

**IDAHO
ATTORNEY
GENERAL'S
REPORT**

FOR THE BIENNIUM

BEGINNING JULY 1, 1978

AND ENDING JUNE 30, 1980

AND

OPINIONS

FOR THE YEAR

1979

DAVID H. LEROY

Attorney General

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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	1975-1978
DAVID H. LEROY	1979



DAVID H. LEROY
Attorney General



STATE OF IDAHO

OFFICE OF THE ATTORNEY GENERAL

BOISE 83720

The Honorable John V. Evans
Governor of the State of Idaho

Idaho State Legislature

Pursuant to Idaho Code § 67-1401 (12), I respectfully submit herewith the Biennial Report of the Office of the Attorney General for the period of July 1, 1978 to June 30, 1980.

These months have been a time of increasing professionalism, reorganization, readjusted priorities, and major litigation. On issues of significant consequence to the state, region and nation, we have appeared in argument three times during the biennium before the United States Supreme Court. Our new Local Government Assistance, Administrative Law and Litigation, Legislative and Administrative Affairs, and State Finance Divisions have refined client services and delivered specialized legal advice with great effectiveness in those topic areas. An emphasis on professionalism, a vigorous program of recruiting experienced, private practitioners, an insistence on detailed research and a policy of objective opinion writing have further enhanced the credibility and stature of this Office as the state's chief legal advisor. Modern law office management techniques such as calendaring, system-wide docketing, time-keeping and a uniform Manual of Policy and Procedure have improved office administration. I have diligently sought to keep both budget requests and actual costs down and tightly controlled.

In sum, I would report to you that the state's largest law office is also among its best and best run. I am pleased to deliver to you by this report a detailed explanation of our duties, structure and reference copies of our work product on the major legal issues encountered during these two years.

Respectfully submitted,

David H Leroy
DAVID H. LEROY
Attorney General
State of Idaho

DHL/lh

FORTY-FIFTH BIENNIAL REPORT
of the
ATTORNEY GENERAL
of
IDAHO



**For the period beginning July 1, 1978
and ending June 30, 1980**

DAVID H. LEROY
Attorney General

ATTORNEY GENERAL OPINION NO. 79-1

TO: Senator James E. Risch
Majority Leader
Idaho State Senate

Per request for Attorney General's Opinion

QUESTION PRESENTED:

What is the effective date of Proposition (Initiative) 1 as the same was enacted at the last election?

CONCLUSION:

The effective date specified in the Initiative is "October 1 following the passage of this statute" — i.e., October 1, 1979. Ambiguity exists with regard to the first tax rolls to be affected. Although the absolute certainty desirable for planning can only be obtained by remedial legislation or judicial determination, the interpretation likely to prevail in the event of litigation is that the initiative affects the tax year which for all practical purposes begins on January 1, 1980 and the 1980 tax rolls.

ANALYSIS:

This Attorney General Opinion in essence is issued to expand upon a portion of Attorney General Opinion No. 78-37 concerning the one percent property tax initiative. A copy of Opinion No. 78-37 is attached for your convenience. The most pertinent pages are 3, 11 and 12.

As noted in the prior Opinion, ambiguity exists with regard to the timing of the impact of all provisions of the initiative except Section Three. Section Five of the initiative provides that it shall take effect "for the *tax year* beginning on October 1 following the passage of this statute." (Emphasis added.) As also noted in the previous opinion, there is no tax year beginning on October 1. To eliminate the confusion which thus permeates Section Five, the previous Opinion recommended that the Initiative be amended to state an accurate, more clear effective date and suggested January 1, 1980. Your request in substance asks for additional and more specific advice as to what tax roll will be affected if October 1 remains the effective date — i.e., relevant remedial legislation is not passed. The following is offered as the most reasonable legal construction.

October 1, 1979 is the intended effective date. For all practical purposes, the tax year and processes commencing January 1, 1980 are the first to be affected. As of October 1, 1979, the 1979 taxes will have already been levied pursuant to Section 63-102, *Idaho Code*, and levy amounts will have been set by County Commissioners pursuant to Section 63-901, *Idaho Code*. Consequently, all the decisions and processes necessary to levy 1979 taxes will have been accomplished prior to October 1, 1979. Only the ministerial act of mailing tax notices will remain. Therefore, the taxes levied against property shown on 1980 tax rolls probably would be the first affected. Stated in different form, the tax bills payable December 20, 1980 probably would be the first tax bills affected.

It is interesting to note that the timing of the practical effects of the Initiative is the same under both the construction offered by this Opinion and the amendment tentatively suggested by the prior Opinion. Amending Section Five, however, is recommended, even if this timing is generally acceptable. The necessary certainty with regard to the tax rolls to be affected can only be obtained by litigation, which should be avoided, or remedial legislation.

AUTHORITIES CONSIDERED:

1. Attorney General Opinion No. 78-37.

Idaho Code, §§63-102; 63-901.

DATED this 9th day of January, 1979.

ATTORNEY GENERAL
State of Idaho
/s/ DAVID H. LEROY

ANALYSIS BY:
LARRY K. HARVEY
Chief Deputy Attorney General

LKH/dm

cc: Idaho Supreme Court
Idaho Supreme Court Law Library
Idaho State Library

ATTORNEY GENERAL OPINION NO. 79-2

TO: Jim Harris,
Ada County Prosecuting Attorney
Ada County Courthouse
Boise, Idaho 83702

The Honorable Warren H. Gilmore,
District Trial Court Administrator
Ada County Courthouse
Boise, Idaho 83702

QUESTIONS PRESENTED:

1. Under *Idaho Code*, §§1-1613, 1-2217, 31-867, and other pertinent statutes, who has the power to determine what facilities are suitable and adequate for the district court, what facilities and equipment are necessary to make the space provided for the district court functional for its intended use, and the number and adequacy of the staff, personnel, supplies, and other expenses of the district court?

2. Who has the authority to administer and expend from the district court fund?

CONCLUSIONS:

1. The power to determine what facilities are suitable and adequate for the district court, what facilities and equipment are necessary to make the space provided for the court functional for its intended use, and the number and adequacy of the staff, personnel, supplies, and other expenses of the court as required by the *Idaho Code*, §§1-1613 and 1-2217, is initially vested in the board of county commissioners. However, if a county in fact fails to provide necessary facilities, equipment, personnel, supplies, etc., the courts have inherent power to order the county to provide them and to incur expenses for such purpose, payable by the county.

2. Administration and control of the district court fund probably is vested in the county commissioners.

ANALYSIS:

Numerous appellate courts, including the Idaho Supreme Court, have held or recognized that courts have inherent power and authority to incur and order paid all such expenses as are reasonably necessary for the holding of court and the administration of the duties of the court and to require the appropriation or expenditure of public funds for judicial purposes. *Schmelzel v. Board of Com'rs*, 16 Idaho 32, 100 P. 106 (1909); *Zylstra v. Piva*, 85 Wash.2d 743, 539 P.2d 823 (1975); 59 A.L.R.3d 569 (1974). For example, the Idaho Supreme Court has stated:

We think, upon the outset, that, without discussion or controversy, it must be admitted that the courts have the inherent power and authority to incur and order paid all such expenses as are necessary for the holding of court and the administration of the duties of courts of justice. *Schmelzel v. Board of Com'rs*, 16 Idaho 32, 35.

Even where statutes vest control of court funds in counties, it has been held that a county cannot conduct its affairs under the budget law or any other law so as to prevent the courts' existence and operation. *Lockwood v. Board of Sup'rs.*, 80 Ariz. 311, 297 P.2d 356 (1956).

The Courts' inherent powers stem from their status as an independent branch of government, upon whose functions the legislative and executive branches may not intrude except as provided by the constitution. *Idaho Constitution*, Art. II, §1; Art. V, §13; *State v. McCoy*, 94 Idaho 236, 486 P.2d 247 (1971).

This inherent power, however, is not unlimited. It extends only to those expenses which are reasonably necessary for the proper function and administration of the courts, and must be exercised responsibly in the spirit of mutual cooperation among the various branches of government. *Commonwealth ex rel. Carroll v. Tate*, 442 Pa. 45, 274 A.2d 193, cert. den. 402 U.S. 974, 29 L.Ed.2d 138, 91 S.Ct. 1665 (1971); *O'Coin's, Inc. v. Treasurer of County of Worcester*, 287 N.E.2d 608 (Mass. 1972); 59 A.L.R. 3d 569 (1974). It has been held that the very concept of inherent power carries with it the implication that its use is for occasions not provided for by established methods, so statutory procedures for fulfilling the needs of the judiciary ordinarily must first be pursued before exercising inherent power. Several cases have, for example, expressed the view that the power of the courts to order the appropriation or expenditure of public funds for judicial purposes was limited by statutes regulating the appointment

or compensation of court employees. *State ex rel. Hillis v Sullivan*, 48 Mont. 320, 137 Pac. 392 (1913); *Board of County Com'rs. v. Devine*, 72 Nev. 57, 294 P.2d 366 (1956); *Leahey v. Farrell*, 362 Pa. 52, 66 A.2d 577 (1949); *Stevenson v. Milwaukee County*, 140 Wis. 14, 121 N.W. 654 (1909).

Idaho statutes charge each county with the duty to provide facilities and personnel for the district court. *Idaho Code*, §1-1613 provides:

Each county in the state shall provide suitable and adequate facilities for the district court, including the facilities and equipment necessary to make the space provided functional for its intended use, and shall provide for the staff, personnel, supplies, and other expenses of the district court.

Section 1-2217, *Idaho Code*, contains similar requirements for furnishing facilities, equipment, and staff for the magistrate division.

Idaho Code, §31-867, enacted in 1976, creates a district court fund and provides that the board of county commissioners of each county may levy annually a special tax not to exceed two mills for the purpose of providing for the functions of the district court and the magistrate division within the county. All revenues from the special tax are paid into the district court fund. The board may also appropriate otherwise unappropriated monies into this fund. Monies in the district court fund shall be expended for all court expenditures other than courthouse construction or remodeling and for salaries of the deputies of the district court clerk, whose salaries are expended from the current expense fund.

Section 31-867, *Idaho Code*, does not expressly state that the county commissioners shall have the control of expenditures from the district court fund, nor does it vest such control in the district court. However, since the statute gives the county commissioners the power to set the tax levy for and to appropriate to the district court fund, it appears to be the legislative intent that the commissioners also control the expenditures from it. No other statutes have been located which contradict this view. Indeed, the County Budget Law, (*Idaho Code*, §§31-1601 through 31-1612) and other statutes governing county fiscal matters, as well as §§1-1613 and 1-2217, *Idaho Code*, which require counties to provide facilities and personnel for courts, lend support to the conclusion that the counties, and not the courts, have control of expenditures from the district court fund.

Section 1-907, *Idaho Code*, does give the administrative judge in each judicial district certain administrative supervision and authority over the operation of the district courts and magistrates. These powers include, but are expressly not limited to, the functions enumerated in the statute, including supervision of the clerks of the district courts in the discharge of the clerical functions of the district courts. However, nothing in the statute appears to grant the administrative judge any power to make expenditures from or to exercise direct control over the district court fund.

Stated from a different perspective, it would appear that §§31-867 and 1-907, *Idaho Code*, are inadequate bases for concluding that the courts' inherent power is now unlimited or specifically that the District Court Fund is to be administered by the court rather than the county commissioners.

This is not to say that district courts can never exercise control over county funds. Section 31-1502, *Idaho Code*, grants district courts certain powers over transfer of county monies, and district courts have powers of review on appeal from acts or orders of the county commissioners under *Idaho Code*, §§31-1509 through 31-1512. *See also Idaho Code*, §§19-851 et seq. (costs of court-appointed counsel are charges against the county). None of these statutes grant district courts the power to make expenditures or to exercise direct administration over county funds, including the district court funds.

The Idaho district courts can exercise *indirect* control over such funds by incurring expenses necessary for the administration of the courts and ordering them paid. It then becomes the duty of the county, not the court, to pay them. E.g., *Schmelzel v. Board of Com'rs.*, *supra*. However, none of the cases cited in support of the courts' inherent power to incur necessary expenses and to order them paid indicate that such powers include the direct control and administration of county court funds. The rationale for this distinction is in part set forth in the following quotation:

Harmonious cooperation among the three branches is fundamental to our system of government. Only if this cooperation breaks down is it necessary for the judiciary to exercise inherent power to sustain its separate integrity. *Zylstra v. Piva*, 85 Wash.2d 743, 539 P.2d 823 at 827.

District Courts have also exercised control over county funds to insure payment of indispensable expenses incurred by the county officers. For instance, the Idaho Supreme Court has recognized the authority of district courts to order the payment of expenditures which were reasonable in amount and incurred for items indispensably required for the discharge of the county's governmental function, notwithstanding that the expenditures were in excess of budget appropriations. *Bonneville County v. Hopkins*, 94 Idaho 536, 493 P.2d 395 (1972); *H.J. McNeel, Inc. v. Canyon County*, 76 Idaho 74, 277 P.2d 554 (1954) (completion of county jail). *See also Association Collectors, Inc. v. King County*, 194 Wash. 25, 76 P.2d 998 (1938) (relating to necessary upkeep, maintenance and operation of a jail).

It is the view of this office, then, that administration and control of the district court fund is a function of the county commissioners. It is also the duty of the counties to provide the facilities, equipment, personnel, etc. required by *Idaho Code*, §§1-1613 and 1-2217, so it is the function of the county commissioners, in the first instance, to make determinations as to the adequacy and suitability of facilities and staff. If, however, the county commissioners fail or refuse to provide such facilities, equipment, and personnel, or fail to provide adequate or sufficient facilities, etc., then the district court may order such facilities, etc. to be provided, or incur expenses for them and order them paid as a charge against the county. Adequacy and sufficiency are questions of fact which must be determined in each instance.

1. *Idaho Constitution*, Art. II, §1; Art. V, §13, and Art. XVIII, §6.
2. *Idaho Code*, §§1-907, 1-1613, 1-2217, 19-851, et seq., 31-867, 31-1502, 31-1509 et seq., 31-1601, et seq.
3. *Schmelzel v. Board of Com'rs*, 16 Idaho 32, 100 Pac. 106 (1909).

4. *Zylstra v. Piva*, 85 Wash.2d 743, 539 P.2d 823 (1975).
5. *Lockwood v. Board of Sup'rs*, 80 Ariz. 311, 297 P.2d 356 (1956).
6. *State v. McCoy*, 94 Idaho 236, 486 P.2d 247 (1971).
7. *Commonwealth ex rel. Carroll v. Tate*, 442 Pa. 45, 274 A.2d 193, cert.den. 402 U.S. 974, 29 L.Ed.2d 138, 91 S.Ct. 1665 (1971).
8. *O'Coins, Inc. v. Treasurer of County of Worcester*, 287 N.E.2d 608 (Mass. 1972).
9. *State ex. rel. Hillis v. Sullivan*, 48 Mont. 320, 137 Pac. 392 (1913).
10. *Board of County Com'rs v. Devine*, 72 Nev. 57. 294 P.2d 366 (1956).
11. *Leahey v. Farrell*, 362 Pa. 52, 66 A.2d 577 (1949).
12. *Stevenson v. Milwaukee County*, 140 Wis. 14, 121 N.W. 654 (1909).
13. *Bonneville County v. Hopkins*, 94 Idaho 536, 493 P.2d 395 (1972).
14. *H.J. McNeel, Inc. v. Canyon County*, 76 Idaho 74, 277 P.2d 554 (1954).
15. *Association Collectors, Inc. v. King County*, 194 Wash. 25, 76 P.2d 998 (1938).
16. 59 A.L.R.3d 569 (1974).

DATED this 9th day of February, 1979.

ATTORNEY GENERAL
State of Idaho
/s/ DAVID H. LEROY

ANALYSIS BY:

MICHAEL C. MOORE
Deputy Attorney General
Chief, Local Government Division

WARREN FELTON
Deputy Attorney General
Local Government Division

cc: Idaho Supreme Court
Idaho Supreme Court Law Library
Idaho State Library

ATTORNEY GENERAL OPINION NO. 79-3

TO: The Honorable John V. Evans
Governor of Idaho
Statehouse

QUESTIONS PRESENTED:

1. Does an incumbent Public Utilities Commissioner whose nomination fails of reconfirmation continue to hold office until his successor is appointed and qualified?

2. If the answer to question 1 above is in the negative, what is the precise time at which such a commissioner ceases to serve?

CONCLUSIONS:

1. It is our opinion that an incumbent Public Utilities Commissioner whose nomination fails of reconfirmation continues to hold office until a successor is appointed and is duly qualified. We base our opinion on the rule of case law developed and followed by the majority of American states. The majority rule provides that incumbent public officers "hold over" in office as de-facto officers until a successor is duly appointed and qualified. Since a minority of states do not follow the general rule, this question can only be resolved with absolute certainty by the courts.

2. It is impossible to discern under the circumstances of this opinion request the precise time at which an incumbent commissioner would cease to serve as a holdover. However, *Idaho Code* § 61-201 requires the Governor to fill forthwith a Public Utilities Commission vacancy temporarily occupied by a holdover.

ANALYSIS:

An analysis of the first question presented necessarily begins with a discussion of the two pertinent statutory provisions dealing with the appointment of public utilities commissioners.

Idaho Code § 59-904 is the general statute that details how appointments to, and vacancies in, a number of statutorily enumerated state offices are to be made and filled. Along with a number of others, gubernatorial appointments to the Public Utilities Commission are subject to Senate confirmation. In relevant part, Section 59-904 provides:

(e) Appointments made pursuant to this section while the senate is in session shall be submitted to the senate forthwith for the advice and consent of that body. The appointment so made and submitted shall not be effective until the approval of the senate has been recorded in the journal of the senate.

This language clearly indicates that certain statutorily enumerated gubernatorial appointments, including appointments to the Public Utilities Commission, are not effective until appointees have received the requisite Senate confirmation. The statute, however, fails to clearly indicate whether incumbent public officeholders, who have been nominated to a new term, and whose office

falls within the class enumerated in Section 59-904, continue to hold office during the interval between the expiration of one term of office and the point in time at which they are reconfirmed by the Senate to a new term. Likewise, the statute fails to indicate whether an incumbent officeholder who is not renominated, or fails reconfirmation by the Senate, continues to hold office during the interval between the point in time his term expires and a subsequent successor is appointed and qualified.

The second statutory provision relevant to our analysis is *Idaho Code* § 61-201 relating to the creation of the Public Utilities Commission and to the appointment of members thereto:

61-201 CREATION — APPOINTMENT AND TERM OF OFFICE OF MEMBERS OF THE IDAHO PUBLIC UTILITIES COMMISSION — FILLING OF VACANCIES. — There is hereby created a state commission to be known and designated as the Idaho public utilities commission. The commission shall be comprised of three (3) members appointed by the governor, with the approval of the senate. Not more than two (2) members of said commission shall belong to the same political party. The members of the first commission after taking effect of this act (March 9, 1951) shall be appointed for terms beginning with the effective date of this act and expiring as follows: Two (2) commissioners for a term expiring the second Monday in January, 1953 and one (1) commissioner for a term expiring the second Monday in January, 1955. *Each of the commissioners shall hold office until his successor is appointed and qualified.* On the second Monday in January, 1961, the governor shall appoint one (1) commissioner for a four (4) year term and one (1) commissioner for a six (6) year term, and on the second Monday in January, 1963, the governor shall appoint one (1) commissioner for a six (6) year term. On the second Monday in January of each second year after the year of 1963, the governor shall appoint one (1) commissioner for a six year term. Whenever a vacancy in the office of commissioner shall occur, the governor shall forthwith appoint a qualified person to fill the same for the unexpired term. If any appointment is made during the recess of the legislature it shall be subject to confirmation by the senate during its next ensuing session. (Emphasis added)

At first blush it appears that perhaps all appointees to the commission are affected by the underlined language. However, the language that provides that the commissioners are to hold over in office until a successor is appointed and qualified comes after the language providing for the initial appointment of members to the original Public Utilities Commission. The statutory language that provides for the appointment of commissioners from 1961 to the present follows the statutory holdover provision.

Ambiguities found in statutory language such as this are resolved by the application of generally accepted rules of statutory construction. It is our opinion that the proper rule of statutory construction applicable here is that of textual construction.

One of the common techniques of construction . . . is to read and examine the text of the acts and draw inferences concerning meaning from its composition. Guidance may be drawn from consideration of the principles of composition . . . 2A Sands, *Sutherland Statutory Construction*, § 47:01 at 70.

The composition of the statutory section is significant. Because the holdover concept contained in *Idaho Code* § 61-201 is placed in context of the provisions for replacing the original appointees, construction of this statute raises serious doubt about whether that statute authorizes holdovers generally and, in particular, under the circumstances of this case.

In summary, analysis of the above discussed statutory provisions fails to produce a clear answer to the question. Additionally, Idaho has no general constitutional or statutory language providing that public officeholders continue in office until a successor is appointed and qualified. Consequently, in attempting to find the proper answer, a review must be made of applicable case law on the subject as developed by the appropriate appellate courts.

Because Idaho has no relevant reported case law on the matter of holdover public officeholders, the development of a legal opinion requires an analysis of pertinent case authority from other states. Although such case law is not controlling in Idaho, it normally is persuasive to an Idaho Court when considering a matter of first impression such as this. In instances such as this, only the courts can resolve the problem with absolute certainty.

The general rule of law as developed by the majority of state appellate courts that have ruled on the matter is that an incumbent officeholder continues in office after the expiration of his term to the point in time that a successor is appointed, or elected, and qualifies. The general rule has been stated as follows:

The general rule . . . is that on the expiration of an officer's term he holds over until his successor is chosen and qualified. 63 Am. Jur. 2d Public Officers § 138

Since the public interest ordinarily requires that public offices should be filled at all times without interruption, as a general rule, in the absence of an express or implied constitutional provision to the contrary, an officer is entitled to hold his office until his successor is appointed, or chosen and has qualified. 67 C.J.S. Officers § 71

The above quotations found in the cited general legal reference materials provide only a basic generalized statement of the law. Although helpful, an Idaho Court would find actual case language more persuasive in deciding the questions. Examples of such frequently found primary case authority are illustrative:

Where an officer is appointed or elected to a specific term, he continues to hold over until his successor has qualified, unless there is an express legislative mandate to the contrary. *Ossorghin v. Nevada Real Estate Commission*, 73 Nev. 165, 312 P.2d 634 (1957).

An elected or appointed officer may remain in office at the expiration of his term until his successor qualifies, whether or not the statute creating the office so provides. *Grooms v. LaVale Zoning Board*, 27 Md. App. 266, 340 A.2d 385, (1975).

In the absence of any constitutional or statutory provision for an incumbent in office holding over beyond his fixed term (or until his successor shall be chosen and shall qualify), the greater weight of

judicial authority, and what we conceive to be based on sound principles of public policy, permits such officer to hold over until his successor has been chosen and has qualified. State ex. rel. *Stain v. Christensen*, 84 Utah 185, 35 P.2d 775, (1934).

In summary, relevant case authority from a majority of other state jurisdictions provides that incumbent officers continue in office until a successor is appointed and qualified. A minority of states follow the rule that an incumbent officer whose fixed term has expired does not hold over in office. *Booth v. Board of Education*, 191 Ken. 147, 229 S.W. 84, (1921), *State v. Johnson*, 176 Wis. 107, 184 N.W. 683, (1921). We base our opinion upon the prevailing majority rule believing that the above quoted public policy consideration is persuasive. Public offices should be filled to the greatest extent possible, so as to insure that public bodies may perform and complete their important responsibilities without serious interruption. It is our opinion that an incumbent Public Utilities Commissioner who is nominated to a subsequent term, but fails to qualify for lack of confirmation, continues in office until a subsequent nominee is duly appointed and qualified.

Your second question inquires as to what point in time an incumbent Public Utilities Commissioner's term of office ends when his subsequent appointment fails of reconfirmation. Under the circumstances of your opinion request, the precise time an incumbent ceases to serve cannot be ascertained. However, *Idaho Code* § 61-201 requires that the Governor "forthwith" fill a vacancy temporarily occupied by a holdover. The relevant portion of 61-201 provides "whenever a vacancy in the office of commissioner shall occur, the governor shall *forthwith* (emphasis added) appoint a qualified person to fill the same for the unexpired term." It was clearly the intent of the legislature in enacting Section 61-201 that vacancies on the Public Utilities Commission are to be filled by the Governor as expeditiously as possible, inasmuch as the legal definition of "forthwith" is "Immediately; without delay, directly, hence within a reasonable time under the circumstances of the case; promptly and with reasonable dispatch . . ." *Black's Law Dictionary*, 782 (4th Ed. 1968).

Finally, the presence of a holdover incumbent officeholder raises the question of whether or not a vacancy exists so as to allow the Governor to appoint a replacement officer pursuant to *Idaho Code* § 61-201 and 59-904. In a literal sense, there is no vacancy in that an incumbent officeholder continues in office. However, vacancy in this case is not taken in the literal sense. The following case authority is instructive:

It may appear that in order to constitute the vacancy referred to in a constitutional or statutory provision and authorized to be filled in a manner therein prescribed, the office need not be physically vacant but it is enough that it is not by a de jure officer. The term "vacancy," when so used, applies to . . . a holdover . . ." *Alcorn v. Keating*, 120 Conn. 486, 181 A. 340, 341 (1935).

This same interpretation of the term "vacancy" is found in a number of other state jurisdictions. *State v. Amos*, 101 Fla. 114, 133 So. 623 (1931), *People v. Pillman*, 284 Ill. App. 387, 1 N.E. 2d 788 (1936) *Ryan v. Bailey*, 133 Conn. 40, 48 A2d 229 (1946). Although Idaho Courts have not interpreted the term "vacancy" in the context of holdover public officeholders, it is our opinion that the above quoted interpretations would probably be adopted by the Idaho Supreme Court.

AUTHORITIES CONSIDERED:

1. *Idaho Code* § 59-904.
2. *Idaho Code* § 61-201.
3. 2A Sands, *Sutherland Statutory Construction*, § 47:01, at 70.
4. 63 Am. Jur. 2d Public Officers § 138.
5. 67 C. J. S. Officers § 71.
6. *Ossorghin v. Nevada's Real Estate Commission*, 73 Nev. 165, 312 P.2d 634, (1957).
7. *Grooms v. LaVale Zoning Board*, 27 Ind. Appl. 266, 340 A.2d 385, (1975).
8. State Ex. rel. *Stain v. Christensen*, 84 Utah 185, 35 P.2d 775, (1934).
9. *Alcorn v. Keating*, 120 Conn 486, 181 A. 340, 341, (1935).
10. *State v. Amos*, 101 Fla. 114, 133 So. 623 (1931).
11. *People v. Pillman*, 284 Ill. Appl. 387, 1 N.E. 2d 788, (1936).
12. *Ryan v. Bailey*, 133 Conn. 40, 48 A.2d 229 (1946).
13. *Black's Law Dictionary*, (4th Ed. 1968).

DATED this 16th day of February, 1979.

ATTORNEY GENERAL
State of Idaho
/s/ DAVID H. LEROY

DHL/RLE/tr

ANALYSIS BY:

ROY L. EIGUREN
Deputy Attorney General

cc: Idaho Supreme Court
Idaho Supreme Court Law Library
Idaho State Library

ATTORNEY GENERAL OPINION NO. 79-4

TO: Gordon W. Petrie
Nez Perce Prosecuting Attorney
307 19th Street
Suite B-5
Lewiston, Idaho 83501

Per request for Attorney General Opinion

QUESTIONS PRESENTED:

What effect, if any, will the November, 1978 constitutional amendment to Article I, Section 11 of the Idaho Constitution (the right to keep and bear arms amendment) have on state laws prohibiting the carrying of concealed weapons and the confiscation of weapons which may or may not be used during a crime but which are seized by police pursuant to a search incident to an arrest?

CONCLUSION:

1. The current state law prohibiting the carrying of concealed weapons is entitled to full force and effect.

2. The state is entitled to seize all firearms found during a search incident to the arrest of a suspect. However, the State, pursuant to court order, may subsequently confiscate those weapons seized only if an Idaho felony conviction ultimately results *and* the weapons were determined by the court to have been used in the commission of that felony.

ANALYSIS:

In November, 1978, the Idaho voters amended Article I, Section 11 of the Idaho Constitution. In doing so, the voters expanded a citizen's "right to bear arms" to include a citizen's "right to *keep* and bear arms." The section as amended now reads:

SECTION 11. RIGHT TO KEEP AND BEAR ARMS. The people have the right to keep and bear arms, which right shall not be abridged; but *this provision shall not prevent the passage of laws to govern the carrying of weapons concealed on the person* nor prevent passage of legislation providing minimum sentences for crimes committed while in possession of a firearm, nor prevent the passage of legislation punishing the use of a firearm. No law shall impose licensure, registration or special taxation on the ownership or possession of firearms or ammunition. *Nor shall any law permit the confiscation of firearms, except those actually used in the commission of a felony.* (Emphasis added)

The questions in your letter concerning the effect of the amendment fall into two categories. First, your question concerning the validity of any prohibition on the carrying of concealed weapons addresses a citizen's right *to bear arms*. Second, your question on the confiscation of weapons relates to a citizen's right *to keep arms*.

1. Prohibition Against the Carrying of Concealed Weapons.

Prior to the 1978 amendment to Article I, Section 11, the Idaho Supreme Court recognized that a legislative prohibition against the carrying of a concealed weapon, including a firearm, was a legitimate regulation of a citizen's right to bear arms. *State v. Hart*, 66 Idaho 217, 220-221, 157 P.2d 72, 73 (1945). Such a prohibition is contained in *Idaho Code*, §18-3302.

In attempting to harmonize the 1978 amendment to Article I, Section 11 with the then existing concealed weapon prohibition of *Idaho Code*, §18-3302, two generally accepted rules of construction should be recognized. First, when the legislators forwarded the constitutional amendment to the voters, a reasonable interpretation of their action is that they intended the amendment and *Idaho Code*, §18-3302 to be compatible. *Cf. Sutherland, Statutory Construction* §45.12. Second, when a constitutional amendment is considered by the electorate, the state of the law at the time is that which is considered controlling and must be considered as that which the electorate had in mind. *See Idaho Mutual Benefit Association, Inc. v. Robison*, 65 Idaho 793, 800, 154 P.2d 156, 159 (1944). Therefore, when Article I, Section 11, as amended, specifically approved laws governing the carrying of concealed weapons, it can only be concluded that the voters were cognizant of the current law on that subject, to wit, *Idaho Code*, §18-3302, and intended it to remain in effect.

In light of these two rules of construction, it is the opinion of the Attorney General's Office that, if litigated, the courts would hold that Article I, Section 11, as amended, did not undermine the validity of the current *Idaho Code* prohibitions against the carrying of concealed weapons.

2. Confiscation of Firearms

The second portion of your question concerns the extent of a citizen's right to keep arms. In effect, this question involves the interplay between: (a) amended Section 11's prohibition against the confiscation of firearms except those actually used in the commission of a felony; and (b) the *Idaho Code* provision which authorizes a district court, subsequent to a defendant's felony conviction, to confiscate firearms:

19-3807. Confiscation of firearms or explosives upon conviction. — At the time any person is convicted of a felony in any court of the state of Idaho, firearms, ammunition, bombs, nitroglycerin, or explosives of any nature, found in his possession or under his control at the time of his arrest may be confiscated and disposed of in accordance with the order of the court before which such person was tried. The court may direct the delivery of such firearms, ammunition, bombs, nitroglycerin, or explosives, to the law enforcement agency which apprehended such person, for its use or for any other disposition in its discretion.

In analyzing these two provisions, it is necessary to recognize the distinction between a "seizure" by police officers of firearms when the defendant is arrested and the "confiscation" of those firearms upon court order after a felony conviction has been entered. In similar contexts, the courts have recognized that a "confiscation" order issued by a court is a separate and distinct proceeding which may or may not conclude a sequence of events initiated in the first instance by a "seizure" of the goods or articles in question. *See, e.g., Pelham v. Rose*, 76 U.S.

103, 9 Wall. 103, 19 L.Ed. 602 (1870); *Young's Market Co. v. American Home Assurance Co.*, 82 Cal.Rptr. 855, 858, 2 C.A.3d 1052, 1056-57 (1969); *Rader v. Simmons*, 35 N.Y.S.2d 573, 264 App.Div. 415 (1942); *Utah Liquor Control Commission v. Wooras*, 92 P.2d 455, 462 (Utah 1939). The language of *Idaho Code*, §19-3807 follows this distinction.

Since Article I, Section 11, as amended, refers exclusively to confiscation, it is reasonable to assume that the legislators did not intend to alter any statute or court decision pertinent to the law of seizure of firearms during a search incident to an arrest. Cf. Sutherland, *Statutory Construction* §46.04. Your officers should continue in their efforts to seize — within the constitutional limitations of the Fourth Amendment to the United States Constitution and Article I, Section 13 of the Idaho Constitution — all firearms discovered during such searches.

The confiscation provision of *Idaho Code*, §19-3807, specifically limits itself to a confiscation of the concerned firearms after a felony conviction has been entered. Article I, Section 11, as amended, limits the confiscation to instances wherein the firearm was "... actually used in the commission of a felony" whereas *Idaho Code*, §19-3807, has in the past sanctioned a somewhat broader confiscation, to wit, where the firearm was found in the defendant's "... possession or under his control at the time of his arrest. . . ." In situations where a statute exceeds a constitutional provision, the scope of the statute must necessarily be limited only to what the constitution permits. *State v. Idaho Power Co.*, 81 Idaho 487, 505, 346 P.2d 596, 605 (1959); *Golden Gate Highway District v. Canyon County*, 45 Idaho 406, 413, 262 P.2d 1048, 1050 (1927). Therefore, in pursuing any confiscation issues, the following guidelines should be considered:

- a. In a case where the seized weapons are not relinquished to federal authorities for possible federal prosecution and where no Idaho criminal proceeding either is initiated or results in a felony conviction, the amended constitutional provision requires that the firearms be returned to the person holding legal title thereto. That person may or may not be the person from whom the firearms were seized. (See I. C. §19-3801, 3805, Disposal of Stolen Property.)
- b. In a case where an Idaho felony conviction results, the firearms seized are to be confiscated by order of the court before which the person was tried if the court determines, per Article I, Section 11, as amended, that the firearms were actually used in the commission of a felony. Any language in I.C. §19-3807 allowing confiscation in other instances can no longer be deemed controlling. Should confiscation not be ordered by the court, the firearms should be returned either to the person from whom they were seized or the person with legal title thereto. (I.C., §§3801-3805.)

In summary, the Attorney General's office does not believe it reasonable to conclude that the *Idaho Code* prohibition against the carrying of concealed weapons or the state of the law on the seizure of weapons during searches incident to an arrest is affected by the language of Article I, Section 11, as amended. This office is of the opinion that the only Code provision which might be more narrowly construed by the courts in order to conform to the constitutional amendment would be the confiscation provision contained in *Idaho Code*, §19-1807.

AUTHORITIES CONSIDERED:

1. *United States Constitution*, Amendment IV.
2. *Idaho Constitution*, Article I, Section 11 (amended 1978); Article I, Section 13.
3. *Idaho Annotated Laws*, Chapter 18, §3302; Chapter 18, §§3302; Chapter 19, §§3801-3805, 3807.
4. *Pelham v. Rose*, 76 U.S. 103, 9 Wall. 103, 19 L.Ed. 602 (1870).
5. *State v. Idaho Power Co.*, 81 Idaho 487, 346 P.2d 596 (1959).
6. *State v. Hart*, 66 Idaho 217, 157 P.2d 72 (1945).
7. *Idaho Mutual Benefit Association, Inc. v. Robison*, 65 Idaho 793, 154 P.2d 156 (1944).
8. *Golden Gate Highway District v. Canyon County*, 45 Idaho 406, 262 P.2d 1048 (1927).
9. *Young's Market Co. v. American Home Assurance Co.*, 82 Cal.Rptr. 855, 2 C.A.3d 1052 (1969).
10. *Rader v. Simmons*, 35 N.Y.S.2d 573, 264 Appl.Div. 415 (1942).
11. *Utah Liquor Control Commission v. Wooras*, 93 P.2d 455 (Utah 1932).
12. Sutherland, *Statutory Construction*, §§45.12; 46.04.

DATED this 27th day of March, 1979.

ATTORNEY GENERAL
State of Idaho
/s/ DAVID H. LEROY

ANALYSIS BY:

EUGENE A. RITTI
Deputy Attorney General
State of Idaho

DHL:EAR:lb

cc: Idaho State Library
Idaho Supreme Court
Idaho Supreme Court Library

ATTORNEY GENERAL OPINION NO. 79-5

TO: Honorable Harold W. Reid
State Representative
Honorable Carl P. Braun
State Representative
Statehouse Mail

Per Request for Attorney General Opinion

QUESTION PRESENTED:

What categories of applicants for operator and chauffeur licenses will be required to take and satisfactorily complete written examinations prior to the issuance of such license pursuant to the terms of House Bill #37, as passed by the First Regular Session of the Forty-Fifth Idaho Legislature?

CONCLUSION:

All applicants for operator and chauffeur licenses, *excepting* those seeking renewal of previously issued licenses, shall be required to satisfactorily complete a written examination prior to issuance of such license.

ANALYSIS:

A discussion of the question presented necessarily begins with a review of those sections of the Idaho Code currently in effect regarding the issuance and renewal of operator and chauffeur licenses. The two applicable Idaho Code Sections are 49-316 and 49-322. *Idaho Code* §49-316, as currently written, provides in relevant part:

... the applicant's (for an operators's or chauffeur's license) knowledge of the traffic laws of this state shall be tested by a written examination.

Idaho Code § 49-322 states:

(a) every operator's and chauffeur's license originally issued to an operator or chauffeur shall expire on the licensee's birthday in the third year following the issuance of such license. Every such license shall be renewable on or before its expiration, but not more than twelve (12) months before, upon application, payment of the required fee, and satisfactory completion of the examination required or authorized.

Reading Sections 49-316 and 49-322 together, it is clear that all applicants for operator and chauffeur licenses are required to satisfactorily complete a written examination testing their knowledge of the state's traffic laws before they are issued a license. The term "applicant" includes those individuals who are seeking to renew their previously issued operator or chauffeur license.

House Bill #37 amends and modifies both of the above cited Idaho Code Sections. In lines 22 and 23 of Page 1 of the bill, *Idaho Code* § 49-316 is amended to read in relevant part as follows:

In addition, the applicant's knowledge of traffic laws of this state shall be tested by a written examination, except *as provided in Section 49-322, Idaho Code.* (Emphasis Added)

Lines 28 through 38 of Page 1 of the bill amend *Idaho Code* § 49-322 as follows:

(a) operator's and chauffeur's license originally issued to an operator or chauffeur shall expire on the licensee's birthday in the third year following the issuance of such license. Every such license shall be renewable on or before its expiration, but not more than twelve (12) months before, upon application, payment of the required fee, and satisfactory completion of the *required eyesight and hearing examination.* *No written examination shall be required for renewal of a license.* (Emphasis Added)

Reading amended sections 49-316 and 49-322 together, the statutory scheme requires the satisfactory completion of a written examination by an applicant prior to the issuance of an operator's or chauffeur's license except by those applicants who are seeking to renew their previously issued licenses.

