rules of the Senate and House of Representatives and the Joint Rules all provide for including and crossing out all material to be deleted from an amendment to a law, (see *Authorities Considered*).

A copy of this opinion will be sent to Miss Miller, the State Librarian. Perhaps corrective legislation should be proposed to the 1977 Idaho Legislature to correct this matter and possibly to validate formation of library districts formed since 1967.

AUTHORITIES CONSIDERED:

1. Permanent Idaho Rules of the Senate, Rule No. 18.
2. Permanent Idaho Rules of the House of Representatives, Rule No. 28.
3. Manual for Preparation of Proposed Legislation attached to Permanent Joint Rules of the Idaho Legislature.
4. *Idaho Code*, Sections 33-2701, 33-2704A, 33-2705, and 33-2722.
5. Idaho Session Laws, 1965, Chapter 255.

6. Idaho Session Laws, 1967, Chapter 93.
7. S.C.R. No. 1, 1965 Idaho Session Laws, page 916 (adopting rules for 38th Regular Session).
8. H.C.R. 42, p. 769, 1975 Idaho Session Laws.

DATED This 20th day of October, 1976.

ATTORNEY GENERAL OF IDAHO

WAYNE L. KIDWELL

ANALYSIS BY:

WARREN FELTON
Deputy Attorney General

ATTORNEY GENERAL OPINION NO. 76-59

To: Gerald A. Ingle, Chairman
Latah County Board of County Commissioners
P. O. Box 8068
Moscow, Idaho 83843

Per Request for Attorney General Opinion

QUESTIONS PRESENTED:

(1) Does the Idaho Building Code Advisory Act, (I.C. §39-4101 *et seq.*), supersede the building code ordinance previously adopted by Latah County, Ordinance No. 10?

(2) If so, will Latah County have to re-adopt their building code ordinance to require building permits for agricultural buildings?

CONCLUSIONS:

(1) The Idaho Building Code Advisory Act supersedes the Latah County building code ordinance only to the extent that the two enactments are in conflict.

(2) Insofar as the Latah County ordinance is consistent with the provisions of the Building Code Advisory Act, it may be enforced without re-enactment. However, to the extent that the ordinance is inconsistent with the Act, in requiring building permits for agricultural buildings, Latah County may not enforce such inconsistent provisions, nor may such inconsistent provisions be re-enacted by an amendment to the ordinance.

ANALYSIS:

Your questions are directed towards the problem of whether Latah County can enforce a building code which by its terms is stricter than the Idaho Building Code Advisory Act. The Latah County ordinance was adopted some two years before the effective date of the Idaho Building Code Advisory Act as it applies to local governmental units. Specifically, the problem is that the Latah County ordinance, Ordinance No. 10, applies to all construction within the County, whereas the Building Code Advisory Act, in §39-4103(4), exempts farms from the coverage of the Act. A copy of the Latah County ordinance is attached to this Opinion for reference.

It is clear that it was within the power of Latah County to adopt an ordinance relating to building code enforcement. §31-714, *Idaho Code*, relating to the powers of the board of county commissioners, gives them the authority to

“ . . . pass all ordinances and make all rules and regulations, not repugnant to law, necessary for carrying into effect or discharging the powers and duties conferred by the laws of the State of Idaho, and such as are necessary or proper to provide for the safety, promote the

health and prosperity, improve the morals, peace and good order, comfort and convenience of the county and the inhabitants thereof, and for the protection of property therein, and may enforce obedience to such ordinances with such fines or penalties as the board may deem proper”

In similar fashion, the Idaho Constitution, in Article 12, Section 2, gives counties the authority to

“ . . . make and enforce, within its limits, all such local police, sanitary and other regulations as are not in conflict with its charter or with the general laws.”

It has been repeatedly held by the courts that such constitutional or statutory authorization as set out above is broad enough to authorize the passage of building code ordinances. See 7 McQuillan, *Municipal Corporations*, §24.505(1969). (citations omitted)

However, it has been held that, despite such constitutional or statutory authorization for a city or county to pass such an ordinance, such ordinance may be partially or totally invalidated by the subsequent passage of an inconsistent state statute.

See 6 McQuillan *Municipal Corporations* §21.34(1969) (citations omitted). There does appear to be conflicting case authority as to whether the general rule set out above applies in the area of building code enforcement. The case of *Coyle v. Alland & Co., Inc.*, 158 Cal. App. 2d 664, 323 P.2d 102 (1958), held that state law does not necessarily preclude a municipal corporation from passing a building code ordinance going into more detail and including more severe regulation than the state law. However, other cases have held that the state may preempt the field of building code regulation, in which case the state statute would control in the case of conflict. See, e.g., *Kaveny vs. Board of Com'rs of Town of Montclair*, 69 N.J. Super. 94, 173 A. 2d 536 (1961). The majority rule would appear to be that, if a state has preempted a particular field of regulation, then local regulation and enforcement is still valid if it does not add or vary the terms of the state statute. Therefore, a close examination of the state statute is necessary.

One important consideration in statutory interpretation is whether the statute in question was intended to apply retroactively. It is the law in Idaho, as set out in I.C. §73-101, that no statute shall be retroactive unless it expressly so declares. Idaho case law has also permitted retrospective application of a statute if “its terms show clearly that it should operate retrospectively.” *Application of Forde L. Johnson Oil Company*, 84 Idaho 288, 372 P. 2d 135 (1962) (citations omitted). To this end, the stated legislative intent and the terms of the statute would be determinative.

The Building Code Advisory Act itself does not specifically provide for retroactive application. It does, however, evince a clear intent that all building code legislation in the state be uniform. The principal section of the Act dealing with the powers and duties of local governmental entities re building code enforcement, I.C. §39,4116(1), reads as follows:

"(l)ocal governments shall, effective January 1, 1976, comply with the codes enumerated in this act, and such codes, rules and regulations promulgated pursuant to this act, and such inspection and enforcement may be provided by the local government, or shall be provided by the department if such local government opts not to provide such inspection and enforcement . . .".

From the above section, it is apparent that the legislature intended to preserve the right of local governmental units to adopt and enforce ordinances relating to buildings and construction. A reasonable construction of the Act would also validate pre-existing ordinances which meet the requirements of I. C. §39-4116(1).

An examination of the legislative intent section of the Act further reveals the desire by the legislature that building codes be uniform throughout the state. Section 39-4101(1) of the Code sets out the following as the legislative finding:

"(u)niformity of building codes and uniformity in procedures for enforcing building codes throughout the nation and state are matters of nationwide and statewide concern and interest, in that uniformity would enhance elimination of obsolete, restricting, conflicting, duplicating and unnecessary regulations and requirements which could unnecessarily increase construction costs or retard the use of new materials and methods of installation or provide unwarranted preferential treatment to types or classes of materials or products or methods of construction".

Given the legislative intent that building codes throughout the state must be uniform, it is apparant that local building code ordinances are invalid to the extent that they conflict with the Building Code Advisory Act or the codes enumerated therein. Therefore, it is necessary to examine Latah County Ordinance No. 10 to determine the existance or degree of conflict.

The principal code in question here is the Uniform Building Code, 1973 edition, as supplemented, which is compiled by the International Conference of Building Officials. By its terms, the Uniform Building Code applies to all buildings and construction. Uniform Building Code, §103. This was the building code adopted by Latah County Ordinance No. 10 (See Section 10-1.01). The Building Code Advisory Act, in I.C. §39-4109(1), also adopted the Uniform Building Code, except for Chapter 15 of the Code as it relates to agricultural buildings as defined in Section 402 of the code. Section 402 defines an agricultural building as

" . . . a structure designed and constructed to house farm implements, hay, grain, poultry, livestock or other horticultural products. This structure shall not be a place of human habitation or a place of employment where agricultural products are processed, treated or packaged; nor shall it be a place used by the public."

The Act itself also contains a section exempting farms from the coverage of the Act, defining "farm" as "an agricultural unit of five (5) acres or more". I.C. §39-4103(4) The Idaho Department of Labor and Industrial Services' Building

Safety regulations, in Section 07-30-112, further elaborates on the definition of "farm" by saying that it includes

" . . . a unit of land of five (5) acres or more upon which the owner resides, and from which the owner or occupant receives his principal income and livelihood from the growing or raising of, but not the commercial processing of, agricultural, horticultural or viticultural commodities, and shall include stock, dairy, poultry, fruit, and fur-bearing animals."

The broad farming exemption contained in the above section must be construed in light of the fact that the Uniform Building Code was adopted by the Act except for provisions relating to agricultural buildings. Therefore, it would be the opinion of this office that the exemption section should be given a narrow construction, and that Latah County Ordinance No. 10 could be enforced as to construction on farms, except for agricultural buildings as defined in Section 402 of the Uniform Building Code.

As the Act neither expressly nor by implication repealed local building code ordinances which are consistent with the Act, it is the opinion of this office that it would not be necessary to readopt the ordinance. However, the ordinance could not be applied to types of construction exempted by the Act, as discussed above, nor could an amendment to the ordinance properly be passed which would provide for the application of the building code to types of construction exempted by the Act.

AUTHORITIES CONSIDERED:

(1) *Idaho cases: Application of Forde L. Johnson Oil Company*, 84 Idaho 288, 372 P. 2d 135 (1962).

(2) *Idaho statutes: Idaho Code*, Sections 39-4103(4), 31-714, 73-101, 39-4116(1), 39-4104(1), 39-4109(1).

(3) *Other Idaho authority: Idaho Constitution*, Article 12, Section 2; *Idaho Department of Labor and Industrial Services Reg. 07-30-112*.

(4) *Other authority: Latah County Ordinance No. 10*; 7 McQuillan, *Municipal Corporations*, §24-505(1969); 6 McQuillan, *Municipal Corporations*, §21.34(1969); *Coyle v. Alland & Co., Inc.*, 158 Cal. App. 2d 664, 323 P. 2d 102(1958); *Kaveny vs. Board of Com'rs of Town of Montclair*, 69 N.J. Super. 94, 173 A. 2d 536 (1961); *Uniform Building Code*, 1973 ed., §§ 103, 402.

Dated this 25th day of October, 1976.

ATTORNEY GENERAL OF THE STATE OF IDAHO

WAYNE L. KIDWELL

ANALYSIS BY:

THOMAS H. SWINEHART
ASSISTANT ATTORNEY GENERAL

ATTORNEY GENERAL OPINION NO. 76-60

TO: Honorable James E. Risch
Idaho State Senate, District No. 18
Route No. 3
Boise, Idaho 83705

Per Request for Attorney General Opinion.

QUESTION PRESENTED:

"The Idaho Department of Employment appears to have taken an inconsistent position in interpreting *Idaho Code* §72-1328(a). The Idaho Department of Employment considers vacation pay and severance pay for purposes of levying the unemployment tax; on the other hand, the Department does not consider vacation pay and severance pay wages within (the) legislation of (§) 72-1328(a) when determining eligibility (to draw unemployment benefits). This appears to be patently inconsistent on its fact."

" . . . I would appreciate an opinion from your office interpreting *Idaho Code* Section 72-1328(a) as that definition pertains to the unemployment tax and unemployment eligibility when that definition is applied to vacation pay, severance pay, etc."

CONCLUSION:

Whenever an employer pays to an employee at the time of layoff or separation from employment or thereafter monies in the form of "wages" from which the standard deductions have been made, whether such monies be styled as vacation pay, severance pay, pay in lieu of notice, dismissal pay, or the like, said monies must be treated as "wages" for unemployment compensation eligibility purposes. Thus, a terminated or laid off employee will be considered to have retained certain aspects of the former employer-employee relationship during that period of time after actual employment has ceased but monies are being paid, as above described, and those monies are capable of being allocated to weekly periods.

Such terminated or laid off employee will not be eligible for unemployment compensation benefits or will not have the statutory waiting period begin to run until after the monies paid at time of separation, applied forward on a weekly basis from date of separation, have been exhausted.

In like manner, a former employee who, by virtue of contract or company policy, is entitled to vacation pay at some period of time after the employment relationship has been severed (but not at the date of separation itself) will become ineligible for unemployment benefits of the number of weeks allocable to the vacation pay received, calculated on the basis of prior salary with that employer. Whenever such vacation pay described in this paragraph is received during the course of a period where the former employee is both eligible for and drawing unemployment benefits the claimant will not be required to undergo another waiting period after the term over which the vacation pay monies are allocated.