In your opinion request of March 23, 1979, you specifically asked "whether there is any specified time that a person who holds an Idaho driver's license shall apply for renewal without being required to take a written test?" As previously discussed, in our opinion, only applicants seeking renewal of their licenses are exempted from the written examination provisions of amended *Idaho Code* § 49-316 and 49-322. We base our opinion on three factors:

- (1) A reading of the applicable statutes in light of the amendments provided by House Bill #37, as discussed above, and
- (2) The definition of the word renewal.
- (3) Application of the generally accepted rules of statutory construction.

Black's Law Dictionary, revised 4th Edition, defines renewal as "the act of renewing or reviving. The substitution of a new right or obligation for another of the same nature, a change of something old to something new. To grant or obtain an extension of, to continue in force for a fresh period." Applying this definition to the statutes in point, renewal of an operator's or chauffeur's license would mean the statutorily or delineated process by which an individual revives or extends the validity of a previously issued license. The license definition of renewal is not in any way modified or changed by either the currently existing statute or House bill #37.

Idaho Code § 49-316 and 49-322 as amended by House bill #37, do not specify that any particular category of applicants seeking *to renew* (emphasis added) their licenses must satisfactorily complete a written examination as required of other applicants per *Idaho Code* § 49-316. Since the statutory scheme does not require that renewal applicants take the written examination, application of the applicable rule of statutory construction precludes reading into the amended statute such a requirement for any category of renewal applicant. It is our opinion that the appropriate rule of statutory construction applicable here is that of *expressio unius exclusio alterius*. This canon of statutory construction is

defined as "applied to statutory interpretation, for a form of conduct, the manner of its performance and operation, and the persons and things to which it refers or designates, there is an inference that all omissions should be understood as exclusions (from the statute)." *Sutherland Statutory Construction*, 4th Edition, Section 47-23. Applying the rule to this particular statutory scheme, since the legislature provided by statute that only certain types of applicants were to satisfactorily complete the written examination, it was the intent of the legislature to exclude all other types of applicants. Consequently, since the statute provides that only first time applicants for operator's and chauffeur's licenses are to take the written examination, all other types of applicants were to be excluded from the written examinations.

Finally there remains a question of whether or not the executive agency which is charged with the enforcement of a particular statute has the authority to administratively require that certain types of applicants for operator's or chauffeur's licenses satisfactorily take and complete written examinations as a requirement of obtaining such licenses. Since the statutory scheme specifically delineates what particular categories of applicants are to satisfactorily complete the written examination prior to the issuance of licenses, we believe that it is not properly within the power of an executive agency to require a written examination in situations expressly provided against by statute. The general powers of administrative agencies relative to the interpretation and execution of statutes may be concisely summarized as follows:

The powers of administrative agencies are measured and limited by the statutes and acts creating them or granting the powers to those conferred expressly or by necessary or fair implications. 1 Am. Jur. 2d *Administrative Law* § 72 at 868.

The above cited statutory scheme does not expressly confer to any administrative agency the power to determine what categories of applicants are to take the written examination. In addition, it is our opinion that one cannot necessarily or fairly imply from the Idaho statutory scheme as amended in 1979 any power to an administrative agency to require written examinations beyond those required by statute.

Courts of law, when interpreting statutes governing or conferring powers on an administrative agency, generally adopt the following rules of law in determining what portions of a particular statute are subject to administrative interpretation and definition:

Particular language may and should be construed in the light of the purposes of the legislation, especially a declared purpose and policy. The meaning of a particular word may be determined by the purposes of the legislation; for a word may take color from its surroundings and derive meaning from the context of the statute, which must be read in the light of the mischief to be corrected and the end to be attained. 1 Am. Jur. 2d *Administrative Law* § 38 at 840.

The statement of purpose presented by the drafters of House Bill #37 in relevant part provided that:

This proposal revises the procedure for renewal of the operator's and chauffeur's license by providing that no written examination shall be required for renewal.

It is our opinion that the legislature, pursuant to the statement of purpose of House Bill #37, declared its intention that a written examination is not to be required of those applicants who are seeking to renew their operator's or chauffeur's license. The abolition of the requirement that applicants successfully take and complete a written examination is applicable to all operator and chauffeur license renewal applicants, regardless of the point in time that their previous license expired.

AUTHORITIES CONSIDERED:

1. *Idaho Code* § 49-316; 49-322.
2. House Bill #37, First Regular Session of the Forty-Fifth Idaho State Legislature.
3. *Black's Law Dictionary*, 4th Revised Edition.
4. Sands, *Sutherland Statutory Construction*, Vol. 2A, (1973).
5. 1 Am. Jur. 2d *Administrative Law* § 72 at 868.
6. 1 Am. Jur. 2d *Administrative Law* § 38 at 840.

DATED this 30th day of March, 1979.

ATTORNEY GENERAL
State of Idaho
/s/ DAVID H. LEROY

ANALYSIS BY:

ROY L. EIGUREN
Deputy Attorney General
State of Idaho

DHL:RLE:tr

cc: Idaho State Library
Idaho Supreme Court
Idaho Supreme Court Library

ATTORNEY GENERAL OPINION NO. 79-6

TO: Paul D. McCabe
Attorney at Law
P.O. Box 1338
Coeur d'Alene, Id. 83814

Per Request for Attorney General's Opinion

QUESTION PRESENTED:

Whether or not Highway Districts have the authority to impose traffic regulations, such as parking ordinances and speed regulations.

CONCLUSION:

Highway districts are not political municipalities and do not have the authority to enact traffic or other regulations enforceable by criminal sanction.

ANALYSIS:

Idaho law grants broad powers to highway districts. They are bodies politic and corporate, with all of the powers set forth in the Highway District Law. *Idaho Code*, §40-1608. *Idaho Code*, §40-1611, grants the board of highway commissioners of each district all of the powers and duties that would by law be vested in the county commissioners if the district did not exist. *Idaho Code*, §40-1615 provides that the grant of powers to highway districts shall be liberally construed as a broad and general grant of powers. The Traffic Act (*Idaho Code*, §§49-534, 49-683) defines "local authorities" as including highway districts and empowers local authorities to regulate certain areas.

If this question — whether highway districts have the authority to impose traffic control regulations — were viewed solely in light of the statutes, a strong argument could certainly be made that highway districts have the power to enact traffic regulations. Indeed, there is an earlier Attorney General's opinion (No. 69-75, copy enclosed) which so indicates, although that opinion expressly stated that highway districts had no authority to establish *criminal* sanctions for violation of its regulations.

There are, however, at least two problems with reading the highway district statutes as granting to highway districts the power to impose ordinances or other measures to regulate traffic. First, there is the general rule that the power to legislate cannot be delegated by the state except to the extent that such power may be conferred upon municipal corporations for local self-government, 2 McQuillin, *Municipal Corporations*, §§4.08, et seq. *Idaho Constitution*, Article 12, §2 provides that 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 the general laws. This provision has frequently been held to grant direct authority to cities and counties, as general governmental bodies, to legislate under the police powers. *State v. Robbins*, 59 Idaho 279, 81 P.2d 1078 (1938); *Rowe v. City of Pocatello*, 70 Idaho 343, 218 P.2d 695 (1950); *Taggart v. Latah County*, 78 Idaho 99, 298 P.2d 1217 (1976). No cases have considered whether Article 12, §2, *Idaho Constitution*, permits delegation of police power legislation to entities other than cities or counties.

Secondly, the Idaho Supreme Court has consistently, in a long line of decisions, held that highway districts are not municipalities and are not organized for general governmental purposes. They are neither true municipal corporations, such as cities, nor true public corporations, such as counties. *Shoshone Highway District v. Anderson*, 22 Idaho 109, 125 Pac. 219 (1912); *Fidelity State Bank v. North Fork Highway District*, 35 Idaho 797, 209 Pac. 448 (1922); *Strickfaden v. Greencreek Highway District*, 42 Idaho 738, 248 Pac. 456 (1926); *Stark v. McLaughlin*, 45 Idaho 112, 261 Pac. 244 (1927). The cases have uniformly held that highway districts are in the category of purely business and proprietary, not governmental, corporations, *Murtaugh Highway District v. Twin Falls Highway District*, 65 Idaho 260, 142 P.2d 579 (1943), even though they are, by statute, made bodies politic and corporate. *Dalton Highway District v. Sowder*, 88 Idaho 556, 401 P.2d 813 (1956). See also *Oregon Short Line R. Co. v.*

Kimama Highway District, 287 Fed. 734 (S.D. Idaho 1923); *Kimama Highway District v. Oregon Short Line R. Co.*, 298 Fed. 431 (9th Cir. 1924).

It is well established that the passage of a regulatory ordinance is a legislative act or function (5 McQuillin, *Municipal Corporations*, §15.01) which cannot be performed by an entity other than a governmental body possessing the power to legislate (2 McQuillin, *Municipal Corporations*, §§4.08, et seq.). It has been held elsewhere that the state in its sovereign capacity can entrust control of its highways to political subdivisions, but its police powers can be exercised only through bodies possessing governmental powers. *Breinig v. Allegheny County*, 332 Pa. 474, 2 A.2d 842. In light of the Idaho Supreme Court's long and uninterrupted line of decisions holding that highway districts are not political municipalities and do not possess broad governmental powers, it is the view of this office that highway districts do not have the authority to adopt enforceable regulatory ordinances.

This is not to say that highway districts cannot adopt rules and regulations for their internal management, standards of design, and other regulations not involving criminal sanctions. *Idaho Code*, §40-1636, for example, empowers highway districts to "legislate" under the local improvement district code for certain improvements. It appears most likely, however, that the Idaho Supreme Court, if presented with the specific question, would hold that local police power regulations governing highways could only be enacted by those entities which are expressly empowered with governmental, legislative authority — i.e., cities and counties.

AUTHORITIES CONSIDERED:

1. *Idaho Code*, §40-1608, 40-1611, 40-1615, and 40-1636.
2. *Idaho Code*, §49-534 and 49-683, The Traffic Act.
3. *Idaho Constitution*, Article 12, §2.
4. *Breinig v. Allegheny County*, 332 Pa. 474, 2 A.2d 842.
5. *Dalton Highway District V. Sowder*, 88 Idaho 556, 401 P.2d 813 (1965).
6. *Fidelity State Bank v. North Fork Highway District*, 35 Idaho 797, 209 Pac. 448 (1922).
7. *Kimama Highway District v. Oregon Short Line R. Co.*, 298 Fed. 431 (9th Cir. 1924).
8. *Murtaugh Highway District v. Twin Falls Highway District*, 65 Idaho 260, 142 P.2d 579 (1943).
9. *Oregon Short Line R. Co. v. Kimama Highway District*, 287 Fed. 734 (S.D. Idaho 1923).
10. *Rowe v. City of Pocatello*, 70 Idaho 343, 218 P.2d 695 (1950).
11. *Shoshone Highway District v. Anderson*, 22 Idaho 109, 125 Pac. 219 (1912).
12. *Stark v. McLaughlin*, 45 Idaho 112, 261 Pac. 244 (1927).

13. *State v. Robbins*, 59 Idaho 279, 81 P.2d 1078 (1938).
14. *Strickfaden v. Greencreek Highway District*, 42 Idaho 738, 248 Pac. 456 (1926).
15. *Taggart v. Latah County*, 78 Idaho 99, 298 P.2d 979 (1956).
16. *Voyles v. City of Nampa*, 97 Idaho 597, 548 P.2d 1217 (1976).
17. Attorney General Opinion No. 69-75.
18. 2 McQuillin, *Municipal Corporations*, §§4.08, et seq.
19. 5 McQuillin, *Municipal Corporations*, §15.01.

DATED this 30th day of March, 1979.

ATTORNEY GENERAL
State of Idaho
/s/ DAVID H. LEROY

ANALYSIS BY:

MICHAEL C. MOORE
Deputy Attorney General
Chief, Local Government Division

DHL/MCM/dm

cc: Idaho State Library
Idaho Supreme Court
Idaho Supreme Court Library

ATTORNEY GENERAL OPINION NO. 79-7

TO: Lynn Hossner, Esq.
Prosecuting Attorney
Fremont County
Fremont County Courthouse
St. Anthony, ID 83445

Per Request for Attorney General's Opinion

QUESTION PRESENTED:

1. "[D]oes the LID code now come under the 1% limitation and if it does not, may we proceed to form an LID without regard to the limitation?"

Upon analysis of your question and the circumstances described in your letter, it appears to us that your question includes several subsidiary issues which should be separately discussed. These issues include:

2. Can a new taxing district be formed during the two year freeze imposed by the one percent implementation bill, House Bill 166 (1979 Session Laws, Chapter 18)?

3. If so, can the newly formed district impose an ad valorem property tax to raise revenues to fund its operating budget in 1979 and 1980?

4. If a new district cannot impose a tax, can a district formed to replace an existing district, which is then abandoned or dissolved, impose such taxes in an amount not in excess of that which the old district could have imposed under the freeze?

5. What is the difference between revenue to fund the operating portion of the budget which is subject to the freeze and revenue which is to fund the non-operating portion which is not subject to the freeze?

CONCLUSIONS:

1. A local improvement district (LID) assessment is a "special assessment" within the meaning of *Idaho Code* §63-923 (1) (b) as recently enacted by House Bill 166. It is, therefore, outside the restriction imposed by that section.

2. Yes, a new district can be formed.

3. Probably no, a district which levied no ad valorem taxes to raise revenue for an operating budget in 1978 could not impose such a tax in 1979 or 1980 absent an override election as provided by *Idaho Code* §63-2220 as enacted by House Bill 166. However, only future legislative action or a judicial determination would provide a clear, definitive answer.

4. An exception to the rule stated in number 3 above is that a new district which is a successor to an existing district which levied taxes in 1978 could levy subject to the limitation that would have applied to the predecessor district.

5. Classification of particular expenses as operating or non-operating expenses is a question of fact and not one of law. Generally, expenses related to the usual activities of a district have been found to be operating expenses while unusual capital expenditures are not.

ANALYSIS:

It is the view of this office that revenues raised by such an LID, albeit through the tax levy process, are the result of "special assessments" within the meaning of *Idaho Code* §63-923 (1) (b), rather than general *ad valorem* taxes subject to the 1% restriction of §63-923 (1) (a). This view is based first on the language of House Bill 166. The terms of §63-923 (1) (b) specifically distinguish "special assessments" from other taxes. The bill's title states, on p. 1, lines 9 through 10, that "the one percent limitation shall not apply on ad valorem taxes used to pay for bonded indebtedness or special assessments." A review of the LID statute also confirms that revenues raised by those districts are based not generally upon property value as are *ad valorem* taxes, but upon the special benefits accorded to the property by the particular services or facilities provided by the LID. See for example *Idaho Code* §50-1707 (c), §50-1710.

Secondly, judicial authority in Idaho and California has confirmed the established distinction between general *ad valorem* taxes and special assessments. California authority is relevant since the "special assessment" language was in the original initiative as passed in the general election and was part of the language which the sponsors of the Idaho initiative took bodily from California's Proposition 13. In California, the term is defined judicially:

A "special assessment" is a compulsory charge placed by the state on real property within a predetermined district, made under express legislative authority, defraying in whole or in part the expense of a permanent public improvement enhancing the present value of the real estate, and laid by some reasonable rule of uniformity based on, in the ratio of, and limited by that enhanced value. (*Spring St. Co. v. Los Angeles*, 170 C 24, 148 P. 217)

This is entirely consistent with statements made by the Idaho Court on the subject. In *Regnard v. City of Caldwell*, 53 Idaho 62 (1933), the Idaho Supreme Court said:

There is a well-recognized distinction between an assessment for special improvements and the levy of a tax, and while the power to levy special assessments comes from the general power of taxation, the two should not be confounded. General taxes are a public imposition levied for the purpose of carrying on the government, an assessment is induced by request, made known according to charter provisions or general law of the majority of the inhabitants of the assessment districts, or under some statute by determination of the question of the public needs, and is levied for the benefit of the property situated in a particular district. An assessment, wholly dependent on the benefits to accrue, is not a tax within the purview and meaning of the constitutional provisions above stated, but a charge *in rem* against the special tracts of land assessed for benefits.

The legislature is generally presumed to know the ruling of the Supreme Court when it enacts legislation.

The factual circumstances described in your letter raise several other significant questions which a complete answer to your inquiry cannot ignore.

House Bill 166 imposes a restriction on budgets set in 1979 and 1980. The operating portion of these budgets may not be funded by ad valorem taxes in a dollar amount greater than the dollar amount of ad valorem tax revenue devoted to the operating portion of the budget set in 1978. However, this restriction is limited to (1) revenue raised by ad valorem taxes which is (2) used to fund the operating budget. The restriction on budgets for 1979 and 1978 does not contain an exception for special assessments but does — by necessary implication — contain an exception for non-operating expenses.

The restriction does not apply if it is overridden by a two-thirds vote at an election called for that purpose. In this opinion, we address ourselves to the operation and extent of the freeze in the absence of such an override.

The language of the restriction creates obvious difficulties for a newly formed taxing district since it had no tax base and, therefore, no revenue from ad

valorem taxes in 1978. An argument can be made for the proposition that the freeze provisions of House Bill 166 presume the existence of a tax base in 1978 and, therefore, cannot apply to a district which had no 1978 base. Such a conclusion would seem to be contrary to the evident intent of House Bill 166 when read as a whole. First, the legislature's choice of language — "no taxing district" — appears to be inclusive language which would not permit any qualification or exception. Additionally, such a conclusion seems contrary to the evident general intent of House Bill 166 when read as a whole since it would permit an expansion rather than act as a limitation upon the size of government. On the other hand, we cannot say with certainty that by imposing the freeze the legislature intended to preclude the funding of absolutely essential governmental services. Therefore, it is our opinion that more probably than not a newly formed district cannot impose an ad valorem levy for the first time in 1979 if the revenue raised thereby is to be used for operating purposes. However, only future legislative action or a judicial determination can provide certainty in this area. What is certain is that a newly formed district can impose a non-ad valorem levy to fund current operations if it is otherwise properly authorized to do so by law or can impose an ad valorem levy for non-operating purposes or both.

However, the LID you propose to form in Fremont County would replace an already existing district which has been operating for some indefinite period of time. Nothing contained in House Bill 166 limits or prohibits the formation of new districts. It does restrict the ability of any district to raise revenue from property taxes. But where the district replaces an older district which is then dissolved or abolished, with the new district assuming the duties and responsibilities of the older district together with its operating property, we believe that House Bill 166 probably allows the new district to fund its own operating budget by levying ad valorem taxes in a dollar amount not to exceed the dollars which the predecessor district raised by ad valorem taxes for operating purposes in 1978. This presumes, of course, that the abandoned predecessor district in fact levies no tax for a similar purpose in 1979 or 1980.

In short, such a successor district should not be treated in the same manner as a district created to undertake some entirely new public program or project. This result seems consistent with both the intent of House Bill 166 when read as a whole and with legislatively expressed desire to limit the growth of government but not to cripple or eliminate already established essential operations such as sewer districts. We would consider it prudent, when forming the new district, to state expressly in the basic document creating the district that it is the successor to the older district and is intended to assume all of the rights, powers, duties and property of the predecessor district.

Finally, as we stated earlier, a district's ad valorem revenue budgeted for operating expenses is frozen at 1978 levels. Operating expenses are generally understood to be those incurred in the course of currently carrying out ordinary duties and activities. It clearly includes such costs as employee salaries and travel expenses, *People ex rel. Schlaefer v. Reilly Tar & Chemical Corp.*, 399 Ill. 438, 59 NE 2d 843, 846 (1945), or for personal services even though not of an ordinary nature such as political advocacy, *Powell v. City and County of San Francisco*, 62 C.A. 2d 291, 144 P.2d 617, 621 (1944). It usually does not include construction of new public works, *Penrose v. Whitacre*, 61 Nev. 440, 132 P.2d 609, 616 (1942), or interest paid on bonded debt, *State College Borough Authority v. Pennsylvania Public Utilities Commission*, 152 Pa. Super. 363; 31 A.2d 557, 152 (1943). Repair of existing capital assets has been said to be an operating expense,

Nampa & Meridian Irrigation District v. Bond, 288 F. 541, Aff'd 268 U.S. 50 (1923). But the cases are not entirely consistent. In *City of Pocatello v. Peterson*, 93 Idaho 774, 473 P.2d 644 (1970), a split court found that financing a new city airport terminal building by means of a sale and leaseback arrangement resulted in "ordinary and necessary expenses" on the part of the city. That decision emphasizes, however, that the determination is made by "... taking into account the contextual framework peculiar to the City of Pocatello." Other courts have also emphasized consistently that classification of particular costs as either operating expenses or capital expenditures is a question of fact to be viewed in light of all the facts relating to it. The U.S. Ninth Circuit Court of Appeals, in a case originating in Idaho, *Nampa & Meridian Irrigation District v. Bond*, 288 F. 541, Aff'd 268 U.S. 50 (1923), has said:

While indefinite, the term "operating expense" is a broad and comprehensive one, and its meaning in a given case depends on the nature and amount of the expenditure, and all the surrounding circumstances. As said by the court in *Schmidt v. Louisville C. & L. Ry. Co.*, 119 Ky. 287, 302, 84 S.W. 314, 318:

"There is no rule of law declaring what constitutes operating expenses. That is to be determined by the testimony as to each item of expenditure. It is a matter of evidence, and determinable like any other fact."

It is worth noting that in the case just cited, the court gave weight to the exercise of sound discretion by an administrative agency charged with making the initial classification of the costs in question as operating expenses.

AUTHORITIES CONSIDERED:

1. *Idaho Code* §§50-1707 (c); 50-1710; 63-923 (1) (a) & (b).
2. House Bill 166 (1977 Session Laws, Chapter 18).
3. Cases: *Spring St. Co. v. Los Angeles*, 170 C 24, 148 P. 217 (1915).

Regnard v. City of Caldwell, 53 Idaho 62, 21 P.2d 527 (1933).

People ex rel Schlaefer v. Reilly Tar & Chemical Corp., 399 Ill. 438, 59 NE 2d 843, 846 (1945).

Powell v. City and County of San Francisco, 62 C.A. 2d 291, 144 P.2d 617, 621 (1944).

Penrose v. Whitacre, 61 Nev. 440, 132 P.2d 609, 616 (1942).

State College Borough Authority v. Pennsylvania Public Utilities Commission, 152 Pa.Super. 363; 31 A.2d 557, 152 (1943).

Nampa & Meridian Irrigation District v. Bond, 288 F. 541, Aff'd 268 U.S. 50 (1923).

City of Pocatello v. Peterson, 93 Idaho 774, 473 P.2d 644 (1970).

DATED this 27th day of April, 1979.

ATTORNEY GENERAL
State of Idaho
/s/ DAVID H. LEROY

ANALYSIS BY:

THEODORE V. SPANGLER, JR.
Deputy Attorney General

TVS:ji

ATTORNEY GENERAL OPINION NO. 79-8

TO: Marjorie Ruth Moon
State Treasurer
Statehouse Mail

Per Request for Attorney General's Opinion

QUESTIONS PRESENTED:

1. Is the analysis of Attorney General Opinion #78-43 applicable to transactions made by the Endowment Investment Board?
2. Could the State Treasurer, as custodian of the Public School Endowment Fund, be held liable for transactions by the Endowment Investment Board relating to investment of permanent endowment funds?

CONCLUSION:

1. No. Attorney General Opinion #78-43 is limited in its scope to defining *Idaho Code*, §67-1210. This code section makes it the duty of the State Treasurer to "invest idle monies" in certain listed bonds, notes and other securities. The above-mentioned opinion is limited solely to the powers and duties of the State Treasurer as defined by *Idaho Code*, §67-1210, which exempts the public endowment funds. The Endowment Investment Board which was originally organized in 1969, receives its grant of authority through Title 57, Chapter 7, *Idaho Code*. For the reason that Attorney General Opinion #78-43 did not consider, nor discuss, Title 57, Chapter 7, *Idaho Code*, it is not applicable to the Endowment Investment Board's transactions.

2. No. The State Treasurer will not be held liable for transactions of the Endowment Investment Board. The legislature of the state of Idaho is under a statutory duty to make up losses that occur in the permanent school funds. *Idaho Code*, §57-724. The manager of the permanent endowment funds has

control over the funds as though he owned said funds, and the Department of Finance is responsible for insuring that the transactions of the Endowment Investment Board comply with the law. *Idaho Code*, §57-721.

For the reason that the legislature has not delegated any duties to the State Treasurer with regard to the management of the permanent endowment funds, no liability could attach to the State Treasurer for any transactions made by the Board.

ANALYSIS:

1. Without attempting to completely rephrase Attorney General Opinion #78-43, it would be fair to say that this opinion only attempts to define the term "invest idle monies" as that term is used in *Idaho Code*, §67-1210. This Code section makes it the duty of the State Treasurer to invest idle monies in certain types of securities. The opinion of General Kidwell was that the State Treasurer does not have the authority to sell an investment. It should be reiterated that this opinion dealt solely with the interpretation of the verb "invest" as that term is used in *Idaho Code*, §67-1210. Presumably, the analysis concerning the term "invest" when not modified by other terms, would have the same meaning in other sections of the Idaho Code.

The Endowment Investment Board has a different grant of authority from the legislature than the State Treasurer. The Investment Board has the authority to "control, manage and invest." *Idaho Code*, §57-715. In attempting to define a statutory grant of authority, the foremost consideration is to determine what the legislature intended at the time the statute was adopted. The following review of both the history of the permanent endowment funds and the relevant provisions of Chap. 244, 1969 Session Laws, shows a legislative intent to give the Endowment Investment Board authority to sell investments prior to their maturity date.

Prior to March 25, 1969, the permanent endowment funds were invested by the Department of Public Investments. The Department of Public Investments had very limited authority. It could only invest in certain types of governmental bonds and farm mortgages. The Department did not have the authority to sell any of the bonds or mortgages in which it invested. In other words, the Department of Public Investments only had the authority from the legislature to "invest." By emergency legislation, Chapter 244, 1969 Session Laws, the Department of Public Investment was abolished and the Endowment Investment Board was created.

The abolition of the Department of Public Investment and the creation of the Endowment Investment Board was due in part to the 1968 amendment to Article IX, §11, *Idaho Constitution*, which placed discretion with the legislature of the state of Idaho on formulating a policy concerning the loaning of the permanent endowment funds of the State. The legislature of the State of Idaho vested the authority of managing the Permanent Endowment Fund with the Endowment Investment Board through Title 57, Chapter 7, *Idaho Code*. *Idaho Code*, §57-715, states that the Endowment Investment Board shall control, manage and invest the permanent endowment funds of the State of Idaho. If the definition of invest, which is used in Attorney General Opinion #78-43, is controlling, then the Endowment Investment Board must receive its authority to sell from either of the terms control or manage.

Idaho Code, §57-720, grants authority to the Investment Board to adopt regulations which shall govern the "conditions or restrictions upon the methods, practices or procedures for investment, reinvestments, purchases, sales or exchange or transactions." (Emphasis added) This Code section evidences a legislative intent that the Endowment Investment Board not be limited only to investing in certain types of securities, but that it be also empowered to sell those securities. This same legislative intent is reflected in *Idaho Code*, §57-725, which requires the Endowment Investment Board to report to the legislature on the fourth Monday of each regular session, "all securities and investments sold, purchased or acquired by the permanent endowment funds of the state." (Emphasis added) The Code section goes on to state that the report shall further include the net profit or loss, if any, as a result of all sales or purchases of such securities and investments.

Idaho Code, §57-724, requires the Endowment Investment Board to report to the legislature once every four years the status of the permanent endowment funds. Part of this Code section states, "In computing net capital gains or net capital losses, the board shall . . . use the difference between the acquisition cost of securities and actual proceeds received from the sale as the determinate of the gain or loss." (Emphasis added) This again reflects a legislative intent that the Endowment Investment Board has the authority to sell a security before its maturity date. It should also be noted that this Code section was construed at length and found to be constitutional by the Idaho Supreme Court in *Moon v. Investment Bd.*, 96 Idaho 140, 525 P.2d 335 (1974).

Two interpretations of *Idaho Code*, §57-715, can be used to harmonize it with Attorney General Opinion #78-43. First, the Endowment Investment Board was given the authority in *Idaho Code*, §57-715, to control, manage and invest the permanent endowment funds of the State of Idaho. The power to sell a security could come from either of the terms control or manage. The second, and more persuasive interpretation of Title 57, Chapter 7, *Idaho Code*, is that the legislature, in using the term "control, manage and invest the permanent endowment funds," placed a different definition upon the term "invest" than it did in *Idaho Code*, §67-1210. The first rule of statutory construction is whole act construction. This is to say all parts of a single chapter of the Idaho Code are to be read in harmony with one another, if possible. Using this canon of statutory construction, the term "invest" must be read in context with, and modified by the use of, the term "sales" in *Idaho Code*, §§57-720, 57-724, 57-725. Under either analysis the Endowment Investment Board has the statutory authority to sell investments before their maturity date.

This statutory construction is bolstered by the decision of the Idaho Supreme Court in *Moon v. Investment Bd.*, *supra*, defining the circumstances under which the legislature would have to make up losses from sales made by the Endowment Investment Board. In *Moon v. Investment Bd.*, *supra*, the court stated:

However turning the same example around, a security purchased in 1965 for \$800 . . . and subsequently sold for \$900 . . . 96 Idaho at 143.

The court was construing the provisions of *Idaho Code*, §57-724, and held that the Code section did not conflict with Article IX, §3, *Idaho Constitution*. One assumption inherent in the case is that the Board has the power to sell securities. It is the conclusion of the Attorney General that the Board does have the authority to sell investments.

2. The second question asked was whether the State Treasurer, as custodian of the public school funds, can be held liable for actions of the Investment Board. The case of *State v. Herbert*, 49 Ohio St.2d 88, 358 N.E.2d 1090 (1976), was cited as prompting this request. Without more information it will be assumed that possible liability, both from the "sales" practice of the Board, and "acquisitions" made by the Board is questioned.

In *State v. Herbert*, *supra*, the state of Ohio brought an action against a former state treasurer, his deputy, and the sureties. The suit was to recover a loss incurred by the treasurer through his investment practices in what is equivalent to Idaho's "idle funds." *Idaho Code*, §67-1210. The defendant was under a statutory duty not to invest more than fifty million dollars in commercial paper at any one time. He invested in more than fifty million dollars, and as part of the post-fifty million dollar investment, he purchased two notes which later defaulted. The defendants were held liable for the defaulted notes. The court, in finding liability, relied solely upon statutory construction of Ohio law. In interpreting the Revised Code of Ohio, the court stated:

It is a generally accepted rule that a court must first look to the language of the statute itself to determine the legislative intent and that the statute must be applied accordingly if its meaning is clear, unequivocal and definite. *Provident Bank v. Wood*, (1973), 36 Ohio St.2d 101, 304 N.E.2d 378. 358 N.E.2d at 1094.

With this canon of statutory construction in mind, we will look at Idaho law on this point.

The State Treasurer is the custodian of the endowment investment funds. Art. IX, §3, *Idaho Constitution*. The Idaho Supreme Court in *Moon v. Investment Bd.*, 97 Idaho 595, 548 P.2d 861 (1976), defined this duty as follows:

The matter of investment provisions of the fund as heretofore quoted was before this Court in *Moon v. Investment Board*, 96 Idaho 140, 525 P.2d 335 (1974), and in a unanimous opinion it was pointed out that the legislative control over investment of the funds through the Investment Board "does not conflict with the provision that the state treasurer should be the custodian of the fund, but bifurcates the responsibilities between the executive and legislative branches of government." 96 Idaho at 144, 525 P.2d at 339. 97 Idaho at 596.

This same legislative responsibility is found in Art. IX, §11, *Idaho Constitution*, which states:

The permanent endowment funds . . . shall be loaned . . . on such other investments as may be permitted by law under such regulations as the legislature may provide.

It is the legislative branch of government that has the authority and responsibility to formulate a sound investment policy for the State with regard to the permanent endowment funds. Pursuant to this authority, the legislature, in 1969, adopted *Idaho Code*, §57-724. This Code section provides the mechanism for the legislature to make up losses to the funds that are a result of sales made by the Endowment Investment Board. See *Moon v. Investment Board*, 96 Idaho 140. Thus, with a statutory mechanism set up for making up any losses to the

funds that are the result of "sales" activities by the Board, the legislature did not place any responsibility upon the Treasurer relative to this type of transaction.

The second category of investment practices concerns "acquisitions" made by the Endowment Investment Board. The Endowment Investment Board is authorized to invest in eight different types of securities. *Idaho Code*, §57-722. The *Herbert* decision points out the possibility of liability if the permanent endowment funds are invested in a manner contrary to the statutory authorization.

As was pointed out in an earlier portion of this opinion, the court in *Herbert* relied on the interpretation of Ohio statutes and held:

A court must first look to the language of the statute itself to determine the legislative intent and that the statute *must* be applied accordingly if its meaning is clear, unequivocal and definite. (Emphasis added) 358 N.E.2d at 1094.

Unlike Ohio, which vested a type of co-equal authority between the investment board and the state treasurer, the legislature of the state of Idaho has not burdened the Idaho State Treasurer with such a responsibility. *Idaho Code*, §57-721, states in part:

The Department of Finance shall be responsible for insuring that the investment manager(s) comply with this act. . . .

Thus, in Idaho, the responsibility (and liability, if any,) relative to supervising both sales and acquisitions, rest with the Director of Finance. Earlier in the same Code section the Endowment Investment Board was given the authority to contract with, "a minimum of one (1) investment manager(s) to manage the permanent endowment funds." The authority given to the investment manager(s) is to, "exert control over the funds . . . as though the investment manager(s) were the owner thereof." *Idaho Code*, §57-721.

The Board and its manager(s) are governed by the Idaho Prudent Man Investment Act in their control over the fund. The Board and/or its manager(s) have the duty to control the funds. If any liability arose from the transactions of the Board, the Board and/or its manager(s) would be held accountable by reason of their statutory duty.

The Idaho Supreme Court in *Hurlebaus v. American Falls Irrigation Dist.*, 49 Idaho 158, 226 P. 598 (1930), stated the following pertinent rule with regard to the State Treasurer's bond:

In this state the law governing defaults in official duties is fixed by statutory enactments, but in the absence of statute the rule is well settled that where an added duty of an official nature is lawfully imposed upon an official, and no additional bond is provided, the conditions of the official bond, given thereafter, cover the added duties. (Citations omitted) 49 Idaho at 168.

It is clear from the above-stated rule that for liability to attach to the State Treasurer, some official duty must be breached. The legislature has not vested the State Treasurer with any duties in relation to the transactions of the

Endowment Investment Board, nor does the Idaho Constitution vest the Treasurer with any of said duties. *Moon v. Investment Board*, *supra*.

It is the conclusion of the Attorney General that, based upon Title 57, Chapter 7, *Idaho Code*, and *Moon v. Investment Bd.*, 97 Idaho 595, 548 P.2d 861 (1976), the State Treasurer does not have any potential liability for any improper acquisitions or sales made by the Endowment Investment Board or its manager(s). Liability, if any, would be placed first with the Board or its manager(s), and possibly with the Director of the Department of Finance. No opinion is expressed as to the circumstances or conditions which might lead to liability upon either the Board, its manager(s), or the Director of the Department of Finance. This opinion is solely limited to answering the two questions posed in the opinion request submitted by the State Treasurer.

AUTHORITIES CONSIDERED:

1. *Idaho Code*, §§57-715, 57-720, 57-721, 57-724, 57-725, 67-1210.
2. *Idaho Constitution*, Art. IX, §11, 1968 amendment.
3. Attorney General Opinion #78-43.
4. *Moon v. Investment Board*, 96 Idaho 140, 525 P.2d 335 (1974).
5. *State v. Herbert*, 49 Ohio St.2d 88, 358 N.E.2d 1090 (1976).
6. *Moon v. Investment Bd.*, 97 Idaho 595, 548 P.2d 861 (1976).
7. *Hurlebaus v. American Falls Irrigation Dist.*, 49 Idaho 158, 226 P. 598 (1930).

DATED this 8th day of May, 1979.

ATTORNEY GENERAL
State of Idaho
/s/ DAVID H. LEROY

ANALYSIS BY:

JOHN ERIC SUTTON
Deputy Attorney General
Division of Finance

DHL:JES:lb

cc: Idaho State Library
Idaho Supreme Court
Idaho Supreme Court Library

ATTORNEY GENERAL OPINION 79-9

TO: C. W. Crowl, Director
Department of Corrections
Statehouse Mail

Per Request For Attorney General Opinion

QUESTIONS PRESENTED:

1. Is it appropriate for a sentencing judge to commit a person to a term of imprisonment of not less than "X" years nor more than "Y" years?
2. Assuming an affirmative response to question No. 1, is the hypothetical commitment to be treated as a fixed term sentence of "X" years imprisonment, a fixed term sentence of "Y" years imprisonment or an indeterminate sentence of not to exceed "Y" years imprisonment?

CONCLUSION:

1. Idaho courts are required to sentence convicted felons under either §19-2513, which mandates that only a maximum sentence be set, or §19-2513A, which empowers a court to establish a definite, fixed term of imprisonment. Any attempted combination of the two sentencing statutes so as to produce a hybrid sentence which includes both a judicially imposed minimum and a maximum term of imprisonment is inappropriate under our present sentencing scheme.
2. The Department of Corrections should not attempt to unilaterally modify, amend or characterize a hybrid sentence but should instead encourage the parties involved to seek a judicial clarification.

ANALYSIS:

Several issues pertaining to the constitutionality of Idaho's new fixed term sentencing law (*Idaho Code*, §19-2513A) as well as questions relating to the construction thereof are currently pending before the Idaho Supreme Court. *State v. Rawson*, Idaho S.Ct. 12843 (argued April 6, 1979); *State v. Avery*, Idaho S.Ct. 12896; *State v. Johnson*, Idaho S.Ct. 12728. These appeals challenge the facial constitutionality of the fixed term law and, in the alternative, request an interpretation clarifying the authority of the Idaho Commission for Pardons and Parole to grant early releases to individuals sentenced under the statute. In view of the forthcoming Supreme Court opinions, this office will abstain from addressing the number of fundamental preliminary questions relating to §19-2513A and its impact on the Parole Commission's power to grant pardons, commutations and paroles.

Prior to July 1, 1977, the only sentencing scheme available to judges in Idaho was embodied in *Idaho Code*, §19-2513, which states in relevant part:

INDETERMINATE SENTENCE — The minimum period of imprisonment in the penitentiary heretofore provided by law for the punishment of felonies, and each such minimum period of imprisonment for felonies, hereby is abolished. Whenever any person is convicted of having committed a felony, the court shall, unless it shall commute the

sentence, suspend or withhold judgment and sentence or grant probation, as provided by Chapter 26 of Title XIX, Idaho Code, or unless it shall impose the death sentence provided by law, sentence such offender to the State Board of Correction for an indeterminate period of time, but stating and fixing in such judgment and sentence a maximum term which term shall be for a period of not less than two years nor exceeding that provided by law therefor, and judgment and sentence shall be given accordingly, and such sentence shall be known as an indeterminate sentence;

The Indeterminate Sentencing Act allows the Parole Commission, within certain limitations, to set the actual release date for convicted felons. This system of sentencing is based upon the theory that every individual can be "rehabilitated" in a penitentiary setting. However, the theory underlying indeterminate sentencing has been subject to heavy criticism by penologists throughout the country. See, Morris, *Conceptual Overview, Commentary on the Movement Toward Determinacy and Determinate Sentencing: Reform or Regression?*, U.S. Department of Justice, March, 1978.

With an awareness of the problems inherent in indeterminate sentencing, the 1977 legislature adopted a bill which authorizes our trial judges to impose fixed term sentences as an alternative to determinate terms. The fixed term law states:

ALTERNATIVE FIXED TERM SENTENCE—As an alternative to an indeterminate sentence for any person convicted of a felony, the court, in its discretion, may sentence the offender to the State Board of Correction for a fixed period of time but not less than two years and not more than the maximum provided by law for said felony.

This sentencing scheme is designed to permit the trial judge who is closest to the community, the defendant and the crime, to fix a sentence to a definite length of incarceration in those special cases where the judge determines that this stricter approach is appropriate. The language of the act also makes it clear that the fixed term law is designed to provide our courts with an alternative to indeterminate sentences; it is not meant to replace or modify the pre-existing indeterminate sentencing statute so as to produce the kind of hybrid sentence which has presented problems of interpretation to the Department of Corrections. A judge may either sentence an individual to an indeterminate period of imprisonment or he may impose a fixed, definite term. Nothing in the language of either of the sections in issue authorizes a sentencing court to establish both a minimum and a maximum period of imprisonment in a single commitment order.

Confusion may be generated by the concluding language of §19-2513A which authorizes imposition of a sentence "for a fixed period of time of not less than two years and not more than the maximum provided by law for said felony." For example, in a case cited by the Department of Corrections, an individual was committed to a term of not less than ten nor more than twelve years imprisonment. It may be argued that this kind of sentence is authorized by the aforementioned language in that the minimum term established in this sentence is not less than two and the maximum is apparently not greater than the maximum penalty provided by law for the crime. However, this argument ignores the preceding language in the statute as well as its caption. The act provides for

"fixed term" sentences and empowers the court to incarcerate the individual for a "fixed period of time." A sentence ranging from ten (10) to twelve (12) years does not establish a fixed period of imprisonment and it is subversive of the conceptual underpinnings of the fixed term sentencing law in that it allows the Parole Commission to make the ultimate decision as to the timing of release.

It is noteworthy that language which is virtually identical to that which appears in §19-2513A is also found in the determinate sentencing statute; that act authorizes the imposition of a maximum term subject to the limitation that the term "shall be for a period of not less than two years nor exceeding that provided by law therefor." Clearly, a judge sentencing a felon to imprisonment under §19-2513 cannot impose a ten to twelve year sentence as other language in the section specifically abolishes minimum periods of imprisonment and authorizes the trial courts to impose only maximum terms. This language is the product of an amendment to §19-2513 in 1947, prior to which the section provided for the fixing by the court of both minimum and maximum terms within certain limits. 1947 Session Laws, Ch. 46, §1, p.50. A subsequent amendment to §19-2513 in 1957 provided that the maximum term of imprisonment which was to be set by the court could not be for a period of less than two years. 1957 Session Laws, Ch. 47, §1, p.82. It has never been argued that the "less than two years" language which appears in §19-2513 repeals the earlier provision of the statute which abolishes minimum periods of imprisonment. The reference to "not less than two years" in §19-2513, merely represents a legislative attempt to impose a minimum sentence for felony convictions.

The incorporation into §19-2513A of the same "not less than two years" language which appears in §19-2513 should be viewed as a legislative attempt to fix a minimum period of imprisonment for felonies and not as an authorization for a sentencing court to fix a sentence range which includes both a judicially determined minimum as well as a maximum period of imprisonment. As aforementioned, such a result would be contrary to the provisions of §19-2513A which empower courts to impose imprisonment for a "fixed period" of time. The use of the term "fixed" implies a legislative intent that the sentence was to be definite and not subject to change or variation at the discretion of the Parole Commission. This analysis leads to the conclusion that a sentence which imposes both a mandatory minimum as well as a maximum term of imprisonment is inappropriate.

In view of the above conclusions, it would appear advisable to inform those persons who have been given hybrid sentences, as well as the district court judges and prosecuting attorneys involved, of this opinion in order that they may elect to take such action as they deem advisable. *See, e.g.,* Rule 35, Idaho Rules of Criminal Practice and Procedure. Following this procedure will facilitate ultimate review of the issue by the Idaho Supreme Court.

It would not be advisable for the Department of Corrections to attempt to unilaterally modify or amend a judicially imposed sentence as a number of cases have held that the Department lacks the authority to do so. *See, In re Prout*, 12 Idaho 494, 86 P. 275 (1906); *Storseth v. State*, 72 Idaho 49, 236 P.2d 1004 (1951); *State v. Evans*, 73 Idaho 50, 245 P.2d 788 (1952). Absent judicial clarification of a hybrid sentence, the Commission for Pardons and Parole would appear to be precluded from paroling an individual until he has completed the minimum stated in the hybrid sentence, and the Department of Corrections would appear to be similarly precluded from detaining the individual in excess of the

maximum period of time established in the commitment order. This conclusion assumes that the Idaho Supreme Court will not determine that §19-2513A has no effect on the paroling authority. If the Court holds to the contrary, all judicially imposed minimum terms authorized by the present fixed term law will be merely recommendatory.

AUTHORITIES CONSIDERED:

1. *Idaho Code*, §§19-2513, 19-2513A.
2. Idaho Session Laws, 1947, Ch. 46, §1, p.50; 1957, Ch. 47, §1, p.82.
3. Idaho Rules of Criminal Practice and Procedure, Rule 35.
4. Morris, *Conceptual Overview, Commentary on the Movement Toward Determinacy and Determinate Sentencing: Reform or Regression?*, U.S. Department of Justice, March, 1978.
5. *State v. Rawson*, Idaho S.Ct. #12843; *State v. Avery*, Idaho S.Ct. #12896; *State v. Johnson*, Idaho S.Ct. #12728.
6. *In re Prout*, 12 Idaho 494, 86 P. 275 (1906); *Storseth v. State*, 72 Idaho 49, 236 P.2d 1004 (1951); *State v. Evans*, 73 Idaho 50, 245 P.2d 788 (1952).

DATED this 10th day of May, 1979.

ATTORNEY GENERAL
State of Idaho
/s/ DAVID H. LEROY

ANALYSIS BY:

P. MARK THOMPSON
Deputy Attorney General
State of Idaho

DHL:PMT:1b

cc: Idaho State Library
Idaho Supreme Court
Idaho Supreme Court Library

ATTORNEY GENERAL OPINION NO. 79-10

TO: Jay A. Kohler
Bear Lake County Prosecuting Attorney
852 Washington
Montpelier, ID 83254

Per Request for Attorney General Opinion

QUESTIONS PRESENTED:

1. May the county commissioners lawfully authorize the use of county equipment by or for private persons or firms?
2. Would it make any difference if the county were to charge users competitive fees and rates for the use of county equipment or property?

CONCLUSIONS:

1. Except as noted below, county commissioners are not authorized to allow the use of county property by or for the benefit of private persons and firms.
2. Since counties have no authority to engage in a purely private enterprise or business, they are not authorized to engage in the business of leasing out equipment or other property even at competitive fees or rates.
3. However, counties may, in accordance with statutory requirements, lease to private persons and firms county property which is not presently needed for public use, so long as the lease does not conflict with the public's use or need for the property. However, such activity must be merely incidental to the county's ownership of the property and must not have as its primary purpose the conducting of or engaging in a business for profit.
4. Under a county's general police powers, a county probably has the authority, when acting primarily for the promotion or protection of the public health, safety, and welfare, to allow the use of county property by private persons and firms for such public police power purposes. However, the question has apparently not been determined in Idaho.

ANALYSIS:

As a general rule, counties have no legal authority to authorize the use of county equipment or other property by or for the benefit of private persons or firms. This conclusion is based upon three separate grounds: (1) Counties have only those powers expressly granted by the state or necessarily implied from such express powers, and the state has not authorized such activities by counties. (2) There is a general requirement, implicit in the Idaho Constitution and expressed in several decisions of the Idaho Supreme Court, that all county acts must be for a public, as opposed to a private, purpose. Allowing public property to be used by or for the benefit of private persons or firms would violate the public purpose requirement. (3) Such activity would probably violate the prohibition found in Idaho Constitution art. 8, § 4, and art. 12, § 4, against the lending or pledging of a county's faith or credit in aid of private interests.

We see two exceptions to this general rule, first, where property owned by a county and not presently needed for public purposes is leased to private persons in accordance with *Idaho Code* § 31-836, and, secondly, where the use of county property by private persons is primarily in furtherance of a county police power purpose, i.e. for the promotion or protection of the public health, safety, or welfare. Both exceptions are discussed below.

It is a well-established rule of law in Idaho that counties and county commissioners have and may exercise only those powers conferred upon them by statute, or such as may arise by necessary implication from an express power, and no other. *Idaho const. art. 18, § 11; Idaho Code* §§ 31-601, 31-801; *Johnson v. Young*, 53 Idaho 271, 23 P.2d 723 (1932); *Shillingford v. Benewah County*, 48 Idaho 447, 282 P. 864 (1929); *Prothero v. Board of Comr's. of Twin Falls County*, 22 Idaho 598, 127 P. 175 (1912); *Conger v. Board of Comr's. of Latah County*, 5 Idaho 347, 48 P. 1064 (1897).

It is true that Idaho Constitution art. 12, § 2, has been held to constitute a direct grant to counties of the *police powers*, empowering counties to legislate with respect to the public health, safety, and welfare without the necessity of an express grant of authority from the legislature. *Dawson Enterprises, Inc. v. Blaine County*, 98 Idaho 506, 567 P.2d 1257 (1977); *County of Ada v. Walter*, 96 Idaho 630, 533 P.2d 1199 (1975); *State v. Clark*, 88 Idaho 365, 399 P.2d 955 (1965); *Taggart v. Latah County*, 78 Idaho 99, 298 P.2d 979 (1956); *Gartland v. Talbott*, 72 Idaho 125, 237 P.2d 1067 (1951). However, no cases have held that art. 12, § 2 grants counties any non-police powers, including the use, management, or disposition of county property. In our view, counties must rely upon specific statutes, and not upon the constitutional provision, for authority with respect to county property, with the exception noted later in this opinion.

We have examined the statutes governing the powers and duties of counties, with particular reference to those governing the acquisition, use, management, lease, and disposition of county property, including Chapters 6, 7, and 8, Title 31, *Idaho Code*. Sections 31-601 and 31-801 basically limit the powers of counties to those expressed by statute or necessarily implied therefrom. Section 31-604 sets forth certain general powers, including the power to purchase and hold property necessary to the exercise of its powers. Section 31-605 expressly prohibits counties from loaning or giving their credit to or in aid of private interests, except as allowed by law. Section 31-714 authorizes passage of ordinances and regulations, basically for police power purposes. Section 31-807 authorizes county commissioners to purchase, receive by donation, or lease any real or personal property necessary for the use of the county, and to preserve, manage, and control such property. Sections 31-808 and 31-829 set forth the manner by which counties may sell property not necessary for county use. Section 31-828 is a general authorization to do all acts necessary to a full discharge of the duties of the county government. Section 31-836 sets forth the manner of leasing county property.

With the exception of leases authorized by § 31-836, which exception is discussed more fully below, the statutes nowhere authorize, either expressly or by necessary implication, boards of county commissioners to allow the use of county property by private persons or firms. In light of the specific restrictions in §§ 31-604 and 31-807 that the acquisition and holding of property are limited to that necessary to the exercise of county powers, or necessary for the use of the county, it is entirely possible that the statutes could be read, not only as not

authorizing, but as impliedly *prohibiting*, the use of county property by private persons or firms.

It is our opinion, then, that except for leases authorized under *Idaho Code* § 31-836, counties are not authorized by statute to allow the use of county equipment or other property by private persons or firms, and, in the absence of such statutory authorization, counties have no power to do so. However, lack of statutory authorization is not the only ground upon which we base this opinion. In our view, allowing the use of county property by purely private interests violates the “public purpose” requirement which has been held to be implicit throughout state and local government.

The rule is well established, in Idaho and elsewhere, that powers conferred upon municipal and other governmental entities must be exercised for a public, as distinguished from a private, purpose. 2 McQuillin *Municipal Corporations* § 10.31; 15 McQuillin, § 39.19; *Idaho Water Resource Board v. Kramer*, 97 Idaho 535, 548 P.2d 35 (1976); *Board of County Comr’s. v. Idaho Health Fac. Auth.*, 96 Idaho 498, 531 P.2d 588 (1975); *Village of Moyie Springs v. Aurora Mfg. Co.*, 82 Idaho 337, 353 P.2d 767 (1960); *Visina v. Freeman*, 252 Minn. 177, 89 N.W.2d 635 (1958). (See generally, “State Constitutional Provisions Prohibiting the Loaning of Credit to Private Enterprise — A Suggested Analysis,” 41 U. Colo. L. Rev. 135, 138-40 (1969), for a review of the public purpose requirement.)

In *Board of County Com’rs. v. Idaho Health Fac. Auth.*, *supra*, the Idaho Supreme Court stated:

Article 3 of the Constitution of Idaho does not specifically mention a requirement of a public purpose for legislation authorizing a state-created public entity to expend funds. However, in the case of *Village of Moyie Springs, Idaho v. Aurora Manufacturing Co.*, *supra*, this Court declared that “municipal corporations . . . are limited to functions and purposes which are . . . public in character as distinguished from those which are private in character and engaged in for private profit. . . .”

. . . If this rule is a restriction upon the cities’ powers, it must be so because it is also a restriction upon the state’s power, for the cities are not singled out for unique treatment in this regard by statute or constitutional provision. Therefore, this restriction must be inherent throughout state government and must be a fundamental limitation upon the power of state government under the Idaho Constitution, even though not expressly stated in it. *Thus, no entity created by the state can engage in activities that do not have primarily a public, rather than a private purpose, nor can it finance or aid any such activity.* 96 Idaho 498, 502. (Emphasis added.)

The court elaborated upon the doctrine in *Idaho Water Resource Board v. Kramer*, *supra*, 97 Idaho 535 at 559:

It is a fundamental constitutional limitation upon the powers of government that activities engaged in by the state, funded by tax revenues, must have primarily a public rather than a private purpose. *A public purpose is an activity that serves to benefit the community as a whole and which is directly related to the functions of government.* (Emphasis added.)

In *Village of Moyie Springs v. Aurora Manufacturing Co.*, 82 Idaho 337, 353 P.2d 767 (1960) the Idaho Supreme Court, after stating that Idaho has "a long history of recognition by the legislature of the constitutional limitations of the powers of municipalities to activities which are either governmental or embraced within the accepted definitions of 'public purpose,' or 'affected with a public intent,' such as utilities," held invalid a state statute which authorized municipalities to issue revenue bonds for the purpose of financing the cost of acquiring land and constructing facilities which were to be sold or leased to private enterprise. It also invalidated an ordinance passed by the village pursuant to the statute, providing for the issuance of revenue bonds to defray its cost of acquiring a site, and constructing an industrial plant which it planned to lease to the Aurora Manufacturing Co. As the court later, in *Idaho Water Resource Board v. Kramer*, *supra*, summarized the *Moyie Springs* decision:

This court found both the statute and ordinance to be invalid. It ruled that the proposed revenue bond issue was violative of the constitutional restriction against a municipality loaning its credit in aid of a private corporation [art. 8, § 4, and art. 12, § 4, Idaho const.] In addition the proposed venture was found to have only an incidental benefit to the public. 97 Idaho 535 at 561.

Under the requirement that a governmental entity's actions be for a public purpose, numerous cases from other jurisdictions have held that a municipal corporation or other governmental entity may only acquire, hold, and use property for governmental or corporate purposes. 10 McQuillin *Municipal Corporations* § 28.11. It is generally held that, ordinarily, a municipality cannot permit its property to be diverted to a possession or use exclusively private, in the absence of specific legislative authority. 10 McQuillin, *supra*, § 28.42.

Thus, in *Ex Parte Conger*, 357 S.W.2d 740 (Tex. 1962), it was held that use of public equipment and labor to perform work on privately owned church property to furnish parking facilities for the use of members attending church was not for a public use or purpose.

The matter does not turn on the extent or character of the work, but rather for whose benefit it was performed. . . . To constitute "public use" all persons must have an equal right in respect to the property and it must be in common and on the same terms no matter that only a few in number may avail themselves of it. 357 S.W.2d 740, 742.

To the same effect is *Godley v. Duval County*, 361 S.W.2d 629 (Tex. Civ. App. 1962), which held:

The county commissioners are not authorized to permit the use of county labor, materials, or equipment for other than public use. . . . This same rule applies to county employees, regardless of the motives or whether a profit is made.

Nor can a municipal corporation engage in a private business or expend its funds to undertake a private enterprise. 12 McQuillin *Municipal Corporations* § 36.02.

The public purpose requirement, as recognized in Idaho and elsewhere, clearly appears to prohibit a county either from allowing its property to be used

primarily for a private purpose (with the exceptions noted below), or from engaging in the business of using its property for, or permitting its property to be used by, private persons or business for a fee. This conclusion is particularly reinforced by Idaho's constitutional prohibition against the lending of city or county faith or credit to or on behalf of private persons or businesses.

As set forth in the *Moyie Springs* case, *supra*, a doctrine which is closely related to the public purpose requirement is the constitutional inhibition against the loan of public funds, faith, or credit in aid of private individuals or business. 15 McQuillin *Municipal Corporations* §§ 39.26, 39.30. Idaho const. art. 8, § 4 provides:

No county, city . . . or other subdivisions, shall lend or pledge the credit or faith thereof directly or indirectly, in any manner, to, or in aid of any individual, association, or corporation, for any amount or for any purpose whatever, or become responsible for any debt, contract or liability of any individual, association or corporation in or out of this state.

And, Idaho const. art. 12, § 4 provides:

No county, town, city, or other municipal corporation, by vote of its citizens or otherwise, shall ever become a stockholder in any joint stock company, corporation or association whatever, or raise money for, or make donation or loan its credit to, or in aid of, any such company or association. . . .

Under these constitutional provisions, numerous attempts by local governmental entities in Idaho to aid private individuals or associations have been invalidated by the Idaho Supreme Court. *Atkinson v. Board of County Comr's. of Ada County*, 18 Idaho 282, 108 P. 1046 (1910) (statute authorizing formation of county railroad districts was unconstitutional, where the obvious purpose was to build branch lines for donation to private railroad companies); *Fluharty v. Board of County Com'r's. of Nez Perce County*, 29 Idaho 203, 158 P. 320 (1916) (appropriation of county funds to a non-profit fair association held to be an unconstitutional donation); *School Dist. No. 8 v. Twin Falls County Mutual Fire Ins. Co.*, 30 Idaho 400, 164 P. 1174 (1917) (school district prohibited from becoming a member of a county mutual fire insurance company, because it would indirectly sanction the use of public funds for a private purpose); *Johnson v. Young*, 53 Idaho 271, 23 P.2d 723 (1932) (constitution prohibits a county from delegating to a private trustee power and control over county property).

When these decisions are considered with *Village of Moyie Springs v. Aurora Mfg. Co.*, *supra*, it becomes clear that counties are prohibited from aiding private persons or businesses by loaning their funds, faith, or credit. In our opinion, the constitution likewise prohibits the loan or use of county property by, or for the benefit of, private persons or firms.

However, we do not view the above legal and constitutional limitations as prohibiting *any* possible use of county property by private persons or firms. We see two exceptions to the general prohibition; first, leases of property not presently needed for public purpose, and, secondly, use of county property by private concerns where the principal purpose is the furtherance of a legitimate police power objective.

It is now well established in Idaho that a county or other governmental entity may lease to private persons, for private business uses, public property which is not presently needed for public purposes. *Mountain States Tel. & Tel. Co. v. City of Boise*, 95 Idaho 264, 506 P.2d 832 (1973); *Hansen v. Kootenai County Board of Comr's*, 93 Idaho 655, 471 P.2d 42 (1970); *Hansen v. Independent School Dist. No. 1*, 61 Idaho 109, 98 P.2d 959 (1939); *Idaho Code* § 31-836; 10 McQuillin *Municipal Corporations*, § 28.42; Annotation: 47 A.L.R. 3d 19 (1973).

In *Hansen v. Independent School Dist. No. 1*, *supra*, the Idaho Supreme Court held that art. 8, § 4 and art. 12, § 4, Idaho const., were not violated by a lease of a school baseball field to a professional baseball club, so long as there was no interference with school use. *Hansen v. Kootenai County Board of Comr's*, *supra*, held that a lease of the county fairgrounds to a private horse racing business for part of the year did not violate the constitution, as long as there was no conflict with the public use of the property.

Those cases express some important limitations on a public entity's power to lease its property to private concerns. First, the property must not presently be needed for public purposes. Second, the lease of the property must not conflict with the public's use or need for the property. We see a third limitation implicit in the general requirement that public entities must act only for public purposes — a county or other governmental entity must not use its power to lease property in such a manner as to constitute engaging in a private business. *Village of Moyie Springs v. Aurora Mfg. Co.*, *supra*.

The second probable exception (we find no Idaho cases or statutes specifically in point) is that a city or county, when acting pursuant to its constitutional police powers under art. 12, § 2, Idaho const., in the promotion or protection of the public health, safety, or welfare, can probably loan or lease public property to private individuals or firms where the primary purpose is the furtherance of a police power objective. For example, *Collins v. Eldorado*, 122 S.W.2d 690 (Tex. Civ. App.) held that a city could lawfully purchase sanitary pit toilets and rent them to property owners to enable them to comply with a sanitary ordinance. We think it probable, too, that in coping with an emergency situation such as a flood, a city or county could permit its equipment to be used by private individuals or firms for the purpose of dealing with the emergency without violating the constitution.

With these two exceptions, however, it is our opinion that a county is not authorized to permit public property to be used by or on behalf of private individuals or firms, whether or not competitive rental rates or user fees are charged.

We call attention to *Idaho Code* § 31-855, which provides:

Any commissioner who neglects or refuses, without just cause therefor, to perform any duty imposed on him, or who wilfully violates any law provided for his government as such officer, or fraudulently or corruptly attempts to perform such 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.

AUTHORITIES CONSIDERED:

1. Idaho const. art. 8, §§ 2 and 4; art. 12, §§ 2 and 4; art. 18, § 11.

2. *Idaho Code* §§ 31-601, 31-604, 31-605, 31-714, 31-801, 31-807, 31-808, 31-828, 31-829, 31-836, 31-855.

3. Cases:

Conger v. Board of Comr's. of Latah County, 5 Idaho 347, 48 P. 1064 (1897).

Atkinson v. Board of Comr's. of Ada County, 18 Idaho 282, 108 P. 1046 (1910).

Prothero v. Board of Comr's. of Twin Falls County, 22 Idaho 598, 127 P. 175 (1912).

Fluharty v. Board of Comr's. of Nez Perce County, 29 Idaho 203, 158 P. 320 (1916).

School Dist. No. 8 v. Twin Falls County Mut. Fire Ins. Co., 30 Idaho 400, 164 P. 1174 (1917).

Shillingford v. Benewah County, 48 Idaho 447, 282 P. 864 (1929).

Johnson v. Young, 53 Idaho 271, 23 P.2d 723 (1932).

Hansen v. Independent School District No. 1, 61 Idaho 109, 98 P.2d 959 (1939).

Gartland v. Talbott, 72 Idaho 125, 237 P.2d 1067 (1951).

Taggart v. Latah County, 78 Idaho 99, 298 P.2d 979 (1956).

Village of Moyie springs v. Aurora Mfg. Co., 82 Idaho 337, 353 P.2d 767 (1960).

State v. Clark, 88 Idaho 365, 399 P.2d 955 (1965).

Hansen v. Kootenai County Board of Comr's., 93 Idaho 655, 471 P.2d 42 (1970).

Mountain States Tel. & Tel. Co. v. City of Boise, 95 Idaho 264, 506 P.2d 832 (1973).

Board of County Comr's. v. Idaho Health Fac. Auth., 96 Idaho 498, 531 P.2d 588 (1975).

County of Ada v. Walter, 96 Idaho 630, 533 P.2d 1199 (1975).

Idaho Water Resource Board v. Kramer, 97 Idaho 535, 548 P.2d 35 (1976).

Dawson Enterprises, Inc. v. Blaine County, 98 Idaho 506, 567 P.2d 1257 (1977).

Visina v. Freeman, 252 Minn. 177, 89 N.W.2d 635 (1958).

Collins v. Eldorado, 122 S.W.2d 690 (Tex. Civ. App.)

Ex Parte Conger, 357 S.W.2d 740 (Tex. 1962).

Godley v. Duvall County, 361 S.W.2d 629 (Tex. Civ. App. 1962).

4. Other Authorities:

2 McQuillin *Municipal Corporations* § 10.31.

10 McQuillin *Municipal Corporations* §§ 28.11, 28.42.

12 McQuillin *Municipal Corporations* § 36.02.

15 McQuillin *Municipal Corporations* §§ 39.19, 39.26, 39.30.

"State Constitutional Provisions Prohibiting the Loaning of Credit to Private Enterprise — A Suggested Analysis," 41 U. Colo. L. Rev. 135 (1959).

Annotation: 47 A.L.R. 3d 19 (1973).

DATED this 11th day of May, 1979.

ATTORNEY GENERAL
State of Idaho
/s/ DAVID H. LEROY

ANALYSIS BY:

MICHAEL C. MOORE
Deputy Attorney General
Chief, Local Government Division

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ATTORNEY GENERAL OPINION NO. 79-11

TO: The Honorable Reed Budge
President Pro Tem
Idaho State Senate
Statehouse
Boise, Idaho 83720

Per Request for Attorney General Opinion

QUESTIONS PRESENTED:

1. Does the State claim geothermal resources in lands previously sold by the State when such resources were not *specifically* reserved on the Land Sale Certificate?

2. Since water is involved, but the geothermal values are declared not to be water resources, is there a distinction to be drawn between hot water having geothermal potential and any other water, as to ownership, by the State, under § 42-226, *Idaho Code*?

3. If the State claims ownership of geothermal resources, then is a geothermal developer bound by the provisions of § 42-213, *Idaho Code*, requiring consent of land owners, before being eligible to appropriate subterranean water for geothermal uses?

4. As a secondary consideration, is a geothermal lease, providing royalties based on production, a proper method of acquiring landowner consent, if you hold that such consent is necessary? Or does State ownership preclude the right of royalties to private landowners?

5. Does the State claim the right to offer geothermal leases to geothermal developers on privately owned land under any circumstances, or is the State's control of such resources on private land limited to the granting of permits under § 42-4003, *Idaho Code*, and related sections?

CONCLUSIONS:

1. In adopting laws regulating geothermal development, the Idaho legislature balanced important public policies including protection of appropriated waters and promotion of geothermal development both as an additional energy source and to maximize income from state owned lands. Geothermal resources were defined as "sui generis," meaning "of its own kind or class." Black's Law Dictionary 1602 (Rev. 4th ed. 1968). This definition is consistent with subsequent court decisions which declared geothermal resources to be a mineral included within reserved mineral rights when extracted for energy purposes. The State of Idaho, therefore, claims ownership of geothermal resources whenever mineral rights are reserved by the state.

2. Idaho law declares that all ground waters are owned by the state subject to appropriation under the doctrine "first in time, first in right," as governed by Title 42, *Idaho Code*. The law distinguishes between ground water and energy extracted from geothermal sources which "will not unreasonably decrease ground waters available for prior water rights. . . ."

3. The geothermal developer is not bound by the provisions of *Idaho Code* § 42-213, since that statute regulates only private surface water rights and not energy resources.

4. Obtaining consent of the surface owner is not necessarily a prerequisite to securing a geothermal well permit. Protection for the surface owner's estate is provided by bonding requirements.

5. The state claims *ownership* of mineral rights and geothermal resources *only* in lands presently or previously owned by the state. The Geothermal Resources Act empowers the state to *regulate* and require permits for geothermal development upon *all* lands within the state.

INTRODUCTION

In 1972, Idaho enacted laws for the regulation and leasing of geothermal energy. The legislature, recognizing the complex nature of geothermal energy, balanced these important public policies concerning water and mineral resources. First, the Idaho legislature has consistently protected private water rights to assure an adequate water supply for the arid lands of the state. *Idaho Const.* art. 14; *Idaho Code*, Title 42. Second, the state constitution and laws also require the State Board of Land Commissioners to manage and protect state lands in a manner which will secure maximum return. The legislature has declared that mineral rights in state lands are reserved to the state and may be developed privately only by rental and royalty. *Idaho Code* § 47-701. Finally, a significant public policy evolved from the energy crisis of the last decade requiring that geothermal resources become another critical energy source.

These three interests prompted the legislature to enact laws designed to protect appropriated waters, authorize leasing of state owned lands for geothermal development in order to maximize economic return, and encourage as well as regulate development of geothermal energy.

ANALYSIS:

In 1972 the legislature reconciled these three public policies by adopting two separate acts, each containing substantially the same definition:

(c) "*Geothermal resource*" means the natural *heat energy* of the earth, the energy, in whatever form, which may be found in any position and at any depth below the surface of the earth present in, resulting from, or created by, or which may be extracted from such natural heat, and all minerals in solution or other products obtained from the material medium of any geothermal resource. Geothermal resources are found and hereby declared to be sui generis, being neither a mineral resource, nor a water resource, but they are also found and hereby declared to be closely related to and possibly affecting and affected by water resources in many instances. *Idaho Code*, § 42-4002 (c). [Emphasis added.]

Idaho Code § 47-1302, however, contains one additional sentence not found in *Idaho Code* § 42-4002 (c). The sentence states "[n]o right to seek, obtain, or use geothermal resources has passed or shall pass with any existing or future lease of state or school lands, including but not limited to, *mineral leases* and leases

issued under *Chapter 8, Title 47, Idaho Code.*" [Emphasis added.] These definitions acknowledged the imprecise geo-physical character of the resource yet affirmed its close relationship to minerals and water.

In referring to *Idaho Code* § 47-801 et seq., the Geothermal Act is making clear reference to the mineral nature of the resource. Moreover, the leasing limitations found in *Idaho Code* § 47-801 et seq. are made applicable by the wording of the statute which explicitly reserves to the state the right to lease geothermal resources in the same manner as other mineral resources. At present the State of Idaho grants mineral leases on a commodity by commodity basis. General grants of mineral rights do not include geothermal rights which can only be leased by specific agreement.

Both definitions of geothermal resources recognize the relationship between geothermal energy and mineral resources and geothermal energy and water resources. This dual nature of geothermal energy is responsible for its being treated as *sui generis*. Geothermal resources can thus be construed as water for purposes of ground water appropriation, and as minerals for purposes of extracting geothermal energy. Idaho law recognizes these distinctions.

In recognition of the dual nature of geothermal resources there are two regulatory statutes. The Geothermal Resources Act empowers the Idaho Department of Water Resources to *regulate* and require *permits* for any geothermal development on *all lands* in Idaho, within the limits and definitions of the Act. Chapter 40, Title 42, *Idaho Code*. The other statute, *Idaho Code* § 47-1601, et seq., authorizes the State Board of Land Commissioners to *lease state owned lands* for geothermal development.

Answer to question one: Subsequent to the adoption of the above two Acts, courts of law, after analyzing other geothermal resource statutes, have held that geothermal resources for energy purposes constitute mineral rights for certain purposes. The Ninth Circuit Court of Appeals in 1977 ruled that the mineral reservation in patents issued under the Stock-raising Homestead Act of 1916 reserved geothermal resources to the United States, notwithstanding the absence of specific reference to geothermal resources in the language of the Act or in its legislative history. The court reasoned that the Act intended to retain for the United States all subsurface fuel resources underlying the patented lands. *United States v. Union Oil Company of California*, 549 F.2d 1271, *cert. denied*, 98 S. Ct. 121 (1977). This reservation of mineral rights is, as will be discussed later, analogous to the reservation found in *Idaho Code* § 47-701. In *Reich v. Commissioner of Internal Revenue*, 52 T. C. 700, *aff'd*, 454 F.2d 1157 (9th Cir. 1972), the Court held that geothermal steam was a gas for purposes of the oil and gas depletion allowance in the Internal Revenue Code. In *Geothermal Kinetics v. Union Oil Company of California*, 75 Cal. Appl. 3d 56, 141 Cal. Rptr. 879 (1977), the California State Court of Appeals held that geothermal energy is a mineral. The California statute defines geothermal resources in a manner similar to Idaho law. *See*, Cal. Pub. Resource Code § 6903. In reaching its decision the California Court accepted a functional approach focusing upon the purposes and expectations generally associated with mineral estates and surface estates. The Court stated:

The utilization of geothermal resources does not substantially destroy the surface of the land. *The production of the energy from geothermal energy is analogous to the production of energy from such other*

minerals as coals, oil and natural gas in that substances containing or capable of producing heat are removed from beneath the earth. In fact, the wells used for the extraction of the steam are similar to oil and gas wells. (Emphasis supplied.) Geothermal Kinetics v. Union Oil Co., supra. at 881.

Chapter 16, Title 47, *Idaho Code*, authorizing the Land Board to lease geothermal resources for energy purposes, provides an obvious basis for issuing leases for geothermal development on State lands since the adoption of that Act. Moreover, as pointed out earlier, *Idaho Code* § 47-1602 specifically provides that all leases of geothermal resources must be issued pursuant to *Idaho Code* § 47-801, et seq. In light of the recent Court decision declaring geothermal energy a mineral, it appears that the State reserved geothermal resources in lands previously sold. *Idaho Code*, § 47-701 declared that all mineral rights, including certain named minerals, "and all other mineral lands, minerals or deposits of minerals of whatsoever kind or character . . ." are "reserved to the State and are reserved from sale except upon a rental and royalty basis . . . and the purchaser of any land belonging to the State shall acquire no right, title or interest in or to such deposits, and the rights of such purchaser shall be subject to the reservation of all mineral deposits. . . ." This statute was passed in 1923. Attorney General Opinion No. 78-38 analyzed this statute and concluded that all mineral rights, whether expressly reserved or not, were in fact reserved to the State upon sale of any lands subsequent to the enactment of that statute in 1923. The opinion stated, moreover, that § 47-701 limited the power and authority of the State Board of Land Commissioners so that the Board could not legally sell mineral rights conjointly with the land even if they intended or purported to do so. The effect of § 47-701 is the reservation of all mineral rights in State lands including geothermal resources.

Accordingly, in 1974 the State Board of Land Commissioners approved rules and regulations authorizing the leasing of geothermal resources. Rule 1.7. On May 23, 1977, the State Board of Land Commissioners unanimously declared that geothermal resources were a mineral and were specifically reserved to the State in all deeds issued, regardless of the absence of a specific reservation on the State Land Sale Certificate. See official minutes of the State Board of Land Commissioners, May 23, 1977. This administrative interpretation of *Idaho Code* § 47-1602 by the State Land Board would be given great weight by the courts. Generally "in construing their own state statutes the courts should take judicial notice of contemporaneous circumstances and usage. . . ." Sutherland, *Statutory Construction* § 49.03. This rule of the Land Board as a contemporaneous interpretation of a statute establishes a presumption in favor of a state reservation of geothermal resource rights. *Weyerhaeuser Co. v. State Department of Ecology*, 86 Wash. 2d 310, 545 P.2d 5 (1976).

It should be emphasized that the State claims ownership of geothermal resources solely in lands presently owned or owned after 1923. The legislature has, however, empowered the State to *regulate* the extraction and development of geothermal resources on private lands. Chapter 40, Title 42, *Idaho Code*.

Answer to question two: Regulations under the Geothermal Resources Act are directed only toward the energy resource. The water as the medium in which the energy is stored is regulated as a water resource. *Idaho Code* § 42-226 states in part:

All ground waters in this state are declared to be the property of the State, whose duty it shall be to supervise their appropriation and allotment to those diverting the same for beneficial use.

With this statement in mind, the legislature enacted § 42-4005 (e) as part of the Geothermal Resources Act intended to protect appropriated waters:

The Director [of the Idaho Department of Water Resources] shall not issue a permit [to construct a geothermal well] if he finds that the operation of any well under a proposed permit *will unreasonably decrease ground water available for prior water rights* in any aquifer or other ground-water source for water for beneficial purposes, other than uses as a mineral source, an energy source, or otherwise as a material medium, *unless and until* the applicant has also obtained a permit for the appropriation of ground waters under Chapter 2, Title 42, *Idaho Code* (*Emphasis supplied.*) I.C., § 42-4006 (e).

This section read in concert with the entire Act was intended to balance the potentially conflicting interests of geothermal development and appropriated water rights. The following regulatory procedure is the result: A prospective geothermal developer must first obtain a permit to drill a well from the Department of Water Resources. If the Director of the Department of Water Resources determines that the operation ". . . will unreasonably decrease ground water available for prior water rights . . ." the permit cannot be issued unless and until the applicant obtains a separate permit for the appropriation of ground water and complies with ground water law under Chapter 2, Title 42, *Idaho Code*.

As discussed in the answer to question one above, if the land to be developed is state owned or was owned by the state after May 8, 1923, the applicant must then obtain a lease from the Department of Lands in addition to a permit(s) from the Department of Water Resources. The procedure of the Geothermal Resources Act is consistent with *Idaho Code*, § 42-226, quoted in part above, declaring ground waters to be the property of the state. This section also states:

. . . a reasonable exercise of this right [to appropriate waters on a priority basis] shall not block full development of underground water resources, but early appropriators of underground water shall be protected in the maintenance of reasonable ground water pumping levels as may be established by the Director of the Department of Water Resources as herein provided. *Idaho Code* § 42-226.

Hence, Idaho law distinguishes between ground water and the energy in water. Only the extraction of geothermal energy which ". . . will not unreasonably decrease ground waters available for prior water rights . . ." is allowed.

Answer to question three: *Idaho Code* § 42-213 applies to the reservation of private surface *waters* and in no way applies to geothermal resources of water. The geothermal resource is not water but is the energy or heat available in various mediums, *including* water. As an energy resource it is treated differently than water resources, and, in particular, geothermal resources are not private waters subject to the provisions of *Idaho Code* § 42-213.

The issue of landowner consent is dealt with in *Idaho Code* § 47-1601, which grants geothermal resource leases paramount access rights. The state then, as

owner of a mineral right, has the "... right to use and occupy so much of the surface of said land as may be required for all purposes reasonably incident to ... (the development of the resource)." *Idaho Code* § 47-1601.

Answer to question four: Obtaining consent of the surface owner is not a prerequisite to securing a geothermal well permit. Protection for the surface owner's prior water rights is provided in *Idaho Code* § 42-4005 (e). Protection for the surface owner's estate is provided by bonding requirements at the time of obtaining either a permit or lease. *Idaho Code* §§ 42-4005 and 47-1608. As pertaining to state owned lands, the bond provisions are similar to mineral extraction of oil and gas. Compare *Idaho Code* §§ 47-1608 and 47-808.

Answer to question five: The state claims ownership of mineral rights only in lands presently or previously owned by the state. The Geothermal Resources Act, *Idaho Code* § 42-4001, et seq., empowers the state to regulate and require permits for geothermal development upon all lands within the state.