A true bonus or gratuity, from which standard deductions have not been

made, given to an employee by the employer at time of separation or otherwise will in no way affect the time for the commencement of either the waiting period or unemployment benefits.

ANALYSIS:

At the outset it should be noted that *every* state and the District of Columbia, except California and Delaware (by statute), consider vacation pay to be "wages" within the meaning of the unemployment compensation laws. *CCH Unemployment Security Reports* ¶1220 (for each state). A few states, again by statute, do not consider vacation pay paid at time of separation from employment as "wages", however the overwhelming majority of states, as will be discussed *infra*, do treat such pay as "wages". Only one other state, by interpretation such as has occurred in Idaho, also refuses to consider vacation pay at termination to be "wages" or "remuneration" for unemployment benefit purposes. For reasons which will be developed herein, we consider such interpretations to be fallacious and not in keeping with the underlying purpose of unemployment security laws.

The declaration of state public policy concerning Idaho's employment security law is contained at Section 72-1302, *Idaho Code*, as follows:

(a) As a guide to the interpretation of this act, the public policy of this state is declared to be as follows: Economic insecurity due to unemployment is a serious menace to the health, morals and welfare of the people of this state. Involuntary unemployment is therefore a subject of national and state interest and concern *which requires appropriate action to prevent its spread and lighten its burden* which now so often falls with crushing force on the unemployed worker and his family. The achievement of social security requires protection against this greatest hazard of our economic life. This can be provided by encouraging employers to provide more stable employment and by the systematic accumulation of funds during periods of employment *to provide benefits for periods of unemployment, thus maintaining purchasing power and limiting the serious social consequences of poor relief assistance*. The legislature therefore declares that, in its considered judgment, the public good, and the general welfare of the citizens of this state require the enactment of this measure, under the police powers of the state, and for the compulsory setting aside of unemployment reserves to be used for the benefits (sic.) of persons unemployed through no fault of their own. (Emphasis supplied.)

We feel strongly that our consideration of the question presented herein be guided by reference to the underlying intent and policy of the unemployment compensation law as embodied in §72-1302(a) above. Referring to 2A Sutherland Statutory Construction §54.03, p. 355 (Sands 4th ed., Callaghan & Co. 1973), we find:

An extended or restricted interpretation (of statutory language) may be reconciled, for example, on the ground that "the intent prevails over the letter"; that "the reason of the statute controls the letter"; that the literal meaning of the statute is subject to its "object," "aim," or "real intent"; or that "that implied is as much a part of the statute as that expressed."

The spirit of an act has been found to render its meaning "clear and unmistakable" even though "its language is capable of more than one

meaning." (Footnotes omitted.)

Applying these statutory construction principles to the underlying policy of the employment security law and the evils it was designed to prevent it at once becomes obvious that the purpose of the law is to provide subsistence income so as to alleviate the devastating financial hardship caused by unemployment. It is inconceivable that the policy of the employment security law would contemplate a situation wherein interpretation of eligibility for benefits would allow an unemployed claimant to secure unemployment benefits while, at the same time, the claimant had the benefit of monies from his former employer which, properly allocated, covered the same weeks for which unemployment benefits were being paid. In such manner, the unemployed person would actually have the benefit of more money at his disposal than he would be entitled to if he were fully employed. This can hardly be the intent of the law! Yet, such situations presently may exist based upon decisions of the Idaho Department of Employment and its Appeals Examiners. For reasons which we shall develop herein, we strongly disagree with this present policy and find it out of keeping not only with the intent of the Idaho Legislature and employment security law of the State of Idaho, but also at odds with the interpretation applied to similar employment security laws by the overwhelming majority of other states. For example:

Assume that there are four employees, "A" and "B" who are employed by Company No. 1; "X" and "Y" who are employed by Company No. 2. Further assume that the period under consideration is a 52 week work year. In this hypothetical, assume also that employees "B" and "Y" have each been entitled to *and have taken* during their work year certain weeks of vacation for the purpose of relaxing, fishing, travel, or the like. Assume that "A" and "X" have also been entitled to the same vacation, but have not yet taken the same. Company No. 1 shuts down with three weeks remaining in the work year; Company No. 2 shuts down with seven weeks remaining in the work year. (For purposes of this example the waiting week is disregarded; it would affect all employees equally.) Under the present application of the law and benefit entitlements by the Department of Employment, the following would occur:

WORKER	ACTUAL WEEKS WORKED	VACATION	SUB- TOTAL	UNEMPLOY BENEFITS	TOTAL WEEKS OF PAY REC'D
A	49	3	52	3	55
B	48	3	49	3	52
X	45	2	47	7	54
Y	43	2	45	7	52

All the workers in this example have had the opportunity to take their vacations while the companies were in operation, however the present interpretation of law by the Department of Employment acts to "penalize" employees "B" and "Y" who actually took their vacations and to "favor" with extra money and benefits employees "A" and "X" who were equally entitled to take vacations, but, instead, were paid vacation pay in lieu of vacation at the time the companies shut down and laid all employees, "A", "B", "X", and "Y", off. Department interpretation allows "A" and "X" to receive more remuneration than they could have received if fully employed for the entire year, as well as allowing the described "advantage" over their co-employees "B" and "Y".

Legal analysis and reason cannot allow such reasoning to remain, and we hereby disapprove the same.

We are in agreement with an interpretation from Massachusetts regarding this very matter in which it was held:

In industry, a vacation is a period of time of freedom from work or employment duties. It is almost universally recognized today that an employee who has worked faithfully should be allowed time away from his work during which he may rest and enjoy himself without loss of pay. If the contract entitles the claimant to a week or weeks off for vacation purposes without loss of pay, and the employer has not given him time off prior to the time of separation, the contract of employment has not been completed until the claimant has had the specified vacation time. The employer cannot terminate him without breaking the contract until he has allowed him the time off. The time is the very essence of the contract; time for recreation and enjoyment without loss of pay. *It does not cease to be a vacation with pay merely because he does not resume the same employment immediately afterwards.* In the instant case, the contract stipulated that if an employee was terminated permanently he should be entitled to and receive immediately his vacation pay to that date. The essence of this contract still is that the claimant shall have free time without loss of remuneration, not merely that he shall receive a sum of money and it *would definitely defeat the purpose of the law to pay unemployment benefits to him during the period which was in fact covered by such an allowance.* The granting or denial of benefits in these cases should be based upon the substance of the situation rather than upon technical considerations regarding the language which may have been used. Employees should not be denied benefits because the employer mentioned certain specific weeks when he gave them their vacation allowances, while others receive benefits under identically the same situation except for the fact that the employer did not make express reference to particular weeks. (Emphasis supplied.) *Bd. of Rev. Dec. No. X-83969-A, July 29, 1949 (Mass.) (CCH Unemployment Security Reports ¶1995.21 (Mass.))*

Other states take similar positions either through administrative or court decisions, or by statute.

In Alabama, it has generally been held that workers are not entitled to receive unemployment benefits during a period for which they are receiving vacation pay from their employers, even though they hold themselves out as available for work. (Referring to *Wellman v. Riley*, 67 A.2d 428 (N.H. 1949) and *Grobe v. Board of Review*, 407 Ill. 576, 101 N.E.2d 95 (1951).) *App. Ref. Dec. Nos. 2062-AT-52 to 2087-AT-52, October 31, 1952 (Ala.). (CCH Unemployment Security Reports ¶1901.65 (Ala.))* (NOTE: Hereafter the *CCH Unemployment Security Reports* will be referred to merely as *CCH* with the appropriate paragraph and state reference.) Though noting that the policy of the law as determined by the Idaho Industrial Commission does not presently allow such a result, a consistent application of benefit entitlement principles which are now applied to a claimant whose employment has been terminated should allow a worker who was subjected to a mandatory vacation period for which he performed no services to collect benefits during the vacation term regardless of whether the employee received vacation pay for the "forced" vacation or not.

Yet such person could be receiving vacation pay from his employer while, at the same time, receiving unemployment benefits. This would be inconsistent with the policy of the unemployment law, as is present policy.

In Alaska, where both vacation pay and wages in lieu of dismissal notice are paid to a claimant upon dismissal from his job, the payments are allocated for consecutive weeks after termination of employment. The wages in lieu of dismissal notice extend the period of regular pay and the vacation period begins from there, unless the vacation period has been allocated by contract for a specific period. *ESC Ref. Man.*, 7/55 (Alaska). (Regulation 5013.) (CCH ¶1901.01.(Alaska))

In Arizona, at the time of his termination, a claimant had accumulated the right to six days' vacation pay, which was paid to him at time of separation. It was held that: "under such circumstances, the pay received by such employees may be considered wages. Likewise, it is reasonable that such wages should be considered applicable to the period immediately following the termination of the employee's services." An individual cannot be considered unemployed during any week unless he performs no services and acquires no right to wages. The claimant did not meet the latter requirement for the week immediately following the termination of his services and was therefore ineligible for unemployment services for that week. *App. Trib. Dec. No. 2684*, 11-17-52 (Ariz.). Similarly, *App. Trib. Sec. No. 3095*, 12-9-53 (Ariz.). (CCH ¶1901.17 Ariz.))

Section 81-1106, *Arkansas Statutes Ann.*, makes a person ineligible for benefits: "(f) If he receives or has received remuneration in the form of:

(1) Dismissal payments paid in one payment at the time of dismissal;

(2) Vacation pay; . . . "

Unused vacation pay paid at the time of separation is a taxable wage. *ESD Letter*, Aug. 30, 1972 (Ark.). (CCH ¶1220 (Ark.))

Section 8-73-110(1), *Colorado Rev. Statutes*, provides:

Individuals who receive the following types of remuneration shall be determined to have received, for weeks after separation from employment, the individual's full-time weekly wage for a number of consecutive weeks equal to the total amount of the remuneration awarded, divided by the full-time weekly wage:

(a) Wages in lieu of notice;

(b) Vacation pay;

(c) Severance allowances.

In Connecticut when vacation pay is provided in an amount substantially the same as an employee would have received if he had actually worked he is not eligible for unemployment benefits during the vacation period. *Kelly v. Administrator*, 136 Conn. 482, 72 A.2d 54 (1950), *aff'd* Conn. Super. Ct., New Haven Co., July 15, 1949. Similarly, employer allocation of vacation pay to a week including the 4th of July during a long layoff was held equitable even though the employees should have received the vacation pay, upon their request for it, at the start of the layoff. Benefits were, therefore, denied for that week. *Barrie v. Administrator*, Conn. Super. Ct., New London Co., Aug. 1, 1951. (CCH ¶1901.04(Conn.))

In Florida it was held that a claimant was not unemployed during a two week period after separation from employment in which she received pay equal to two weeks' wages, and the employer was legally required by contract to make

such payments. *App. Ref. Dec. No. 5961, App. Dkt. No. 8925 (Fla.)*. (CCH ¶1265.01(Fla.))

Prior to a statutory change Illinois law did not bar claims for benefits for a period after separation for which vacation pay was received. However, since 1956 *Illinois Revised Statutes*, ch. 48, §440B, provides that if an employer makes, or becomes obligated and holds himself ready to make, payment as vacation pay, vacation pay allowance, or pay in lieu of vacation to a claimant in connection with his separation or layoff, such payments may be allocated to specific periods of unemployment, with the burden on the employer to make such a designation within seven days after the filing of a claim for benefits otherwise such payments are not deemed "wages" for purposes of attributing them to specific weeks of unemployment following separation or layoff. (CCH ¶4090 (Ill.))

Payment of three weeks' vacation pay and eight weeks' termination allowance to an Indiana worker at the time of his separation was allocable to the weeks following such termination and rendered the claimant ineligible for benefits since he was deemed to have received his regular pay for the weeks in question and was, therefore, not "unemployed" in any manner. *Rev. Bd. Dec., 52-R-83, Oct. 31, 1952 (Ind.)*. (CCH ¶1995.21) Termination pay in lieu of notice and vacation pay in total amount of 21 weeks' pay, although paid in a lump sum and not allocated to any particular week or weeks in the accounting records of the employer, were held allocable and made "for" and "with respect to" a period of 21 weeks after termination, including the week in which the actual payment was made. The employee was held not eligible for unemployment benefits during that period. *Schenley Distillers, Inc. v. Rev. Bd.*, 123 Ind. App. 508, 112 N.E.2d 299 (1953). This result is consistent with Section 22-4-15-4, *Burns' Ind. Statutes*, which makes a claimant ineligible for waiting period or benefit rights for any week with respect to which he receives or is entitled to monies equal to or greater than his weekly unemployment benefit amount.