AUTHORITIES CONSIDERED:

1. Title 42, *Idaho Code*.
2. Title 58, *Idaho Code*.
3. Title 42, Chapter 2, *Idaho Code*.
4. Title 47, Chapter 16, *Idaho Code*.
5. Title 42, Chapter 40, *Idaho Code*.
6. *Idaho Code* § 42-213.
7. *Idaho Code* § 42-226.
8. *Idaho Code* § 42-4002 (c).
9. *Idaho Code* § 42-4005.
10. *Idaho Code* § 42-4005 (e).
11. *Idaho Code* § 42-4006 (e).
12. *Idaho Code* § 47-701.
13. *Idaho Code* § 47-808.
14. *Idaho Code* § 47-1602.
15. *Idaho Code* § 47-1608.
16. Cal. Pub. Resource Code § 6903.
17. Idaho Const. art. 14.

18. *Geothermal Kinetics v. Union Oil Co. of California*, 141 Cal. App. 879 (1977).

19. *Reich v. Commissioner of Internal Revenue*, 52 T. C. 700, *aff'd*, 454 F.2d 1157 (9th Cir. 1972).

20. *United States v. Union Oil Co. of California*, 549 F.2d 1271, *cert. denied*, 98 S. Ct. 121 (1977).

21. *Weyerhaeuser v. State Dept. of Ecology*, 86 Wash. 2d 310, 545 P.2d 5 (1976).

22. Sutherland, *Statutory Construction* § 49.03.

23. Attorney General Opinion No. 78-38.

24. Black's Law Dictionary 1602 (Rev. 4th ed. 1968).

DATED this 17th day of May, 1979.

ATTORNEY GENERAL
State of Idaho
/s/ DAVID H. LEROY

ANALYSIS BY:

W. HUGH O'RIORDAN
Deputy Attorney General
Chief, Natural Resources Division

and

L. MARK RIDDOCH
Deputy Attorney General

DHL/WHO/dm

cc: Idaho State Library
Idaho Supreme Court
Idaho Supreme Court Library

ATTORNEY GENERAL OPINION NO. 79-12

TO: The Honorable Richard R. Eardley
Mayor
City of Boise
P.O. Box 500
Boise, ID 83701

Per Request for Attorney General Opinion

QUESTIONS PRESENTED:

1. In a budget override election authorized by Idaho Code § 63-2220, passed by the 1979 Idaho legislature, can the ballot proposition be presented to the

voters as a proposal to override the budget freeze for a particular purpose or purposes, such as police or fire, or must the proposal be to override the limitation on the entire city budget?

2. In an override election, must the ballot proposition set forth a certain dollar figure which will establish the maximum amount of the budget override, or can the proposition merely authorize a budget override and leave it to the city council to establish the ultimate amount?

3. Must the override election question propose a fixed dollar amount which shall be added to the authorized tax levy? What is the effect if the actual tax collection of the authorized levy exceeds or falls short of the authorized revenues?

4. In view of the general requirement of Idaho Code §§ 50-1003 and 50-1006 that a city cannot exceed its adopted budget during the fiscal year, must a city, in order to exceed the budget freeze established by Idaho Code § 63-2220 by means of the override election authorized therein, hold and pass the override measure prior to adoption of its budget and appropriation ordinance, or can an override election be held during the fiscal year and the budget amended upwards if the override measure passes?

5. Is a tort judgment levied against a city outside the 1% and budget freeze limitations?

6. Are insurance premiums for property and liability insurance outside the budget freeze and 1% limitations, or are they considered normal budgetary items within such limits?

CONCLUSIONS:

1. Although the override provisions of Idaho Code § 63-2220 are not specific, the more likely interpretation is that a city may present the ballot question either as a budget override for particular purposes, such as police or fire, or as a general city budget override, however the city council chooses to phrase the proposition.

2. In our opinion, the authority to exceed the budget freeze must be expressed in dollar amounts, and not merely as general unlimited authority to exceed the limit. Therefore, the ballot proposition should set forth either the maximum dollar amount which will be raised by ad valorem taxation for all operating expenses of the city for the fiscal year, if the override proposition passes, or the additional amount, in dollars, over and above the amount which would be levied without the override, which will be levied for particular stated purposes if the override measure passes.

3. The override measure should be phrased in terms of specific dollar amounts, either as a maximum overall levy for all operating expenses or as a maximum amount for the particular purposes (such as police or fire) of the election. Therefore, if the measure passes, the city would only be able to collect tax revenues up to the amount so authorized. If the actual authorized levy, not including the additional amount authorized by the override, results in more dollars than originally anticipated, the override will authorize only the collection of such additional amount as is needed to reach the limit established by the

ballot proposition. If the authorized levy, not including the override, is less than anticipated, then the passage of the override would authorize an additional amount to reach the amount set by the override proposition. The amount levied cannot, however, exceed other statutory mill levy limitations.

4. A city may either hold its override election before adoption of the budget and appropriation ordinance, or it may hold such election after the adoption, in which case, if the override proposition passes, the city may amend its appropriation ordinance as authorized by Idaho Code § 50-1003.

5. The 1% initiative and Idaho Code § 63-2220 do not provide an answer to the question whether tort judgments are within or outside the 1% limitation or the budget freeze. However, in light of prior case law and the provisions of Idaho Code §§ 50-1006 and 6-928, we believe that it is possible that a tort claim which is actually reduced to judgment may be outside the scope of the 1% limitation and budget freeze. However, only further legislation or court decision can provide a definite answer.

6. Although Idaho Code § 6-927 provides that a levy for liability insurance premiums may exceed other maximum levy restrictions, we believe that the 1% initiative supersedes § 6-927, and that insurance premiums are part of the cities' operating expenses and are within the restrictions of the 1% initiative and Idaho Code § 63-2220.

ANALYSIS:

Before addressing the specific questions, we believe it is important to set forth the exact language of the enabling legislation which authorizes override elections. This language is contained in Idaho Code § 63-2220, which was created by § 2 of H.B. 166, as amended by H.B. 308, of the 1979 Idaho Legislature, which section reads as follows:

63-2220 (1) (a) For its fiscal year commencing in 1979 and ending in 1980, no taxing district shall certify a budget request to finance the ad valorem portion of its *operating budget that exceeds the dollar amount of ad valorem taxes certified for that purpose in 1978.*

(b) No board of county commissioners shall set a levy in 1979, nor shall the state tax commission approve a levy for operating budget purposes in 1979 which exceeds the limitation imposed by paragraph (a) of this subsection, *unless authority to exceed such limitation has been approved by a two-thirds (2/3) majority of the taxing district's electors voting on the question at an election called for that purpose.*

(2) (a) For its fiscal year commencing in 1980 and ending in 1981, no taxing district shall certify a budget request to finance the ad valorem portion of its operating budget that exceeds the lesser of:

(i) the dollar amount of ad valorem taxes certified for the same purpose in 1978; or

(ii) when combined with the budget requests from all other taxing districts imposing taxes on the same property, the limitation imposed by section 63-923 (1), Idaho Code.

(b) No board of county commissioners shall set a levy in 1980, nor shall the state tax commission approve a levy for operating budget purposes in 1980 which exceeds the limitation imposed by paragraph (a) of this subsection, unless authority to exceed such limitation has been approved by a two-thirds (2/3) majority of the taxing district's electors voting on the question at an election called for that purpose. (Emphasis added.)

We particularly call attention to § 63-2220 (1) (a), which establishes a freeze on the dollar amount of that portion of the *operating budget* which is financed by ad valorem taxes. We interpret this language as applicable to the *aggregate* of ad valorem taxes used for operating budget purposes, and not as freezing the amount which may be collected or expended for individual budget items within the operating budget.

Turning to the specific questions:

Question one: The budget override provisions contained in Idaho Code § 63-2220, set forth above, require only that the authority to exceed the budget freeze limitations be approved by a two-thirds majority of the taxing district's electors voting on the question at an election called for that purpose. The statute does not indicate whether the election is to be on the question of overriding the 1978 operating budget in general, or whether the override is to be limited to particular budget items only. In our opinion, either approach is authorized by the language of the statute. In other words, the ballot proposition could, if the city council so desires, be limited to the question of allowing a levy for additional funds for police and fire purposes only. Thus, a ballot proposition might be phrased as follows:

Shall the City of Boise be permitted to certify an ad valorem tax levy, over and above the amount of \$ _____ contained in its 1978 operating budget from ad valorem tax sources, for the sum of \$ _____ for police and fire protection purposes for the fiscal year commencing in 1979 and ending in 1980?

If the city wishes to finance a greater portion of the police and fire budget from the override levy, thus diverting more of its already authorized levy (based on its 1978 ad valorem taxes) to other purposes, then the ballot question should be framed accordingly.

Question two: We believe that the intent of Idaho Code § 63-2220 is that a budget override authorized by the voters must be expressed in maximum dollar amounts. We do not view Idaho Code § 63-2220 (a) (b) or (2) (b), as authorizing open-ended overrides, to be set solely by the city council.

However, the amount of the override can be expressed in at least two different ways. The ballot proposition could simply authorize the total portion of the operating budget financed by ad valorem taxes to be exceeded by a specified dollar amount, without stating where the extra dollars will be used, or it could provide for a stated amount of dollars to be used for specific purposes, such as police and fire protection. The actual wording would have to be determined after the city council determines which approach it wants to take.

Question three: As set forth in our analysis of the preceding question, the override measure should be phrased in terms of dollar amounts. Thus, if the city

anticipated receiving \$2,000,000 for police purposes from ad valorem taxation, based on the 1978 budget, but actually received \$2,500,000 and the voters had approved the sum of \$3,000,000 total for the police department, then the override would authorize collection of an additional \$500,000, not an additional \$1,000,000. The reason for this is that the ad valorem tax portion of the budget was set at \$3,000,000 and was approved by the voters at that figure, not at \$3,500,000. Any other interpretation, in our view, runs contrary to the intent both of the budget laws and of the freeze created by Idaho Code § 63-2220.

Nothing in the 1% initiative or in Idaho Code § 63-2220 repeals any other statutory mill levy limitation, so an override levy must still comply with such statutory limitations.

Question four: Based upon our reading of Idaho Code §§ 50-1002, 50-1003, and 50-1006, it is our opinion that a city may hold an override election either before it adopts its budget and passes its appropriation ordinance, that is, prior to October 1, of each year, or it may hold the election during the fiscal year and, if the override passes, it may amend its appropriation ordinance to reflect the override amounts. The override, however, would have to be completed prior to the certification of taxes to the county in September.

Under the budget laws, the council must prepare a budget and estimate its revenues anticipated for the ensuing year (§ 50-1002). It must then pass an annual appropriation ordinance not exceeding the tax to be levied and other anticipated revenues (§ 50-1003). The city has no power to expend money unless the same has been appropriated or ordered by ordinance (§ 50-1006). Except for additional state or federal grants or allocations, the council can make no further appropriation during the year, “. . . unless the proposition to make each [additional] appropriation has been first sanctioned by a majority of the legal voters of such city, either by petition signed by them equal in number to a majority of the number who voted at the last general city election, or approved at a special election duly called therefor. . . .” (Emphasis added.) Idaho Code § 50-1003.

Although, again, the statutes do not deal directly with the point, we see no reason why the override election authorized by Idaho Code § 63-2220 and the additional appropriation election required by Idaho Code § 50-1003 could not be combined, since they obviously have a similar purpose. Care would have to be taken to ensure that the ballot proposition is clearly worded both to authorize the override and to approve the additional appropriation, and, since the appropriation amendment under Idaho Code § 50-1003 requires only a simple majority, while the budget override authorized by Idaho Code § 63-2220 requires a two-thirds vote, the ballot proposition should clearly indicate that the appropriation ordinance is not amended if the budget override fails, (unless the city has some other source of previously unappropriated revenue).

Another possibility would be for the council to schedule or plan upon holding an override election at a later date during the fiscal year and to budget and appropriate the full amount it feels that it needs for the ensuing year, treating the amount for which the override vote is needed as anticipated revenue even though it has not yet been approved. If the override election were subsequently passed, there would be no need, then, to amend the appropriation ordinance. However, this procedure has obvious risks. If the override were to fail, the city obviously could not certify the additional levy the following September. Secondly, although there are no Idaho Supreme Court cases on this point, it is possible that funds not yet approved by an override election would not be deemed

to be "anticipated" for budgetary purposes. We recommend against the use of this procedure.

Question five: The 1% initiative and Idaho Code § 63-2220 do not expressly exclude tort judgments from their limitations, and, on their face, a strong argument can certainly be made that the voters and the legislature intended to include tort judgments within the 1% limitations. This would certainly be the more prudent approach for cities to take, to the extent that they can anticipate the amount of tort judgments likely to accrue during the fiscal year (we are assuming, of course, that the city in question is a self-insurer or for some other reason is not carrying the insurance required by the Idaho Tort Claims Act).

However, statutes must be construed in light of existing legislation, and there is no presumption that the voters or legislature intended to repeal existing legislation unless that intent clearly appears. 2 Sutherland, *Statutory Constructor* §§ 23.09, 23.10 (4th ed. 1972). To the extent possible, statutes will be read in conjunction with, rather than contrary to, each other. *Sampson v. Layton*, 86 Idaho 453, 387 P2d 883.

Two statutes may bear on this question. Idaho Code § 6-928 (part of the Idaho Tort Claims Act), provides that, *notwithstanding any provision of law to the contrary*, and if no funds are available, a political subdivision which has not provided itself with insurance shall levy and collect a property tax to meet claims and judgments. Idaho Code § 50-1006 provides that, if any judgment is obtained against the city, the city may borrow an amount sufficient to pay the same, which amount shall be added to the general tax levy of the next year. Neither section was expressly repealed by the 1% measure.

To the extent that the older statutes and the 1% legislation conflict, the latter prevails. However, it is possible that the courts could read the 1% legislation as not being applicable to tort judgments and other obligations which are not voluntarily assumed, but which are imposed by law. There is considerable authority for the view that debt limitation provisions do not apply to obligations which are imposed by law or are otherwise involuntary, including tort obligations. 15 McQuillin, *Municipal Corporations* §§ 41.28, 41.29; 16 McQuillin, *Id.* §§ 44.27 et seq. There are Idaho cases to the same effect. *Cruzen v. Boise City*, 58 Idaho 406, 74 P2d 1037 (1937) (Idaho Const. art. 8, §3, held not applicable to involuntary liability arising out of embezzlement of special assessment funds by city clerk, so city was held liable); *Hughes v. Village of Wendell*, 47 Idaho 370, 275 P. 1116 (1929); *Independent School Dist. No. 12 v. Manning*, 32 Idaho 512, 185 P. 723 (1919) (obligations imposed by statute are not within the debt limitation of art. 8, §3 Idaho Const.).

If the Idaho courts were to adopt a similar view with respect to the application of the 1% legislation to tort and other involuntary obligations, then tort judgments would be outside the 1% and budget freeze limitations. Cities would be free to pay such judgments and levy for such purposes as authorized by Idaho Code § 50-1006. However, without a court decision or legislative action, we cannot so state with any degree of certainty.

Question six: The Idaho Tort Claims Act, Idaho Code § 6-927, provides that political subdivisions may, notwithstanding the provisions of any law to the contrary, levy a property tax sufficient to provide a comprehensive liability plan, by insurance or otherwise, even though as a result of such levy the maximum levy provided by law may be exceeded.

The same legal considerations which were applicable to the last question are applicable here; i.e., this statute was in existence at the time of the 1% initiative, and should not be construed as being repealed unless the intent to repeal or supersede is clear.

However, different considerations may be involved in viewing expenditures for liability insurance than for payment of tort judgments. The latter are viewed as involuntary obligations; the former may not be, since, even though the Idaho Tort Claims Act arguably mandates the expenditure, it is something which can be anticipated and budgeted for in advance, whereas tort claims may not.

In our view, expenditures for insurance premiums are operating expenses and are within the 1% and budget freeze limitations.

AUTHORITIES CONSIDERED:

1. Idaho Code §§ 6-927, 6-928, 50-1002, 50-1003, 50-1006, 63-923, 63-2220.
2. Idaho Const. art. 8, §3.
3. *Cruzen v. Boise City*, 58 Idaho 406, 74 P.2d 1037 (1937).
4. *Hughes v. Village of Wendell*, 47 Idaho 370, 275 P. 1116 (1929).
5. *Independent School Dist. No. 12 v. Manning*, 32 Idaho 512, 185 P. 723 (1919).
6. *Sampson v. Layton*, 86 Idaho 453, 387 P.2d 883 (1963).
7. 15 McQuillin, *Municipal Corporations* §§ 41.28, 41.29; 16 McQuillin, *Municipal Corporations* §§ 44.27, et seq.
8. 2 Sutherland, *Statutory Construction* §§ 23.09, 23.10 (4th ed. 1972).

DATED this 31st day of May, 1979.

ATTORNEY GENERAL
State of Idaho
/s/ DAVID H. LEROY

ANALYSIS BY:

MICHAEL C. MOORE
Deputy Attorney General
Chief, Local Government Division

DHL/MCM/dm

cc: Idaho State Library
Idaho Supreme Court
Idaho Supreme Court Library

ATTORNEY GENERAL OPINION NO. 79-13

TO: Gordon W. Petrie
Nez Perce County Prosecuting Attorney
307 19th Street B-5
Lewiston, ID 83501

Per Request for Attorney General Opinion

QUESTION PRESENTED:

Does an indemnity or "hold harmless" clause whereby a city and county agree to hold the federal government free from damages resulting from construction of a bridge and its approaches, other than for damages due to the fault or negligence of the United States or its contractors, constitute the incurring of a debt or liability by the city and county in violation of art. 8, § 3, Idaho Constitution?

CONCLUSION:

Such a contract indemnity clause would probably create a "liability" contrary to the constitutional debt limitation only to the extent that the city or county would be contracting to assume an existing or contingent tort liability of the federal government or its contractors. To the extent that the city and county would be assuming liability only for their own torts arising out of operation and maintenance after the federal government surrenders control and operation of the bridge to the local government entities, no violation of art. 8, § 3, Idaho Constitution, would occur.

ANALYSIS:

Article 8, § 3, Idaho Constitution, provides, in pertinent part, as follows:

No county, city . . . 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, nor unless, before or at that time of incurring such indebtedness, provisions shall be made for the collection of an annual tax sufficient to pay the interest on such indebtedness as it falls due, and also to constitute a sinking fund for the payment of the principal thereof, within thirty years from the time of contracting the same. Any indebtedness or liability incurred contrary to this provision shall be void: Provided, that this section shall not be construed to apply to the ordinary and necessary expenses authorized by the general laws of the state. . . .

The specific question posed here has not been answered by the Idaho Legislature or by the Idaho Supreme Court. Resolution of the question depends upon an interpretation of art. 8, § 3, and upon resolving which of two lines of cases is more analogous.

On the other hand, a long line of cases involving contractual liability supports the conclusion that the terms "indebtedness" or "liability," within art. 8, § 3, are much broader than similar clauses in other state constitutions and include any kind of debt or liability. *Feil v. City of Coeur d'Alene*, 23 Idaho 32, 129 P. 643

(1912); *Miller v. City of Buhl*, 48 Idaho 668, 284 P. 843 (1930); *Williams v. City of Emmett*, 51 Idaho 500, 6 P.2d 475 (1931); *Straughan v. City of Coeur d'Alene*, 53 Idaho 494, 24 P.2d 321 (1933); *O'Bryant v. City of Idaho Falls*, 78 Idaho 313, 303 P.2d 672 (1956); *Village of Moyie Springs v. Aurora Mfg. Co.*, 82 Idaho 337, 353 P.2d 767 (1960).

Two Idaho cases first appear to be somewhat in point. *School District No. 8 of Twin Falls County v. Twin Falls County Mutual Fire Ins. Co.*, 30 Idaho 400, 164 P. 1174 (1917), held that art. 8, § 3, prohibited a contract between the school district and the mutual fire insurance company (which the school district had helped form and had joined) for mutual fire insurance protection, because the district was, in effect, assuming a contingent liability (possible future assessment for payment of another member's loss). The second case is *Boise-Payette Co. v. School Dist. No. 1*, 46 Idaho 403, 268 P. 26 (1928), which held that a statute which rendered property subject to liens of contractors' materialmen could not be applied to school district property, since a school district could not assume, nor could the legislature impose, such liability without violating art. 8, § 3.

The foregoing cases, however, all involved a voluntary, contractual incurring of debt or assumption of liability, and thus are distinguishable from a second line of cases which indicate that *involuntary* liabilities, such as unliquidated tort claims, may not constitute a debt or liability within the prohibition of art. 8, § 3. *Cruzen v. Boise City*, 58 Idaho 406, 74 P.2d 1037 (1937) (art. 8, § 3 held not applicable to involuntary liability arising out of embezzlement of special assessment funds by city clerk, so city was held liable); *Hughes v. Village of Wendell*, 47 Idaho 370, 275 P. 1116 (1929) (dictum to the effect that, had there been negligence on the village's part in failing to collect special assessments, village's obligation would not have been prohibited by art. 8, § 3); *Independent School District No. 12 v. Manning*, 32 Idaho 512, 185 P. 723 (1919) (an obligation imposed by statute is not within the inhibition of art. 8, § 3). See generally, 15 McQuillin, *Municipal Corporations* § 41.29.

No Idaho cases appear to have held that an involuntary obligation, such as a tort liability, is prohibited by art. 8, § 3, nor that an agreement by a governmental entity to assume and pay its own tort obligations violates the constitutional provision.

Although not controlling of the present question, cases from other jurisdictions have nearly unanimously held that assumption of unliquidated or uncertain tort liability does not violate constitutional debt limitations. See 10 McQuillin, *Municipal Corporations* § 29.06; 15 McQuillin, *Id.*, §§ 41.28 — 41.29; *Openheim v. City of Florence*, 229 Ala. 50, 155 So. 859; *Graham v. City of Philadelphia*, 334 Pa. 513, 6 A.2d 78 (1939). An old Pennsylvania case, *Keller v. Scranton*, 200 Pa. 130, 49 A. 707 (1901) is contra, but has probably been overruled by implication by later cases such as *Schuldice v. City of Pittsburgh*, 251 Pa. 28, 95 A 938 (1915) and *Graham v. City of Philadelphia*, *supra*, which held that the undertaking of an obligation to assume contingent or unliquidated tort obligations, as part of a present consideration for a contractual benefit, did not violate constitutional debt limitations.

The contractual provision in question provides that the local governmental entities shall "hold and save the United States free from damages resulting from construction of the bridges and its approaches." This clause is immediately followed, however, by the proviso that "this does not include damages due to the

fault or negligence of the United States or its contractors.” The last sentence is thus consistent with the requirement of 42 U.S.C. § 7962d-15 that:

The requirement in any water resources development project under the jurisdiction of the Secretary of the Army, that non-federal interests hold and save the United States free from damages due to the construction, operation, and maintenance of the project, does not include damages due to the fault or negligence of the United States or its contractors.

Thus, it appears that the contract does not purport to impose any liability for the fault or negligence of the United States or its contractors upon the cities and counties. Although the meaning of the remainder of the clause is, at best, vague, it appears to say that the cities and counties will hold the federal government harmless only from their own torts resulting from construction of the bridge and its approaches. Since, under the contract, the federal government is responsible for construction, and since the clause in question appears expressly to exempt the cities and counties from any liability for the fault or negligence of the federal government or its contractors, it does not appear that the local governmental entities are voluntarily assuming someone else’s tort obligations.

To the extent, then, that the city and county are obligated by the contract only for their own tort liability, we see no apparent violation of art. 8, § 3, Idaho Constitution because no liability has been incurred. For similar reasons the prohibition against indemnification set forth in Idaho Code § 29-114 would not be violated. However, in view of the Idaho Supreme Court decisions cited above, we caution that, to the extent that the contract provision imposes or purports to impose upon the city and county an assumption of any existing or contingent tort liability of the federal government or its contractors in the design or construction of the bridge or its approaches, such assumption might constitute a violation of art. 8, § 3.

For purposes of clarification, we recommend that the cities and counties who are parties to the contract exchange letters with the Corps of Engineers setting forth their understanding that the clause in question does not obligate the cities and counties to assume any existing or contingent tort liability arising from the fault or negligence of the federal government or its contractors, and refers only to tort liabilities arising from the tortious acts or omissions of the cities and counties themselves.

AUTHORITIES CONSIDERED:

1. Idaho Const. art. 8, § 3.
2. Idaho Code § 29-114.
3. 42 U.S.C. § 1962d-15.
4. *Boise-Payette Co. v. School Dist. No. 1*, 46 Idaho 403, 268 P. 26 (1928).
5. *Cruzen v. Boise City*, 58 Idaho 406, 74 P.2d 1037 (1937).
6. *Feil v. City of Coeur d’Alene*, 23 Idaho 32, 129 P. 643 (1912).
7. *Graham v. City of Philadelphia*, 334 Pa. 513, 6 A.2d 78 (1939).

8. *Hughes v. Village of Wendell*, 47 Idaho 370, 275 P. 1116 (1929).
9. *Independent School Dist. No. 12 v. Manning*, 32 Idaho 512, 185 P. 723 (1919).
10. *Keller v. Scranton*, 200 Pa. 130, 49 A. 707 (1901).
11. *Miller v. City of Buhl*, 48 Idaho 668, 284 P. 843 (1930).
12. *O'Bryant v. City of Idaho Falls*, 78 Idaho 313, 303 P.2d 672 (1956).
13. *Oppenheim v. City of Florence*, 229 Ala. 50, 155 So. 859.
14. *School Dist. No. 8 of Twin Falls County v. Twin Falls County Mutual Fire Ins. Co.*, 30 Idaho 400, 164 P. 1174 (1917).
15. *Schuldice v. City of Pittsburgh*, 251 Pa. 28, 95 A. 938 (1915).
16. *Straughan v. City of Coeur d'Alene*, 53 Idaho 494, 24 P.2d 321 (1933).
17. *Village of Moyie Springs v. Aurora Mfg. Co.*, 82 Idaho 337, 353 P.2d 767 (1960).
18. *Williams v. City of Emmett*, 51 Idaho 500, 6 P.2d 475 (1931).
19. 10 McQuillin, *Municipal Corporations*, §29.06; 15 McQuillin, *Municipal Corporations*, §§ 41.28-41.29.

DATED this 31st day of May, 1979.

ATTORNEY GENERAL
State of Idaho
/s/ DAVID H. LEROY

ANALYSIS BY:

LARRY K. HARVEY
Chief Deputy Attorney General

WARREN FELTON
Deputy Attorney General
Local Government Division

cc: Idaho State Library
Idaho Supreme Court
Idaho Supreme Court Library

ATTORNEY GENERAL OPINION NO. 79-14

TO: The Honorable Richard S. High
State Senator
802 Sunrise Blvd. North
Twin Falls, ID 83301

Per Request for Attorney General Opinion

QUESTION PRESENTED:

The principal question is whether Idaho cities may charge a service fee, in lieu of or in addition to ad valorem taxes, not based upon the cost of administering any existing or additional fire safety regulations, but solely to provide additional funds for general maintenance and operation of fire protection services.

CONCLUSIONS:

1. Under existing Idaho constitutional and statutory provisions, it appears probable that a service fee for general fire protection services, based solely upon the need for additional revenue and not upon the need to regulate property under the police powers, would constitute a tax and would be held invalid as exceeding cities' taxing authority.

2. However, to the extent that such a fee were reasonably related to the cost of administering a regulatory ordinance, such as a fire inspection program for public safety purposes, it probably could be upheld under a city's constitutional police powers.

ANALYSIS:

Your letter on behalf of the Idaho Fire Chiefs Association and the City of Twin Falls poses the question whether the cities in Idaho can charge a service fee to provide funds for fire protection services.

You also inquire whether such a fee, if valid, could be based upon "fire flow demand," which is defined as the rate of water flow, in gallons per minute, needed for fire-fighting purposes for a given property. You ask whether such a fee may be progressively increased for increased fire flow needs, whether cities may terminate water service to property for which the fire service fee has not been paid, whether a lien may be placed upon property to enforce unpaid service fees, and whether properties which are exempt from ad valorem taxation may be charged such a fee. In view of our answer to your first question, we will not deal in depth with the remaining questions, but will discuss them briefly in the context of our suggestion, later in this opinion, of a type of regulatory fee which probably could be lawfully imposed.

As we understand the proposal of the Idaho Fire Chiefs Association, the intent would be to supplement the ad valorem tax source of funds for general maintenance and operation of fire protection services, or, perhaps, to replace ad valorem funding altogether, by charging a fee to property owners for the fire protection services available to the property, based upon the amount of protection ("fire flow") required for the particular property. We further understand that no new regulatory measures are proposed to be enacted concurrently with the fee.

The general rule, long recognized in Idaho and elsewhere, is that cities have only those powers expressly granted to them by the state constitution or by enabling legislation, or those powers necessarily implied in or incidental to the powers expressly granted, or those essential to the accomplishment of the express powers. *Mountain States Tel. & Tel. Co. v. City of Boise*, 95 Idaho 264, 506 P.2d 832 (1973); *Hendricks v. City of Nampa*, 93 Idaho 95, 456 P.2d 262 (1969); *O'Bryant v. City of Idaho Falls*, 78 Idaho 313, 303 P.2d 672 (1956); *Continental Oil Co. v. City of Twin Falls*, 49 Idaho 89, 286 P. 353 (1930); *Bradbury v. City of Idaho Falls*, 32 Idaho 28, 177 P. 388 (1918); *Sandpoint Water & Light Co. v. City of Sandpoint*, 31 Idaho 498, 173 P. 972 (1918); *Boise Dev. Co. v. Boise City*, 30 Idaho 675, 167 P. 1032 (1917). Municipal corporations have no inherent power of taxation and have only such taxing power as has been granted to them by the constitution or by statute. 16 McQuillin, *Municipal Corporations* § 44.05; *State v. Nelson*, 36 Idaho 713, 213 P. 358 (1923).

The Idaho Constitution, art. 12, § 2, does contain a grant of authority to Idaho cities to exercise the police powers with respect to regulation of persons or property in furtherance of the public health, safety, morals, or welfare, without the necessity of express legislative authority. [*Rowe v. City of Pocatello*, 70 Idaho 343, 218 P.2d 695 (1950)], but this section of the constitution does not contain a grant of taxing or other financial powers except, as will be discussed below, the power to impose regulatory fees in furtherance of police power regulatory measures. *State v. Nelson, supra*; *Foster's, Inc. v. Boise City*, 63 Idaho 201, 118 P.2d 721 (1941).

Idaho cities have available to them a limited number of revenue sources. Generally speaking, the actual or potential (depending on one's interpretation of the Idaho Constitution and statutes) sources of city revenue include: (1) federal and state grants in aid, (2) bonds and special (local) assessments, (3) ad valorem taxes, (4) other taxes, (5) police power fines and regulatory fees, and (6) user fees or service charges.

The first source, governmental grants in aid, is not at issue here. Passage of municipal bonds is not particularly relevant to this problem, since, although bonds may be issued, in accordance with the statute, for the purchase of buildings, equipment, and apparatus for fire protection (Idaho Code § 50-1019), the bonding statutes do not authorize collection of service fees or charges for general expenses of maintaining and operating a fire department or its services. Likewise, the statute authorizing assessments for local improvement districts (Idaho Code § 50-1703) contains no such authorization, and, since local improvement districts are for particular improvements rather than for general purposes, the local improvement district laws do not help us, either. 14 McQuillin, *Municipal Corporations*. §§ 38.11, 38.29.

Nor do Idaho cities' ad valorem tax powers provide authority to levy a service fee of this nature. Municipal power to assess and collect taxes is within the control of the Idaho legislature. Idaho Const. art. 7, § 6. The legislature has provided a comprehensive scheme of ad valorem taxation in Title 63, Idaho Code, and has granted to cities the power to levy taxes on all property, within their corporate boundaries, taxable according to the laws of the state (Idaho Code § 50-235) and to certify all such taxes, plus any special taxes allowed by law, to the county commissioners for collection (Idaho Code § 50-1007). Taxes must be uniform upon the same class of property (Idaho Const. art. 7, § 5), and taxable property must be assessed and taxed uniformly according to value. *Idaho Telephone Co. v. Baird*, 91 Idaho 425, 423 P.2d 337 (1967); *Chastain's, Inc.*

v. State Tax Commission, 72 Idaho 344, 241 P2d 167 (1952). Since the proposed service fee is not authorized under present ad valorem tax laws, and since such a fee, being based upon the particular fire flow needs rather than upon the assessed valuation of the property, would probably violate art. 7, § 2, Idaho Constitution, it most likely could not be justified as a property tax.

Another possibility is to attempt to justify the fee as a tax other than an ad valorem tax; i.e., as a license tax, per capita tax, or excise tax. This approach, again, must fail because (1) the legislature is vested with the control of this type of taxation by art. 7, § 2, Idaho Constitution, and (2) the legislature has not (with the exception of certain excise taxes for resort cities in counties with populations not in excess of 20,000, under Idaho Code §§ 50-1043 through 50-1048) authorized such taxation by cities. In light of the Idaho Supreme Court's holding, in *State v. Nelson*, 36 Idaho 713, 213 P. 358 (1923), that the legislature cannot, under art. 7, § 6, Idaho Constitution, authorize municipalities to levy taxes other than property taxes, it may not be possible for the legislature legally to grant such taxing authority. See also, *First American Title Co. of Idaho v. Clark*, 99 Idaho 10, 576 P2d 581 (1978). For purposes of this opinion, however, it is sufficient to note that the legislature has not, in fact, done so.

We have considered the possible application of Idaho Code § 50-301, as amended in 1976, as a possible source of additional taxing power. That section, in pertinent part, provides that cities may "... exercise all powers and perform all functions of local self-government in city affairs as are not specifically prohibited by or in conflict with the general laws or the constitution of the state of Idaho." However, since article 7 of the Idaho Constitution appears clearly to vest all taxing authority in the legislature, subject to the power of the legislature to delegate a portion of that power to municipalities (art. 7, § 6, Idaho Const.), we strongly doubt that matters of taxation could be considered of purely local concern or "city affairs," as opposed to matters of statewide concern, or that an attempt by a city to enact taxing legislation not authorized by the legislature would not be in conflict with the general laws or constitution, within the meaning of Idaho Code § 50-301. 16 McQuillin, *Municipal Corporations* § 44.06.

This leaves two possible bases upon which cities might justify such a fee: as a police power regulatory fee, or as a user fee or service charge such as is commonly used for water, sewer, and garbage collection charges.

The Idaho Supreme Court has recognized that cities may, under their police powers, rather than under their taxing powers, pass regulatory measures which may incidentally, through the imposition of regulatory fees, raise revenues. *State v. Nelson*, 36 Idaho 713, 213 P. 358 (1923); *Foster's Inc. v. Boise City*, 63 Idaho 201, 118 P2d 721 (1941); 9 McQuillin, *Municipal Corporations* § 26.15. As noted above, the police power is the power of government to regulate people and property in furtherance of the public health, safety, morals, and welfare. *Winther v. Village of Weippe*, 91 Idaho 798, 430 P2d 689 (1967); *Sweet v. Ballantyne*, 8 Idaho 431, 69 P.995 (1902). In *Foster's, Inc. v. Boise City*, *supra*, the Idaho Supreme Court stated:

Effective exercise of the police power necessarily involves expenditures in many ways. . . . It is only reasonable and fair to require the business, traffic, act, or thing that necessitates policing, to pay this expense. To do so has uniformly been upheld by the courts. On the other hand, this

power may not be resorted to as a shield or subterfuge, under which to enact and enforce a revenue-raising ordinance or statute. . . . 63 Idaho 201, 218.

Since cities in Idaho derive their police powers (as opposed to their taxing, proprietary, and other powers) directly from the Idaho Constitution, art. 12, § 2, rather than from statutory grants of authority, an Idaho city does not have to rely upon authorization from the legislature to impose police power regulatory fees. *Foster's, Inc. v. Boise City*, *supra*. The Idaho legislature has, nevertheless, provided, by statute, for the levy of a license fee for regulatory purposes, on occupations and businesses. Idaho Code § 50-307.

However, the Idaho cases and nearly all of the cases from other jurisdictions which recognize cities' powers to impose such fees also recognize two important limitations upon that power. First, the purpose of the ordinance must be for regulation, not revenue. The police power does not include the power to tax. 16 McQuillin, *Municipal Corporations*, § 44.05. The revenue must be purely incidental to the regulation. Secondly, the fee must bear some reasonable relation to the cost of such regulation. Otherwise, it will be held to be a tax, which, unless it can be justified under the taxing power, will be held to be invalid.

The Idaho Supreme Court emphasized these points in *State v. Nelson*, 36 Idaho 713, 213 P. 358 (1923):

A license [fee] that is imposed for revenue is not a police regulation, but a tax, and can only be upheld under the power of taxation. . . . A city . . . cannot, in the exercise of its police power, levy taxes.

* * *

One of the distinctions between a lawful tax [fee] 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; but if it is imposed under the general taxing power and can be lawfully maintained under such taxing power . . . then the amount of such tax that can be imposed upon the citizens or business rests wholly within the discretionary power of the taxing authority. 36 Idaho 713, 722-723.

The Idaho court reiterated these points in *Foster's, Inc. v. Boise City*, 63 Idaho 201, 118 P2d 721 (1941), in which, while upholding the parking meter fee in question, it recognized that, if the fee had in fact been primarily a revenue measure, it would have been invalid. The court said:

The spread between actual cost of administration and the amount of fees collected must not be so great as to evidence on its face a revenue measure rather than a license tax [fee] measure. 63 Idaho 201, 218.

See also, Chapman v. Ada County, 48 Idaho 632, 284 P. 259 (1930) (a fee must bear some relation to the value of the services, or it will be a tax).

The court, in *State v. Nelson*, *supra*, in holding an occupational license tax to be invalid, emphasized that the measure in question was solely for revenue purposes and did not contain any provision for regulation. Nearly every appel-

late court which has considered the question has likewise emphasized that a fee or charge, to be justified as a police power measure, must *regulate* — i.e., it must impose some restriction or obligation in furtherance of the public health, safety, morals, or welfare. Otherwise, it is a revenue measure and not within the police powers. *City of Chicago v. R. & X. Restaurant, Inc.*, 369 Ill. 65, 15 N.E.2d 725 (1938); *Lamere v. City of Chicago Heights v. Western Union Tel. Co.*, 406 Ill. 428, 94 N.E.2d 306 (1950); *Heckendorf v. Town of Littleton*, 286 P.2d 615 (Colo. 1955); *Tamiami Trail Tours, Inc. v. City of Orlando*, 120 So.2d 170 (Fla. 1960); *State v. Boyd*, 89 N.W. 417 (Neb. 1902); *Haugen v. Gleason*, 226 Or. 99, 359 P.2d 108 (1961); *City of Lovington v. Hall*, 68 N.M. 143, 359 P.2d 769 (1961); *Weber Basin Home Builders Ass'n. v. Roy City*, 26 Utah 2d 215, 487 P.2d 866 (1971); *Barron v. City of Minneapolis*, 212 Minn. 5, 66, 4 N.W.2d 622 (1942); 9 McQuillin, *Municipal Corporations* § 26.16.

In short, if the ordinance which imposes the fee or charge does not impose any regulations, it cannot be sustained under the police power. Many of the above cases emphasize this point.

... there must be regulation in order to collect a license fee. . . . *City of Lovington v. Hall*, *supra*, 359 P.2d 769, 771.