Section 96.5, *Code of Iowa*, provides that vacation pay on separation or termination, severance pay, pay in lieu of notice, and the like, are deemed "wages" and cause ineligibility for unemployment benefits until they are exhausted when allocated over a weekly basis.

At the time of his layoff, a Kansas claimant received two weeks' vacation pay. He contended that since he had received a separation notice he was unemployed and the vacation pay did not categorize him as "in employment". It was held, however, that an employee in such a situation remains constructively employed since the employer has an option of continuing the employee on the payroll before paying him and laying him off, or of laying him off and at the same time giving him cash for his vacation. The claimant further contended that his vacation was not to occur for several more months after the layoff, but it was held that vacation pay is assignable to the period following a separation. As far as his employment status is concerned it is only necessary that a claimant either receive wages or perform some service to render him "employed". Claimant was held to be "employed" and on a paid vacation during the two weeks in question. *App. Ref. Dec. No. 17,961, Aug. 31, 1955 (Kansas)*. (CCH ¶1901.95 (Kan.)) In a similar case: "The facts . . . show . . . that instant claimant had earned his vacation and wages to cover same prior to the incident which gives rise to this hearing (a refusal to accept vacation payment from the employer). That these earnings are wages is beyond cavil and under the law in force we have no alternative other than to hold that their existence for the first

two weeks of the lay-off render claimant not unemployed . . . " *App. Ref. Dec. No. 13,813, July 11, 1952 (Kansas). (CCH ¶1901.95 (Kan.))*)

Kentucky claimants whose annual vacations with pay were not scheduled between June 1 and September 15 as provided under the employer-union agreement but who were given vacation pay at the time of their layoff in August were held not unemployed during the period for which the payment was made, since they received wages in the form of vacation pay. *Comm. Dec. No. 969 (Ky. B TPU-460.75-5, BSSUT), June 15, 1949 (Ky.). (CCH ¶1901.035 (Ky.))*

26 *Maine Rev. Statutes Ann.* §1193.5 disqualifies a person from receiving benefits for any week with respect to which he is receiving, is entitled to receive, or has received remuneration in the form of dismissal wages or wages in lieu of notice or terminal pay or vacation pay.

Under prior Maryland law, vacation pay given to workers at the time of layoff was wages payable with respect to the week or weeks immediately following the layoff. Therefore, the workers were not unemployed with respect to such time and were ineligible for unemployment benefits during the period covered by the vacation pay. *Allen v. ESB*, 206 Md. 316, 111 A.2d 645 (1955). A 1966 amendment to Art. 95A, §20(n), *Annot. Code of Maryland*, repealed (n) (10) a provision which had been added to the law after the *Allen* case making vacation and holiday pay earned or accumulated to the credit of an employee and paid at the time of layoff not treated as "wages" for the purpose of determining whether a person is unemployed. This repeal should have the effect of reinstating the legal status determined by the *Allen* case. Also by statute, dismissal payments and wages in lieu of notice are deemed "wages" regardless of whether or not the employer is legally obligated to make the same, and are allocated to the weeks following the separation equal in number to the number of weeks' pay represented by the payment. (*CCH ¶4017C & ¶5018 (Md.)*)

In Michigan, vacation pay received by an employee upon being laid off for an indefinite period in mid-June was allocated to the period beginning with the layoff's start notwithstanding that, prior to being laid off, the employee had elected to take his vacation during July. Benefits were denied for that part of the layoff to which the vacation pay was allocated on the ground that the claimant was not unemployed during that period. *Hickson v. Chrysler Corp.*, Mich. Cir. Ct., Macomb County, No. XA-4516, Dec. 9, 1971. (*CCH ¶1901.253 (Mich.)*)

Prior to 1966, Minnesota treated severance pay at time of dismissal or layoff as not rendering a claimant ineligible for unemployment benefits, *Ackerson v. Western Union Telegraph*, 234 Minn. 271, 48 N.W.2d 338 (1951). This was changed by statute in 1966, and present law provides that receipt of lump sum severance pay may result in disqualification for benefits. An employer now may allocate lump sum termination, severance, or dismissal payments over a period of weeks equal to the lump sum divided by the employee's weekly salary, with such allocation not to exceed four weeks. Section 268.08, subd. 3(1), *Minnesota Statutes*. (*CCH ¶4085*) §268.08, subd. 3(2) also renders ineligible for unemployment benefits a person who is receiving, has received, or has filed a claim for vacation allowance or holiday pay.

Whenever a person in Nebraska is entitled to a stated period of paid vacation at the termination of his employment, irrespective of whether such entitlement is based upon an existing union contract or a general company practice or custom, and the nature of the termination of the work is such that a disqualify-

ing period for receiving unemployment benefits must be imposed, the period of disqualification shall only commence to run from the date of the vacation period's completion and thereafter. Such individual, during the vacation period, is constructively an employee. *Appeal Tribunal Decision* No. 148, Vol. XIV, Jan. 27, 1950 (Neb.). (CCH ¶1901.06 (Neb.))

A Nevada person will be disqualified from receipt of benefits for any week with respect to which he receives wages in lieu of notice or during which a claimant is on paid vacation. Disqualification is also applicable to any week, occurring after termination, which could have been compensated for by vacation pay had termination not occurred, provided that the person actually receives such compensation at the time of separation or on regular pay days immediately following termination. (CCH ¶1995, ¶¶4083-4085 (Nev.))

In New Hampshire, vacation pay to an employee occurring at a time when the employee was laid off constituted "wages" within the meaning of the law and, therefore, an individual who received vacation pay could not qualify as "totally unemployed" within the meaning of the law. Claimant was held ineligible for benefits for the week with respect to which he received the vacation pay. *Wellman v. Riley*, 67 A.2d 428 (N.H. 1949). Similarly, *App. Trib. Dec.*, Appeal No. 429-A-51, August 17, 1951. (CCH ¶1901.01 (N.H.))

New York, by statute, provides that no benefits are payable to a claimant for any day during a paid vacation period, nor for a paid holiday irrespective of whether the employment has or has not been terminated. (CCH ¶4143 (N.Y.); full text of N.Y. law)

North Carolina holds that where an individual has been given, at the time of separation, pay for two weeks of accrued vacation together with one week's wages in lieu of notice, benefits are not payable during such period. For the two weeks of vacation the individual would be considered as still in the employ of the employer, and benefits are not payable with respect to a week for which wages have been paid in lieu of notice. *ESC Interp.* No. 132, Feb. 28, 1956. (CCH ¶1901.01 (N. Carol.))

Though presently contra by statute, under prior Ohio law interpretation a worker who was given a two week paid vacation at the time she was laid off was not held eligible for benefits during those two weeks. "Claimant, being on a paid vacation at the time she filed her application for unemployment compensation was, in effect, still employed and, therefore, was not then eligible for unemployment compensation . . ." *Reid v. Board of Review*, 115 Ohio St. Rep. 9, 97 N.E.2d 31 (1951). Similarly, *Barry v. Administrator*, Ct. Com. Pleas, Muskingum County (Ohio 1960). (CCH ¶1995.85 (Ohio)) Mining operation abandonment caused claimant to be paid off May 26, but he was subsequently given \$100 in vacation pay for the established vacation period of June 28 to July 7, as provided by a contract with the miner's union. Held, that such pay was "remuneration" within the meaning of the Act and that claimant could not be considered unemployed during the period covered by the vacation pay. *Collopy v. Smith*, Ct. Appeals, Athens County, Dec. 14, 1950 (Ohio). (CCH ¶1995.853 (Ohio)) Present Ohio law only requires reduction of benefits for pay in lieu of notice, vacation pay, and the like. Section 4141.31, *Baldwin's Ohio Rev. Code Ann.* (CCH ¶4104 (Ohio))

Miners, including some who had been paid off prior to the vacation period, who received vacation pay in Oklahoma had such pay treated as "wages" allocable to the particular vacation period. Benefits for those receiving unemployment compensation were reduced by the amount of vacation pay, and those

claimants whose vacation pay exceeded the benefit amount were held not unemployed with respect to the week covered. *App. Trib. Dec.*, July 30, 1953 (Okla.) (CCH ¶1901.38 (Okla.)) Statutory law in effect since mid-1959 now provides that vacation pay or sick leave pay which arise by reason of separation from employment are not deemed "wages" as that term is used regarding an unemployed status. 40 Okla. Statutes 1971 §229(j). (CCH ¶4069 (Okla.))

Section 657.205(1) (a), *Oregon Rev. Statutes*, (Ch. 655, L. 1955) effective August 3, 1955, disqualified a person receiving vacation pay from receiving unemployment benefits. The vacation pay disqualification portion of the law was repealed in 1975, but disqualification from benefits still applies when a claimant receives a dismissal or separation allowance. (CCH ¶4041 (Ore.))

Effective October 1, 1971, Section 404(d) (2), *Purdon's Penna. Statutes Ann.*, vacation pay and separation benefits were merely deducted from unemployment benefits payable a claimant. A ruling under prior law provided that a claimant's severance pay of \$735 was to be allocated to a six week period following his termination, based on his \$115 per week salary, and that during such period the claimant was not unemployed and was ineligible for benefits. *Bd. of Rev. Dec. No. B-70220*, Mar. 5, 1962 (a.). (CCH ¶1995.63 (a.))

Section 28-44-21, *Rhode Island General Laws, 1956*, makes a person ineligible for unemployment benefits if he is receiving or entitled to vacation pay, and is not eligible for waiting period credits either. A claimant who elected to take part of her vacation pay during a one week layoff was not allowed to claim that week as her waiting period when he later received vacation pay for only one week of a vacation shutdown period and had applied for benefits for the remaining two weeks. *Adeline Ottiano v. DES*, Rhode Isl. Super. Ct., Providence, Sc., C.A. No. 72-3170, April 20, 1976. (CCH ¶1901 and ¶1955.10 (R.I.))

Section 35-4-5(j), *Utah Code Ann.*, makes a person ineligible for benefits for any week with respect to which he is receiving, has received, or is entitled to receive remuneration in the form of: "(1) Wages in lieu of notice, or a dismissal or separation payment; or (2) Accrued vacation or terminal leave payment."

A Vermont claimant was paid a substantial amount of money on separation, including therein a two week's vacation allowance. Held, that "... claimant is disqualified for benefits for the period covered by the payment received at the time of separation inasmuch as such payment was not legally required of employer, did not represent a bonus or other accumulated emolument and was, therefore, in the nature of a dismissal payment of wages in lieu of notice." *Ref. Dec. App. No. 1197E*, Aug. 31, 1950 (Vt.). Another claimant was paid two weeks' vacation pay and eight weeks' termination pay on separation. Vacation pay was based on length of service and paid because vacation had not been taken by time of termination. Neither payment was allotted to any time period by the employer. Concerning the vacation pay, the Commission concluded that "it is inherent in this type of payment that the employer-employee relationship exists and is payment in the legal sense for services" and the pay should be allotted to the two weeks immediately following its payment, in this case the termination date. Claimant was denied benefits for these two weeks. The employer considered the termination pay as wages for income tax and federal insurance purposes, but did not pay unemployment compensation taxes on that money. For that and other reasons the payment was held by the Commis-

sion not to be wages in lieu of notice, but the result of the employment relationship, arising during the course of employment, and not applicable to the period after the date of separation during which she was free to accept employment immediately. No disqualification was made for receipt of this payment. *Comm. Dec. App. No. 1365A*, June 6, 1952 (Vt.). (CCH ¶1995.03 for 1950 decision above; ¶1995.05 for 1952 decision (Vt.)) A claimant was disqualified for benefits for a period specifically allotted to the period immediately following separation for which he was paid money in lieu of accrued vacation. *Ref. Dec. App. No. 1522*, Sept. 25, 1952 (Vt.). (CCH ¶1995.06 (Vt.)); see also Section 5379, *Vermont Statutes Ann.*)

Under present Virginia law, as amended March 5, 1952, an individual is definitely disqualified from receiving benefits for any week with respect to which he receives remuneration in the form of a vacation allowance. (CCH ¶1995 and ¶1901.07 (Va.))

In West Virginia a claimant is ineligible for benefits if vacation pay paid after termination or layoff is specifically allocable to some known period of time, otherwise, if the allocable dates are unknown or unspecified, the claimant is not ineligible. *Bd. of Rev. Dec.*, Cases 6013 through 6017, 6111, Oct. 21, 1953 (W. Va.); *Anderson v. Board of Review*, Thirteenth Jud. Cir. Ct., Apr. 20, 1954; *Bd. of Rev. Dec.*, Case 4555, Mar. 19, 1951 (W. Va.). (CCH ¶1901.0195 (W. Va.))

Following the sale of his business, a Wisconsin employer terminated claimants' employment and notified them as soon as a computation could be made they would be paid the vacation pay, pay in lieu of notice, and dismissal pay due them under their collective bargaining agreement. Subsequently, the claimants received checks for the entire amount due, but the notice accompanying the checks did not specify which weeks following termination of employment were intended to be compensated by vacation pay, which by pay in lieu of notice, or which by dismissal pay. The Commission properly allocated the aggregate amount paid to an unbroken series of weeks following receipt of the payment, but did not allow allocation to weeks prior to the week in which the payment was made. Claimants were ineligible for benefits during such weeks. *Brink v. Ind. Comm.*, 27 Wis. 2d 531, 135 N.W.2d 326 (1965). Section 108.05(4), *Wisconsin Statutes*, (CCH ¶4040 (Wis.)) provides for ineligibility when holiday or vacation pay is due or received; §108.05(5) (CCH ¶4040A) provides the same result with regard to termination pay.

In Wyoming, a claimant who received separation or vacation pay for a period of two weeks following his separation was disqualified from benefits for that period. *App. Exam. Dec. No. 1458-AT-62-UCFE*, July 17, 1962 (Wyo.). (CCH ¶1995.04 (Wyo.))

The states of Delaware, Georgia, Hawaii, Mississippi, Montana, New Jersey, New Mexico, North Dakota, South Dakota, Tennessee, Texas, and Washington, and the District of Columbia appear to have no statutes or decisions relating to the status of a claimant with regard to vacation pay, separation pay, and the like, received after separation from employment.

The states of California and Missouri provide by statute that vacation pay does not disqualify a claimant from benefits, nor does separation pay. South Carolina statutory law provides that a person is not disqualified from benefits as a result of separation pay, but appears to be silent concerning vacation pay. The only state that, like the present status in Idaho, has provided by interpretation that receipt of vacation or separation pay after termination does not make a claimant ineligible for benefits is Louisiana.

Turning to an examination of Idaho determinations, we endeavor to discuss and distinguish the reasoning therein espoused based upon the underlying policy of the Idaho Employment Security Law and the overwhelming weight of authority nationally which, contrary to present Idaho policy, treats vacation and dismissal pay received after termination as disqualifying a claimant from benefits.

In *Appeals Examiner Decision* No. 854-75, July 11, 1975 (Mary Ihrig) (Idaho), the decision reached provided: "That payments received by the claimant for (1) vacation pay, (2) pay in lieu of notice, and (3) severance pay, cannot be considered as "wages" for benefit payment purposes." This determination was based upon Sections 72-1302(a) (declaration of state public policy), 72-1312(b) (compensable week), 72-1324 (definition of "payroll"), 72-1328(a) (definition of "wages"), and 72-1367(d) (benefit formula), *Idaho Code*. §72-1312(b), relates to compensable weeks of a benefit claimant and provides that such week "shall be a week of either no work or less than full-time work" concerning which the claimant is otherwise eligible for benefits. The term "work" is nowhere defined in the Idaho Employment Security Law, nor is the term "employment" itself, which one would deem synonymous with "work". "Covered employment" is defined at Section 72-1316(a), *Idaho Code*, as "an individual's entire service, including service in interstate commerce, performed by him for wages" with certain defined exceptions. Since vacation pay, separation or termination pay, pay in lieu of notice, and the like all arise from and are incident to a period of employment during which actual services are performed, such pay must be held to be within the Act's definition relating to "covered employment" even though payment of monies for the same do not occur for purposes of consideration herein until after the termination of the performance of actual services and, for most purposes, severance of the employer-employee relationship. "Service" and "employment" generally imply that the employer or person to whom the service is due both selects and compensates the employee or person rendering the service. *Ledvinka v. Home Ins. Co. of New York*, 139 Md. 433, 115 A. 596, 597, 19 A.L.R. 167. Referring, again, to the policy of the law at §72-1302(a) we believe that legislative intent demands the conclusion that the term "work" as used in §72-1316(a) means a week for which the claimant is not being compensated by his employer either for present or past services. Any other conclusion could lead to the result that a claimant might be receiving pay after separation from his employer plus unemployment benefits and, thus, be receiving more money on a weekly basis while unemployed than he could have made while fully employed. Such a possibility, we find, it is not the policy of the Idaho Employment Security Law which, rather, is designed to "maintain" purchasing power during periods of unemployment and limit the "serious consequences" of often inadequate relief assistance. §72-1302(a). Creating a greater purchasing power by adding unemployment benefits on top of pay benefits after separation which may be allocated over a period of weeks following such separation is most assuredly not within the contemplation of "maintaining" purchasing power, nor of limiting "social consequences" of unemployment. We therefore find Section 72-1312(b), *Idaho Code*, with its reliance on the term "work" to define a compensable week inapplicable to those weeks for which a claimant is receiving compensation after separation in the form of vacation pay, severance or dismissal pay, pay in lieu of notice, and the like, so long as those forms of pay have become payable as a result of the performances of services at some time during the employer-employee relationship.

§72-1324 merely defines the term "payroll" insofar as the same relates to the term "wages" as defined in §72-1328(a), and its inclusion in the Appeals Examiner's decision has no substantive effect on the issues under consideration herein. Likewise, §72-1367(d) does not affect the decision's outcome substantively.

§72-1328(a), however, concerns the definition of the term "wages" and is the essence of the question asked of this opinion. As we have set out in lengthy detail above by reference to the law and interpretation of the law by thirty-two states, the overwhelming majority of states include within the definition of "wages", both during employment and after separation, vacation pay, and also consider termination or separation pay and pay in lieu of notice as wages. We are convinced that inclusion of such pay, whether during employment or after its termination, in the definition of "wages" is the proper result, and we, therefore, overrule present policy of the Idaho Department of Employment which treats vacation pay as "wages" for purposes of unemployment compensation contributions from the employer, yet does not consider the same as "wages" when determining eligibility for benefits after separation from employment. Since the effect of this Department policy allows a claimant of unemployment benefits to collect not only pay from his former employer which is allocable over a period of weeks after severance of the employer-employee relationship, but also unemployment benefits during the same weeks is to make, for such period of time, an unemployed person better off financially while unemployed than he could possibly be while fully employed by his former employer, such Department policy defeats the underlying policy and purpose of the Idaho Employment Security Law and must be discontinued. Section 72-1302(a), *Idaho Code*. We, therefore disagree with the result reached by the Appeals Examiner in Appeal No. 854-75.

Similarly, in *James M. Irwin v. Dept. of Employment*, Indust. Comm., DoE No. 565-74, Oct. 28, 1974 (Idaho), the Commission reversed a decision of the Appeals Examiner and ruled that: "There is no statutory provision for allocating previously earned vacation pay to a period following the termination of employment." To which we would add that there is no statutory prohibition against doing the same. The Commission concluded that the employee became eligible for unemployment benefits as of the date of his unemployment without consideration of the vacation pay payment. Again, we disapprove such conclusion for the reasons expressed above. See also *Gerald L. Broadfoot v. Department of Employment*, Indust. Comm., DoE No. 619-74, Aug. 22, 1974 (Idaho), which reaches the same conclusion based on similar facts, and is accordingly disapproved.

We are further favorably impressed by a *Statement* by H. Fred Garrett delivered to the Idaho Department of Employment on September 12, 1975, relating to certain proposed Rules amendments. Mr. Garrett notes carefully the phrase "wages paid for services" in §72-1315, the words "entire service" in §72-1316, and the phrase "all remuneration for personal services from whatsoever (sic.) source" in §72-1328, then notes:

The foregoing three sections establish the first essentials for unemployment benefits:

1. Specifying amount of wages at which an employer becomes covered and defining "covered employment" and "wages." All necessary elements in an individuals (sic.) qualifications for receipt of benefits.

2. Establishing liability of an employer for contributions (taxes)

based on amount of payroll.

Section 72-1342 provides that "contributions shall accrue and become payable by each *covered employer* for each calendar quarter with respect to *wages* paid for covered employment." (emphasis added)

This section (§72-1342) implements the directive in the statement of policy (Sec. 72-1302(a)) " . . . the setting aside of unemployment reserves to be used for the benefits of persons unemployed."

One of the requirements in attaining benefit eligibility is that the claimant meet the minimum wage requirements of section 72-1367. This section deals almost exclusively with the amount of *wages* for services performed by *covered employers* within his base year, in establishing first eligibility then the weekly rate of benefits and the number of weeks of potential benefit duration. The section also includes two other important steps relating to the amount of benefits that may be paid to a claimant.

1. Compute the average weekly wage paid by all *covered employers* for the preceeding calendar year.
2. Compute the prescribed percentage of statewide average wage to establish the maximum weekly benefit that may be paid.

The final (link) in this continuous chain of inter-relationships of definitions and usage of terms is Section 72-1351 - Experience Rating. Defining the ingredients and prescribing the methods to be followed in computing and assigning the tax rates for individual "covered employers." Two of the major factors in computing employer rates are amount of benefit charges to his account and the ratio of the reserve fund balance to total wages in covered employment. This illustrates the absolute necessity of having uniformity in the interpretation and application of terms and definitions used for both tax and benefit purposes. You will note that the proposed paragraphs to be added to the Rules apply to benefit determinations only. If adopted they would not apply to the employers (sic.) tax liability but opening (sic.) the gate for the payment of benefits to a substantial number of benefit claimants who have suffered *no wage loss* during the period for which they have received *vacation pay*. This simply means that the employer would be caught in the middle as he would be taxed on the amount of wages paid on the accrued vacation time. Then by allowing the worker to qualify for and receive benefits during the period covered by the advance payment of wages for the time equivalent of his vacation accrual the employer would be taxed for such wages and at the same time his experience rating account would be charged and thereby adversely affecting (sic.) his tax rating record. All for payments to a claimant who has actually suffered *no wage loss*. This is in direct violation of the basic principles of unemployment insurance. (Emphasis in original.) *Statement* of Garrett at 3-5.

The credentials and knowledge of Mr. Garrett who started with Idaho's unemployment compensation program in 1938 before it was fully organized and served for many years in the administration of the same are without equal in this state. We both respect and agree with his views above expressed.

We cannot escape the conclusion that unemployment benefits are designed to replace lost income so as to alleviate resulting financial hardship. Yet,

persons who draw vacation pay, termination or severance pay, or other similar pay have suffered no loss of income whatsoever. Unemployment benefits are designed to alleviate the involuntary loss of purchasing power, but no loss of purchasing power has occurred if a claimant is paid vacation or severance types of pay after separation. (§72-1302(a)) The Idaho Employment Security Law is abused and its policy violated whenever employees drawing both vacation or severance types of pay plus unemployment compensation receive more income than they formerly received while employed. Since vacation pay is taxable as wages for unemployment tax purposes it should not be construed to be non-wages for benefit purposes.

Finally, we are convinced that the greatest hardship period for an unemployed person occurs after an extended period of unemployment, not at the beginning. The decision we reach herein, that receipt of vacation pay, severance or termination pay, pay in lieu of notice, and the like, after separation from employment makes a claimant ineligible for unemployment benefits for a period of weeks following separation carried forward for a period determined by the claimant's former wage calculated and applied on a weekly basis, prevents duplication of "pay" to the unemployed person. Yet, our decision has no effect whatsoever on the length of time over which an unemployed person may receive unemployment benefits; it merely means that such person will not be able to establish his waiting week and begin his period of benefit entitlement until *after* the post-separation payments by his former employer have been exhausted over a period of weeks. Thus, the period of time over which an unemployed person will have a chance to receive some form of compensation is actually extended by our decision.