The purpose for which the police power may be exercised is for the protection of the lives, health, morals, comfort and quiet of all persons and the protection of property within the State, and a statute or ordinance enacted under such power must be designed to prohibit or regulate those things which tend to injure the public in such matters. On the other hand, an ordinance which provides for a license and the payment of a license fee without regulatory provisions of any kind is solely a revenue measure and not within the police power. *Lamere v. City of Chicago*, *supra*, 63 N.E.2d 863, 866.

We find nothing in [the ordinance] about policing the licensee's business and regulating the orderly conduct thereof, nor anything in the way of requiring inspection of articles to be sold. . . . What the city council sought to accomplish, and did accomplish, was the enactment of a revenue measure. *Barron v. City of Minneapolis*, *supra*, 4 N.W.2d 622, 624.

When we apply these principles of law to the proposed service fee for general fire protection services, it is apparent that there are serious constitutional questions involved. First, the proposal on its face purports to be a revenue-raising device. *State v. Nelson*, 36 Idaho 713, 213 P. 358 (1923), invalidated a license tax on that very ground. Secondly, the proposed fee would not in any way be regulatory. It imposes no new requirements for fire safety. It would not regulate anyone's conduct, property, or business. It proposes no new safety inspection program or other regulatory or enforcement program. It is true that the operation of a fire department is itself a governmental police power function. *Ford v. City of Caldwell*, 79 Idaho 499, 321 P.2d 589 (1958). However, the express purpose of this proposal is for revenue, not regulation. As such, it most likely would be held to be a tax, not a police power regulatory fee. Whether or not a particular charge is a tax is determined by its nature and effect, not its name. *City of Idaho Falls v. Pfost*, 53 Idaho 247, 23 P.2d 245 (1933).

We find one case to the contrary. In *Holman v. City of Dierks*, 217 Ark. 677, 233 S.W.2d 392 (1950), the Arkansas Supreme Court upheld, as a police power

fee rather than a tax, an ordinance which required property owners to pay an annual sanitation fee of \$4.00 for each business house and dwelling in the city, the revenue to be used for fogging the city with insecticide periodically. The court said that this levy was actually not a tax but a charge for services rendered. However, the ordinance itself imposed no regulations and was apparently purely for purposes of raising revenue for the insecticide program. The case is contrary to the great weight of American law, including the Idaho cases. It does not appear to have been cited or relied upon by any other court in the country. The Arkansas Supreme Court itself does not appear to have relied upon the case as precedent in any later cases. In our opinion, this single, deviant case would be of little weight or no weight in Idaho, and the Idaho Supreme Court would continue to adhere to the rule of *State v. Nelson* and *Foster's, Inc. v. Boise City, supra*.

We are aware that similar fee proposals have been made, and may have been implemented in some cities in other states operating under constitutional and statutory provisions differing from our own. Some state constitutions do permit fees to be charged either as taxes or as regulatory measures; i.e., either under the taxing power or under the police power. See, for example, *Weber Basin Home Builders Ass'n. v. Roy City*, 26 Utah 2d 215, 487 P.2d 866 (1971). It is possible that a fee such as the one proposed here could be upheld under the laws of such other states. However, we have located no reported appellate cases, even in such states, upholding, under the police power, non-regulatory fees for the provision of general fire protection services.

Finally, it might be contended that such a fee could be justified as a charge for services, just as cities charge for water, sewer, and garbage collection services. We have examined a number of decisions upholding water, sewer, and garbage collection charges, among them being *Glass v. City of Fresno*, 62 P.2d 765 (Cal. App. 1936); *Northern Pac. Ry. Co. v. Lutey*, 66 P.2d 785 (Mont. 1937); *City of Glendale v. Trondsen*, 308 P.2d 1 (Cal. 1957); *City of Hobbs v. Chesport, Ltd.*, 417 P.2d 210 (M.M. 1966); *Craig v. City of Macon*, 543 S.W.2d 772 (Mo. 1976); and *Hawkins v. City of Prichard*, 30 So.2d 659 (Ala. 1947). Under these and other cases, water fees and charges are often upheld as *proprietary* fees under specific statutory authorization, as are sewer charges. (Idaho law specifically authorizes such charges. See Idaho Code § 50-1030(g).) Other cases uphold such fees and charges under the general taxing powers. Many of the above-cited cases upheld garbage collection charges as regulatory fees under the police power, as discussed above.

None of these justifications are present in the case of the proposed fire protection fees. Operation of a fire department is not a proprietary function of a city; it is a governmental police power function. *Ford v. City of Caldwell*, 79 Idaho 499, 321 P.2d 589 (1959). Fees for its operation are not authorized by statute as in the case of water and sewer charges. As discussed above, it is unlikely that the fees could be justified as police power fees pursuant to a regulatory scheme such as garbage collection. In short, we doubt that the fees could successfully be justified as charges for services.

While only the enactment of such a fee, followed by a test case in the Idaho courts, could provide a conclusive answer, it is the opinion of this office that the proposed fire protection fee would constitute an unauthorized tax rather than an authorized fee and would be invalid.

However, it is our opinion, in light of the numerous cases cited above, including the Idaho case of *Foster's, Inc. v. Boise City*, 63 Idaho 201, 118 P.2d 721 (1941), and *State v. Nelson*, 36 Idaho 713, 213 P. 358 (1923), that an Idaho city could, under its police powers granted by art. 12, § 2, Idaho Constitution, enact ordinances to regulate property for fire protection and public safety purposes and charge a reasonable fee to cover the cost of providing such regulatory services, including the cost of necessary administration and inspection. Such a regulatory program might, for example, impose additional fire safety building code regulations and require regular inspections. The fee charged pursuant to such regulations could be progressive or graduated upon any fair, reasonable, and equitable basis. 9 McQuillin, *Municipal Corporations* § 26.38. This could probably include progressive fees based upon size or height of buildings, construction materials, increased protection ("fire flow") needs, or any other reasonable basis.

In connection with such regulatory fee, it might be appropriate here to consider some of the other questions you raised in connection with the proposed general fire protection service fee proposal. As we have already noted, such a fee probably could be increased progressively based upon "fire flow" needs. As to the question whether water service could be terminated for non-payment of this fee (assuming, of course, that the city has the ownership or control of the domestic water service), most cases held that a city may not terminate water service. *Garner v. Aurora*, 149 Neb. 295, 30 N.W.2d 917 (1948), Annotation: 60 A.L.R.3d 714, § 3. There are a few cases to the contrary [*Cassidy v. Bowlin's Green*, 368 S.W.2d 318 (Ky. 1963)], but we advise that such a sanction, if imposed at all, be done so with caution and with adequate notice. *Memphis Light, Gas & Water Division v. Craft*, ____ U.S. ____, 56 L. Ed. 2d 30 (1978). The question whether a lien may be placed on property for nonpayment of the fee has not been decided in Idaho, so we recommend that cities seek enabling legislation to impose such liens if they choose to utilize this means of enforcement. It is possible that such fees could be charges against otherwise tax-exempt governmental property, since it has been held that the public-property exemption under art. 7, § 4, Idaho Constitution applies only to ad valorem taxes [*Pfost v. Boise*, 57 Idaho 507, 66 P.2d 1016 (1937)], but further research and, possibly, enabling legislation would be desirable if a city wishes to pursue this.

Such a fee, carefully drafted to meet the requirement that it be for purposes of regulation, not revenue, and that any revenue realized therefrom be reasonably related and incidental to the regulatory purpose, would, in our opinion, stand a good chance of meeting a challenge that it amounted to an unconstitutional tax.

AUTHORITIES CONSIDERED:

1. Idaho Const., art. 7, §§ 2, 4, 5, & 6.
Idaho Const. art. 12, § 2.
2. Idaho Code § 50-235, § 50-301, § 50-307, § 50-1007, § 50-1019, § 50-1030, §§ 50-1043 through 50-1048, § 50-1703.
3. *Idaho cases*:
 - a. *First American Title Co. of Idaho v. Clark*, 99 Idaho 10, 576 P.2d 581 (1978).

- b. *Mountain States Tel. & Tel. Co. v. City of Boise*, 95 Idaho 264, 506 P.2d 832 (1973).
 - c. *Hendricks v. City of Nampa*, 93 Idaho 95, 456 P.2d 262 (1969).
 - d. *Winther v. Village of Weippe*, 91 Idaho 798, 430 P.2d 689 (1967).
 - e. *Idaho Telephone Co. v. Baird*, 91 Idaho 425, 423 P.2d 337 (1967).
 - f. *Ford v. City of Caldwell*, 79 Idaho 499, 321 P.2d 589 (1958).
 - g. *O'Bryant v. City of Idaho Falls*, 78 Idaho 313, 303 P.2d 672 (1956).
 - h. *Chastain's Inc. v. State Tax Comm.* 72 Idaho 344, 241 P.2d 167 (1952).
 - i. *Rowe v. City of Pocatello*, 70 Idaho 343, 218 P.2d 695 (1950).
 - j. *Foster's, Inc. v. Boise City*, 63 Idaho 201, 118 P.2d 721 (1941).
 - k. *Pfost v. Boise*, 57 Idaho 507, 66 P.2d 1016 (1937).
 - l. *City of Idaho Falls v. Pfost*, 53 Idaho 247, 23 P.2d 245 (1933).
 - m. *Continental Oil Co. v. City of Twin Falls*, 49 Idaho 89, 286 P. 353 (1930).
 - n. *Chapman v. Ada County*, 48 Idaho 632, 284 P. 259 (1930).
 - o. *Chambers v. McCollum*, 47 Idaho 74, 272 P. 707 (1928).
 - p. *State v. Nelson*, 36 Idaho 713, 213 P. 358 (1923).
 - q. *Bradbury v. City of Idaho Falls*, 32 Idaho 28, 177 P. 388 (1918).
 - r. *Sandpoint Water & Light Co. v. City of Sandpoint*, 31 Idaho 498, 173 P. 972 (1918).
 - s. *Boise Dev. Co. v. Boise City*, 30 Idaho 675, 167 P. 1032 (1917).
 - t. *Sweet v. Ballentyne*, 8 Idaho 431, 69 P. 995 (1902).
4. *Other cases:*
- a. *City of Chicago v. R. & X. Restaurant, Inc.*, 369 Ill. 65, 15 N.E.2d 725 (1938).
 - b. *Lamere v. City of Chicago*, 391 Ill. 552, 63 N.E.2d 863 (1945).
 - c. *City of Chicago Heights v. Western Union Tel. Co.*, 406 Ill. 428, 94 N.E.2d 306 (1950).
 - d. *Heckendorf v. Town of Littleton*, 286 P.2d 615 (Colo. 1955).
 - e. *Tamiami Trail Tours, Inc. v. City of Orlando*, 120 So.2d 170 (Fla. 1960).

- f. *State v. Boyd*, 81 N.W. 417 (Neb. 1902).
- g. *Garner v. Aurora*, 149 Neb. 295, 36 N.W.2d 917 (1948).
- h. *City of Lovington v. Hall*, 68 N.M. 143, 359 P.2d 769 (1961).
- i. *City of Hobbs v. Chesport, Ltd.*, 417 P.2d 210 (N.M. 1966).
- j. *Weber Basin Home Builders Ass'n. v. Roy City*, 26 Utah 2d 215, 487 P.2d 866 (1971).
- k. *Barron v. City of Minneapolis*, 212 Minn. 566, 4 N.W.2d 392 (1950).
- l. *Cassidy v. Bowling Green*, 368 S.W.2d 318 (Ky. 1963).
- m. *Holman v. City of Dierks*, 217 Ark. 677, 233 S.W. 2d 392 (1950).
- n. *Glass v. City of Fresno*, 62 P.2d 765 (Cal. App. 1936).
- o. *City of Glendale v. Trondser*, 308 P.2d 1 (Cal. 1957).
- p. *Northern Pac. Ry. Co. v. Lutey*, 66 P.2d 785 (Mont. 1937).
- q. *Craig v. City of Macon*, 543 S.W.2d 772 (Mo. 1976).
- r. *Hawkins v. City of Prichard*, 30 So.2d 659 (Ala. 1947).
- s. *Memphis Light, Gas & Water Division v. Craft*, _____ U.S. _____, 56 L. Ed. 2d 30 (1978).

5. *Other authorities*: 9 McQuillin, *Municipal Corporations* §§ 26.15, 26.16, 26.38; 14 McQuillin, *Municipal Corporations* §§ 38.11, 38.29; 16 McQuillin, *Municipal Corporations* §§ 44.05, 44.06, 60 A.L.R. 3d 714.

DATED this 15th day of June, 1979.

ATTORNEY GENERAL
State of Idaho
/s/ DAVID H. LEROY

ANALYSIS BY:

MICHAEL C. MOORE
Deputy Attorney General
Chief, Local Government Division

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Idaho Supreme Court
Idaho Supreme Court Library

ATTORNEY GENERAL OPINION NO. 79-15

TO: Dennis E. Goff
Canyon County Prosecuting Attorney
Canyon County Courthouse
P.O. Box 668
Caldwell, ID 83605

John O. Cossel
Shoshone County Prosecuting Attorney
Shoshone County Courthouse
Wallace, ID 83873

Per Request for Attorney General's Opinion

QUESTIONS PRESENTED:

1. What is the definition of "taxing district" for the purposes of Idaho Code § 63-2220?

2. What is the meaning of the restriction contained in Idaho Code § 63-2220 that no taxing district for its 1979-80 fiscal year shall certify a budget request to finance the ad valorem portion of its operating budget that exceeds the dollar amount of ad valorem taxes "certified for that same purpose in 1978" — i.e., is it permissible to increase a county levy for one purpose (such as current expense fund) and decrease another levy (such as welfare) as long as the total certification for ad valorem taxes for operating budget purposes remains the same as the previous year?

3. If a special taxing district, which receives revenue from only a portion of the county, ceases to exist or reduces its levy, can the county increase its levy by the amount so reduced, as long as the total 1978 levy is not exceeded?

4. If there are outstanding and unpaid warrants drawn on the county at the end of fiscal year 1979, can a special tax be levied to redeem those warrants pursuant to art. 7, § 15, Idaho Constitution, notwithstanding the provisions of Idaho Code § 63-2220?

CONCLUSIONS:

1. For purposes of Idaho Code § 63-2220, a "taxing district" is any entity which has the authority to cause ad valorem taxes to be levied upon the taxable property within its boundaries. This definition includes counties, cities, and special districts having ad valorem taxing powers.

2. We interpret the limitation contained in Idaho Code § 63-2220 (1) (a) that, for its fiscal year commencing in 1979 and ending in 1980, no taxing district shall certify a budget request to finance the ad valorem portion of its operating budget that exceeds the dollar amount of ad valorem taxes certified for that same purpose in 1978, as referring to the total or aggregate ad valorem tax levy for operating purposes in 1978-79. In our opinion, counties are free to increase any particular county levy as long as there is a corresponding dollar decrease in another county levy or combination of levies.

3. The levies of independent taxing districts, including those which are legal districts even though under the administrative control of the county commissioners (such as ambulance districts) are not part of a county's operating budget within the meaning of Idaho Code § 63-2220, and if such a district reduces its levy or ceases to levy altogether, the county cannot increase any of its own levies by the amount of the reduction.

4. Since the provisions of the Idaho Constitution prevail over any statutory provisions to the contrary, it is our opinion that, if a county has outstanding and unpaid warrants drawn on the county treasury at the end of the 1979-80 fiscal year, and those warrants were properly issued to pay obligations for which the county duly budgeted and appropriated in compliance with the statutes for lawful county purposes, the county may, in its next tax levy, levy a special tax to redeem those warrants as provided in art. 7, § 15 Idaho Constitution.

ANALYSIS:

The first question concerns the definition of "taxing district" for purposes of Idaho Code § 63-2220, as created by H.B. 166, amended by H.B. 308 (Chapter 285, 1979 Idaho Session Laws).

Neither Initiative Proposition No. 1 (the "1% Initiative") which was approved by the voters on November 7, 1978, nor Idaho Code § 63-2220, created by the 1979 Idaho Legislature, contains a definition of the term "taxing district," and it is our view that the legislature intended that the term have its common, ordinary meaning. *Oregon Short Line R. Co. v. Pfost*, 53 Idaho 559, 27 P.2d 877 (1933); *Cook v. Massey*, 38 Idaho 264, 220 P. 1088 (1923); *Nagel v. Hammond*, 90 Idaho 96, 408 P.2d 468 (1965); *City of Lewiston v. Mathewson*, 78 Idaho 347, 303 P.2d 680 (1956). Black's Law Dictionary 1630 (4th ed.) defines "taxing district" as a district throughout which a particular tax or assessment is ratably apportioned and levied upon the inhabitants. A "taxing district" is a district which has the authority to levy taxes, or to levy assessments under a taxing power. *Lister v. Riddle*, 50 Idaho 431, 296 P. 771 (1931).

It is probable that the legislature intended that the meaning of the term "taxing district" be the same as set forth in the ad valorem tax laws. That term is defined in Idaho Code § 63-621 as follows:

The term "taxing district," as used in this act, shall mean any city, school district, road district, highway district, cemetery district, junior college district, hospital district, water district, sewer district, fire protection district, or any other district or municipality of any nature whatsoever having the power to levy taxes, organized under any general or special law of this state. The enumeration of certain districts herein shall not be construed to exclude other districts or municipalities from said definition.

See also Idaho Code § 63-3101, which, for purposes of tax anticipation borrowing, defines "taxing district" as follows:

A taxing district within the meaning of this act is any county, any political subdivision of the state, any municipal corporation, including specially chartered cities, any school districts, including specially char-

tered school districts, any quasi-municipal corporations, or any other public corporation authorized by law to levy taxes, now or hereafter organized.

In addition to the state itself, cities, counties, and various special districts have the power to cause the ad valorem taxes to be levied upon the taxable property within their boundaries. These entities are thus "taxing districts" within the meaning of Idaho Code § 63-2220.

The second question concerns the meaning of the words "that same purpose," as used in Idaho Code § 63-2220, as applied to the question whether a county may increase one tax levy while decreasing other levies, so long as the total dollars levied from ad valorem taxes for operating purposes remain the same in 1979 as they were in 1978.

Idaho Code § 63-2220, created by H.B. 166 as amended by H.B. 308, provides, in pertinent part, as follows:

(1) (a) For its fiscal year commencing in 1979 and ending in 1980, no taxing district shall certify a budget request to finance the *ad valorem portion of its operating budget* that exceeds the dollar amount of ad valorem taxes certified *for that same purpose* in 1978.

(b) No board of county commissioners shall set a levy in 1979, nor shall the state tax commission approve a levy for operating budget purposes in 1979 which exceeds the limitation imposed by paragraph (a) of this subsection, unless authority to exceed such limitation has been approved by a two-thirds (2/3) majority of the taxing district's electors voting on the question at an election called for that purpose. (Emphasis added.)

The words "ad valorem portion of the operating budget" contain no limitation to particular levies. They refer to the total ad valorem portion of the operating budget. The question, then, is whether the language limiting the certification to the dollar amount of ad valorem taxes certified "for that same purpose" in 1978 means that the county is limited as to each separate levy, or whether the statute places an *overall* limitation without necessarily limiting each separate levy to the amount levied in 1978.

The primary function in construing a statute is to ascertain and give effect to the legislative intent *as expressed in the statute*. *Streibeck v. Employment Sec. Agency*, 83 Idaho 531, 366 P.2d 589 (1962). Our purpose must necessarily be to determine, as nearly as possible, the probable interpretation which a court would give to the statute if called upon to construe it. If the meaning and intent of the statute can be determined from its language, the courts will not attempt to use extrinsic means to determine the legislative intent, nor will they speculate upon other possible meanings which the legislature may have intended, nor read into the statute something which is not there. *Roe v. Hopper*, 90 Idaho 22, 408 P.2d 161 (1965); *State v. Berntsen*, 68 Idaho 539, 200 P.2d 1007 (1948). In short, we must construe the statute as written.

Webster's Dictionary defines "same" as being the one under discussion or already referred to. The question, then, is to what word or words in Idaho Code § 63-2220 (1) (a) the phrase "for that same purpose" refers. The general rule of

statutory construction is that a qualifying phrase or clause (here, the words "for that same purpose") refers to the last antecedent in the same clause, sentence, or section being construed, i.e., the last word which can be made an antecedent without impairing the meaning of the sentence. 2A Sutherland, *Statutory Construction*, § 47.33 (rev. ed. 1973); *McCall v. Potlatch Forests, Inc.*, 69 Idaho 410, 208 P.2d 799 (1949). Here, the words "for that same purpose" appear clearly to refer back to the words "ad valorem portion of its operating budget." No mention is made of limiting the tax levy for any other purpose. Nowhere in the statute is any reference made to the separate levies which constitute a taxing district's total levy for operating purposes. Since no such reference to the separate levies appears, it is our opinion that the courts would have to view "for that same purpose" as referring to "ad valorem portion of its operating budget." To construe the limitation any other way would require the courts to read into the statute words which are not there. It would require them to engage in speculation that the legislature intended a different meaning than appears in the statute. This the courts are not likely to do.

Where the language of a legislative enactment is clear, then the court cannot speculate upon the intention of the legislature, but must accept the interpretation of the act as it appears therein. *State v. Bernsten*, 68 Idaho 539 at 549.

Where the language of a statute is clear, as we believe it to be in this instance, the court cannot speculate upon the intention of the legislature, much less read something into the statute which is not there, but must accept the interpretation of the act as it appears from its plain and unambiguous language. *Roe v. Hopper*, 90 Idaho 22 at 28.

In construing the statute as written, the courts view not only the literal wording, but also the context and object in view, as determined from the wording of the statute. *Messenger v. Burns*, 86 Idaho 26, 382 P.2d 913 (1963). With reference to these considerations, it is likely that the courts would view the apparent intent of the legislature in enacting Idaho Code § 63-2220 to limit ad valorem taxes for operating purposes in 1979 to the amount so certified in 1978. The interpretation we are suggesting — that it is the overall levy for operating budget purposes of any particular taxing district, not the amount of any particular tax levy within the overall levy, that is restricted to 1978 levels — effectuates this apparent intent. This view is further supported by the legislative subcommittee report of February 12, 1979, which recommended that the *ad valorem tax portion* of a taxing district's operating budget be frozen by 1978 levels. Here, as in the statute itself, the reference is to the total levy of a taxing district, not to the various individual levels.

We note that the opposite reading of the statute — that each separate, individual levy is limited to 1978 levels — could have the effect of restricting a county to budgeting and expending no more for any particular purpose in 1979 than it did in 1978, while not so restricting cities and other taxing districts which have greater power to transfer monies between particular funds. Compare Idaho Code § 31-1605 with Idaho Code § 50-1014. We find nothing expressed in the statute to indicate that the legislature intended to impose such a limitation on counties without similarly restricting cities and other taxing districts.

We also note that House Bill 166, which enacted Idaho Code § 63-2220, also contained language which, in effect, mandates that all counties complete a reappraisal to 1978 values of all property subject to ad valorem taxation for use during the tax year 1980. We are aware that some counties levied little or no tax pursuant to Idaho Code § 63-221 in 1978 to conduct a valuation program. Under the interpretation of Idaho Code § 63-2220 mentioned above — that each individual levy is frozen to not more than the 1978 certification — those counties would be unable to levy a tax for such purposes even if there were a corresponding reduction in other levies. Again, we do not view it as likely that the courts would, in the absence of clear statutory language to that effect, construe the statute as requiring counties to conduct a revaluation program on the one hand, and as denying to those counties the means of adjusting their budgets to fund such a mandated program on the other. Where a reading of a statute will work an apparently unreasonable result, if a reasonable intent of the legislature can be arrived at, the courts will construe the act so as to arrive at such reasonable intent. *Smallwood v. Jeter*, 42 Idaho 169, 244 P. 149 (1926).

It is our opinion that, if confronted with the question, the courts would view Idaho Code § 63-2220 (1) (a) as imposing a limitation to 1978 dollar amounts upon the total tax levy for operating purposes of any taxing district, and not as limiting each separate, individual levy of a taxing district to 1978 dollar amounts, so long as the total dollar amount levied from ad valorem taxes for operating purposes does not exceed the total dollar amount so levied in 1978.

We have been informed that several individual legislators believed that the individual county levies, and not just the overall levy for operating purposes, should be frozen to 1978 levels, and that they in fact thought that Idaho Code § 63-2220 (1) (a), as enacted, accomplished that result. Although no published legislative history supporting this view exists, we expect that, if this was in fact the purpose of the individual legislators, the 1980 legislature may revise the language to reflect such intent.

The third question is whether, if a special taxing district which levies only in a portion of the county ceases to exist or reduces its levy in 1979, can the county itself add such reduced levy to its own levy. In our opinion, the answer is no. As set forth above, Idaho Code § 63-2220 limits the levy for operating purposes of each *taxing district* to the dollar amount levied for operating purposes in 1978. Independent districts such as fire districts, highway districts, school districts, recreation districts, and the like, which levy in only a portion of the county, are separate “taxing districts” within the meaning of Idaho Code § 63-2220. Their 1978 levies constituted no part of the counties’ levy for operating purposes in 1978. A reduction in their levies, or even a complete cessation of their levies, does not affect the levy of a county or of any other taxing district.

In our view, this is also true of special taxing districts administered by the county itself. An example is an ambulance district created pursuant to Idaho Code § 31-3908. By statute, the board of county commissioners is the governing board of an ambulance service district. However, the same statute provides that such a district is a “legal taxing district.” Thus, although the county commissioners constitute the governing body, the district itself is an entity separate from and independent of the county for taxing purposes. A tax levy of an ambulance service district, in our opinion, is independent of the various levies for county purposes, and a county cannot increase its own levy by reducing the levy of such an independent taxing district over which it has administrative

control. The same is true of pest extermination districts created under Idaho Code § 25-2621.

In our view, then, under the definition of "taxing district" set forth above, if the taxing district is an independent taxing entity, a reduction in its levy does not affect the county's levy, even if the district is actually administered by the county commissioners.

The last question concerns the applicability of Idaho Constitution art. 7, § 15 where the county has unpaid warrants outstanding at the end of the fiscal year. Art. 7, § 15 provides:

The legislature shall provide by law, such a system of county finance, as shall cause the business of the several counties to be conducted on a cash basis. It shall also provide that whenever any county shall have warrants outstanding and unpaid, for the payment of which there are no funds in the county treasury, the county commissioners, in addition to other taxes provided by law, shall levy a special tax, not to exceed ten mills on the dollar, of taxable property, as shown by the last preceding assessment, for the creation of a special fund for the redemption of said warrants; and after the levy of such special tax, all warrants issued before such levy, shall be paid exclusively out of said funds. All moneys in the county treasury at the end of each fiscal year, not needed for current expenses, shall be transferred to said redemption fund. (Emphasis added.)

This section has been held to be self-executing where the legislature has provided the necessary machinery for its execution. *Peavey v. McCombs*, 26 Idaho 143, 140 P. 965 (1914); see *Lloyd Corporation v. Bannock County*, 53 Idaho 478, 25 P.2d 217 (1933). The legislature has provided such machinery in Idaho Code §§ 63-911 and 63-913. These statutes were not expressly repealed by Idaho Code § 63-2220.

It is fundamental that the Constitution prevails against conflicting statutory provisions. *Golden Gate Highway Dist. v. Canyon County*, 45 Idaho 406, 262 P. 1048 (1927); *State v. Johnson*, 50 Idaho 363, 296 P. 588 (1931). A provision of the Constitution cannot be amended or repealed by legislative action. *State v. Village of Garden City*, 74 Idaho 513, 265 P.2d 328 (1953); *State v. Malcom*, 39 Idaho 185, 226 P. 1083 (1924). This rule applies both to legislation passed by the legislature and to legislation passed by initiative. *State v. Finch*, 79 Idaho 275, 315 P.2d 529 (1957).

In light of these well established principles of constitutional law, to the extent that there is or may be any conflict between a constitutional provision and the statute, the constitutional provision prevails. It is our opinion, then, that if a county has properly issued warrants after complying with applicable requirements of the constitution and statutes (i.e., has complied with the County Budget Act and properly budgeted for a lawful expenditure within anticipated revenues, taking into consideration the limitations of Idaho Code § 63-2220), but the actual revenues are not sufficient to pay lawful claims or to redeem warrants as they become payable, then the county is both authorized and required by art. 7, § 15, Idaho Constitution, to levy a special tax to redeem those warrants, notwithstanding the provisions of Idaho Code § 63-2220.

AUTHORITIES CONSIDERED:

1. Idaho Const. art. 7, § 15.
2. Idaho Code §§ 25-2621, 31-1605, 31-3908, 50-1014, 63-221, 63-621, 63-911, 63-913, 63-2220, 63-3101.
3. *Nagel v. Hammond*, 90 Idaho 96, 408 P.2d 468 (1965).
4. *Roe v. Hopper*, 90 Idaho 22, 408 P.2d 161 (1965).
5. *Messenger v. Burns*, 86 Idaho 26, 382 P.2d 913 (1963).
6. *Streibeck v. Employment Sec. Agency*, 83 Idaho 531, 366 P.2d 589 (1962).
7. *State v. Finch*, 79 Idaho 275, 315 P.2d 529 (1957).
8. *City of Lewiston v. Mathewson*, 78 Idaho 347, 303 P.2d 680 (1956).
9. *State v. Village of Garden City*, 74 Idaho 513, 265 P.2d 328 (1953).
10. *McCall v. Potlatch Forests, Inc.*, 69 Idaho 410, 208 P.2d 799 (1949).
11. *State v. Berntsen*, 68 Idaho 539, 200 P.2d 1007 (1948).
12. *Oregon Short Line R. Co. v. Pfof*, 53 Idaho 559, 27 P.2d 877 (1933).
13. *Lloyd Corporation v. Bannock County*, 53 Idaho 478, 25 P.2d 217 (1933).
14. *Lister v. Riddle*, 50 Idaho 431, 296 P. 771 (1931).
15. *State v. Johnson*, 50 Idaho 363, 296 P. 588 (1931).
16. *Golden Gate Highway Dist. v. Canyon County*, 45 Idaho 406, 262 P. 1048 (1927).
17. *Smallwood v. Jeter*, 42 Idaho 169, 244 P. 149 (1926).
18. *State v. Malcom*, 39 Idaho 185, 226 P. 1083 (1924).
19. *Cook v. Massey*, 38 Idaho 264, 220 P. 1088 (1923).
20. *Peavey v. McCombs*, 26 Idaho 143, 140 P. 965 (1914).
21. Black's Law Dictionary 1630 (4th ed.).
22. 2A Sutherland, *Statutory Construction* § 47.33 (3rd rev. ed. 1973).

DATED this 11th day of July, 1979.

ATTORNEY GENERAL
State of Idaho
/s/ DAVID H. LEROY

ANALYSIS BY:

LARRY K. HARVEY
Chief Deputy Attorney General

MICHAEL C. MOORE
Deputy Attorney General
Chief, Local Government Division

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ATTORNEY GENERAL OPINION NO. 79-16

TO: The Honorable John V. Evans
Governor of Idaho
Statehouse
Boise, Idaho 83720

Per Request for Attorney General Opinion

QUESTIONS PRESENTED:

1. If inflation in actual property values exceeds two percent per year, and, as a result, property values in Idaho for taxation purposes do not reflect actual current market values, does Idaho Code § 63-923 (2) (b), which restricts property values for assessment purposes to 1978 market values plus an inflationary rate not to exceed 2% for any given year, violate any provision of the Idaho Constitution?

2. If the above statutory provision does violate any provision of the Idaho Constitution, should state and local government administrative agencies with responsibility for the valuation of property for taxation purposes enforce the statute even if it is probable that it would ultimately be held to be unconstitutional?

3. Can any statutory scheme which places a ceiling on the amount of increase in the value of property for taxation purposes and which, as a result, requires a valuation of property other than the actual current market value of that property, meet the requirements of the Idaho Constitution?

CONCLUSIONS:

1. In view of the decisions both of the Idaho Supreme Court and of supreme courts of other states with constitutional provisions similar to Idaho's, it appears likely that, especially with passage of time, a valuation system limited to the 1978 market value, with an artificial inflationary limit of 2% per year during years of higher rates of actual inflation, will violate both the "just valuation"

provision of Idaho Constitution, art. 7, § 5, and the uniform taxation provisions of Idaho Constitution, art. 7, §§ 2 and 5.

2. In spite of the likelihood that the 2% inflationary cap contained in Idaho Code § 63-923 (2) (b) may ultimately be declared to be unconstitutional, it is the opinion of this office that those officers charged with the duty of valuing property for taxation purposes should enforce the provisions of that statute until such time as it may actually be declared to be invalid by a court of competent jurisdiction.

3. Any statutory scheme which places a ceiling on the amount of increase in the value of individual properties for taxation purposes and does not provide for periodic reappraisals based upon fair market value or full cash value eventually would be subject to the same constitutional questions and attacks discussed in the analysis of the first question.

ANALYSIS:

1. Your first question concerns the constitutionality of the limitation on property valuation for tax purposes contained in Idaho Code § 63-923 (2) (b), which limits such valuation to 1978 market values, plus an inflationary rate not to exceed 2% per year. That section, as amended by the 1979 Idaho Legislature in House bills 166 and 308, provides:

The 1978 market values for assessment purposes of real and personal property shall be adjusted from year to year to reflect the inflationary rate but at a rate not to exceed two percent (2%) for any given year as shown in the consumer price index or comparable data for the area under taxing jurisdiction.

For purposes of this opinion, we will assume a continued inflationary rate in the actual market value of taxable property in excess of 2% per year.

First, we call attention to Attorney General Opinion No. 78-37, dated September 15, 1978, which considered this issue at pages 12 and 13. That opinion stated, in part:

This subsection as written seems to limit the change in the 1978 base value of property not purchased, newly constructed or subjected to change in ownership to the change in inflation not to exceed two percent. On its face, this provision limits and provides for all similar property equally. It thus appears to be constitutional. However, with the passage of time, it is predicted that the provision as applied may be attacked under certain circumstances as being in violation of Art. VII, §§2 and 5, Idaho Constitution. The reason for this concern is that "real life" may subsequently prove the basic and necessary underlying assumption of the provision erroneous. This assumption seems to be that all property will actually change in value approximately at the same rate. Thus, the imposition of a fixed maximum inflation rate on the change in value of all properties will have a fair and equal impact. This may not be what is in fact experienced in the next few years. Given such factors as change in the desirability of location, two parcels of property which begin with identical characteristics and values may well in fact have considerably different characteristics and/or values in sub-

sequent years. Although the disuniformity produced may be less obvious and will be experienced less frequently than that produced by subsection one of Section Two of the initiative, the tax burden will apparently not always fall equally on the properties considering their fair and actual values. It would take only a slight extension of the holding in *Idaho Telephone, supra*, to determine that such a result is impermissibly discriminatory under Art. VII, §§2 and 5, *Idaho Constitution*.

Although the 1979 Idaho Legislature extensively amended Idaho Code § 63-923, as approved by the voters, it did not, in our opinion, cure all the potential problems raised in Opinion No. 78-37. We continue to adhere to that opinion.

In addition to the problem of equal and uniform taxation, it is our opinion that the 2% limitation may, and, with the passage of time, probably would, be held to violate the "just valuation" requirement of art. 7, § 5 of the Idaho Constitution, which reads as follows:

All taxes shall be uniform upon the same class of subjects within the territorial limits, of the authority levying the tax, and shall be levied and collected under general laws, *which shall prescribe such regulations as shall secure a just valuation for taxation of all property*, real and personal: provided, that the legislature may allow such exemptions from taxation from time to time as shall seem necessary and just, and all existing exemptions provided by the laws of the territory, shall continue until changed by the legislature of the state: provided further, that duplicate taxation of property for the same purpose during the same year, is hereby prohibited. (Emphasis added.)

The question is whether the constitutional requirement of just valuation for taxation of all property is violated by a statutory provision which restricts valuation for tax purposes to 1978 market values plus a maximum inflationary rate of 2% a year, regardless of the actual rate of inflation of property values.

The Idaho Supreme Court has, on numerous occasions, held that the Idaho statutes require valuation at full, actual cash value, and that nothing less than valuation at actual current market value will satisfy the statutory requirements of Idaho Code §§ 63-102, 63-111, and 63-202. *Janss Corp. v. Board of Equalization of Blaine County*, 93 Idaho 928, 478 P.2d 878 (1970); *Abbott v. State Tax Comm.*, 88 Idaho 200, 398 P.2d 221 (1965); *Boise Community Hotel, Inc. v. Board of Equalization*, 87 Idaho 152, 391 P.2d 840 (1964); *Anderson's Red & White Store v. Kootenai County*, 70 Idaho 260, 215 P.2d 815 (1950). However, the Idaho Supreme Court does not appear to have had many occasions to consider whether valuation at actual current market value is a *constitutional*, as well as a statutory, requirement. If the requirement is a constitutional one, Idaho Code § 63-923 (2) (b), to the extent that it requires a different method of valuation, will be invalid. *State ex rel. Rich v. Idaho Power Co.*, 81 Idaho 487, 346 P.2d 596 (1959); *State v. Village of Garden City*, 74 Idaho 513, 265 P.2d 328 (1953). Even a statute which was enacted by direct vote of the people, as Idaho Code § 63-923 was, cannot override constitutional requirements. *State v. Finch*, 79 Idaho 275, 315 P.2d 529 (1957).

At least two Idaho Supreme Court decisions support the view that the "just valuation" requirements of Idaho Constitution art. 7, § 5 require valuation of

taxable property at actual current market value. The first case is *Washington County v. First National Bank of Weiser*, 35 Idaho 438, 206 P. 1054 (1922), in which the court, after quoting art. 7, § 5, acknowledged that taxable property must be assessed at actual cash value. Although it went on to hold that this requirement is secondary to the constitutional mandate (art. 7, §§ 2 and 5) of equality of taxation, there is a strong implication that the court viewed the "just valuation" provision of the Constitution as requiring valuation of property at actual cash value. See also *In re Farmer's Appeal*, 80 Idaho 72, 325 P.2d 278 (1958).

An even stronger statement to this effect is contained in the very recent case of *Merris v. Ada County*, 593 P.2d 394 (Idaho 1979), which was decided after issuance of Attorney General Opinion No. 78-37, wherein the court stated:

In our opinion the valuation of taxable property for assessment purposes must reasonably approximate the fair market value of the property in order to effectuate the policy embodied in Id. Const. art. 7, § 5, i.e., that each taxpayer's property bear the just proportion of the property tax burden. . . . Although different types of property are by their nature more amenable to valuation by one method of appraisal than another, the touchstone in the appraisal of property for *ad valorem* tax purposes is the fair market value of that property, and fair market value must result from application of the chosen appraisal method. An arbitrary valuation is one that does not reflect the fair market value or full cash value of the property. 593 P.2d 394, 398.

Although the Supreme Court also cited the Idaho statutory provisions which require valuation at full cash value, it clearly appears to be saying in the *Merris* case that art. 7, § 5, Idaho Constitution, requires valuation at full cash value, regardless of any statutory provisions.

The supreme courts of other states which have similar constitutional provisions have likewise held that constitutional requirements of just valuation or true valuation are synonymous with full current market value. *Cleveland v. T.V. Cable Co.*, 239 Miss. 184, 121 So.2d 862; *Newark v. West Milford Township*, 9 N.J. 295, 88 A.2d 211; *Kittery Elec. Light Co. v. Assessors of Town of Kittery*, 219 A.2d 728 (Maine); *Tyson v. Lanier*, 156 So.2d 833 (Fla.); *Fruit Growers Express Co. v. Brett*, 94 Mont. 281, 22 P.2d 171.