We further find no legitimate basis to distinguish between vacation pay or severance-type pay for purposes of this opinion. We are further of the opinion that if company policy or contract provide that a terminated employee is to receive vacation pay at some time in the future after the claimant has satisfied the waiting period requirement of Section 72-1329, *Idaho Code*, such claimant, though by this opinion totally ineligible for benefits during such period over which the vacation pay is allocable on a weekly basis based on former wage, would not be required to undergo yet another waiting period. To hold otherwise would do injustice to the policy of the Act embodied in §72-1302(a). We note the fact that certain states take the position that when vacation pay is received by a claimant during the course of a period of benefit entitlement, the vacation pay amount is deducted from benefit entitlements over the number of weeks to which the vacation pay applies. Such an interpretation, obviously, has the effect that most claimants would receive nothing in the way of unemployment benefits for those weeks because of the net effect of what will almost always be a larger sum paid as vacation pay. Yet, such interpretation has the undesirable effect, we believe, of using up those weeks of entitlement for the claimant, rather than totally staying the effect and operation of the benefit period for those weeks over which vacation pay is allocable. Again referring to the underlying purpose and policy of the Act, we hold that receipt of vacation pay during the course of unemployment benefit entitlement shall have the effect of staying the running of the benefit entitlement period for that claimant, with said period of entitlement commencing to run after the number of weeks allocable to such vacation pay have ended.

This opinion shall have no effect upon a situation where a former employer pays to his ex-employee a true bonus or gratuity from which standard deduc-

tions or contributions to the unemployment security fund have not been made. Such payments would not be deemed "wages" for any purpose.

AUTHORITIES CONSIDERED:

Idaho: Sections 72-1302(a), 72-1312(b), 72-1316, 72-1324, 72-1328(a), 72-1315, 72-1342, 72-1351, and 72-1367, *Idaho Code. Appeals Examiner Decision* No. 854-75, July 11, 1975 (Mary Ihrig); *James M. Irwin v. Department of Employment*, Indust. Comm., DoE No. 565-74, Oct. 28, 1974; *Gerald L. Broadfoot v. Department of Employment*, Indust. Comm., DoE No. 619-74, Aug. 22, 1974. *Other Authorities*: CCH *Unemployment Security Reports* ¶1220 (for each state) (hereafter CCH). 2A Sutherland Statutory Construction §54.03, p. 355 (Sands 4th ed., Callaghan & Co. 1973). *Alabama*: App. Ref. Dec. Nos. 2062-AT-52 to 2087-AT-52, Oct. 31, 1952; CCH ¶1901.65. *Alaska*: ESC Ref. Man., 7/55 (Regulation 5013); CCH ¶1901.01. *Arizona*: App. Trib. Dec. No. 2684, Nov. 17, 1952 & App. Trib. Dec. No. 3095, Dec. 9, 1953; CCH ¶1901.17. *Arkansas*: §81-1106, *Arkansas Statutes Ann.*; ESD Letter Aug. 30, 1972; CCH ¶1220. *Colorado*: §8-73-110(1), *Colorado Rev. Statutes*. *Connecticut*: *Kelly v. Administrator*, 136 Conn. 482, 72 A.2d 54 (1950), aff'd Conn. Super. Ct., New Haven Co., July 15, 1949; *Barrie v. Administrator*, Conn. Super. Ct., New London Co., Aug. 1, 1951; CCH ¶1901.04. *Florida*: App. Ref. Dec. No. 5961, App. Dkt. No. 8925; CCH ¶1265.01. *Illinois*: *Illinois Revised Statutes*, ch. 48, §440B; CCH ¶4090. *Indiana*: Rev. Bd. Dec., 52-R-83, Oct. 31, 1952; CCH ¶1995.21; *Schenley Distillers, Inc. vs. Rev. Bd.*, 123 Ind. App. 508, 112 N.E.2d 299 (1953); §22-4-15-4, *Burns' Indiana Statutes*. *Iowa*: §96.5, *Code of Iowa*. *Kansas*: App. Ref. Dec. No. 17,961, Aug. 31, 1955; CCH ¶1901.95, App. Ref. Dec. No. 13,813, July 11, 1952; CCH ¶1901.95. *Kentucky*: Comm. Dec. No. 969 (Ky. B TPU-460.75-5, BSSUI), June 15, 1949; CCH ¶1901.035. *Maine*: 26 *Maine Rev. Statutes Ann.* §1193.5. *Maryland*: *Allen v. ESB*, 206 Md. 316, 111 A.2d 645 (1955); Art. 5, §20(n), *Annot. Code of Maryland*; CCH ¶4017C & 5018. *Massachusetts*: Bd. of Rev. Dec. No. X-83959-A, July 29, 1949; CCH ¶1995.21. *Michigan*: *Hickson v. Chrysler Corp.*, Mich. Cir. Ct., Macomb County, No. XA-4516, Dec. 9, 1971; CCH ¶1901.253. *Minnesota*: *Ackerson v. Western Union Telegraph*, 234 Minn. 271, 48 N.W.2d 338 (1951); §268.08, subd. 3(1) & (2), *Minnesota Statutes*; CCH ¶4085. *Nebraska*: *Appeal Tribunal Decision* No. 148, Vol. XIV, Jan. 27, 1950; CCH ¶1901.06. *Nevada*: CCH ¶1995, ¶¶4083-4085. *New Hampshire*: *Wellman v. Riley*, 67 A.2d 428 (N.H. 1949); App. Trib. Dec., Appeal No. 429-A-51, Aug. 17, 1951; CCH ¶1901.01. *New York*: CCH ¶4143. *North Carolina*: ESC Interp. No. 132, Feb. 28, 1956; CCH ¶1901.01. *Ohio*: *Reid v. Board of Review*, 115 Ohio St. Rep. 9, 97 N.E.2d 31 (1951); *Barry v. Administrator*, Ct. Com. Pleas, Muskingum County (1960); CCH ¶1995.85; *Collopy v. Smith*, Ct. Appeals, Athens County, Dec. 14, 1950; CCH ¶1995.853; §4141.31, *Baldwin's Ohio Rev. Code Ann.*; CCH ¶4104. *Oklahoma*: App. Trib. Dec., July 30, 1953; CCH ¶1901.38; 40 *Oklahoma Statutes* 1971 §229(j); CCH ¶4069. *Oregon*: §657.205(1)(a), *Oregon Rev. Statutes*, (Ch. 655, L. 1955); CCH ¶4041. *Pennsylvania*: §404(d) (2), *Purdon's Penna. Statutes Ann.*; Bd. of Rev. Dec. No. B-70220, Mar. 5, 1962; CCH ¶1995.63. *Rhode Island*: §28,44-21, *Rhode Island General Laws*, 1956; *Adeline Ottiano v. DES*, Rhode Isl. Super Ct., Providence, Sc. C.A. No. 72-3170, April 20, 1976; CCH ¶1901 & ¶1955.10. *Utah*: §35-4-5(j), *Utah Code Ann.*. *Vermont*: Ref. Dec. App. No. 1197E, Aug. 31, 1950; CCH ¶1995.03; Comm. Dec. App. No. 1365A, June 6, 1952; CCH ¶1995.05; Ref. Dec. App. No. 1522, Sept. 25, 1952; ¶1995.06; §5379, *Vermont Statutes Ann.*. *Virginia*: CCH ¶1995 & ¶1901.07. *West Virginia*: Bd. of Rev. Dec., Cases 6013 through 6017, 6111, Oct. 21, 1953; *Anderson v. Board of Review*,

Thirteenth Jud. Cir. Ct., Apr. 20, 1954; *Bd. of Rev. Dec.*, Case 4555, Mar. 19, 1951; CCH ¶1901.0195. Wisconsin: *Brink v. Ind. Comm.*, 27 Wis. 2d 531, 135 N.W.2d 326 (1965); §108.05(4), *Wisconsin Statutes*; CCH ¶4040; §108.05(5), *Wis. Stats.*; CCH ¶4040A. Wyoming: *App. Exam. Dec. No. 1458-AT-62-UCFE*, July 17, 1962; CCH ¶1995.04. Collateral reference: *Ledvinka v. Home Ins. Co. of New York*, 139 Md. 433, 115 A. 596, 19 A.L.R. 167.

DATED this 6th day of December, 1976.

ATTORNEY GENERAL OF IDAHO

Wayne L. Kidwell

ANALYSIS BY:

Peter E. Heiser, Jr.
Chief Deputy Attorney General

ATTORNEY GENERAL OPINION NO. 76-61

TO: Milton G. Klein, Director
Department of Health & Welfare
700 West State Street
Building Mail

Per Request for Attorney General opinion.

QUESTIONS PRESENTED:

1. Pursuant to §39-422, *Idaho Code*, as amended, the Idaho Department of Health and Welfare has certain fiscal responsibilities concerning health districts. What is the scope of that responsibility?
2. What was the intent of the Idaho Legislature when it amended §39-422, *Idaho Code* by replacing the word "administrative" with the word "ministerial"?
3. May the Department of Health and Welfare charge the health districts for services rendered pursuant to §39-422, *Idaho Code*?

CONCLUSIONS:

1. The Department of Health and Welfare is required by §39,422, *Idaho Code* to perform ministerial fiscal duties for the health districts created pursuant to §39-401, *et seq*, *Idaho Code*. These responsibilities include mechanical steps necessary for deposits to - and withdrawals from - the special fund created in the State Treasury by §39-422, *Idaho Code*. The Department of Health and Welfare is also required to perform purely ministerial accounting functions of a non-discretionary nature.
2. In amending §39-422, *Idaho Code* in 1976 by changing the word "administrative" to the word "ministerial", the logical conclusion would be that the legislature was more narrowly defining and restricting the duties of the Department over health districts.
3. The Department of Health and Welfare may not charge the health districts for services required by the Health District law. However, the Department may make reasonable charges for services performed in addition to those required by law.

ANALYSIS:

The answer to the questions presented in this request turn initially on the status of health districts under Idaho law. The seven (7) health districts, created by §39-408, *Idaho Code* are not agencies of State government. The legislative intent is expressed in §39-401, *Idaho Code* as follows:

"It is legislative intent that health districts operate and be recognized not as state agencies or departments, but as governmental entities whose creation has been authorized by the state, much in the manner

as other single purpose districts . . . This section merely affirms that health districts created under this chapter are not state agencies, and in no way changes the character of those agencies as they existed prior to this Act."

The independent role of the seven health districts is amplified throughout the Health Districts Act which places broad responsibilities and powers on each of the districts and minimizes the powers and responsibilities at the State level. See e.g. §39-414, *Idaho Code*, establishing the powers and duties of the District Board of Health.

Section 39-422, *Idaho Code*, specifically in issue here, provides in part as follows:

"There is hereby authorized and established in the state treasury a special fund to be known as the Public Health District Fund for which the state treasurer shall be custodian. Within the public health district fund there shall be seven (7) divisions, one(1) for each of the seven (7) public health districts. Each division within the fund will be under the exclusive control of its respective district board of health and no funds shall be withdrawn from such division of the fund unless authorized by the district board of health or their authorized agent. The state director of the department of health and welfare will act as fiscal officer of the various health districts and perform such ministerial functions as are necessary for deposits and withdrawals, and accounting for the funds of each division and the public health district fund."

Initially, it should be recognized that this section furthers the legislative intent by providing paramount fiscal control in each of the public health districts. In fact, each district is given exclusive control of its portion of the special fund. See also §39-414(6), *Idaho Code* which gives the District Board of Health powers and duties "to establish a fiscal control policy corresponding as substantially as possible to that required to be followed by the state department of health and welfare." Thus, although the fiscal control policy of health and welfare must be used as a guideline, overall responsibility for such policy lies in the individual health district.

In light of the legislative intent expressed in the Act, the various provisions in the Act creating broad powers and duties in the public health districts, and the language of §39-422, *Idaho Code*, it must be concluded that the State Department of Health and Welfare has ministerial fiscal duties only over the public health districts. It is logical also to assume that the word "ministerial" was added to §39-422, *Idaho Code* in order to more clearly define the limited role played by the Department of Health and Welfare. The term "ministerial duty" is defined in *Black's Law Dictionary* as "one regarding which nothing is left to discretion - a simple and definite duty, imposed by law, and arising under conditions admitted or proved to exist." Research discloses numerous cases from many jurisdictions adhering to this definition and emphasizing that "ministerial duties" are inherently of a non-discretionary nature. See e.g. *Industrial Commission v. Superior Court*, 423 P.2d 375 (Ariz. 1967); 73 C.J.S. *Public Administrative Bodies and Procedures* §15; 43 Am. Jur. *Public Officers* §278. The term "ministerial duty" is narrowly defined in the law, and it must be

assumed that the legislature had this meaning in mind when it added the word "ministerial" to §39-422, *Idaho Code*.

The last question raised is whether the Department of Health and Welfare may appropriately charge health districts for services rendered pursuant to the Health District law. If the function or service is one required under the Health District law, the Department is under a duty to provide such function or service without exacting a fee. However, if services are provided which go beyond the bounds of the statute, a fee may be recovered by the Department of Health and Welfare. Section 39-401 allows health districts to enter into contractual arrangements with any department of State government for performance of additional services. Nothing prohibits such contractual arrangement from including fees for services, and the standard law of contracts would allow such a payment for services provided. Applying this to the Health District law, the Department would not be allowed to charge for ministerial duties provided under §39-422, *Idaho Code*, but if additional fiscal duties, including accounting services, were provided, services could be rendered by entering into contractual arrangements pursuant to §39-401, *Idaho Code*. As discussed above, ministerial functions include those services or procedures which are non-discretionary in nature. They are duties primarily of a mechanical nature, and would not include such functions as policy making decisions.

In conclusion, we wish to emphasize that this opinion deals with the fiscal responsibilities of the Department of Health and Welfare under §39-422, *Idaho Code*. The opinion should not be extended to apply to other duties and responsibilities placed upon the Department of Health and Welfare under the Public Health District law.

For example, §39-414, *Idaho Code* requires the Health Districts to cooperate with the Director of the Department of Health and Welfare and to meet at least semi-annually with the Director. This section contemplates additionally that the Director of the Department of Health and Welfare have authority to delegate certain responsibilities and functions to the Districts. See §39-414(2), *Idaho Code*. Also, the Director of the Department of Health and Welfare is required to assist in the preparation of procedures for deposit and expenditures of money from the Public Health District Fund pursuant to §39-422, *Idaho Code*. He is also required pursuant to §39-423, *Idaho Code* to submit a tentative projection of available State aid. Finally, §39-425, *Idaho Code* places certain monetary and appropriation responsibilities on the Department of Health and Welfare for the public health districts. What this opinion does conclude is that under §39-422, *Idaho Code*, the Department of Health and Welfare is quite limited in its duties and responsibilities pertaining to fiscal control. These duties are ministerial in nature and cannot extend to discretionary functions such as policy making decisions.

POINTS AND AUTHORITIES

1. *Industrial Commission v. Superior Court*, 423 P.2d 375 (Ariz. 1967).
2. §39-401, *et seq.*, *Idaho Code*.
3. *Black's Law Dictionary* (ministerial duty).

4. 73 C.J.S. *Public Administrative Bodies and Procedures*, §15.

5. 43 AM. Jur. *Public Officers*, §278.

DATED This 21st day of December, 1976.

WAYNE L. KIDWELL
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State of Idaho

ANALYSIS BY:

GUY G. HURLBUTT
Deputy Attorney General
State of Idaho

ATTORNEY GENERAL OPINION NO. 76-62

TO: Gary J. Jensen, Prosecuting Attorney
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Per Request for Attorney General opinion.

QUESTIONS PRESENTED:

Pursuant to the U.S. Soldiers and Sailors Relief Act, is a judge required to have consent of a serviceman to appoint counsel during his absence in a default judgment?

If an attorney is appointed, who compensates the appointed attorney?

CONCLUSION:

The Court need not have the serviceman's consent to appoint an attorney for the defendant in a default action where the defendant is in the military service. The Court *shall* on application of the party requesting default make that appointment.

The appointed attorney's compensation should be taxed as costs of suit and compensated by the party seeking default.

ANALYSIS:

The court need not obtain the consent of a defendant in the military service before appointing an attorney for the defendant pursuant to 50 U.S.C. App. 520(1). This appointment is necessary because of the above section which is a part of the Soldiers and Sailors Relief Act.

50 U.S.C. App. 520(1) provides as follows:

(1) In any action or proceeding commenced in any court, if there shall be a default of any appearance by the defendant, the plaintiff, before entering judgment shall file in the court an affidavit setting forth facts showing that the defendant is not in military service. If unable to file such affidavit plaintiff shall in lieu thereof file an affidavit setting forth either that the defendant is in the military service or that plaintiff is not able to determine whether or not defendant is in such service. If an affidavit is not filed showing that the defendant is not in the military service, no judgment shall be entered without first securing an order of court directing such entry, *and no such order shall be made if the defendant is in such service until after the court shall have appointed an attorney to represent defendant and protect his interest, and the court shall on application make such appointment.* Unless it appears that the defendant is not in such service the court may require, as a condition before judgment is entered, that the plaintiff file a

bond approved by the court conditioned to indemnify the defendant, if in military service, against any loss or damage that he may suffer by reason of any judgment should the judgment be thereafter set aside in whole or in part. And the court may make such other and further order or enter such judgment as in its opinion may be necessary to protect the rights of the defendant under this Act (sections 501-548 and 560-590 of this Appendix). Whenever, under the laws applicable with respect to any court, facts may be evidenced, established, or proved by an unsworn statement, declaration, verification, or certificate, in writing, subscribed and certified or declared to be true under the penalty of perjury, the filing of such an unsworn statement, declaration, verification, or certificate shall satisfy the requirement of this subsection that facts be established by affidavit. (Emphasis added.)

The Court questions whether the defendant will, in fact, be protected by such procedure. Defendant is protected by §520(4) against an unlawful default, whereby within 90 days after release from military service, the default is a voidable judgment under certain conditions.

It appears clear from the statute that where there is no personal appearance by the defendant and the plaintiff is seeking to obtain a default judgment, the Court shall make an appointment to represent the absent defendant.

The second question relates as to who is to compensate the attorney who is appointed pursuant to this Act. The Act itself is silent as to who shall compensate the attorney. Many cases have dealt with this situation and it appears that the most logical explanation is found in *Weinberg v. Downey*, 25 N.Y.S. 2d 661 (1941), which reads as follows:

"The question presented is whether the appointed attorney may be awarded compensation for his services. It is agreed that the Act does not specifically or expressly mention the matter of compensation, being similar in that respect to the Act considered in *Davidson v. Lynch*, 103 Misc. 311, 171 N.Y.S. 46, and, as suggested in that case, an attorney so appointed in time of actual war should regard that as a patriotic duty to act regardless of compensation. At the present time, however, we are not in a state of war, and the applicable practice of analogous practice is that governing compensation to a guardian ad litem (through the appointed attorney is not so called in the Act). Thus with the inherent power of the court independent of an active rule . . . the attorney is allowed taxable costs in the action as an expense in the action.

Other cases seem to affirm the fact that there should be compensation for the attorney, but do not show out of which funds the compensation is to be paid. It would seem logical to believe that it would be proper to tax the appointed attorneys reasonable fee as costs to the plaintiff since the plaintiff is the one bringing the default action and is the one who will benefit from the court action and not the defendant. The defendant will eventually pay the costs of the appointed attorney, when the judgment is satisfied. The costs would be costs of suit and become part of the judgment. There is no statutory authority in the State of Idaho which would allow the court to order payment of attorney fees

out of county funds.

AUTHORITIES CONSIDERED:

1. 50 U.S.C. App. §520(1).
2. *Davidson v. General Finance Corporation*, 295 F.Supp. 878 (1968).
3. *Weinberg v. Downey*, 25 N.Y.S. 2d 661 (1941).
4. *In re Cool's Estate*, 19 N.J. Misc. 236 18 A.2d 114 (1941).

DATED THIS 22nd day of December, 1976.

WAYNE L. KIDWELL
Attorney General
State of Idaho

ANALYSIS BY:

GORDON S. NIELSON
Senior Deputy Attorney General
State of Idaho

ATTORNEY GENERAL OPINION NO. 76-63

TO: WILSON KELLOGG
Director
Idaho Department of Agriculture
Building Mail

Per Request for Attorney General Opinion.

QUESTION PRESENTED:

Whether establishments in which a machine composed of a beater assembly and cooling capacity is used to convert a liquid mix into a semi-solid substance commonly known as soft ice cream are ice cream factories within the meaning of Section 37-503, *Idaho Code*, and as such must annually obtain an ice cream factory license from the Department of Agriculture?

CONCLUSION:

Establishments using ice cream machines to convert a liquid mix into ice cream are ice cream factories within the meaning of Section 37-503, *Idaho Code*.

ANALYSIS:

The Director of the Department of Agriculture is commanded by statute to make inspections, or cause inspections to be made, of all places required to be licensed pursuant to Section 37-503, *Idaho Code*, as well as all places in this state where dairy products are sold, offered for sale or manufactured. Section 37-502, *Idaho Code*. While the Dairy Products Dealers Law, Chapter 5, Title 37, *Idaho Code*, does not so specifically state, a self-evident intent and purpose of the Legislature in requiring these inspections by the Department of Agriculture is to protect the public health. Thus, the term "ice cream factory" is defined to mean, "any place, building or structure wherein milk or ice cream, regardless of butterfat content, and with or without other constituents, shall be manufactured into a frozen or semi-frozen product for human consumption and for sale at wholesale or retail". Such establishments must obtain an annual license from the Department of Agriculture for the protection of the public. Section 37-503, *Idaho Code*.

When administrative powers are granted for the purpose of protecting the public health through a regulatory scheme, the statutes granting these powers are to be liberally construed to effectuate their purpose. Since the beginning of the twentieth century and the concomitant beginning of the science of preventive medicine, the courts have been committed to the doctrine of giving statutes which are enacted for the protection of the public health an extremely liberal construction for the protection of the public health. *United States v. Antikamnia Chemical Company*, 231 US 654, 58L Ed 419 34 S Ct 222 (1914).

The proper enforcement of health laws is dependent upon administrative officers and agencies. For this reason, the courts have created a notable exception to the rule that statutes granting powers to these agencies must be strictly construed to avoid over-reaching by these agencies. 62 Cases, *More or*

Less, Each Containing Six Jars of Jam v. United States, 340 US 593, 95L Ed 566, 71 S Ct 515 (1951).

As stated by Sutherland in his treatise on statutory constructions:

"One of the most common forms of health legislation is to be found in statutes which provide measures designed to guarantee the purity and wholesomeness of foods, drugs and cosmetics, which are enacted not only for the purpose of health protection, but also to prevent frauds upon the public. At common law the duty imposed upon those dealing in food and drugs was very severe, and this policy has been maintained in the construction of statutes upon the same subject. These statutes imposing criminal penalties for storing or selling adulterated food, in the interests of public health, are generally held not to require a criminal intent. Milk control legislation providing for the licensing of milk dealers and the regulation of prices has also received wide adoption. This legislation, enacted for the purpose of maintaining an adequate and wholesale supply of milk fit for human consumption receives a liberal interpretation. The same treatment is relevant in the case of laws providing for the inspection of cattle to determine the presence of contagious disease." Sutherland, *Statutory Construction*, Sands Ed, Section 71.02.

The primary issue raised by your question is whether the premises in which an ice cream machine is used can be called a "factory". A corollary of this question is whether ice cream production is "manufacturing" within the meaning of that term, since the word "factory" is a contraction of the word "manufactory". *DiSanto v. Brooklin Chair Company*, 125 N S 8, 10.

The answer is that the word "factory" has been used extensively in connection with food processing, especially in connection with the production of dairy products. This use has been recognized by the Federal District Court for the District of Idaho in its interpretation of the term "cheese factory" as used in a Federal statute. The court there held that a warehouse used only to store and sell cheese was a cheese factory within the meaning of that statute. *Bowles v. Nelson-Ricks Creamery Company*, 66F. Supp. 885, 888 (Idaho, 1946.)