The constitutional "just value" standard required by the law of the land has been judicially synonymized with "market value," "true value," "real value," and the problem with this fundamental directive lies not so much with the meaning to be given to the terminology as to its application to the particular facts of varied situations. *Kittery Elec. Light Co. v. Assessors of Town of Kittery*, 219 A.2d 728 (Maine 1966).

The requirement of a "just valuation" is the equivalent of a "correct, honest, and true" valuation in the assessment of property and means that such value shall be ascertained and employed as the basis of taxation. *Fruit Growers Express Co. v. Brett*, 22 P.2d 171, 175 (Mont. 1933).

It is true that none of the above-cited cases directly involved a statutory cap on inflationary increases in valuation of taxable property. However, in view of the

many cases, including the above-quoted portion of Idaho's recent *Merris* case, holding that a constitutional requirement of just valuation means nothing less than full current market value, it is our opinion that an arbitrary 2% limitation upon increases in property valuations for tax purposes would, in times of higher actual inflation, result in such a great discrepancy between the actual, current market value of property and the assessed value required by Idaho Code § 63-923 (2) (b) as to violate the just valuation requirements of art. 7, § 5, Idaho Constitution.

We are aware that the California Supreme Court, in determining the general validity of California's Proposition 13, upheld, in general terms, a restriction on valuation very similar to that contained in Idaho Code § 63-923 (2) (b). *Amador Valley Joint Union High School District v. State Board of Equalization*, 583 P.2d 1281 (Cal. 1978). The court held that the equal protection clause of the 14th Amendment to the United States Constitution did not require that property be taxed only at current values. However, we do not base this opinion on an interpretation of the 14th Amendment as the California court did in *Amador*. Our opinion is based upon the uniform taxation and just valuation provisions of the Idaho Constitution. California's Proposition 13 was an amendment to the California Constitution, and thus *Amador* did not involve a conflict between a statute and the relevant state constitutional provision.

In our opinion, the *Amador* case would not be controlling of this question in Idaho.

You also asked whether Idaho Code § 63-923 (2) (b) violates Idaho Constitution art. 8, § 3. That section deals generally with limitations upon county and municipal indebtedness beyond a current year's revenues, and, generally speaking, requires approval by the voters for such indebtedness, other than for ordinary and necessary expenses. As originally enacted by the voters, Idaho Code § 63-923 did not appear to exempt bond issues approved by the voters after the effective date of the statute from the limitations of the statute. However, the legislature appears to have cured this problem by its amendments to Idaho Code § 63-923, contained in H.B. 166, exempting indebtedness approved by the voters. We see no apparent violation of Idaho Constitution art. 8, § 3 in Idaho Code § 63-923 as amended.

2. Your second question is whether, if it appears probable that Idaho Code § 63-923 (2) (b) does violate any provision of the Idaho Constitution, should state and local government administrative agencies responsible for the valuation of property for taxing purposes enforce its provisions anyway?

Since we view it as likely (though obviously not certain) that, given present inflationary rates, the statute eventually will be held to violate art. 7, § 5, Idaho Constitution, we will address your second question.

First, no matter how likely it is that this portion of the statute may ultimately be held unconstitutional as applied to a particular factual situation, it will be held invalid only if the variations in valuation for tax purposes as opposed to true value develop as we have discussed above, and further, if some person with standing to raise the constitutional issue — i.e., a property owner whose property is receiving discriminatory or otherwise invalid tax valuation treatment — actually challenges the statute in a proper legal action. Even then, there exists the possibility that, rather than to declare the entire provision to be unconstitu-

tional, the court may merely adjust that particular litigant's property values downward to the average value prevailing in the community, thus granting relief for the particular litigant's problems without invalidating the 2% cap. Another possibility is that the Idaho Supreme Court, in construing the uniformity and just valuation clauses in the context of the 2% cap, will incorporate some concept not heretofore adopted which would save the statute from constitutional attack.

Secondly, although the Idaho Supreme Court has recognized the general proposition that an unconstitutional act is not a law at all [*Smith v. Costello*, 77 Idaho 205, 290 P.2d 742 (1956); *State v. Village of Garden City*, 74 Idaho 513, 265 P.2d 328 (1954)], it has also recognized the doctrine that, generally, a public officer performing ministerial duties cannot question the constitutionality of a statute and refuse to comply with its terms. *Jewett v. Williams*, 84 Idaho 93, 369 P.2d 590 (1962); *State v. Malcom*, 39 Idaho 185, 226 P. 1083 (1924).

... the question of a statute's constitutionality is a judicial problem that only the courts have power to decide. It is not a proper question for determination by an administrative board even though it may in its normal proceedings exercise quasi judicial powers. *Wanke v. Ziebarth Const. Co.*, 69 Idaho 64, 75, 202 P.2d 384 (1948).

Courts have generally so held. *Braxton County Court v. West Virginia*, 208 U.S. 192, 28 S. Ct. 275, 52 L. Ed. 450; *Denver Ass'n. for Retarded Children, Inc. v. School Dist.*, 535 P.2d 200 (Colo.). Ministerial officers are ordinarily obliged to accept the statute under which they act as valid and to comply with it until it is judicially determined that it is invalid. *Trustees of Wolford College v. Burnett*, 209 S.C. 92, 39 S.E.2d 155.

The reasoning behind this doctrine has been said to be that to allow a ministerial officer to decide upon the validity of a law would be subversive of the object of government, for if one such officer may assume such power, other officers may do the same, resulting in destruction of civil government. *People ex rel. State Board of Equalization v. Pitcher*, 61 Colo. 149, 156 P. 812; see, also *State ex rel. Lockwood v. Tyler*, 64 Mont. 124, 208 P. 1081; *Mohall Farmers' Elevator Co. v. Hall*, 44 N.D. 430, 176 N.W. 131; *Threadgill v. Cross*, 26 Okla. 403, 109 P. 558.

This doctrine also follows the principle, often recognized in Idaho, that the constitutionality of a statute may not be questioned by one whose rights have not been or are not about to be injuriously affected by the statute. *State v. City of Gooding*, 75 Idaho 36, 266 P.2d 655 (1953). Conversely, one recognized exception to the rule that a public ministerial officer cannot question the constitutionality of a statute is where the officer's personal interest is affected by the statute, i.e., where the officer himself could face personal liability for complying with the statute. *State v. Malcom*, 39 Idaho 185, 226 P. 1083 (1924).

It is difficult for us to see how a public officer could successfully be held personally liable to any taxpayer for complying with the provisions of Idaho Code § 63-923 (2) (b). Considering the improbability of such liability on one hand, and the serious consequences to the administration of government that a refusal by public tax enforcement officers to obey the statute would have on the other, it is our firm opinion that those ministerial officers charged with enforcing these tax laws should comply with the provisions of Idaho Code § 63-923 (2) (b) until the law is changed or a court of competent jurisdiction has determined that the statute is invalid.

3. Your third question is whether any statutory scheme which places a ceiling on the amount of increase in the value of property for taxation purposes and which, as a result, requires a valuation of property other than its market value, can meet the requirements of the Idaho Constitution.

In view of our analysis of your first question, set forth above, it is the opinion of this office that any statutory scheme which places a ceiling on the amount of increase in the value of individual properties for taxation purposes, based upon an arbitrary maximum inflationary rate which bears no reasonable relationship either to the actual rate of inflationary increases in property values or to the actual market values of individual properties, and which does not provide for periodic reappraisals based upon fair market value, would eventually be subject to the same constitutional questions and attacks as discussed under your first question above. *Merris v. Ada County*, 593 P.2d 394 (Idaho 1979).

In the absence of a specific alternate proposal, we are not able to render an opinion as to the probable constitutionality of other possible statutory schemes. However, there may be some statutory alternatives which, if carefully drafted, might be more likely to withstand some of the constitutional problems discussed above. One such alternative might include a higher inflationary ceiling more closely approximating the actual inflationary rate, accompanied by periodic reappraisals at fair market value or full cash value. Another alternative might be to spread increases in valuation over a larger period of time, in a manner similar to "income averaging" under federal income tax laws. A third approach might be to apply a higher inflationary ceiling against the total value of all properties within a taxing district, rather than against individual properties, thus permitting taxing authorities greater flexibility in reflecting different actual rates of increase among different properties, within an overall limitation.

All of these alternatives pose many practical problems of drafting, implementation, and administration. Until an alternative is actually proposed, and proposed legislation to effectuate such an alternative drafted, discussions of constitutionality or other validity would be highly speculative.

AUTHORITIES CONSIDERED:

1. Idaho Const. art. 7, §§ 2 & 5; art. 8, § 3.
2. Idaho Code §§ 63-102, 63-111, 63-202, 63-923.
3. *Merris v. Ada County*, 593 P.2d 394 (Idaho 1979).
4. *Janss Corp. v. Board of Equalization of Blaine County*, 93 Idaho 928, 478 P.2d 878 (1970).
5. *Abbott v. State Tax Comm.*, 88 Idaho 200, 398 P.2d 221 (1965).
6. *Boise Community Hotel, Inc. v. Bd. of Equalization*, 87 Idaho 152, 391 P.2d 840 (1964).
7. *Jewett v. Williams*, 84 Idaho 93, 369 P.2d 590 (1962).
8. *State ex rel. Rich v. Idaho Power Co.*, 81 Idaho 487, 346 P.2d 596 (1959).

9. *In re Farmer's Appeal*, 80 Idaho 72, 325 P.2d 278 (1958).
10. *State v. Finch*, 79 Idaho 275, 315 P.2d 529 (1957).
11. *Smith v. Costello*, 77 Idaho 205, 290 P.2d 742 (1956).
12. *State v. City of Gooding*, 75 Idaho 36, 266 P.2d 655 (1953).
13. *State v. Village of Garden City*, 74 Idaho 513, 265 P.2d 328 (1953).
14. *Anderson's Red & White Store v. Kootenai County*, 70 Idaho 260, 215 P.2d 815 (1950).
15. *Wanke v. Ziebarth Const. Co.*, 69 Idaho 64, 202 P.2d 384 (1948).
16. *State v. Malcom*, 39 Idaho 185, 226 P. 1083 (1924).
17. *Washington County v. First Nat. Bank of Weiser*, 35 Idaho 438, 206 P. 1054 (1922).
18. *Braxton County Court v. West Virginia*, 208 U.S. 192, 28 S. Ct. 275, 52 L. Ed. 450.
19. *Amador Valley Joint Union High School Dist. v. State Board of Equalization*, 583 P.2d 1281 (Cal. 1978).
20. *Denver Ass'n. for Retarded Children, Inc. v. School Dist.*, 535 P.2d 200 (Colo. 1975).
21. *People ex rel. State Board of Equalization v. Pitcher*, 61 Colo. 149, 156 P. 812.
22. *Tyson v. Lanier*, 156 So.2d 833 (Fla.).
23. *Kittery Elec. Light Co. v. Assessors of Town of Kittery*, 219 A.2d 728 (Maine).
24. *Cleveland v. T.V. Cable Co.*, 239 Miss. 184, 121 So.2d 862.
25. *Fruit Grower Express Co. v. Brett*, 22 P.2d 171 (Mont. 1933).
26. *State ex rel. Lockwood v. Tyler*, 64 Mont. 124, 208 P. 1081.
27. *Newark v. West Milford Township*, 9 N.J. 295, 88 A.2d 211.
28. *Marshall Farmers' Elevator Co. v. Hall*, 44 N.D. 430, 176 N.W. 131.
29. *Threadgill v. Cross*, 26 Okla. 403, 109 P. 558.
30. *Trustees of Wolford College v. Burnett*, 209 S.C. 92, 39 S.E.2d 155.
31. *Attorney General Opinion No. 78-37 (Idaho)*.

DATED this 17th day of July, 1979.

ATTORNEY GENERAL
State of Idaho
/s/ DAVID H. LEROY

ANALYSIS BY:

LARRY K. HARVEY
Chief Deputy Attorney General

MICHAEL C. MOORE
Deputy Attorney General
Chief, Local Government Division

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cc: Idaho State Library
Idaho Supreme Court
Idaho Supreme Court Library

ATTORNEY GENERAL OPINION NO. 79-17

TO: Commissioner Don C. Loveland
Commissioner Carol M. Dick
Department of Revenue & Taxation
State Tax Commission
Statehouse Mail

Per Request for Attorney General Opinion

QUESTIONS PRESENTED:

1. When the "1978 market value levels for property tax purposes" are first placed on the 1980 tax roll, should the values be increased for inflation for the years 1979 and 1980 — that is, can they be increased by an amount not greater than four percent? Alternatively, is the first adjustment for inflation to be reflected on the 1981 tax roll?

2. Does the freeze on ad valorem taxes for operating purposes mean that a district formed during 1978 and, therefore, imposing no tax cannot now impose a property tax for funding its operating budget for the year 1979? Additionally, can a district formed in 1979 fund its operating budget from ad valorem taxes levied in 1980?

3. Is the carrying out of the reappraisal program mandated by House Bill 166 a part of the counties' operating budgets within the meaning of House Bill 166?

CONCLUSIONS:

1. The most likely construction to be placed on this provision by a court is that the annual two percent inflation index should be applied for the years 1979 and 1980.

2. Our Opinion No. 79-7 of April 27, 1979, issued after we received your request should be responsive to this question.

3. The cost of conducting mandated reappraisals should be considered as a part of the county's operating budget subject to the freeze imposed by §63-2220. It may be overridden by election as discussed in our Opinion No. 79-12 of May 31, 1979. Additionally, in proper cases a county is able to fund the reappraisal using established emergency expenditure procedures.

ANALYSIS:

1. As you have noted, other opinions from this office have alluded to possible constitutional difficulties with the two percent inflation limit on 1978 values. See Opinion No. 78-37 dated September 15, 1978, and our recent opinion No. 79-16. In the latter opinion we have expressed our belief that tax administrators are obliged to assume the statute's constitutionality until such time as it may be declared invalid by the judiciary. Accordingly, your request that we advise you on the proper interpretation of the statute, assuming it to be valid, is appropriate.

Determining whether the "market value for assessment purposes" established by §63-923, *Idaho Code*, may be indexed for the years 1979 and 1980 to reflect inflation requires analysis of subsection (2) of §63-923, *Idaho Code*, both as amended by the legislature in House Bill 166 and as first adopted by referendum in the general election of November 7, 1978. The present language of the statute, following the legislative amendment, is:

(2) (a) The market value for assessment purposes of real and personal property subject to appraisal by the county assessor shall be determined by the county assessor according to the rules and regulations prescribed by the state tax commission, as provided in section 63-202, *Idaho Code*, but where real property is concerned it shall be the actual and functional use of the real property. All taxable property which has not been appraised at 1978 market value levels shall be reappraised or indexed to reflect that valuation for the tax year commencing January 1, 1980. All property placed on the assessment roll for the first time after 1978, and all property which is reappraised after 1978, shall be appraised or indexed to reflect 1978 market value levels.

(b) The 1978 market values for assessment purposes of real and personal property shall be adjusted from year to year to reflect the inflationary rate but at a rate not to exceed two percent (2%) for any given year as shown in the consumer price index or comparable data for the area under taxing jurisdiction.

As can be seen, part (a) requires that the newly established values be reflected on the 1980 tax rolls. Although these values are to be placed on the 1980 rolls, they are to be "1978 market value levels." HB 166 in its entirety contemplates

that these values are to be established as the result of reappraisals mandated in Sections 3 and 4, which are to be completed in time to be on the 1980 rolls. Part (b) allows adjustment of the 1978 market values for assessment purposes to reflect a maximum annual inflationary rate of two percent. These adjustments may be made "from year to year." The question you have presented is whether the "year to year" adjustments include adjustments for the years 1979 and 1980.

Research reveals no court decisions which are at all helpful in trying to resolve the meaning of this particular statutory provision. We must, therefore, attempt to determine legislative intention from the language of the statute.

As a first approach to trying to resolve this ambiguity, we might look merely to the sequence of the language appearing in the section. That is, part (a) requires the newly established values to be placed on the 1980 roll. Part (b) then says that the values may be adjusted "from year to year." Therefore, it may appear that no adjustments could be made for inflation occurring during the years 1979 and 1980 and that the first adjustment to the values would be made for the year 1981 and would appear on the 1981 rolls. Thus, while the values used on the 1980 roll are required to reflect 1978 market values, there would be a two year period for which no change in values would be allowed even though (we assume for the purposes of this opinion) inflation at an annual rate greater than two percent will occur during the years 1978 and 1980. However, this sequential approach to interpreting the language reaches a result which, for reasons stated in this opinion, seem to us to conflict with the most probable legislative intention. For several reasons, we think that a different analysis more likely reflects a correct interpretation.

Section 63-923 imposes what is commonly referred to as the one percent property tax limitation. Actually the section imposes not one but two limitations. The first is a limitation upon tax levies. All property taxes levied on a single parcel of property may not exceed one percent of the market value for assessment purpose of that property. The section also places a limit upon the value against which mill levies are measured. This value, referred to in the statute as "market value for assessment purposes," is the 1978 market value level of the property, established (except the case of personal property) by its actual and functional use. The original *Idaho Code* §63-923, as appearing on the ballot, did not contemplate that these two different limitations would become effective at different times. Instead, the original provision would have limited value to "actual market value . . . as shown on the 1978 tax Assessment . . ." and would have thereafter permitted the two percent inflationary rate for each year. House Bill 166 deferred the application of the one percent limit on levies by providing an effective date for §63-923 (1) (a) of January 1, 1980. However, subsection (2) is effective on January 1, 1979. As a result, different effective dates are provided for each of the two separate limitations which are included in §63-923. The levy limitation is deferred, but the section imposing the value limitation is in force now. Thus, while the substantive part of the latter provision does not require that the value limitation actually be immediately applied, the section itself is in full force and effect as law. Subsection (1) (a) on the other hand, while duly enacted by the legislature and signed by the Governor, does not become effective as a part of the law of the state until January 1, 1980. Ironically, House Bill 166 which was intended to clarify the statute as originally adopted by referendum (and in fact eliminated many of the most difficult ambiguities) inadvertently created an additional problem where none existed in the original provisions.

In determining the meaning of a statute which has been amended by the legislature, the Idaho courts have said that it is appropriate to look at the language existing both before and after the amendment. See for example *Futura v. State Tax Commission*, 92 Idaho 288, 442 P.2d 174 (1968). The effect mandated by the language prior to the amendment was clear. The ambiguity was introduced by the deferral of the one percent levy limitation, not by the amendments to the limitation on value. The amendments to the limitation on value relate to a clarification of how the "market value for assessment purposes" is to be determined and upon which tax roll that value is first to be entered. The latter clarification is necessary because of the impossibility of construing the original effective date provision in the statute as adopted by the referendum, as discussed in Attorney General's Opinion 78-37 dated September 15, 1978, and in Opinion No. 79-1 dated January 9, 1979. None of the changes in the language affected by House Bill 166 appear to be directed to altering the manner in which the two percent inflation index is to be applied to the 1978 values. Accordingly, we think it more reasonable to conclude that the ambiguity introduced by House Bill 166 was inadvertent rather than a deliberate intention to change the manner in which the two percent index is to apply.

Such an interpretation also seems to us to more likely meet the test of reasonableness in statutory interpretation. "The intent of the legislature may be implied from the language used, or inferred on grounds of policy or reasonableness." *Summers v. Pooly*, 94 Idaho 87, 89, 481 P.2d 318 (1971). Very recently the Idaho Court has said in *Smith v. Department of Employment*, _____ Idaho _____, 26 IRC 545 (June 25, 1979):

When the language of a statute is ambiguous, we must consider the social and economic results which would be effectuated by a decision on the meaning of the statute. *Herndon v. West*, 87 Idaho 335, 393 P.2d 35 (1964).

See also Sutherland, *Statutory Construction*, Sec. 5803, p. 79. That is, where ambiguity exists in statutory provisions, a reasonable interpretation should generally be applied over an unreasonable one. In view of the recent history of inflation well above an annual rate of two percent and the probability that this inflationary trend is likely to continue at least until 1981, it seems unreasonable to conclude that the legislature intended the 1978 values to be indexed for inflation for years after 1981 but not for the years 1979 and 1980. If the legislature intended such a result, clearer language expressly so stating would likely have been used. In this regard, we think it fair to rely upon our own knowledge that the language of House Bill 166 underwent legislative scrutiny more detailed than that of most legislation. Where the legislature deliberately intended to alter the effect of the provisions of the statute as enacted at the referendum, every effort was made to state the legislative intention in clear and unambiguous terms. Generally, the legislature's effort to express itself clearly was successful. Therefore, to conclude that the legislature actually intended to change the effect of the two percent inflationary factor when it failed to express such an intent in clear and unambiguous terms is to assume more than we are willing to assume from the language of House Bill 166 as enacted.

2. The second question you have asked overlaps the issues we have discussed in our opinion No. 79-7 dated April 27, 1979. That opinion was issued after the date of your request. We believe it will respond to your second question.

3. We think that carrying out the reappraisal program mandated by House Bill 166 is a part of the county's "operating budget" within the meaning of House Bill 166. Our earlier Opinion No. 79-7 dated April 27, 1979, generally outlines our feelings regarding the meaning of the term "operating budget." The fact that the reappraisal program is not new or unique but rather is a continuation of the previously required reappraisal at minimum five year intervals (which has been mandated by §63-921, *Idaho Code*, for some time) indicates that reappraisal is a regular continuing expense to be incurred by counties rather than an expenditure which could be fairly characterized as "nonoperating." This means, of course, that the funds expended for conducting the mandated reappraisal should be found within the budget freeze imposed by House Bill 166. As we have observed in previous opinions (Opinion No. 79-12, dated May 31, 1979, and Opinion No. 79-15, dated July 11, 1979), the freeze requires that expenditures which are part of the operating budget funded by ad valorem taxes may not exceed during fiscal years commencing in 1979 and 1980 the amount of the operating budget funded by ad valorem taxes for the fiscal year commencing in 1978. The freeze, however, applies to the aggregate total of all separately funded programs which are part of the frozen operating budget and is not a freeze upon individual budget items. It is possible, therefore, to increase the amount budgeted in 1978 for reappraisal to a higher amount so long as the total aggregate operating budget of the county is not exceeded. To do so, of course, requires a decrease elsewhere in the budget.

There are two ways, subject to stringent restraints discussed herein, by which the budget freeze can be exceeded. The first method is by means of the override election allowed by §63-2220, *Idaho Code*. The second is by resort to the statutory and constitutional provisions which allow for expenditures to meet certain designated emergencies. Prudent practice by administrators would mitigate strongly toward use of the former rather than the latter method if such a choice is otherwise unavoidable.

The mechanics of conducting an override election are discussed in our Opinion No. 79-12 dated May 31, 1979. The provisions for declaring an emergency should be briefly outlined.

Conditions under which an emergency may be declared by the county commissioners are found in *Idaho Code* §31-1608. Among the conditions for which the county commissioners may declare an emergency is the need to make "mandatory expenditures required by law." Clearly, the need to make expenditures to perform the mandated reappraisal program are such expenditures. If a county finds that it is truly faced with an emergency, i.e., that it cannot fund the reappraisal program, the county commissioners may — by unanimous vote — declare a state of emergency to exist. See *Justus v. Canyon County*, 63 Idaho 29, 115 P.2d 756 (1941), approving an emergency levy required to meet expenses for mandated public assistance. The requirements for declaring such an emergency are set by the statute and the procedure should be carefully followed.

Once the emergency has been properly declared and all other available funds have been spent to meet the expenses of the emergency and there is insufficient money on hand in the treasury, the county may resort to registered warrants for the payment of these expenses. It is possible, however, to substitute other forms of indebtedness for the registered warrants. In *Lloyd Corporation v. Bannock County*, 53 Idaho 478, 25 P.2d 217 (1933), the Idaho court addressed a similar circumstance as follows:

The record in this case shows that, after the budget was adopted, unforeseen circumstances arose which made necessary the expenditure of more money to meet certain ordinary and necessary expenses, authorized by the general laws of the state, than had been anticipated and included in the budget. These circumstances made necessary the issuance of the emergency warrants. They are justified by Sec. 30-1208 of the code, and not violative of art. 8, sec. 3, of the Constitution, for it does not prohibit incurring indebtedness and liability for such expenses. (*Thomas v. Glindeman*, 33 Ida. 394, 190 Pac. 92.)

The issuance of refunding bonds for the purpose of retiring warrant indebtedness does not create an indebtedness or liability prohibited by Idaho Constitution, art. 8, sec. 3. It merely changes the form of evidence of an existing indebtedness (*Butler v. City of Lewiston*, 11 Ida. 393, 83 Pac. 234; *Veatch v. City of Moscow*, 18 Ida. 313, 109 Pac. 722, 21 Ann. Cas. 1332; *Sebern v. Cobb*, 41 Ida. 386, 238 Pac. 1023.)

The Sec. 30-1208 referred to in the quotation is the predecessor statute to the existing *Idaho Code* §31-1208.

The issuance of tax anticipation notes by taxing districts (including counties) is governed by Title 63, Chapter 31, *Idaho Code*. Sec. 63-3105 provides the mechanics for payment of tax anticipation notes previously issued in the event that taxes collected for the fiscal year are of insufficient amount to pay the anticipation notes. That section requires establishment of a "tax anticipation bond or note redemption fund" for which a levy in the succeeding year shall be made in sufficient amount to provide for the payment of principal and interest of the notes or bonds. The power to make this special levy is constitutionally granted to the counties by Article 7, Section 15, of the Idaho Constitution. That section provides:

The legislature shall provide by law, such a system of county finance, as shall cause the business of the several counties to be conducted on a cash basis. It shall also provide that whenever any county shall have any warrants outstanding and unpaid, for the payment of which there are no funds in the county treasury, the county commissioners, in addition to other taxes provided by law, shall levy a special tax, not to exceed ten mills on the dollar, of taxable property, as shown by the last preceding assessment, for the creation of a special fund for the redemption of said warrants; and after the levy of such special tax, all warrants issued before such levy, shall be paid exclusively out of said fund. All moneys in the county treasury at the end of each fiscal year, not needed for current expenses, shall be transferred to said redemption fund.

As can be seen, the county is authorized to levy up to ten mills for the purpose of financing this special fund. Since the Constitution provides that this tax shall be "in addition to all other taxes provided by law," the statutory limitations otherwise provided by House Bill 166 or other statutes do not restrict the power of the county to make this special constitutional levy. It is fundamental that the Constitution prevails against conflicting statutory provisions. *Golden Gate Highway Dist. v. Canyon County*, 45 Idaho 406, 262 P. 1048 (1927); *State v. Johnson*, 50 Idaho 363, 296 P. 588 (1931). A provision of the Constitution cannot be amended or repealed by legislative action. *State v. Village of Garden City*, 74 Idaho 513, 265 P.2d 328 (1953); *State v. Malcom*, 39 Idaho 185, 226 P. 1083 (1924).

This rule applies both to legislation passed by the legislature and to legislation passed by initiative. *State v. Finch*, 79 Idaho 275, 315 P.2d 529 (1957).

Several restrictions relate to this procedure. First, all money in the county treasury at the end of a fiscal year not needed to meet current expenses must be transferred to the redemption fund. See *State v. Cleland*, 42 Idaho 803, 248 P. 831 (1926). Secondly, the fund may not be created or the tax levied unless there are in fact unpaid bonds or warrants outstanding. *Oregon Shortline Railroad Company v. Gooding County*, 33 Idaho 452, 196 P. 196 (1921).

The question of exactly what funds must be transferred to the redemption fund and which are necessary for current expenses is a decision which is left to the sound discretion of the county commissioners. The section does not require that all county monies, including those needed for funding other essential operations, be placed in the redemption fund for payment of the emergency expenditures. The Idaho court observed in *Laclede Highway District v. Bonner County*, 31 Idaho 476, 196 P. 196 (1921):

Clearly, this provision implies that any monies needed for current operations do not necessarily, and by operation of law, have to be placed in the warrant redemption fund.

In the same case, the court observed that the section:

... [C]ontemplates that the money which is not needed for the purposes for which it was collected is to be transferred to the warrant redemption fund by resolution of the board of county commissioners. Necessarily the duty of ascertaining what money in the treasury at the end of the fiscal year or thereafter collected out of the levy of the proceeding year is needed must devolve upon someone, and by this section the legislature has committed that duty to the discretion of the board of county commissioners.

Although the precise language of the statutes involved has changed somewhat in recent years, nothing in the new language appears to indicate a result contrary to that reached by the Supreme Court under the older statutes.

AUTHORITIES CONSIDERED:

1. *Idaho Code* §§31-1208; 31-1608; 63-921; 63-923; 63-2220; 63-3105.
2. Art. 7, Sec. 15, Idaho Constitution.
3. Attorney General Opinions: No. 79-7 dated April 27, 1979; No. 79-12 dated May 31, 1979; No. 78-37 dated September 15, 1978; No. 79-15 dated July 11, 1979; No. 79-1 dated January 9, 1979; No. 79-16 dated July, 1979.
4. 3 *Sutherland, Statutory Construction*, §5803.
5. Cases:
 - Futura v. State Tax Commission*, 92 Idaho 288, 442 P.2d 174 (1968)
 - Justus v. Canyon County*, 63 Idaho 29, 115 P.2d 756 (1941)

Lloyd Corporation v. Bannock County, 53 Idaho 478, 25 P.2d 217 (1933)

State v. Cleland, 42 Idaho 803, 248 P. 831 (1926)

Oregon Shortline Railroad Company v. Gooding County, 33 Idaho 452, 196 P. 196 (1921)

Laclede Highway District v. Bonner County, 31 Idaho 476, 196 P. 196 (1921)

Summers v. Pooly, 94 Idaho 87, 89, 481 P.2d 318 (1971)

Golden Gate Highway Dist. v. Canyon County, 45 Idaho 406, 262 P. 1048 (1927)

State v. Johnson, 50 Idaho 363, 296 P. 588 (1931)

State v. Village of Garden City, 74 Idaho 513, 265 P.2d 328 (1953)

State v. Malcom, 39 Idaho 185, 226 P. 1083 (1924)

State v. Finch, 79 Idaho 275, 315 P.2d 529 (1957)

Smith v. Department of Employment, _____ Idaho _____, 26 IRC 545 (June 25, 1979)

Herndon v. Wesl, 87 Idaho 335, 393 P.2d 35 (1964)

DATED this 24th day of July, 1979.

ATTORNEY GENERAL
State of Idaho
/s/ DAVID H. LEROY

ANALYSIS BY:

THEODORE V. SPANGLER, JR.
Deputy Attorney General

TVS:ji

ATTORNEY GENERAL OPINION 79-18

TO: C. W. Crowl, Director
Department of Corrections
Statehouse Mail

Per Request for Attorney General Opinion

QUESTION PRESENTED:

May the Department of Corrections lawfully delegate to correctional officers the duty of dispensing prescribed medications to inmates and/or patients com-

mitted to the custody of the Department by virtue of criminal commitments or dispositioned to the Department by virtue of involuntary civil commitments?

CONCLUSION:

Correctional officers are prohibited from dispensing or administering prescription medications to inmates and/or patients of the Board of Corrections unless they have prior medical training and are primarily engaged in the provision of medical services in order that they may be fairly characterized as "medical attendants" as that term is used in the Nurse Practice Act.

ANALYSIS:

For purposes of the following analysis the term "correctional officer" shall be defined as a "guard" who has been employed by the State Board of Corrections pursuant to *Idaho Code*, §20-214, and whose primary responsibilities are in the fields of security and inmate supervision. It will also be assumed that "correctional officers" are distinguishable from "medical attendants" as that term is used in Title 54, *Idaho Code*, which pertains to the practice of nursing (hereinafter referred to as the "Nurse Practice Act"). See, *Idaho Code*, §54-1411. It will be further assumed for purposes of this opinion that the dispensation of prescription medications cited in the question presented relates solely to the dispensing of oral medications to inmates and mental patients.

Idaho Code, §54-1401, makes it unlawful for any person to practice nursing unless that individual has been duly licensed pursuant to state law. Nursing is defined in part as:

(1) The practice of professional nursing means performance of any act in observation, care, and counsel of the ill, injured and infirm persons; in maintenance of health and prevention of illness of others; in supervision and teaching of other health care personnel; and *in administration of medications and treatments as prescribed by nurse practitioners, licensed physicians and licensed dentists*; requiring substantial specialized judgment and skill based on knowledge and application of the principles of biological, physical and social science. (Emphasis added) *Idaho Code*, §54-1402 (b) (1)

It may be argued that the "administration of medications" referred to in the Nurse Practice Act relates only to the performance of acts which require substantial specialized medical training such as the giving of injections or other technical forms of treatment beyond the mere meting out of oral medications. The phrasing of the statute is somewhat inartful and it is unclear whether the final clause of the provision is meant to modify each of the preceding clauses or to present an independent portion of the total definition. However, without expert medical advice to the contrary, this office is unable to conclude that the dispensation of any prescription medication does not require "substantial specialized judgment."¹ Although the tasks delegated to security guards may involve simply removing pills from a container and passing them to inmates, some knowledge of the nature of the medication, its size, shape and color, and its possible aftereffects is necessary to avert unknowing mistakes and potential tragedy. Therefore, the aforementioned issue of statutory construction will not be determinative.

¹ The terms "administer" and "dispense" are generally defined synonymously and are used interchangeably throughout this opinion. See, *Webster's New Collegiate Dictionary*, G & C Merriam Co. (Springfield, Mass. 1976).

It may also be argued that the Board of Corrections stands *in loco parentis* to its inmates and mental patients and that correctional officers, in passing out medications, are merely performing the function of a parent who dispenses prescription medications to his child. Support for this argument may be found in *Idaho Code*, §20-209, which delegates to the Board of Corrections the duty to provide for the care and maintenance of all inmates committed to its custody. A similar argument relating to mental patients may be based upon the language of *Idaho Code*, §66-1303, which authorizes the administrator of the Idaho Security Medical Facility to provide for the care and treatment of persons committed to his custody. See also: *Idaho Code*, §66-1312.

Inmates and patients committed to the Board of Corrections have been incarcerated subsequent to a judicial determination that they merit or require a highly structured custodial setting. Should an *in loco parentis* argument be adopted, it could readily be expanded to include institutionalized persons in other contexts. For example, untrained personnel could be used to dispense potentially dangerous medications to patients in state mental hospitals, to youths in juvenile facilities or to the elderly in state supported nursing homes. These untrained, non-medical personnel would be allowed to administer prescription medications merely by virtue of their employment with an agency which is responsible for the maintenance of an institutionalized person.

The legislatively stated purpose of the Nurse Practice Act is as follows:

In order to safeguard the public health, safety and welfare, it is in the public interest to regulate and control nursing in the State of Idaho, to promote quality health care services, to prohibit unqualified, dishonest persons from practicing nursing and to protect against acts or conduct which may endanger the health and safety of the public. . . . *Idaho Code*, §54-1401.

The Nurse Practice Act represents an exercise of the State's police powers in an attempt to insure quality medical care for all of its citizens. It would appear that no individuals are more vulnerable to improper health care practices than are those who are institutionalized. Therefore, this office would conclude that prison inmates are entitled to the protection of the Nurse Practice Act just as are free citizens, and that this protection is not altered by the special relationship which exists between the prisoner and his keepers.

Idaho Code, §54-1411, articulates exceptions to the licensure requirements of the Nurse Practice Act. This section concludes with a sentence which states: "Nothing shall be construed as prohibiting the use of medical attendants by the department of corrections at its correctional institutions." The Act does not attempt to define the term "medical attendants" and no qualifications are established which must be met prior to one becoming a "medical attendant." However, this section does not use the term "guard" or "correctional officer," and it implies that the persons intended to be covered must have some medical training and be primarily employed for the purpose of providing medical attention to inmates and patients. Although the sentence does not specifically authorize "medical attendants" to function as nurses, it does appear in the

section captioned "EXCEPTIONS TO LICENSE REQUIREMENTS." Accordingly, it would appear that "medical attendants" are authorized to dispense prescription medications despite their lack of licensure as nurses.

The quoted exception to the license requirements was adopted by the legislature in 1977. Idaho Session Laws, 1977, Ch. 132, p.285. Prior to this time there was no reference in the Nurse Practice Act to "medical attendants" or to other non-licensed medical personnel employed by the Board of Corrections. The legislature apparently felt that a specific authorization was required so as to enable these "medical attendants" to perform nursing functions including the dispensation of medication. If a specific statutory authorization was required to enable these presumptively trained medical attendants to administer drugs, it would appear that, at the very least, a similar statutory authorization would be required to allow untrained security guards to dispense medication.

Also, the Idaho Pharmacy Act, as contained in Chapter 17, Title 54, *Idaho Code*, prohibits the "... delivery or administration of any prescription drug or legend drug unless [s]uch legend drug is dispensed or delivered by a pharmacist. . . ." *Idaho Code*, §B54-1732 (3) (a). Violation of this section is a felony. Although the Pharmacy Act is phrased broadly and may be subject to a more narrow construction in light of the Nurse Practice Act, the Board of Corrections may be in danger of criminal sanctions should it continue the practice in issue.

In addition to the preceding considerations, the issue of the potential tort liability of the State which is inherent in a system whereby untrained employees are delegated the duty of administering dangerous drugs, must be noted. As aforementioned, the Board of Corrections, a constitutionally created State agency, is responsible for the care of prisoners committed to its custody. Negligent performance of ministerial functions such as the dispensation of drugs could result in substantial damages being awarded against the State. See, *Idaho Code*, §6-901 et seq. The use of security officers to administer medications in contravention of state law may well constitute negligence *per se* and would, in any event, serve to weaken any defense the State may present to a negligence claim arising out of the prison context.

In view of the foregoing analysis, it would appear that correctional officers, as a class, may not lawfully dispense medications to inmates or patients of the Board of Corrections. This office is aware that this conclusion may have serious practical and financial ramifications for the Board. It may be advisable for the Board to attempt to secure a specific statutory authorization which would allow correctional officers to dispense drugs to inmates and patients. It should be noted that the Board of Nursing has the statutorily delegated authority to exempt individuals from licensure by its own internal rules and regulations. *Idaho Code*, §54-1411. The Board of Corrections may consider petitioning the Nursing Board for an administrative exemption for its correctional officers; such action may not, however, resolve the problem of potential criminal liability under the Pharmacy Act. In the absence of some legislative or administrative action, it would appear that only "medical attendants" employed by the Board of Corrections may dispense prescription medication to inmates and patients.

AUTHORITIES:

1. *Idaho Code*, §§6-901, 20-209, 20-214, 54-1401, 54-1402, 54-1411, 54-1732, 66-1303, 66-1312.

2. Idaho Session Laws, 1977, Chap. 132, p. 285.
3. *Webster's New Collegiate Dictionary*, G & C Merriam Co., 1976.

DATED this 24th day of July, 1979.

ATTORNEY GENERAL
State of Idaho
/s/ DAVID H. LEROY

ANALYSIS BY:

MICHAEL B. KENNEDY
Deputy Attorney General
State of Idaho

DHL:MBK:lb

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Idaho Supreme Court Library

ATTORNEY GENERAL OPINION NO. 79-19

TO: The Honorable Christopher R. Hooper
State Representative
7902 Ustick Road
Boise, Idaho 83704

Per Request for Attorney General's Opinion

QUESTION PRESENTED:

Is Idaho's Mandatory Automobile Liability Insurance Law (Idaho Code §§ 49-233 through 49-246) unconstitutional in its requirement that a motorist provide proof of liability insurance to any peace officer upon request?

CONCLUSION:

1. It is a constitutionally permissible police function for an automobile to be stopped (a) by any peace officer when there is articulable and reasonable suspicion that the motorist is unlicensed, that the auto is not registered, or that the motorist does not possess the required motor vehicle liability insurance; (b) when either the vehicle or an occupant are otherwise properly subject to a stop for a violation of the laws governing the operation of motor vehicles or any other law; or (c) at a roadblock systematically applied to all automobiles.

2. Once an auto is properly stopped it is a constitutionally permissible police function for a peace officer to require a motorist to show proof of liability insurance as required by Idaho's mandatory auto liability insurance law.

ANALYSIS:

The Forty-Fifth Idaho Legislative Session of the Idaho Legislature was responsible for the passage of Senate Bill 1099 which was signed by the Governor on March 29, 1979, and became effective law on July 1, 1979. Senate Bill 1099 amended the existing Idaho law relating to mandatory auto liability insurance by adding new sections, Idaho Code §§ 49-243 through 49-246. These new sections provided, among other things, the requirement that a certificate or proof of liability insurance shall be present in a motor vehicle or in the possession of the operator at all times the vehicle is operated; and further, "the certificate or proof of liability insurance shall be provided for inspection to any peace officer upon request to the operator. . . ." Idaho Code § 49-245. A violation of the section constitutes a misdemeanor.

It is well settled that the use of highways and public roads by motor vehicles may be limited, controlled, and regulated by the responsible public authority in the exercise of that authority's police power whenever, and to the extent, necessary to provide for and promote the safety, peace, health, morals, and general welfare of the people. *Packard v. O'Neil*, 45 Idaho 427, 262 P. 881, 56 A.L.R. 317; *People v. Linde*, 341 Ill. 269, 173 N.E. 361, 72 A.L.R. 997.

Although the use of public highways and streets by motor vehicles is considered more than a mere privilege, but a right or liberty, the enjoyment of which is protected by guarantees of the federal and state constitutions, that right is subject to *reasonable* regulation and control by the state in the exercise of its police powers. *Packard v. O'Neil*, *supra*; *Adams v. City of Pocatello*, 91 Idaho 99, 416 P.2d 46.

In both the *Adams v. Pocatello* case and the *Packard v. O'Neil* case, the Idaho Supreme Court emphasized the principle that state legislators, by virtue of their inherent police powers and jurisdiction over public ways, may enact reasonable regulations governing the conduct of the owners and drivers of vehicles operated thereon.

The right to use the public ways of the state, and the control of that use, being public in its nature, is a special subject for regulation under the police power of the state. This legislative control may be exercised by the enactment of statutes governing the liabilities of drivers of vehicles of all kinds, where the purpose to be subserved is the safety of travelers generally on the roads. There is no dissent from the rule that legislatures, by virtue of their inherent police powers and plenary jurisdiction over roads, may make regulations governing the conduct of owners and drivers of all vehicles. *Packard v. O'Neil*, *supra*, at 438.

* * *

The establishment, maintenance and control of public ways and roads is embraced and included within the police powers of the states. *Packard v. O'Neil*, *supra*, at 440.

The right to operate a motor vehicle upon the public streets and highways is not a mere privilege. It is a right or liberty, the enjoyment of which is protected by the guarantees of the federal and state constitutions. *Adams*, *supra*, at 101.

* * *

The right of a citizen to operate a motor vehicle upon the public streets and highways is subject to reasonable regulation by the state in the exercise of its police powers. *Packard v. O'Neil*, *supra*. *Adams v. City of Pocatello*, *supra*, at 101.

Although it is clear that a public entity, by virtue of its police powers exercised to secure the general public health, welfare and safety, may adopt regulations relating to the use of the public streets and highways, it is also equally clear that those regulations must not violate basic constitutional rights. In determining whether or not a given regulation is violative of constitutional rights, the courts employ a "balancing test" which is consistent with the teaching of *Camara v. Municipal Court*, 387 U.S. 523, 87 S. Ct. 1727, 18 L. Ed. 2d 930 (1967). Although the Supreme Court in *Camara* was not as precise as it might have been, the decision rests upon three important factors: (1) a strong public interest in the maximum effectiveness in combatting the problem at hand; (2) an inability to achieve "acceptable results" by following the usual probable cause limitation; and (3) the "relatively limited invasion of the citizen's privacy" involved in the procedure in question.

As to the first *Camara* factor, a strong public interest in maximum effectiveness in combatting the problem at hand, there has been repeated judicial recognition that the purpose of laws such as mandatory automobile liability insurance is to protect the general public from loss by injury or death caused by the negligence of financially irresponsible persons. *Adams v. City of Pocatello*, *supra*; 7 Am. Jur. 2d *Automobile Insurance* §§ 6, 7, pp. 298-299. Consequently, a general requirement through statutes requiring compulsory liability insurance, that a motor vehicle may be operated upon public highways only when adequate provision is made for compensation to persons injured because of fault in such operation, has long received acceptance as a proper and constitutional regulation of the use of public streets and highways. 39 A.L.R. 1028 (supp. at 69 A.L.R. 397). Almost every state now has some type of legislation directed to the problem of the financially irresponsible motorist. Idaho is one of many states that now have statutes making the carrying of liability insurance compulsory in order for a motor vehicle to be operated upon the public highways. 171 A.L.R. 550, Supp. at 34 A.L.R. 2d 1298, § 1.

Idaho's mandatory automobile liability insurance law has a purpose comparable to Idaho's Safety Responsibility Act in protecting the public against hardship resulting from the use of automobiles by financially irresponsible persons. In addressing itself to the purpose of Idaho's Safety Responsibility Act, the Idaho Supreme Court, in *Adams v. Pocatello*, stated:

The purpose of the safety responsibility act is to protect the public using the highways against hardship which may result from use of automobiles by financially irresponsible persons. This is a public purpose within the police power of the state, and the provisions complained of reasonably tend to accomplish that purpose. *Farmer's Insurance Exchange v. Wendler*, 84 Idaho 114, 119, 368 P.2d 933 (1962); *Escobedo v. State Dept. of Motor Vehicles*, 35 Cal. 2d 870, 222 P.2d 1, 5, (1950); *Sullins v. Butler*, 175 Tenn. 468, 135 S.W.2d 930, 932 (1940); *Cohen v. Metropolitan Cas. Ins. Co.*, 233 App. Div. 340, 252 N.Y.S. 841 (1931). See also, *Rowe v. City of Pocatello*, 70 Idaho 343, 218 P.2d 695 (1950); *State v. Finney*, 65 Idaho 630, 150 P.2d 130 (1944).

"It is well recognized that the social objective of preventing financial hardship and possible reliance upon the welfare agencies of the state is a permissible goal of police power action. *Home Accident Ins. Co. v. Industrial Commission*, 34 Ariz. 201, 269 P. 501 (1928); *Berberian v. Lussier*, [87 R.I. 226, 139 A.2d 869 (1958)]; *Hadden v. Aitken*, [156 Neb. 215, 55 N.W.2d 620, 35 A.L.R.2d 1003 (1952)]; *Rosenblum v. Griffin*, [89 N.H. 314, 197 A. 701, 115 A.L.R. 1367 (1938)]." *Schechter v. Killingsworth*, 93 Ariz. 273, 380 P.2d 136, 141 (1963).

Adams, supra, at 101, 102.

Consequently, the first *Camara* factor, to wit; a strong public interest in combatting a problem, appears to be obviously present, as the purpose of statutes such as Idaho's Mandatory Auto Liability Insurance Law is to mitigate the consequences of careless driving by requiring financial responsibility through insurance as a condition of driving.

Proceeding now to the second *Camara* factor, the inability to achieve "acceptable results" by adhering to the usual probable cause standard, the mandatory auto liability insurance situation is closely analogous to the situations in *Camara*, where it was emphasized that there was no practical and effective way to detect the probability of hazardous conditions. It would be most unusual to have an observable indication from a moving vehicle that Idaho's mandatory automobile liability insurance law has been violated. Requiring individuals to provide certificate or proof of liability insurance upon the request of a peace officer is the only practical method of enforcement of the statute. A comparable conclusion relating to a driver's license statute was reached in the case of *State v. Holmberg*, 194 Neb. 337, 231 N.W.2d 672 (1975), wherein the court stated:

The licensing laws are safety measures applicable to the use of all roads or highways within the state. It would be most unusual to have an observable indication of a licensing violation of a moving vehicle. Stopping the vehicles for inspection is the only practical method of enforcement of the driver's license statute.

Another analogous case is *Palmore v. United States*, 290 A.2d 573 (D.C.Appl. 1972), wherein that court noted that persons who drive in the district without a valid license and registration will not necessarily exhibit conduct or the appearance giving rise to articulable suspicion that they are without proper driving credentials. Parenthetically, it is enlightening to note the comparison between Idaho's requirement of a possession and display of a certificate or proof of automobile liability insurance (Idaho Code § 49-245) and Idaho's requirement of a possession and display of a driver's license (Idaho Code § 49-319). Virtually all cases in which the validity and construction of a statute making it a criminal offense for a motorist to fail to carry or display his operator's license (or vehicle registration) have held that such laws are valid exercises of state police power. 6 A.L.R. 3d 506. Since Idaho Code § 49-245 and Idaho Code § 49-319 are virtually identical in all material respects and requirements, other than the latter deals with operator's licenses and the former with certificates or proof of auto liability insurance, it would be safe to assume the same judicial consequence for both laws. Consequently, the second *Camara* factor is obviously present, in that there would be an inability to achieve acceptable results by following the usual probable cause limitations involved in penal law violations.

As for the third *Camara* factor, that the intrusion be “relatively limited,” the recent United States Supreme Court decision of *Delaware v. Prouse*, 24 Crim. L. Rep. 3079 (dec. March 27, 1979), elucidates that particular factor.

Citing the *Camara* case and applying the “balancing test” the court in *Delaware v. Prouse* outlined the requirements of a constitutionally permissible police stop of a vehicle.

The Fourth and Fourteenth Amendments are implicated in this case because stopping an automobile and detaining its occupants constitute a “seizure” within the meaning of those Amendments, even though the purpose of the stop is limited and the resulting detention quite brief. *United States v. Martinez-Fuerte*, 428 U.S. 543, 556-558 (1976); *United States v. Brignoni-Ponce*, 422 U.S. 873, 878 (1975); cf. *Terry v. Ohio*, 392 U.S. 1, 16 (1968). The essential purpose of the prescriptions in the Fourth Amendment is to impose a standard of “reasonableness” upon the exercise of discretion by government officials, including law-enforcement agents, in order “to safeguard the privacy and security of individuals against arbitrary invasion. . . .” *Marshall v. Barlow’s, Inc.*, 436 U.S. 307, 312 (1978), quoting *Camara v. Municipal Court*, 387 U.S. 523, 528 (1967). Thus, the permissibility of a particular law-enforcement practice is judged by *balancing its intrusion* on the individual’s Fourth Amendment interests against its promotion of legitimate governmental interests. (Emphasis added.) 24 Crim. L. Rep. 3079, 3081.

Prior to the *Prouse* case, many states permitted the random “spot checking” of motor vehicles by peace officers in order to check for compliance with their licensing and vehicle code registration requirements. Although Idaho did not follow such practices, they were common in many states. The *Prouse* decision ended the warrantless random stops of automobiles for the purpose of checking the operator’s license and the vehicular registration, except in those situations in which there exists articulable and reasonable suspicion that a motorist is unlicensed or that an automobile is unregistered or that either the vehicle or occupant is otherwise subject to seizure for a violation of the law. The traditional application of the “balancing test” between the legitimate governmental interest and the individual’s fourth amendment interests was applied in helping the court conclude that random spot checks were unconstitutional. Although the primary emphasis of the court’s opinion in the *Prouse* case dealt with the constitutional prohibition against random “spot checks,” the court did consider the alternative methods of enforcing license and registration laws, i.e., (1) observation of traffic violations and the ensuing stops, and (2) roadblock type stops, when it stated, to wit:

The foremost method of enforcing traffic and vehicle safety regulations, it must be recalled, is acting upon observed violations. Vehicle stops for traffic violations occur countless times each day; and on these occasions, licenses and registration papers are subject to inspection and drivers without them will be ascertained. 24 Crim. L. Rep. 3079, 3082.

* * *

Questioning of all oncoming traffic at roadblock-type stops is one possible alternative. At 3083.

Thus, the U.S. Supreme Court sanctioned the normal and regular procedure of detecting license, registration, and vehicle safety regulation violations once a vehicle was stopped through the observation of a traffic violation. Moreover, although this opinion is not addressed to the subject of roadblocks, it must be noted that the *Prouse* decision has no impact on systematic "roadblock-type stops" and specifically approves them. In concluding the opinion the *Prouse* court stated:

Accordingly, we hold that except in those situations in which there is at least articulable and reasonable suspicion that a motorist is unlicensed or that an automobile is not registered, or that either the vehicle or an occupant is otherwise subject to seizure for violation of law, stopping an automobile and detaining the driver in order to check his driver's license and the registration of the automobile are unreasonable under the Fourth Amendment. At 3083.

Subsequently, on June 25, 1979, the U.S. Supreme Court decided the case of *Zachary C. Brown v. State of Texas*, 25 Crim. L. Rep. 3216. In the *Zachary Brown* case, the court again addressed itself to the legality of a stop or seizure of a person subject to the requirements of the Fourth Amendment. In the *Brown* case, the suspect was not in a vehicle, but was a pedestrian who failed to identify himself after being stopped by two El Paso peace officers. Texas had a statute that required a person "lawfully stopped" to give his name and address to a peace officer requesting such information. The Supreme Court, citing *Delaware v. Prouse*, held that there was an insufficient basis for a "lawful stop" and that therefore the Texas statute was not violated. The *Brown* case addressed itself to the issue of a stop or seizure of a person, and used the same standards enunciated in the *Delaware v. Prouse* case to determine the constitutionality of such a stop. However, the *Brown* case, by way of footnote, specifically indicated that it was not going to concern itself with the question of whether or not a person may lawfully refuse to identify himself in the context of a "lawful investigatory stop":

We need not decide whether an individual may be punished for refusing to identify himself in the context of a lawful investigatory stop which satisfies Fourth Amendment requirements. 25 Crim. L. Rep. 3216, fn. 3 at 3217.

Since Idaho requires the possession and showing of a driver's license, registration, and a certificate or proof of automobile liability insurance, it is only logical to conclude that all three requirements are similar police power regulations of the state. Therefore, the prior judicial precedent and reasoning applicable to driver's license identification and registration would likewise be applicable to certificates or proof of automobile liability insurance. It would be illogical for an officer to be permitted, under the *Delaware v. Prouse* case, to request driver's license identification and registration, but not be permitted to ask for a certificate of or proof of automobile liability insurance. The balancing test of the *Camara* case, with its three factors, combined with the recent reasoning of *Delaware v. Prouse* would support the formal conclusion of this opinion expressed *ante*.

AUTHORITIES CONSIDERED:

1. Idaho Code §§ 49-245, 49-319, and 49-233 through 49-246.
2. *Adams v. City of Pocatello*, 91 Idaho 99, 416 P.2d 46 (1966).

3. *Camara v. Municipal Court*, 387 U.S. 523, 87 S. Ct. 1727, 18 L. Ed. 2d 930 (1967).

4. *Delaware v. Prouse*, 24 Crim. L. Rep. 3079 (dec. March 27, 1979).

5. *Packard v. O'Neil*, 45 Idaho 427, 262 P. 881, 56 A.L.R. 317 (1927).

6. *Palmore v. United States*, 290 A.2d 573 (D.C. App. 1972).

7. *People v. Linde*, 341 Ill. 269, 173 N.E. 361 (1930).

8. *State v. Holmberg*, 194 Neb. 337, 231 N.W.2d 672 (1975).

9. *Zachary C. Brown v. State of Texas*, 25 Crim. L. Rep. 216 (dec. June 25, 1979).

10. 39 A.L.R. 1028 (*supp. at* 69 A.L.R. 397); 56 A.L.R. 997; 72 A.L.R. 997; 171 A.L.R. 550 (*supp. at* 34 A.L.R. 2d 1298 §1); 6 A.L.R. 3d 506.

11. 7 Am. Jur. 2d *Automobile Insurance* § 6, 7, at 298-299.

DATED this 8th day of August, 1979.

ATTORNEY GENERAL
State of Idaho
/s/ DAVID H. LEROY

ANALYSIS BY:

MICHAEL B. KENNEDY
Deputy Attorney General
Criminal Justice Division

DHL/MBK/dm

cc: Idaho State Library
Idaho Supreme Court
Idaho Supreme Court Law Library

ATTORNEY GENERAL OPINION NO. 79-20

TO: Mr. Alfred E. Barrus
Cassia County Prosecuting Attorney
P.O. Box 487
Burley, Idaho 83318

Per Request for Attorney General Opinion

QUESTIONS PRESENTED:

1. Does a lease-purchase agreement for solid waste incinerating equipment, having an initial term of one year but which contains renewal terms for addi-

tional years, whereby all or part of a County's lease payments are applied to interest and principal on the purchase price, and whereby a County obligates itself to exercise its best efforts to obtain funding in future years to finance the future renewal terms, and which agreement contains an option to purchase for \$1.00 at the end of all renewal terms, create a prohibited indebtedness or liability within the meaning of Article 8, § 3, Idaho Constitution?

2. If such an agreement does create an indebtedness or liability, is it nevertheless exempt from the restrictions of Article 8, § 3, Idaho Constitution, as an ordinary and necessary expense authorized by the general laws of the state?

CONCLUSIONS:

1. The proposed lease-purchase agreement probably creates an indebtedness or liability within the meaning of Article 8, § 3, Idaho Constitution, and probably would be held invalid if challenged in a proper legal action, unless it qualifies as an "ordinary and necessary" expense.

2. Although it is possible, in light of recent decisions of the Idaho Supreme Court, that such an expenditure would be held to be ordinary and necessary within the exception contained in Article 8, § 3, Idaho Constitution, the Idaho Supreme Court has not yet gone so far as to hold that installment payments on a wholly new facility, which does not replace an existing facility, are ordinary and necessary expenses, and we do not recommend reliance upon the ordinary and necessary expense exception.

ANALYSIS:

Our opinion has been requested on the validity, under Article 8, § 3, Idaho Constitution, of a proposed lease-purchase agreement whereby Cassia County seeks to purchase, over a period of years, certain solid waste incineration equipment.

The Lease-Purchase Agreement contains recitations as to the need for the equipment. Section V provides that the agreement shall continue in full force and effect for the original term and all renewal terms, as set forth in Exhibit B, and further provides that the agreement shall be extended to each renewal term except as provided in Section VII. Exhibit B sets forth the agreement payment schedule, with columns to show the date and amount of payment, the amount to be credited to interest, and the amount to be credited to principal. Section VI grants the County an option to purchase the property at the end of the agreement term, which is defined as the original term and all renewal terms, if the County is not in default. The option purchase price is \$1.00.

Section VII gives the County a right to terminate the agreement prior to the expiration of the renewal terms. It provides, however, that the obligation to pay the base rent "and . . . other amounts due under this Agreement shall be absolute and unconditional so long as the County shall have any funds available from which such payments may lawfully be made, and such payments shall not be abated through accident or unforeseen occurrence." It also sets forth the anticipated sources of revenue available to the County for payment of base rent and other amounts, which include solid waste collection fees, revenues from sale of solid wastes or their by-products, and any other funds available to the County

for purposes of solid waste disposal, including, but not limited to, appropriated funds. (It is unclear to us exactly what "appropriated funds" are referred to, but we assume this means either moneys received from the State, or general county tax revenues.)

The County further covenants, under Section VII to "do all things lawfully within its power to obtain and maintain funds from which all payments may be made, *including making provisions for such payments to the extent necessary in each biennial or annual budget* submitted for the purpose of obtaining funding, *using its bona fide best efforts to have such portion of the budget approved, and exhausting all available reviews and appeals in the event such portion of the budget is not approved.*" (Emphasis added.)

Section VII then provides that, if the County is not allocated funds for the next succeeding fiscal period to continue the payments due under the Agreement and has no funds for such payment from other sources, the County may terminate the agreement at the end of the then-current fiscal period, after notice to the Trustee not less than 30 days prior to the commencement of the next fiscal period. For the original term, however, the County's obligation to make all payments is absolute and unconditional.

Section IX provides for payment of the base rent, which payment is again made absolute and unconditional, subject to the provisions of Section VII. If the cost of construction is less or greater than contemplated in Exhibit B, then, to that extent, the principal shall be increased or decreased accordingly.

For purposes of this opinion, we assume that the County does not have current, budgeted funds sufficient to meet the payments required under the original term and all renewal terms, has not and does not intend to hold a special election to obtain voter approval as contemplated by Article 8, § 3, and has not made provision for an annual tax to provide for payment of interest and a sinking fund to pay the principal on any payments beyond the initial term.

Article 8, § 3, Idaho Constitution, provides, in pertinent part:

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 in such year, without the assent of two thirds of the qualified electors thereof voting at an election to be held for that purpose, nor unless, before or at the time of incurring such indebtedness, provision shall be made for the collection of an annual tax sufficient to pay the interest on such indebtedness as it falls due, and also to constitute a sinking fund for the payment of the principal thereof, within thirty years from the time of contracting the same. Any indebtedness or liability incurred contrary to this provision shall be void: Provided, that this section shall not be construed to apply to the ordinary and necessary expenses authorized by the general laws of the state. . . .

1. *Indebtedness or Liability*

The Idaho Supreme Court has had occasion to interpret Article 8, § 3, in nearly 100 decisions. No attempt will be made here to analyze all of those decisions,

since consideration of a few of the more significant decisions will suffice to illustrate the very literal and restrictive interpretation which the Court has given to that section of the constitution.

An early, and probably still the leading, case considering the "indebtedness or liability" question is *Feil v. City of Coeur d'Alene*, 23 Idaho 32, 129 P. 643 (1912). This case involved an ordinance which provided for the purchase of a water system for \$180,000 and for the issuance of revenue bonds of the city payable solely from a special fund to be created from the revenues of the water system over a period of 20 years. This fund was to be used solely for the purpose of payment of the principal and interest on the bonds, and the city covenanted to pay into the fund monthly from the revenues an amount sufficient to pay principal and interest on the bonds at maturity. No election had been held, and it was undisputed that the city did not have sufficient current revenues to meet all of the obligations created by the ordinance.

In an action contesting the validity of the ordinance, the city contended that the ordinance obligated no general funds of the city and thus created no indebtedness within the meaning of Article 8, § 3. The Court analyzed several decisions from other states which held that, where such obligations were payable only from special funds, no city indebtedness was created under constitutional provisions somewhat similar to Idaho's. The Court rejected the reasoning of those cases.

The reasoning, however, of those cases utterly fails when applied to our constitution, for the reason that none of those cases deals with the word "liability," which is used in our constitution, and which is a much more sweeping and comprehensive term than the word "indebtedness"; nor are the words "in any manner or for any purpose" given any special attention by the courts in the foregoing cases. The framers of our constitution were not content to say that no city shall incur any indebtedness "in any manner or for any purpose," but they rather preferred to say that no city shall incur any *indebtedness or liability* in any manner, or for any purpose. It must be clear to the ordinary mind on reading this language that the framers of the constitution meant to cover all kinds and character of debts and obligations for which a city may become bound, and to preclude circuitous and evasive methods of incurring debts and obligations to be met by the city or its inhabitants. 23 Idaho 32, 49-50.

The Court defined "liability" as the state of being bound or obliged, in law or justice, whether or not an "indebtedness" was also created. It proceeded to analyze the ordinance in light of this definition. It found that the city had obligated itself in many ways under the ordinance, such as by pledging itself to charge and collect sufficient revenues to meet the bond obligations, to maintain a special fund therefor, to charge sufficient water rates to meet not only the bond obligations but also to pay all operating expenses, and by hypothecating, in advance, the water system revenues to payment of those obligations. The Court concluded that the city had incurred an unlawful liability under Article 8, § 3.

It is arguable that much of the *Feil* decision is pure dictum, that it could have been decided on the sole ground that the city at that time lacked statutory authority to issue revenue bonds, without reaching the constitutional issue, and that it demonstrated more judicial hostility to the *policy* than to the constitu-

tionality of revenue bond financing. The Idaho Supreme Court has, in fact, avoided the constitutional restriction of Article 8, § 3, in many subsequent cases by reliance upon the "ordinary and necessary expenses" proviso, or by holding that the particular governmental entity which incurred the indebtedness or liability was not the type of entity covered by Article 8, § 3, *Boise Redev. Agency v. Yick Kong Corp.*, 92 Idaho 876, 499 P.2d 575 (1972), or by holding that the liability or indebtedness itself was not of the type prohibited by Article 8, § 3 [*Cruzen v. Boise City*, 58 Idaho 406, 74 P.2d 1037 (1937)]. However, it has never retreated from the broad and inclusive definition of "liability" of the *Feil* case, nor has it ever overruled the holding of *Feil* in spite of many opportunities to do so. *Boise Dev. Co., Ltd. v. Boise City*, 26 Idaho 347, 143 P. 531 (1914); *School Dist. No. 8 v. Twin Falls County Mutual Fire Ins. Co.*, 30 Idaho 400, 164 P. 1174 (1917); *Miller v. City of Buhl*, 48 Idaho 668, 284 P. 843 (1930); *Williams v. City of Emmett*, 51 Idaho 500, 6 P.2d 475 (1931) (involving a three-year lease); *Straughan v. City of Coeur d'Alene*, 53 Idaho 494, 24 P.2d 321 (1932) (where the Court expressly refused to overrule *Feil*, *Miller*, and *Williams*, *supra*); *General Hospital v. City of Grangeville*, 69 Idaho 6, 201 P.2d 750 (1949); *O'Bryant v. City of Idaho Falls*, 78 Idaho 313, 303 P.2d 672 (1956); and *Hanson v. City of Idaho Falls*, 92 Idaho 512, 446 P.2d 634 (1968).

It is our conclusion that the holding of *Feil v. City of Coeur d'Alene*, *supra*, continues to be the view of the Idaho Supreme Court, and, with certain exceptions not pertinent here, that any indebtedness or liability in excess of a city or county's revenues for that year is void under Article 8, § 3, unless approved by the voters or unless it falls within "the ordinary and necessary expenses" proviso.

The question, then, is whether this lease-purchase agreement creates an indebtedness or liability under the principles enunciated by the Idaho Supreme Court in the above cases.

The agreement does not purport to be an outright installment purchase contract, but is denominated a "lease-purchase agreement." It provides for an initial term of one year, with additional one-year renewal terms unless terminated by the County in the manner and under the conditions provided.

Many cases in other states have considered the question whether a lease with an option to purchase violates a constitutional debt limitation similar to Idaho's. See cases collected at 71 A.L.R. 1318, 112 A.L.R. 287, 145 A.L.R. 1362, dissenting opinion of McFadden, C.J., in *City of Pocatello v. Peterson*, 93 Idaho 774, 779-783, 473 P.2d 644 (1970), and Magnusson, "Lease-Financing by Municipal Corporations as a Way Around Debt Limitations," 25 Geo. Wash. L. Rev. 377 (1957).

As Chief Justice McFadden noted in his dissenting opinion in *City of Pocatello v. Peterson*, *supra*, there runs throughout these cases the principle that where a lease is in fact a lease and the rentals are intended as rentals, rather than as a subterfuge for installment payments on the purchase price under a conditional sales contract, the lease, even if it contains an option to purchase the property, does not create any indebtedness within the meaning of a constitutional limitation on indebtedness. The reasoning behind these cases is that a genuine lease does not create any indebtedness for the aggregate of future rentals, but only creates an indebtedness for the installment of rent currently owing. (In Idaho, however, it is probable that the aggregate of future rentals under a multi-year

lease would be found to be a liability if not an indebtedness. *Williams v. City of Emmett*, 51 Idaho 500, 6 P2d 475 (1931).

In the leading case of *City of Los Angeles v. Offner*, 19 Cal. 2d 483, 122 P.2d 14, 145 A.L.R. 1358 (1942), the California Supreme Court (which, unlike the Idaho Supreme Court, apparently regards the constitutional terms "indebtedness" and "liability" as being synonymous), upheld a 10-year lease of a rubbish incinerator which had an option to purchase at certain stated intervals during the term of the lease. The court held that the lease created no immediate indebtedness for the aggregate installments, but confined liability to each year's installment as it fell due, and thus did not violate the indebtedness prohibition. However, the court noted that, if the instrument creates a full and complete liability upon its execution, or if its designation as a "lease" is a subterfuge and it is actually a conditional sales contract in which the "rentals" are installment payments on the purchase price, the contract is void. However, the court found no evidence of a present intention on the part of the city to purchase the incinerator and upheld the lease. It should be noted, however, that even the California court, which is generally much less restrictive than Idaho's in construing constitutional debt limitations, would invalidate an instrument which was actually a conditional sales contract rather than a pure lease, if it created a multi-year indebtedness.

As already noted, the Idaho Supreme Court cases construe the term "liability" much more broadly than the term "indebtedness," and we do not find it likely that the Idaho Supreme Court would have upheld the particular lease involved in the *Offner* case, had it arisen in Idaho, unless it qualified under the "ordinary and necessary" exception. However, research discloses only two Idaho Supreme Court decisions under Article 8, § 3, directly involving a lease. One is *Williams v. City of Emmett*, 51 Idaho 500, 6 P.2d 475 (1931), which involved a three-year lease (not a one-year lease with options to renew) of street sprinkling equipment. The city also had an option to purchase the property at a stated price, less rentals already paid. The Court held that the lease violated Article 8, § 3. It made no difference to the Court whether the instrument was called a lease or a conditional sales contract. The important question, said the Court, is whether it created an indebtedness or liability exceeding that year's income and revenue.

The other case involving a lease was the more recent case of *City of Pocatello v. Peterson*, 93 Idaho 774, 473 P.2d 644 (1970). There, the city sought to sell part of its airport property to a contractor, who was to construct a new airport terminal building and lease it back to the city for a 20-year term at a rental of \$6,000 a month. (It is not entirely clear from the facts of the case whether or not the city had an option to purchase the property at the end of the lease. The dissent notes, at p. 781, fn. 2, that the intent apparently was to deed the property to the city at the end of the lease, without further payment.) The Court, in a 3-2 decision, upheld the lease solely on the "ordinary and necessary expenses" doctrine. The majority opinion did not discuss the issue of whether or not an indebtedness or liability was created, and impliedly conceded that there was a liability created by the lease. The dissenting opinion, however, discussed this question at length, and in view of the majority's apparent concession that a liability did exist, we view this portion of the dissenting opinion as carrying sufficient weight to justify its consideration here.

The dissent, after citing the annotations and cases on lease-financing noted above, stated:

Although the mere fact that a lease contains an option to purchase the property upon expiration of the lease will not inevitably transform the lease into a conditional sales agreement, *where the option purchase price decreases with the rentals paid, or where the rentals are sufficient to cover the purchase price so that at the termination of the lease the city acquires the property without any additional payment, or payment of only a nominal sum*, the authorities indicate that the lease does create an indebtedness for the aggregate amount of the rentals. 93 Idaho 774, 78-781. (Emphasis added)

The dissenting opinion cited, among other cases, *City of Phoenix v. Phoenix Civic Auditorium & Convention Center Association, Inc.*, 90 Ariz. 270, 408 P2d 818 (1965), and concluded that, regardless of whether an indebtedness for the aggregate rentals existed, it was evident that there was a "liability" for the future years' rentals to become due.

From the foregoing cases, we derive the following applicable principles:

1. An indebtedness or liability, exceeding the current year's revenue and income, will, unless it is an ordinary and necessary expense or is approved by the voters, violate Article 8, § 3, Idaho Constitution. *Feil v. City of Coeur d'Alene*, 23 Idaho 32, 129 P. 643 (1912), et al.

2. A lease for more than one year, whether or not it contains an option to purchase, creates a liability under Article 8, § 3. *Williams v. City of Emmett*, 51 Idaho 500, 6 P.2d 475 (1931).

3. A lease is not necessarily an invalid installment sale contract merely because it contains an option to purchase, where it is in fact a lease and the rentals are intended as rentals and not as installment purchase payments. *City of Los Angeles v. Offner*, 19 Cal. 2d 483, P2d 14 (1942); Anno: 71 A.L.R. 1318, 145 A.L.R. 1362.

4. Where the option purchase price decreases with the rentals paid, or where the rentals are sufficient to cover the purchase price so that at the termination of the lease the lessee acquires the property without additional payment, or payment of only a nominal sum, it will be viewed as an installment purchase agreement prohibited by Article 8, § 3, and not as a genuine lease. *City of Los Angeles v. Offner*, *supra*; *City of Phoenix v. Phoenix Civic Auditorium & Convention Center Assoc., Inc.*, 90 Ariz. 270, 408 P2d 818 (1965); *City of Pocatello v. Peterson*, 93 Idaho 774, 473 P.2d 644 (1970) (dissenting opinion).

Applying these principles to the proposed agreement, we note, first, that the agreement makes no pretense of being a straight lease, but is straight-forwardly denominated a "Lease-Purchase Agreement." Exhibit B clearly sets forth that part of each lease payment will be applied to interest and part to principal, further evidencing an installment purchase payment. The rental payments are clearly intended to cover the purchase price in full, since the option purchase price at completion of the lease is only \$1.00. Unlike *City of Los Angeles v. Offner*, *supra*, the agreement demonstrates an obvious intent on the part of the County to purchase the incinerating equipment over a period of years.

Further, the agreement expressly states that the continuation of the agreement, and payment of the rental payments, shall be an absolute and unconditional obligation so long as the County shall have funds available from which

such payments may lawfully be made. It sets forth the various sources from which those payments are to be made. (This provision could easily be viewed as a pledge or dedication of those funds for application to the lease-purchase agreement. *Feil v. City of Coeur d'Alene*, *supra*.) The County covenants to do all things lawfully within its power to obtain and maintain funds each year from which payments may be made. It further covenants to include these within its budget each year, and to use its bona fide best efforts to have that portion of the budget approved. Then, and only after adequate notice to the Trustee, can the County terminate the agreement.

We view it as likely that the Idaho courts would find that the lease-purchase agreement is actually an installment purchase agreement whereby the County is attempting to circumvent the constitutional prohibitions against long-term obligations, and that the County is attempting to incur a liability beyond the current year by binding itself to exercise its best efforts in future years to maintain and finance a multi-year installment purchase agreement. Only actual litigation could determine this issue for certain, but it would appear to require a marked departure from a long line of previous decisions for a court to find that this type of obligation was not at least a liability, if not an indebtedness, under Article 8, § 3, Idaho Constitution.

2. "Ordinary and necessary" expense

Assuming that the agreement does create an indebtedness or liability within Article 8, § 3, the next inquiry is whether the expenses for the incinerator property fall within the exception for "ordinary and necessary expenses authorized by the general laws of the state."

The Idaho Supreme Court has made it clear that whether an expense is ordinary and necessary will depend upon the particular facts of each situation. As the Court stated in *City of Pocatello v. Peterson*, 93 Idaho 774, 473 P.2d 644 (1970):

This Court emphasizes that it is meaningless to consider the broad question as to whether the repair, maintenance or construction of an airport is to be considered an ordinary and necessary expense without also taking into account the contextual framework peculiar to the City of Pocatello. In other words, whereas an airport may be considered an ordinary and necessary expense for some municipalities, it may not be for others.

Counties are expressly empowered, under Idaho Code §§ 31-4401, et seq., to provide for the removal and disposal of solid waste. Idaho Code § 31-4403 makes it the duty of each county to maintain and operate solid waste disposal systems. We have little doubt that an expenditure for solid waste incineration equipment would be regarded as authorized by the general laws of the state. *City of Los Angeles v. Offner*, 19 Cal. 2d 483, 122 P.2d 14 (1942). This, however, does not *ipso facto* make such expenditures ordinary and necessary. *City of Pocatello v. Peterson*, *supra*.

The terms "ordinary" and "necessary" have been defined by the Idaho Supreme Court in various contexts. Early cases indicated that such expenditures must be usual to the maintenance of the county government, the conduct of its necessary business, and the protection of its property, as well as necessary for such purposes. *Dunbar v. Board of Cmrs of Canyon County*, 5 Idaho 407, 49 P.

409 (1897). However, it is now well established that an expenditure, though not of a frequently recurring nature, may nonetheless be ordinary and necessary. *Hickey v. City of Nampa*, 22 Idaho 41, 124 P. 280 (1912); *City of Pocatello v. Peterson*, *supra*. While the earlier cases tended to hold one-time expenditures for improvements not to be ordinary and necessary (*Bannock County v. Bunting*, 4 Idaho 156, 37 P. 277 (1894); *County of Ada v. Bullen Bridge Co.*, 5 Idaho 79, 47 P. 818 (1896); *McNutt v. Lemhi County*, 12 Idaho 63, 84 P. 1054 (1906)), except in the case of casualty or accident to an existing improvement (*Hickey v. City of Nampa*, *supra*), there has been a definite tendency in the more recent cases to uphold even seldom-recurring expenses as ordinary and necessary.

Thus, where a city had maintained an airport facility for more than 20 years, and now found it inadequate to serve the traveling public, rentals on a new facility were held to be ordinary and necessary expenses in *City of Pocatello v. Peterson*, 93 Idaho 774, 473 P.2d 664 (1970). Where a county was operating a hospital, expenditures made for the purpose of improving the structure of the hospital to comply with state safety standards were held to be ordinary and necessary, in light of the public health needs of Idaho and the shortage of existing hospital facilities. *Board of County Commissioners v. Idaho Health Facilities Authority*, 96 Idaho 498, 531 P.2d 558 (1975). One older case even upheld an expenditure for an entirely new jail by a newly-created county. *Jones v. Power County*, 27 Idaho 656, 150 P.2d 1915.

It is entirely possible, in light of these cases, that the Idaho Supreme Court might uphold an expenditure for a solid-waste incinerator as an ordinary and necessary expense, in light of the County's mandatory duty to provide for solid waste disposal, existing circumstances, growth of population, demonstrated need for this method of solid waste disposal, public health and safety considerations, and the like. However, it should be kept in mind that the two most recent decisions on this point, *City of Pocatello v. Peterson*, *supra*, and *Board of County Commissioners v. Idaho Health Facilities Authority*, *supra*, as well as the earlier leading case of *Hickey v. City of Nampa*, *supra*, involved repairs to or replacement of *existing facilities*, and this appears to have been an important consideration in upholding the particular expenditures therein involved as ordinary and necessary. It is by no means certain that the Idaho courts would view an entirely new solid waste incineration system, where none had existed before, as an ordinary and necessary, rather than an extraordinary, expenditure.

We caution against undue reliance upon the ordinary and necessary expense exception. However, we believe that local counsel, familiar with the past practices and present needs of Cassia County, would be in the best position to make the initial determination of whether this expenditure qualifies as ordinary and necessary under the principles and cases cited above. Ultimate determination could only be made by the courts if a proper action were brought to test the proposed contract. Perhaps this could be accomplished by a declaratory judgment action as was done in *City of Pocatello v. Peterson*, *supra*.

For all of the foregoing reasons, we are unable to find, as requested, that the proposed amendment would not violate Article 8, § 3, Idaho Constitution, or that the agreement, if executed, would constitute a binding and valid obligation of Cassia County.