Moreover, the Supreme Court of Ohio has passed directly on the question presented. That court was asked to decide whether a person who purchased a liquid raw mix, which that person placed in an ice cream machine for conversion into soft ice cream, was a "manufacturer" for purposes of a tax law allowing manufacturers to list personal property used in business for tax purposes at fifty per cent of true value. The court held that such a person was a manufacturer. *Jer-Zee, Inc. v. Bowers*, 125 N. E. 2d 195 (Ohio, 1955).

The Legislature has determined that the public health requires establishments preparing soft ice cream on the premises by means of an ice cream machine of the type already described herein to be licensed as ice cream factories, since the statute requiring such establishments to be licensed is a public health measure, and since the production of milk food products is manufacturing, even though the machine used is comparatively small.

AUTHORITIES CONSIDERED:

1. *Idaho Code*, Chapter 5, Title 37.
2. Sutherland, *Statutory Construction*, Sands Ed, Section 71-02.
3. *United States v. Antikamnia Chemical Company*, 231 US 654, 58L Ed 419 34 S Ct 222 (1914).
4. *62 Cases, More or Less, Each Containing Six Jars of Jam v. United States*, 340 US 593, 95L Ed 566, 71 S Ct 515 (1951).
5. *DiSanto v. Brooklin Chair Company*, 125 NYS 8, 10.
6. *Bowles v. Nelson-Ricks Creamery Company*, 66F. Supp. 885, 888 (Idaho, 1946).
7. *Jer-Zee, Inc. v. Bowers*, 125 N E2d 195, 196 (Ohio, 1955).

DATED this 22nd day of December, 1976.

ATTORNEY GENERAL OF IDAHO

WAYNE L. KIDWELL

ANALYSIS BY:

MIKE KINSELA

Assistant Attorney General

ATTORNEY GENERAL OPINION NO. 76-64

TO: Richard L. Barrett
State Personnel Director
700 West State
Boise, Idaho 83720

Per request for Attorney General Opinion

QUESTION PRESENTED:

Is the Personnel Commission required to conform to the Administrative Procedure Act in the development and adoption of compensation plans for classified service.

CONCLUSION:

No, the Personnel Commission is not required to conform to the Administrative Procedure Act in the development and adoption of compensation plans for classified service.

ANALYSIS:

Title 67, Chapter 52, *Idaho Code*, commonly known as the Administrative Procedure Act was compiled in the Session Laws of 1965. Its purpose is to "make available for public inspection, all rules and all other written statements of policy or interpretation formulated, adopted or used by the agency in the discharge of its functions." *Idaho Code* §67-5202(2).

Idaho Code §67-5202(b) further states:

No agency rule, order or decision is valid or effective against any person or party, nor may it be invoked by the agency for any purpose, until it has been made available for public inspection as herein required. This provision is not applicable in favor of any person or party who has actual knowledge thereof. (1965, ch. 273, §2, p. 701.)

Judicial constructions of this act are sparse, with none being exactly on point. For this reason, the best possible determination of the breadth and scope of this Act comes from a close examination of the words contained therein. *Idaho Code* §67-5201 defines the words critical to the Act. It states that:

(6) "Person" means any individual, partnership corporation, association, governmental subdivision, or public or private organization or any character other than an agency.

(7) "Rule" means each agency statement of general applicability that implements, interprets or prescribes law or policy, or describes the organization, procedure or practice requirements of any agency. The term includes the amendment or repeal of a prior rule, but does not include, (A) statements concerning only the internal management of any agency and not affecting private rights or procedures available to

the public, or (B) declaratory rulings issued pursuant to §67-5208, or (C) intra-agency memoranda. (1965, ch. 273, §1, p. 701.)

Your question, therefore, requires a determination of the exact nature of the compensation plans for classified service. Simply, the question here is whether or not this agency action is one of "general applicability" or one of "internal agency management not affecting the private right of the public."

Idaho Code §67-5301 establishes the Idaho Personnel Commission and states its purposes:

There is hereby established the Idaho personnel commission which is authorized and directed to administer a personnel system for Idaho employees . . . The purpose of said personnel system is to provide a means whereby employees of the State of Idaho shall be selected, retained and promoted.

Idaho Code §67-5309 addresses the rules by which the Personnel Commission shall operate. It states:

The commission shall have the power and authority to adopt, amend, or rescind such rules and regulations as may be necessary for proper administration of this act. Such rules shall include:

(a) A rule requiring the personnel commission after consulting with each department to develop, adopt, and make effective, a classification plan for positions covered by this act, based upon an analysis of the duties and responsibilities of the position . . . "

From this legislation, it is evident that the legislature intended rules and regulations concerning the development and adoption of compensation plans to be matters "concerning only the internal management of any agency." In 1976 the Idaho legislature thoroughly considered the matter of compensation plans. Detailed statutory requirements were established which prescribe narrow boundaries for implementing compensation plans. *Idaho Code* §67-5303 is the operative section of the Code which defines the classified service and prescribes rules and regulations which the Idaho Personnel Commission must follow. In part it states that:

All departments of the state of Idaho and all employees in such state departments, except those specifically exempt, shall be subject to this act and to the system of personnel administration which it prescribes. Exempt employees shall be . . .

In this particular case, where statutory authority narrowly prescribes the boundaries by which state employee's salaries are to be set, the matter falls under the exclusionary portion of *Idaho Code* §67-5201(7) because it is an "internal management" decision only. The establishment of a compensation plan merely implements statutory policy.

It is still possible that because the word "Rules" is specifically employed in the Code Sections addressing Personnel Commission operations that the legis-

lature intended the Administrative Procedure Act to apply. If this interpretation is deemed controlling, then the Administrative Procedure Act provisions must be employed. The personnel Commission must promulgate regulations in accordance with the Administrative Procedure Act procedures.

Rule Seven of the Rules and Regulations of the Idaho Personnel Commission is the section whereby the Idaho Personnel Commission has established a regulation concerning compensation plans as required by *Idaho Code* §67-5309. It reads:

The personnel commission after consulting with each department shall develop, adopt and make effective after approval by the administrator, division of budget, policy planning and coordination, acting for the governor, a comprehensive compensation schedule for all classes of positions in the classified service. The scope of salary surveys and the methodology and timetable for compensation schedule adjustments as outlined in *Idaho Code* §67-5309(b) shall be utilized by the commission in developing amendments to the schedule.

In essence, *Idaho Code* §67-5309 only requires the Idaho Personnel Commission to follow the administrative Procedure Act to establish their own rule making regulations. Once this has been established, then any Idaho Personnel Commission action forthcoming, such as the establishment of a compensation schedule which is relative to these rules, is not required to comply with the Administrative Procedure Act.

Since we have established that the Idaho Administrative Procedure Act is not applicable to actions of the Idaho Personnel Commission regarding the adoption and development of compensation plans for the classified service, then it follows that the Personnel Commission is not required to conform to the Idaho Administrative Procedure Act in the development and adoption of compensation plans for the classified service.

AUTHORITIES CONSIDERED:

1. *Idaho Code* Sections 67-5202(2), 67-5202(b), 67-5201, 67-5301, 67-5303, 67-5309.
2. Idaho case: *Williams v. State*, 95 Idaho 5,501 P2d, 203 (1972).

Dated this 27th day of December, 1976.

ATTORNEY GENERAL FOR THE
STATE OF IDAHO

WAYNE L. KIDWELL

ANALYSIS BY:

ARTHUR J. BERRY
Assistant Attorney General

ATTORNEY GENERAL OPINION NO. 76-65

TO: Hal Turner
Administrator
Division of Budget, Policy Planning and
Coordination
Building Mail

Per request for Attorney General Opinion.

QUESTIONS PRESENTED:

1. Is the University of Idaho required to allot all appropriated and non-appropriated sources of revenue?
2. Is it necessary or appropriate for the State Treasury to act as a custodian of these revenues?
3. Is it proper for the University of Idaho to spend these revenues without the approval of the State Auditor or the Board of Examiners.

CONCLUSION:

The University of Idaho is required to comply with the statutory allotment process for all sources of income which are appropriated by the Legislature from the General Fund of the State of Idaho.

INTRODUCTION:

Since any answer to the opinion request could vary depending upon the nature of the State departments involved, this opinion will specifically address the allotment process as it relates to the University of Idaho. Also, where it is necessary or proper to distinguish between the appropriated funds and non-appropriated funds, such distinction will be made. Finally, the issue here is whether or not the University of Idaho may allot for its endowment income under the class of Trustee and Benefit payments, even though the money is expended for personnel costs, operating expenditures and capital outlay.

ANALYSIS:

To resolve these issues, it is necessary to define the allotment requirements of the State of Idaho. This necessarily involves a determination of the applicability of the allotment process to the University of Idaho. As discussed below, all appropriated funds are to be available only as allotted. The classes to which all appropriated funds are allotted are personnel costs, operating expenses, capital outlay and trustee and benefit payments. The University of Idaho has, since the inception of the allotment process, or at least for the last six years, allotted for endowment earnings in the trustee and benefit payment class, even though the funds, once in the custody of the University, have been used for personnel costs, operating expenses, and capital outlay.

The Division of the Budget disapproved the allotment request for the first

half of FY 77, even though it was drawn as in prior allotment periods, because the funds were being used for purposes for which more accurate descriptive classes exist. Further, where allotments in trustee and benefit payments are made, the entire amount requested in the allotment is transferred to the University, even though there may not be claims against these moneys on which the State Auditor would issue warrants on vouchers presented.

We would emphasize that there is no suggestion on the part of any agency that the use of the endowment moneys by the University is improper or without legal authority. The issue, as stated above, is whether or not the University must comply with the Division of the Budget's allotment process where allocations of endowment earnings are made.

I.C. §67-3605 provides that "appropriated funds shall be available only as allotted in conformity with the provisions of I.C. §67-3516 through §67-3523." These sections refer to powers which the Division of the Budget has to ensure that allotment requests meet specific requirements. To understand the allotment process, the appropriation process must also be defined since only appropriated funds must be allotted. I.C. §67-3608 requires that all monies received by State educational institutions are to be deposited with the State Treasurer, but there are some exceptions. These exceptions include certain income pledges, monies received from the United States pursuant to appropriations for the University, payments in reimbursement for money expended in cooperative work, and trust monies. "It is hereby made the duty of the state auditor and state treasurer to enter the deposits so received in a general fund of the state of Idaho, . . . The monies shall be expended for the use and support of such institution and shall be audited and accounted for as other appropriations to the said institutions." I.C. §67-3603 establishes the manner of payment for funds appropriated. "All sums appropriated by any appropriation act shall, unless otherwise expressly provided by law, be paid out of the state treasury on warrants drawn by the state auditor against the proper fund upon presentation of proper vouchers or claims as approved by law."

I.C. §67-3609 concerns monies from outside sources which are used in addition to direct appropriations. In relevant part, it states "monies received from outside sources except those mentioned in 67-3608 . . . are to be used in addition to the direct appropriations made to such institution and the appropriations of other income herein made."

The analysis of the distinction between appropriated and unappropriated funds is significant because fund sources, including general fund sources, are listed on appropriation bills affecting the University of Idaho. Presently, funds included in appropriation measures include monies from the general fund, from land grant endowments, from federal funds, and from local institutional funds. Non-appropriated funds include all other funds the University receives, such as grants and contract funds, University enterprise funds, trust funds, and scholarship funds. Presently, the University allots some, but not all, of the above mentioned funds.

Since I.C. §67-3518, the *Idaho Code* section which grants the Division Bureau of the Budget power to require institutions to allocate in a certain manner, does not distinguish between appropriated and unappropriated funds, problems

have arisen. I.C. §67-3517 reads:

In order to guard against excessive expenditure of appropriations, and as an act of economy, efficiency and control relating to said appropriation, it is hereby made the duty of each officer, department, bureau and institution, to file with the administrator of the division of budget, policy planning and coordination a request for allotment of funds . . . Said request for allotment shall be submitted to the administrator of the division at a time and in the form as described by the administrator of the division and as a general rule, in the same detail as appropriated, unless greater detail is deemed necessary by the administrator of the division.

From this reading, it would appear that the Division of Budget does have legal authority to require State agencies to allot funds in any manner the Division reasonably requires.

Whether the University of Idaho and its Board of Regents are governed by these budget requirements is a matter of statutory and constitutional interpretation. I.C. §33-2802 confers upon the Idaho State Board of Education (which constitutes the Board of Regents of the University) general supervisory power and control over the University of Idaho. Since the Idaho State Board of Education is a department of State government, it would normally follow that the department is subject to the allocation and appropriation laws of the State.

However, Art. 9, §10, Idaho Constitution, states:

The location of the University of Idaho, as established by existing laws, is hereby confirmed. All the rights, immunities, franchises, and endowments, heretofore granted thereto by the State of Idaho are hereby perpetuated unto the said university. The regents shall have the general supervision of the University, and the control and direction of all the funds of, and appropriations to, the University, under such regulations as may be prescribed by law.

The Supreme Court of the State of Idaho has on several occasions had an opportunity to interpret the above-cited Article and Section of the Constitution of the State of Idaho. The leading case in this area is *State, ex rel Black v. The State Board of Education and Board of Regents of the University of Idaho*, 56 Idaho 210, 52 P.2d 141 (1921). In this case, the University of Idaho was attempting to transfer monies from the sale of University equipment directly to the University Treasury instead of to the Treasurer of the State of Idaho as required by law. The court upheld the right of the University so to act. The court held:

It (the University of Idaho) is made the highest form of juristic person known to the law, a constitutional corporation of independent authority, which within the scope of its functions is coordinate with and equal to that of the legislature.

The court went on to say:

The regulations which may be prescribed by law and which must be observed by the regents in their supervision of the university, and the control and direction of its funds, refer to methods and rules for the conduct of its business and accounting to authorized officers. Such regulations must not be of a character to interfere essentially with the constitutional discretion of the board, under the authority granted by the constitution.

Further, the court held:

The proceeds of federal land grants, direct federal appropriations, and private donations to the university, are trust funds, and are not subject to the constitutional provision that money must be appropriated before it is paid out of the state treasury. Claims against such funds need not be passed upon by the board of examiners, and the moneys in such funds may be expended by the board of regents subject only to the conditions and limitations provided in the acts of Congress making such grants and appropriations, or the conditions imposed by the donors upon the donations.

However, the court did discuss the general fund appropriation to the University. It held:

When an appropriation of public funds is made to the university, the legislature may impose such conditions and limitation as in its wisdom it may deem proper. If accepted by the regents, it is coupled with the conditions, and can be expended only for the purposes and at the time and in the manner prescribed, and can be withdrawn from the state treasury only as provided by law.

Finally, the court held that for "the board of examiners to pass upon claims against the board of regents would make the latter board subservient to the former, and in the final analysis would operate to deprive the board of regents of the control and direction of and appropriations to the university."

In *Dreps v. Board of Regents of the University of Idaho*, 139 P.2d 467 (1943), the court, in another broad holding, held that the legislature possessed no power to place any restrictions upon the University as to the employment of University workers. Since the State Nepotism Act was declared not to be applicable to the University in this case, *Dreps* has been cited for the proposition that certain legislative acts are not applicable to the University.

In *Melgard v. Eagleson*, 31 Idaho 411 (1918), the Court held that the State and the State Treasury had no authority to control federal funds that are paid to the State Treasury in trust for the University of Idaho as per federal appropriation acts. In granting the University fiscal independence with reference to federal appropriations, the court held "the state treasurer has, with respect to these funds, a mere clerical or ministerial duty to perform, that is to pay over the fund immediately to the treasury of the board of regents."

In *Evans v. Van Deusen*, 31 Idaho 614 (1918), an action was brought by the University of Idaho to compel the State Auditor to draw funds and credit certain trust accounts the state was holding for the University of Idaho. The

court stated that these funds are not "strictly speaking subject to appropriation." In this case, a writ of mandamus to obtain such order was denied by the court for technical reasons not relating to the substantive problem area. In dicta, the court supported the University's position and said that the appropriation bill of 1917 indicated that certain funds named in the appropriation bill were not actually "appropriated" in the true sense of the word since the state cannot appropriate funds that already belong to the University of Idaho.

Other states which have a constitutional status similar to Idaho's have cases directly in point to this question. In *Board of Regents v. Auditor General*, 132 N. W. 1037, the Michigan Supreme Court resolved the question concerning the power and authority of the auditor general to control the expenditures of monies appropriated for the use and maintenance of the university. The court held that no such power existed and the regents of the university had full and exclusive power and authority over matters relating to the control of the university.

The above-mentioned cases provide adequate precedent to support the position that the University of Idaho, as a matter of law, need not follow the State allotment procedures when allotting certain types of monies. This justification rests upon the holding in *Black*, which stated that federal land grants, direct federal appropriations, and private donations to the State University are trust funds and are not subject to constitutional requirements that money must be appropriated before paid out of the State Treasury. It must follow, then, that although certain federal and miscellaneous fund sources are listed in the appropriation bill to the State Board of Education, that this listing of funds in the appropriation bill is not an actual "appropriation." *Evans v. Van Deusen, supra*. Rather, it is a mere listing of fund sources which the legislature includes on the appropriation bill to determine the amount of the appropriation.

Since I.C. §67-3806 exempts certain federal monies and certain trust monies which belong to the University of Idaho and since Idaho case law holds that certain other fund sources are also exempt from regulations of the State Division of Budget, then it follows that the "general fund" category listed on the state appropriation bills is the only source which requires allotment procedures to conform to the Division of the Budget's requirements in I.C. §67-3517.

In conclusion, the University of Idaho must follow the Division of the Budget allocation procedures when allocating monies appropriated from the State General Fund. To hold otherwise would mean that the legislature is actually appropriating federal funds, institutional endowment funds, and other assorted miscellaneous funds, when in fact these monies are not subject to appropriation. *Evans v. Van Deusen, supra*.

2. Is it necessary or appropriate for the State Treasury to act as a custodian of these revenues?

The answer to question no. 1 renders unnecessary an answer to question no. 2.

3. Is it proper for the University of Idaho to spend these revenues without the approval of the State Auditor or the Board of Examiners?

The answer to question no. 1 renders unnecessary an answer to question no. 3.

DATED This 30th day of December, 1976.

ATTORNEY GENERAL OF IDAHO

WAYNE L. KIDWELL

ANALYSIS BY:

JAMES R. HARGIS
Deputy Attorney General

AUTHORITIES CONSIDERED:

1. I.C. §§67-3511, 67-3516 through 67-3523, 67-3603, 67-3605, 67-3608 and 67-3609.
2. Article 8, Section 10, Idaho Constitution.
3. *Dreps v. Board of Regents of the University of Idaho*, 139 P.2d 467 (1943).
4. *State, ex rel Black v. The State Board of Education and Board of Regents of the University of Idaho*, 56 Idaho 210, 52 P.2d 141 (1921).
5. *Melgard v. Eagleson*, 31 Idaho 411 (1918).
6. *Evans v. Van Deusen*, 31 Idaho 614 (1918).
7. *Board of Regents v. Auditor General*, 132 N.W. 1037.

ATTORNEY GENERAL OPINION NO. 76-66

TO: Honorable Cecil D. Andrus
Governor of the State of Idaho
Statehouse
BUILDING MAIL

Per request for Attorney General Opinion.

QUESTION PRESENTED:

"If a major corporate officer of a firm which performs a great deal of work for the Idaho Department of Transportation should become a member of the Idaho Legislature, would there be any possibility of a 'conflict of interest' arising out of his holding public office and voting on appropriations while continuing to be a corporate officer of the private firm?"

CONCLUSION:

If the appropriation is one which, as a practical matter, is tied to the legislator's particular corporation, a conflict of interest would exist. The rules adopted by the Senate or House of Representatives determine whether or not a legislator facing a conflict of interest should declare his interest or should abstain from voting on the particular issue.

ANALYSIS:

The major provisions dealing with conflicts of interest of Idaho's public officers are contained in Article VII, Section 10, *Idaho Constitution*, and Section 59-201, *Idaho Code*. Article VII, Section 10, *Idaho Constitution* provides:

The making of profit, directly or indirectly, out of state, county, city, town, township, or school district money, or using the same for any purpose not authorized by law, by any public officer, shall be deemed a felony, and shall be punished as provided by law.

A review of the proceedings of Idaho's Constitutional Convention reveals that the framers of the Idaho Constitution in adopting Article VII, Section 10, were interested in preventing public treasurers from using public money for their personal profit. The constitutional convention proceedings do not reflect a broader purpose of preventing contracts between public agencies and their officers. *Constitutional Convention Proceedings*, Vol. II, p. 1678, et seq.

The Utah Supreme Court construed a provision virtually identical to Idaho's Article VII, Section 10, in the case of *Brockbank v. Rampton*, 22 Utah 2d 19, 447 P2d 376 (1968). The Utah court said at 447 P2d 378:

Prior to drafting the Utah Constitution, it was a common practice for state treasurers and other custodians of public monies in other states to deposit the same in banks at interest and to treat the earnings from the deposits as their private funds . . . It would appear that the provision of the Utah Constitution above referred to was aimed at the

problem of preventing a custodian of public funds from making a profit therefrom.

The Utah Court held that the constitutional provision did not prohibit Senator Brockbank, a member of the Joint Appropriations Committee, from bidding on contracts let by the state.

Article VII, Section 10, *Idaho Constitution* would probably be interpreted in a similar manner since Idaho's provision is virtually identical to Utah's and since the proceedings of the Idaho Constitutional Convention indicate that the Utah and Idaho provisions were addressed to the same problem.

It should be noted that Article VII, Section 10, *Idaho Constitution* prescribes a felony offense. Therefore, a strict construction such as that given by the Utah Supreme Court would be consistent with the Idaho Supreme Court's ruling that criminal statutes must be strictly construed. *State v. Hahn*, 92 Idaho 265, 441 P2d 714 (1968).

A conflict of interest provision of more general applicability is stated in §59-201 *Idaho Code* which provides:

Members of the legislature, state, county, district and precinct officers, must not be interested in any contract made by them in their official capacity, or by any body or board of which they are members.

This provision prohibits a public servant from placing himself in certain contractual positions that might tend to bring his private interests into conflict with his official duties. Thus, for example, a member of the Idaho House of Representatives could not be financially interested in a contract entered into by the House of Representatives. On the other hand, the statute would not prohibit a member of the House of Representatives from voting on an appropriation or a tax exemption which might benefit the Representative only as a member of the general public who happens to be a member of the benefitted class. The distinction here is between judicial or administrative and legislative functions. If the particular vote prescribes a general rule of conduct or imposes burdens or confers privileges upon a class of persons, the function is legislative in character. On the other hand, if the particular vote confers a privilege in specific cases or affects a personal interest not in common with a class of persons, the function is administrative or judicial in character. *Gardiner v. Bluffton*, 173 Ind. 454, 89 N.E. 953 (1909); *State v. Board of Public Works*, 56 NJL 431, 29A. 163 (1894).

Normally the matters considered by the legislature are legislative rather than administrative or judicial matters and therefore §59-201 *Idaho Code* would not apply.

In addition to constitutional and statutory provisions, the rules of the Senate or House of Representatives may require that members declare their interest or abstain from voting in cases involving conflicting personal and public interests. Article III, Section 9, *Idaho Constitution* provides in pertinent part:

Each house when assembled shall choose its own officers judges of the election, qualifications and returns of its own members, determine its

own rules or proceeding, and sit upon its own adjournments; . . .
(Emphasis supplied.)

Section 522 of Mason's *Manual of Legislative Procedure* which has been used by both houses of the Idaho Legislature provides in part:

It is a general rule that no one can vote on a question in which he has a direct personal or pecuniary interest. The right of a member to represent his constituency, however, is of such major importance that a member should be barred from voting on matters of direct personal interest only in clear cases and when the matter is particularly personal. This rule is obviously not self-enforcing and unless the vote is challenged the member may vote as he chooses . . .

AUTHORITIES CONSIDERED:

Article III, Section 9, *Idaho Constitution*.

Article VII, Section 10, *Idaho Constitution*.

Section 59-201, *Idaho Code*.

State v. Hahn, 92 Idaho 265, 441 P2d 714 (1968).

Dated this 30th day of December, 1976.

ATTORNEY GENERAL FOR THE STATE OF
IDAHO

WAYNE L. KIDWELL

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