AUTHORITIES CONSIDERED:

1. *Idaho Constitution*, Article 8, § 3.
2. *Idaho Code*, §§ 31-4401 et seq.
3. *Idaho Cases*:
 - a. *Bannock County v. Bunting*, 4 Idaho 156, 37 P. 277 (1894).
 - b. *County of Ada v. Bullen Bridge Co.*, 5 Idaho 79, 47 P. 818 (1896).
 - c. *Dunbar v. Board of Commissioners of Canyon County*, 5 Idaho 407, 49 P. 409 (1897).
 - d. *McNutt v. Lemhi County*, 12 Idaho 63, 84 P. 1054 (1906).
 - e. *Hickey v. City of Nampa*, 22 Idaho 41, 124 P. 280 (1912).
 - f. *Feil v. City of Coeur d'Alene*, 23 Idaho 32, 129 P. 643 (1912).
 - g. *Boise Dev. Co., Ltd. v. Boise City*, 26 Idaho 347, 143 P. 531 (1914).
 - h. *Jones v. Power County*, 27 Idaho 656, 150 P. 35 (1915).
 - i. *School Dist. No. 8 v. Twin Falls County Mutual Fire Ins. Co.*, 30 Idaho 400, 164 P. 1174 (1917).
 - j. *Miller v. City of Buhl*, 48 Idaho 668, 284 P. 843 (1930).
 - k. *Williams v. City of Emmett*, 51 Idaho 500, 6 P.2d 475 (1931).
 - l. *Straughan v. City of Coeur d'Alene*, 53 Idaho 494, 24 P.2d 321 (1932).
 - m. *Cruzen v. Boise City*, 58 Idaho 406, 74 P.2d 1037 (1937).
 - n. *General Hospital v. City of Grangeville*, 69 Idaho 6, 201 P.2d 750 (1949).
 - o. *O'Bryant v. City of Idaho Falls*, 78 Idaho 313, 303 P.2d 672 (1956).
 - p. *Hanson v. City of Idaho Falls*, 92 Idaho 512, 446 P.2d 634 (1968).
 - q. *City of Pocatello v. Peterson*, 93 Idaho 774, 473 P.2d 664 (1970).
 - r. *Boise Redev. Agency v. Yick Kong Corp.*, 94 Idaho 876, 499 P.2d 575 (1972).
 - s. *Board of Commissioners v. Idaho Health Facilities Authority*, 96 Idaho 498, 531 P.2d 588 (1975).
4. *Other Authorities*
 - a. *City of Los Angeles v. Offner*, 19 Cal. 2d 483, 122 P.2d 14 (1942).

b. *City of Phoenix v. Phoenix Civil Auditorium & Convention Center Association Inc.*, 90 Ariz. 270, 408 P.2d 818 (1965).

c. Annotations: 71 A.L.R. 1318, 112 A.L.R. 278, 145 A.L.R. 1362.

d. Magnusson, "Lease Financing by Municipal Corporations as a Way Around Debt Limitations," 25 Geo. Wash. L. Rev. 377 (1957).

DATED this 26th day of September, 1979.

ATTORNEY GENERAL
State of Idaho
/s/ DAVID H. LEROY

ANALYSIS BY:

MICHAEL C. MOORE
Deputy Attorney General
Chief, Local Government Division

DHL:MCM:om

cc: Idaho State Library
Idaho Supreme Court
Idaho Supreme Court Library

ATTORNEY GENERAL OPINION NO. 79-21

TO: Jack Barney
Criminal Justice Specialist
Law Enforcement Planning Commission
Statehouse Mail

Per Request for Attorney General Opinion

QUESTION PRESENTED:

"If a county prosecuting attorney is not employed full time does he have to handle city misdemeanor cases? Can he charge for his services?"

CONCLUSION:

Part A. No. A prosecuting attorney, whether full time or part-time, should not regularly handle "city" misdemeanors, in the absence of a contract to do so, since such prosecutions are outside the scope of his statutorily defined duties.

Part B. Yes. A prosecuting attorney, whether full time or part-time, may "charge" for his services through a contract with any city within the county to prosecute non-conflicting misdemeanors that would normally be prosecuted by a city attorney.

ANALYSIS:

Part A. The office of prosecuting attorney receives its lifeblood and legal efficacy through the Idaho Constitution, Art. V, § 18, which provides:

§ 18. Prosecuting Attorneys — Term of office — Qualifications. — A prosecuting attorney shall be elected for each organized county in the state by the qualified electors of such county, and shall hold office for the term of two years, and shall perform such duties as may be prescribed by law; he shall be a practicing attorney at law, and a resident and elector of the county for which he is elected. He shall receive such compensation for services as may be fixed by law.

The part of § 18 that is germane to this particular discussion is: “A prosecuting attorney . . . shall perform such *duties as may be prescribed by law*.”

The duties of a prosecuting attorney as “prescribed by law” have been defined by statutes since 1897. *Idaho Code*, §31-2604 contains the most fundamental statutory description of an Idaho prosecuting attorney’s functioning duties. With respect to the overlap of criminal prosecutorial jurisdiction between a county prosecuting attorney and a city attorney, the relevant provision of §31-2604 is quoted as follows:

It is the duty of the prosecuting attorney: . . . (2) to prosecute all criminal actions for violation of all laws or ordinances, except city ordinances, and except traffic offenses and misdemeanor crimes committed within the municipal limits of a city when the arrest is made or a citation issued by a city law enforcement official, which shall be prosecuted by the city attorney or his deputy, . . . I.C. §31-2604.2

Quite clearly, §31-2604 mandates that prosecutorial jurisdiction and duty of prosecution for “[violation of] city ordinances . . . traffic offenses . . . and misdemeanor crimes committed within the municipal limits of a city when the arrest is made or a citation issued by a city law enforcement official” lies with the city attorney, not the county prosecuting attorney.

Consequently, a prosecuting attorney, in his capacity as county attorney, whether full time or part-time, should not regularly prosecute city misdemeanors, as §31-2604 indicates that such offenses “shall be prosecuted by the city attorney or his deputy.” However, this limitation on a prosecuting attorney with regard to a city misdemeanor prosecution would not prevent the county prosecuting attorney from contracting with any city in the relevant county to prosecute such misdemeanors as discussed *post* in Part B of this opinion.

Part B. In analyzing the ability of a county prosecuting attorney to “charge for his services” in prosecuting city misdemeanor cases, provisions of the Idaho Constitution, as well as some Idaho statutes become relevant. Extracting the following part of Art. V, §18, already quoted in full *ante*, emphasis is added by underlining an important phrase:

He shall receive such *compensation for services as may be fixed by law*.
Art. V, §18, Idaho Const.

Next, Art. XVIII, §7¹ of the Idaho Constitution provides the following additional authority with emphasis again added by underlining certain important wording:

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. Art. XVIII, §7, Idaho Const.

The above-quoted constitutional provisions make it distinctly clear that a prosecuting attorney is to receive only "compensation for services as may be fixed by law." Since a prosecuting attorney's services are outlined by statute and the duties relating to a city misdemeanor prosecution have already been discussed in Part A, *ante*, the beginning premise is that the prosecution of city misdemeanors is not a required service of a prosecuting attorney. Therefore, if a prosecuting attorney provides such a service, any compensation received in remuneration would be for service outside the scope of service contemplated by either Art. V, §18 or Art. XVIII, §7 of the Idaho Constitution and would thus not necessarily violate those constitutional limitations. *Albeit* there are cases prohibiting a county official and other public officials from contracting with or receiving extra compensation from a political subdivision, the focal point of those cases centers around two improper practices which are not present when a county prosecuting attorney contracts with a city to provide criminal prosecution. The two prohibited practices were as follows:

¹ This constitutional provision has been previously analyzed in its application to county sheriffs in Attorney General opinion No. 72-75.

1. A county officer receiving payment beyond the officer's fixed annual salary for services rendered in his official capacity; or

2. A public official contracting with the *political subdivision of which he is an officer* to perform services outside the scope of the official's normal duties. This act is considered against public policy and fraught with conflict of interest.

See: *McRoberts v. Hoar*, 28 Idaho 163, 152 P. 1046 (1915); *Givens v. Carlson*, 29 Idaho 133, 157 P. 1120 (1916); *Corkerv. Cowen*, 30 Idaho 213, 164 P. 85 (1917); *Sanborn v. Pentland*, 35 Idaho 639, 208 P. 401 (1922); *Hudson v. Bertsch*, 38 Idaho 52, 220 P. 109 (1923); *Nez Perce County v. Dent*, 53 Idaho 787, 27 P.2d 979 (1933); *Benewah County v. Mitchell*, 57 Idaho 1, 61 P.2d 284 (1936); *Nampa Highway Dist. No. 1 v. Graves*, 77 Idaho 381, 293 P.2d 269 (1956); *Hanagan v. County of Lea*, 64 N.M. 103, 325 P.2d 282 (1958). The issue presented herein contains neither of the prohibited practices, as a county prosecuting attorney neither has an official duty to prosecute city misdemeanors nor would the prosecutor be contracting with a political subdivision of which he or she is an officer owing a duty.

At this point, a distinction must be made between a part-time and a full-time prosecuting attorney.

Part-Time Prosecuting Attorney:

It cannot be disputed that a part-time prosecuting attorney is permitted a private practice of law while performing the public duties of his office. A large

portion of Idaho prosecuting attorneys are part-time (only 7 counties out of 44 counties statutorily require full time prosecuting attorneys, I.C. §31-3113), and traditionally they have maintained a private clientele while discharging the duties of their public office. Accordingly, there is little difficulty in concluding that a part-time prosecuting attorney, given the freedom of private practice, may contract with a city, as a private client, to provide any number of legal services, including criminal prosecution of city misdemeanors. The only limitation on such a contract is that of preventing ethical conflicts of interest that arise when representing two clients with similar interests.

Full-Time Prosecuting Attorney:

Idaho Code, §31-3113, requires that the prosecuting attorneys in 7 counties devote "full time to the discharge of their duties." With regard to prosecuting attorneys that are required to be full time by statute the question that must be resolved is: Can a prosecuting attorney contract to provide legal services, i.e., city misdemeanor prosecution, that are not contained within the defined duties of office, when the attorney is statutorily mandated to devote full time to his public duties as a prosecuting attorney? The heart of that issue is contained in the definition of the word "compensation" as used in Art. XVIII, §7 and Art. V, §18 of the Idaho Constitution previously quoted herein.

The leading case relating to this issue is the case of *County of Madera v. Gendron*, 59 Cal.2d 798, 382 P.2d 342, 6 ALR3d 555 (1963). In that case, the California court held that the restriction on the private practices of law goes to the *compensation*, rather than the duties, of the office of a prosecuting attorney (in that case, district attorney). The duties of the office remain the same throughout the state. The court in the *Madera* case stated:

As part of the *compensation* of their offices, the legislature permits certain district attorneys to engage in the private practice of law, thus giving them an opportunity to increase their total compensation. By prohibiting such activity, the legislature has determined that the district attorney of Madera should not enjoy this privilege; the effect of the legislation is to limit this compensation to the official figure.

By virtue of the *Madera* case, Art. V, §18, and Art. XVIII, §7, the Idaho legislature would have the power to fix the "compensation" of prosecuting attorneys by statutorily manipulating their ability to maintain a private clientele. The Idaho statute precluding compensation outside of that provided for the performance of their public services would thus prohibit any special contractual relationship to non-county clients for "full-time" prosecutors with only one exception, which is found in *Idaho Code*, §31-3113.

Idaho Code, §31-3113 provides full-time prosecuting attorneys with the ability, through following certain procedural requirements, of securing supplemental compensation by serving as city prosecuting attorney. The relevant part of §31-3113 is quoted as follows:

With the unanimous approval of the board of county commissioners, and with the consent of the prosecuting attorney, the prosecuting attorney may contract with any city within the county to prosecute non-conflicting misdemeanors in those counties where the prosecuting attorneys are required to devote full time to the discharge of their duties.

Consequently, in view of the definition of "compensation" as contained in the leading case of *County of Madera v. Gendron*, *supra*, and *Idaho Code*, §31-3113, a full-time prosecuting attorney may charge for his services through a contract with any city within the relevant county to prosecute non-conflicting misdemeanors.

AUTHORITIES CONSIDERED:

1. Idaho Constitution, Art. V, §18; Art. XVIII, §7
2. *Idaho Code*, §§31-2604, 31-3113
3. *McRoberts v. Hoar*, 28 Idaho 163, 152 P. 1046 (1915)
4. *Givens v. Carlson*, 29 Idaho 133, 157 P. 1120 (1916)
5. *Corker v. Cowen*, 30 Idaho 213, 164 P. 85 (1917)
6. *Sanborn v. Pentland*, 35 Idaho 639, 208 P. 401 (1922)
7. *Hudson v. Bertsch*, 38 Idaho 52, 220 P. 109 (1923)
8. *Nez Perce County v. Dent*, 53 Idaho 787, 27 P.2d 979 (1933)
9. *Benewah County v. Mitchell*, 57 Idaho 1, 61 P.2d 284 (1936)
10. *Nampa Highway Dist. No. 1 v. Graves*, 77 Idaho 381, 293 P.2d 269 (1956).
11. *Hanagan v. County of Lea*, 64 N.M. 103, 325 P.2d 282 (1958)
12. *County of Madera v. Gendron*, 59 Cal.2d 798, 382 P.2d 342, 6 ALR3d 555 (1963)
13. Attorney General Opinion No. 72-75

DATED this 15th day of October, 1979.

ATTORNEY GENERAL
State of Idaho
/s/ DAVID H. LEROY

ANALYSIS BY:

MICHAEL B. KENNEDY
Deputy Attorney General
Chief, Criminal Justice Division

DHL:MBK:lb

cc: Idaho State Library
Idaho Supreme Court
Idaho Supreme Court Library

ATTORNEY GENERAL OPINION NO. 79-22

TO: Mr. Jerry L. Evans
State Superintendent of Public Instruction
State Department of Education
Len B. Jordan Office Building
Boise, Idaho 83720

Per Request for Attorney General Opinion

QUESTIONS PRESENTED:

Question 1. Does a long-term lease or a long-term purchase agreement whereby a school district would lease or purchase a school facility from a private corporation create a prohibited indebtedness or liability within the meaning of Article 8, §3, Idaho Constitution?

Question 2. If a long-term lease or a long-term purchase agreement does create an indebtedness or liability, is such an agreement nevertheless exempt from the restrictions of Article 8, §3, Idaho Constitution, as an ordinary and necessary expense authorized by the general laws of the state?

Question 3. Can a school district borrow funds from a private corporation to construct a school facility, and pay back the loan over a long-term period with the first payment being due one year after the corporation's property is added to the tax rolls?

Question 4. Can a school district issue bonds to build new physical facilities based on a future estimated assessed value of property within the district?

Question 5. With respect to a long-term lease or purchase agreement, can a school district include as a term of any such agreement a provision whereby the private corporation would waive all rights to future payments under the agreement if it should cease doing business in the district prior to the intended termination date of said agreement?

Question 6. Whether a school district may receive a present lump-sum payment from a private corporation in lieu of property taxes to be levied against that corporation in the future?

CONCLUSIONS:

1. A long-term lease or a long-term purchase agreement probably does create an indebtedness or liability within the meaning of Article 8, §3, Idaho Constitution, and would be subject to the constitutional restrictions unless such lease or purchase agreement qualifies as an "ordinary and necessary" expense.

2. Although recent decisions of the Idaho Supreme Court have expanded upon the "ordinary and necessary" expense exception, the Court has not yet gone so far as to hold that lease or purchase payments for a completely new facility, which does not replace an existing facility, are ordinary and necessary expenses.

3. A school district cannot borrow funds from other than a commercial lending institution where repayment is to be made from the school plant facilities fund.

4. A school district cannot issue bonds based upon a future estimated assessed value of property within the district, but rather is limited to the assessed value of property as of the date of approval by the electorate in the school bond election.

5. A school district is a body corporate and politic and is empowered to lease and/or purchase a school facility, and to make contracts to carry out such powers. Specific terms or conditions of a lease or purchase agreement, if agreed to by the parties and otherwise permitted under the law of contracts, are enforceable by the district.

6. Since the legislature has established definite and certain procedures for the collection and payment of property taxes, a school district probably lacks authority to devise or participate in any alternative taxing procedures.

ANALYSIS:

Our opinion has been requested as to the validity, under Idaho law, of a number of proposed financing arrangements between Challis School District and a private corporation. The financing proposals arise because of the corporation's plans to conduct mining operations in the Challis area and the resulting large increase in the number of students attending the Challis schools. The corporation has expressed its intention to cooperate with the district so as to make the district's financial burdens as small as possible.

For the purposes of this opinion, it is assumed that the school district is currently utilizing its bonding capacity to the maximum, and that it does not have current or anticipated budgeted funds sufficient to construct the physical facilities necessary to accommodate the large number of new students.

1. *Liability or indebtedness under Article 8, §3.*

Article 8, §3, Idaho Constitution, provides in pertinent part:

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 in such year, without the assent of two-thirds of the qualified electors thereof voting at an election to be held for that purpose, nor unless, before or at the time of incurring such indebtedness, provision shall be made for the collection of an annual tax sufficient to pay the interest on such indebtedness as it falls due, and also to constitute a sinking fund for the payment of the principal thereof, within thirty years from the time of contracting the same.

Any indebtedness or liability incurred contrary to this provision shall be void: Provided, that this section shall not be construed to apply to the ordinary and necessary expenses authorized by the general laws of the state. . . .

The Attorney General has recently had the opportunity to consider the "indebtedness or liability" provision of Article 8, §3. Attorney General Opinion No. 79-20, released September 26, 1979, addressed the validity of a lease-purchase agreement between Cassia County and a private corporation for solid waste

incinerating equipment. Attorney General Opinion No. 79-20 discussed the decisions of the Idaho Supreme Court relating to the "indebtedness or liability" question, and a portion of that discussion is directly applicable here.

As pointed out in Attorney General Opinion 79-20:

An early, and probably still the leading, case considering the "indebtedness or liability" question is *Feil v. City of Coeur d'Alene*, 23 Idaho 32, 129 P. 643 (1912). This case involved an ordinance which provided for the purchase of a water system for \$180,000 and for the issuance of revenue bonds of the city payable solely from a special fund to be created from the revenues of the water system over a period of 20 years. This fund was to be used solely for the purpose of payment of the principal and interest on the bonds, and the city covenanted to pay into the fund monthly from the revenues an amount sufficient to pay principal and interest on the bonds at maturity. No election had been held, and it was undisputed that the city did not have sufficient current revenues to meet all of the obligations created by the ordinance.

In holding that the ordinance created an impermissible obligation under Article 8, §3, the Court considered decisions from other states which held that obligations payable exclusively from special funds did not create liabilities under somewhat similar constitutional provisions. In striking down the ordinance, the Court rejected the reasoning of those decisions:

The reasoning, however, of those cases utterly fails when applied to our constitution, for the reason that none of those cases deals with the word "liability," which is used in our constitution, and which is a much more sweeping and comprehensive term than the word "indebtedness"; nor are the words "in any manner or for any purpose" given any special attention by the courts in the foregoing cases. The framers of our constitution were not content to say that no city shall incur any indebtedness "in any manner or for any purpose," but they rather preferred to say that no city shall incur any *indebtedness or liability* in any manner, or for any purpose.

It must be clear to the ordinary mind on reading this language that the framers of the constitution meant to cover all kinds and character of debts and obligations for which a city may become bound, and to preclude circuitous and evasive methods of incurring debts and obligations to be met by the city or its inhabitants.

Id at 49-50, 129 P. at 649. As discussed in Attorney General Opinion No. 79-20:

The Court defined "liability" as the state of being bound or obliged, in law or justice, whether or not an "indebtedness" was also created. It proceeded to analyze the ordinance in light of this definition. It found that the city had obligated itself in many ways under the ordinance, such as by pledging itself to charge and collect sufficient revenues to meet the bond obligations, to maintain a special fund therefor, to charge sufficient water rates to meet not only the bond obligations but also to pay all operating expenses, and by hypothecating, in advance, the water system revenues to payment of these obligations. The Court concluded that the city had incurred an unlawful liability under Article 8, §3.

As Attorney General Opinion No. 79-20 notes, the *Feil* case concerned an outright purchase of a facility, and the Court unequivocally held that such purchase was an indebtedness within the meaning of Article 8, §3. In numerous subsequent cases concerning the liability or indebtedness provision of Article 8, §3, the Court has never retreated from the broad and inclusive definition of liability of the *Feil* case, nor has it ever overruled the holding of *Feil*, in spite of many opportunities to do so. It is therefore our conclusion that the holding of *Feil v. City of Coeur d'Alene*, *supra*, continues to be the view of the Idaho Supreme Court, and that any long-term purchase agreement would constitute an indebtedness or liability within Article 8, §3.

In regards to a long-term lease, research discloses only two Supreme Court decisions under Article 8, §3 directly involving a lease. One is *Williams v. City of Emmett*, 51 Idaho 500, 6 P2d 475 (1931), which involved a three-year lease of street-sprinkling equipment. The Court held that the lease violated Article 8, §3 because it created an indebtedness or liability exceeding that year's income and revenue. The Court stated that it made no difference whether or not the instrument was called a lease or a conditional sales contract. The other case involving a lease is *City of Pocatello v. Peterson*, 93 Idaho 774, 473 P2d 644 (1970), discussed below under Question 2. The Court, in a three-two decision, upheld the lease solely on the ordinary and necessary expense doctrine. The majority opinion did not discuss the issue of whether or not an indebtedness or liability was created, and impliedly conceded that there was a liability created by the lease.

In view of the Court's clear holding in *Williams v. City of Emmett*, *supra*, that a lease for more than one year creates a liability under Article 8, §3, we view it as likely that the Idaho courts would find that any long-term lease would also constitute a liability or indebtedness under Article 8, §3. It should be noted, however, that a lease for one year with the option to renew solely at the discretion of the district would, under the decisions of the Idaho court, appear to be valid. Since a one-year lease would not incur liability or indebtedness exceeding the revenue for that year, Article 8, §3 would appear to be inapplicable.

2. "Ordinary and necessary" expense

Assuming that a long-term lease or long-term purchase agreement does create an indebtedness or liability under Article 8, §3, the next question is whether the rental payments or installment payments fall within the exception for "ordinary and necessary expenses authorized by the general laws of the state."

As pointed out in Attorney General Opinion No. 79-20:

The Idaho Supreme Court has made it clear that whether an expense is ordinary and necessary will depend upon the particular facts of each situation. As the Court stated in *City of Pocatello v. Peterson*, *supra*:

This Court emphasizes that it is meaningless to consider the broad question as to whether the repair, maintenance or construction of an airport is to be considered an ordinary and necessary expense without also taking into account the contextual framework peculiar to the City of Pocatello. In other words, whereas an airport may be considered an ordinary and

necessary expense for some municipalities, it may not be for others.

School districts, through their boards of trustees, are expressly empowered:

1. To rent to or from others, school buildings or other property used, or to be used, for school purposes;
2. To contract for the acquisition, purchase, construction or repair of any school building, other property, or equipment, necessary for the operation of the school district.

Idaho Code §33-601 (1) (2). The fact that such powers are expressly conferred, however, does not *ipso facto* make expenditures to rent or purchase such a facility ordinary and necessary. *City of Pocatello v. Peterson, supra*. As analyzed in Attorney General Opinion 79-20:

The terms "ordinary" and "necessary" have been defined by the Idaho Supreme Court in various contexts. Early cases indicated that such expenditures must be usual to the maintenance of the county government, the conduct of its necessary business, and the protection of its property, as well as necessary for such purposes. *Dunbar v. Board of Cmrs of Canyon County*, 5 Idaho 407, 49 P. 409 (1897). However, it is now well established that an expenditure, though not of a frequently recurring nature, may nonetheless be ordinary and necessary. *Hickey v. City of Nampa*, 22 Idaho 41, 124 P. 280 (1912); *City of Pocatello v. Peterson, supra*. While the earlier cases tended to hold one-time expenditures for improvements not to be ordinary and necessary (*Bannock County v. Bunting*, 4 Idaho 156, 37 P. 277 (1894); *County of Ada v. Bullen Bridge Co.*, 5 Idaho 79, 47 P. 818 (1896); *McNutt v. Lemhi County*, 12 Idaho 63, 84 P. 1054 (1906)); except in the case of casualty or accident to an existing improvement (*Hickey v. City of Nampa, supra*); there has been a definite tendency in the more recent cases to uphold even seldom-recurring expenses as ordinary and necessary.

The only Idaho case involving school district physical facilities is *Petrie v. Common School District No. 5*, 44 Idaho 92, 255 P. 318 (1927). There the Court held that a contract entered into between the district and a contractor for the construction of an addition to the schoolhouse was void under Article 8, §3 because the district lacked sufficient funds to pay for the construction. The Court did not cite or discuss or even mention the ordinary and necessary expense exception to the constitutional prohibition, but rather apparently assumed the construction not to be ordinary and necessary.

More recent decisions of the court, although not dealing with school districts, evidence a tendency to uphold even seldom-recurring expenses as ordinary and necessary. As pointed out in Attorney General Opinion No. 79-20:

Thus, where a city had maintained an airport facility for more than 20 years, and now found it inadequate to serve the traveling public, rentals on a new facility were held to be ordinary and necessary expenses in *City of Pocatello v. Peterson, supra*. Where a county was operating a hospital, expenditures made for the purpose of improving the structure of the hospital to comply with state safety standards were

held to be ordinary and necessary, in light of the public health needs of Idaho and the shortage of existing hospital facilities. *Board of County Commissioners v. Idaho Health Facilities Authority*, 96 Idaho 498, 531 P.2d 558 (1975). One older case even upheld an expenditure for an entirely new jail by a newly-created county. *Jones v. Power County*, 27 Idaho 656, 150 P.2d 1915.

It is possible, in light of *Peterson* and *Idaho Health Facilities*, that the Idaho Supreme Court might uphold rental or purchase payments for a new school facility to be ordinary and necessary in light of the school district's mandatory duty to provide adequate educational facilities to meet the needs of the district. However, it must be kept in mind that in both these decisions, the Court noted that the expenses were to be incurred in renovating and/or replacing existing facilities. This appears to have been considered by the majority in upholding the expenditures as ordinary and necessary.

Despite this observation by the majority, we suggest that it might be persuasively argued that Justice McFadden, dissenting in both cases for the same reasons, more carefully assessed the facts: "This case [*Peterson*] does not deal with 'repair and replacement' of existing facilities, but does deal with *rental payments* for a wholly new terminal building." *City of Pocatello v. Peterson*, *supra*, at p. 779. [Emphasis in text.] In *Peterson*, the city sold unimproved land to a private party who was to construct the new airport terminal thereon and upon completion lease the structure back to the city. The fact that another airport had been maintained previously does not render a completely new facility a mere 'repair or replacement'. Comparing the *Peterson* case to the anticipated situation in the Challis School District, it seems reasonable to argue that because the district has for years maintained school facilities, any expenditures to expand current facilities or to construct new facilities would be analogous to the City of Pocatello building a new airport terminal to meet the changing needs of the city. However, because the Court has not yet had occasion to consider this precise question, it is by no means certain that the Idaho courts would view an entirely new educational facility, where none had existed before, as an ordinary and necessary expense.

We therefore caution against undue reliance upon the ordinary and necessary expense exception. However, we believe that the local school district counsel, familiar with past practices and present needs of the district, would be in the best position to make the determination of whether this rental or purchase expenditure qualifies as ordinary and necessary under the principles and cases cited above. Ultimate determination could only be made by the courts, if a proper action were brought. Perhaps this could be accomplished by declaratory judgment action as was done in *City of Pocatello v. Peterson*, *supra*.

3. Long-term loan.

Under the analysis set forth above in Questions 1 and 2, a construction loan to the district from a private corporation requiring repayment over a long-term period would probably be within the restrictions of Article 8, §3, Idaho Constitution. If so, Article 8, §3 requires the school district to obtain voter approval and to provide "for the collection of an annual tax sufficient to pay the interest on such indebtedness as it falls due, and also to constitute a sinking fund for the payment of the principal thereof. . . ."

Idaho law provides one possible method (aside from bonding, which the Challis School District is already utilizing to capacity) by which a school district can generate revenues to repay a long-term construction loan. This method is provided by Idaho Code §33-901, which empowers a district board of trustees to:

Create and establish a school plant facilities reserve fund. . . .

Disbursements from said fund may be made from time to time as the board of trustees may determine, for purposes authorized in §33-1102, Idaho Code, and for lease and lease purchase agreements for such purposes and *to repay loans from commercial lending institutions extended to pay for the construction of school plant facilities.* . . . [Emphasis added].

It must be carefully noted that the statute expressly limits loan payments from the plant facilities fund to repay construction loan from *commercial lending institutions*. The districts therefore have no authority to commit the plant facilities fund to repay a loan from a private corporation other than a commercial lender. Accordingly, it appears that no sinking fund for the payment of the principal amount of the loan could be established by the school district in this instance, and therefore, that no such indebtedness could be incurred.

4. *Bond issue based on future estimated assessed valuation.*

Idaho Code §33-1103 provides in pertinent part that:

An elementary school district which employs not less than six (6) teachers, or a school district operating an elementary school or schools, and a secondary school or schools, or issuing bonds for the acquisition of a secondary school or schools, may issue bonds in an amount not to exceed twenty-five percent (25%) of the assessed valuation thereof. . . .

The term "assessed valuation" means "the amount of the last preceding equalized assessment of all taxable property within the school district on the tax rolls *completed and available as of the date of approval by the electorate in the school bond election.*" Idaho Code §33-1103. [Emphasis added.]

By express definition then, the school district can only issue bonds against the *current* assessed value of property within the district. Estimated future property values may not form the basis of a bond issue.

5. *Specific terms or conditions of a lease or purchase.*

Idaho Code §33-301 provides that:

Each school district, now or hereafter established, when validly organized and existing, is declared to be a body corporate and politic, and in its corporate capacity may sue and be sued and may acquire, hold and convey real and personal property necessary to its establishment, extension and existence. It shall have authority to issue negotiable coupon bonds and incur such other debts, in the amounts and manner, as provided by law.

Pursuant to this grant of authority to the school district, the board of trustees of the district is given the following powers and duties:

1. To rent to or from others, school buildings or other property used, or to be used, for school purposes.

2. To contract for the acquisition, purchase, construction or repair of any school building, other property, or equipment, necessary for the operation of the school district. Idaho Code §33-601.

Given these express statutory powers and duties, a district may enter into such agreements as are necessary to effectuate such powers and duties. These agreements are subject to the general rules of the law of contracts relating to formation, consideration, performance and remedies. 68 Am. Jur. 2d Schools §57.

Under general contract principles, absent fraud, unconscionability or duress, the parties may include as part of their bargain a term or condition whereby one party's continued performance will terminate upon the occurrence of a given event. J. Calamari, *Contracts* §§11-1 - 11-6, (2nd Ed. 1977).

The precise language of such a term or condition must, of course, be determined by the parties. School district counsel, familiar with the financial requirements and limitations of the individual district, would best be able to assist the district in drafting a clause expressing the parties' intent.

6. *Lump-sum prepayment of taxes.*

The authority of a taxing district to accept a lump-sum prepayment of taxes is not directly addressed in the Idaho Code. Idaho Code §63-1102 provides in part that:

All taxes extended on the real property assessment roll *shall* be payable to the tax collector without penalty on or before December 20 of the year in which the taxes were extended on the roll. The taxes *may* be paid in two (2) equal installments, the first on or before December 20 and the second on or before June 20 of the following year. [Emphasis added.]

There is no statutory provision for prepayment of taxes by an individual taxpayer, and no statutory method for distributing the taxes in the event of such lump-sum prepayment.

However, decisions from Idaho and other jurisdictions dealing with the power of a local governmental agency to deviate from the legislative grant of authority conclude that when the legislature has enacted a definite and certain method of procedure for the conduct of any given governmental business, such procedure must be adhered to.

Thus, in *City of Clovis v. Crain*, 357 P.2d 667 (N.M. 1960), where a taxpayer challenged the municipality's method of collecting certain city assessments, which method did not comply with the statutory procedures, the Court said:

The fact that appellee [municipality] has proceeded as it has, instead of following the statutory provisions of Sections 14-32-6 to 14-32-11, *supra*, does not eliminate the legal question as to appellee's power to so proceed. Nowhere in § 14-32-4, *supra*, is there an express grant of

authority to appellee to proceed as it did in this case. *The rule is well established that where the statute directs in definite terms the manner in which municipal acts are to be exercised, such statutory method must be substantially followed.* *Fancher v. Board of County Com.*, 28 N.M. 179, 210 P. 237; *Bibo v. Town of Cubero Land Grant*, 65 N.M. 103, 332 P.2d 1020; *McQuillin, Municipal Corporations*, 3d ed., Vol. 2, § 10.27, p. 640. Also the direction of definite and certain method of procedure in the grant of power to the municipality excludes all other methods by implication of law. *McQuillin*, § 10.27, *supra*.

Moreover, the statute making the grant of power to the municipality must be strictly construed, and the municipality must keep closely within its limits. 38 Am. Jur., § 385, p. 74. . . .

It has been held that a municipality is without power to change, by local law, the method of collecting taxes established by the legislature. *City of Yakutat v. Libby, McNeill & Libby*, D.C. Alaska, 98 F. Supp. 1011, 13 Alaska 378; *County Securities v. Seacord*, 278 N.Y. 34, 15 N.E.2d 179; *Mount Vernon Trust Co. v. City of Mount Vernon*, Sup., 12 N.Y.S.2d 416. [Emphasis added.]

Id at 669.

In *Tobias v. State Tax Comm.*, 85 Idaho 250, 378 P.2d 628 (1963), in an action challenging the tax classification of certain property interests, the Court held:

The procedure prescribed by the legislature in respect to levying, assessing and collecting taxes must be strictly observed. [Citations omitted.]

Id at 258, 378 P.2d at 632.

Because the legislature has provided a definite procedure for the payment and collection of taxes, it would appear from these decisions and the authorities cited therein that a local school district would lack authority to devise any alternative methods of receiving or collecting taxes. Even if an individual taxpayer were to accede to the alternative procedures, the fundamental lack of authority in the district to enter into such a procedure would preclude its implementation.

For these reasons, it seems doubtful that the Idaho courts would validate a school district's participation in any proposal for the prepayment of funds in lieu of future property taxes to be levied against that taxpayer.

AUTHORITIES CONSIDERED:

1. *Idaho Constitution*, Article 8, §3.
2. *Idaho Code*, a. §33-301; b. §33-601 (1) (2); c. §33-901; d. §33-1103; e. §63-1102.
3. *Idaho Cases*
 - a. *Feil v. City of Coeur d'Alene*, 23 Idaho 32, 129 P. 643 (1912).

- b. *Petrie v. Common School District No. 5*, 44 Idaho 92, 255 P.318 (1927).
- c. *Williams v. City of Emmett*, 51 Idaho 500, 6 P.2d 475 (1931).
- d. *Tobias v. State Tax Comm.*, 85 Idaho 250, 378 P.2d 628 (1963).
- e. *City of Pocatello v. Peterson*, 93 Idaho 774, 473 P.2d 644 (1970).
- f. *Board of County Commissioners v. Idaho Health Facilities Authority*, 96 Idaho 498, 531 P.2d 558 (1975).

4. *Other Authorities*

- a. *City of Clovis v. Crain*, 357 P.2d 667 (N.M. 1960)
- b. J. Calamari, *Contracts*, §§11-1 - 11-6 (2nd ed. 1977)
- c. 68 Am. Jur. 2d Schools §57.
- d. Attorney General Opinion No. 79-20 (September 26, 1979)

DATED this 15th day of October, 1979.

ATTORNEY GENERAL
State of Idaho
/s/ DAVID H. LEROY

ANALYSIS BY:

KENNETH L. MALLEA
Deputy Attorney General
Education

DHL:KLM:jr

cc: Idaho State Library
Idaho Supreme Court
Idaho Supreme Court Library

ATTORNEY GENERAL OPINION NO. 79-23

TO: Arthur J. Robinson
City Clerk
City of Hauser, Idaho
Route 1
Post Falls, Idaho 83854

Per Request for Attorney General Opinion

QUESTION PRESENTED:

Does Idaho Code § 50-2201, which provides that a petition for disincorporation of a city be signed "by not less than half of the qualified electors thereof as shown

by the vote cast at the last general city election held therein,” require the signatures of not less than half of those voters *who actually voted at the election*, or does it require signatures of not less than half of the *number* of those who did vote at the last election, whether the signers actually voted at the last election or not?

CONCLUSION:

Idaho Code § 50-2201 requires the signatures of one-half of the qualified electors of the city, which number is determined by the number voting at the last general city election. The signature of a presently qualified elector is valid and should be counted, whether or not the particular elector voted or was registered to vote at the last city election.

ANALYSIS:

Your question is whether the signatures of qualified city electors should be counted on a petition for disincorporation of a city, where the signers did not vote, and were not registered to vote, in the last city election.

Idaho Code § 50-2201 provides, in pertinent part:

A city existing under the laws of this state may disincorporate after proceedings had as required by sections 50-2201 through 50-2213. The council shall, upon receiving a petition therefor, *signed by not less than half of the qualified electors thereof as shown by the vote cast at the last general city election held therein*, submit the question of whether such city shall disincorporate to the electors of such corporation. . . . [Emphasis added.]

We find no Idaho Supreme Court case directly in point. Two Idaho cases have held, under initiative or referendum laws, that similar statutes required that signers be registered electors at the time they sign the petition. *Dredge Mining Control – Yes! Inc. v. Cenarrusa*, 92 Idaho 480, 455 P.2d 655 (1968); *Kerley v. Wetherell* 61 Idaho 31, 96 P.2d 503 (1939). The *Cenarrusa* case involved the general Idaho initiative statute, I.C. § 34-1805, which required that a petition be signed by “legal voters equal in number to not less than ten per cent (10%) of the electors of the state based upon the aggregate vote cast for governor at the general election next preceding the filing of such . . . petition.” The *Kerley* case involved a city charter referendum provision which required a petition “signed by qualified electors equal in number to twenty five per cent of the entire vote cast for mayor” at the last general city election. Neither case indicated that a registered elector was disqualified from signing if he or she had not voted in the last election.

The only case closely in point which our research has disclosed is *State ex rel. Stanley v. City Council of Avon*, 39 Ohio St. 2d 150, 314 N.E.2d 167, which is a 1974 Ohio Supreme Court decision. In that case, a city charter referendum provision required signatures of “ten (10%) percent of the total electors voting at the last regular municipal election.” The Ohio Supreme Court rejected a contention that this required signatures of 10% of those actually voting at the election.

That language clearly provides that the ten-percent signature requirement is *of the total electors voting* at the last municipal election. There is no language in either the Avon Charter or the Ohio Constitu-

tion which justifies a disqualification of signatures of registered voters simply because they had not voted in the last municipal election. [Emphasis in original.]

314 N.E. 2d 167, 169

We find this reasoning persuasive. We find no indication in I.C. § 50-2201 that the term "qualified electors thereof" is restricted to those electors who actually voted at the last general city election. The phrase "as shown by the vote cast at the last general city election" refers to the determination of the *number* of those who did vote. The statute thus requires a number of signatures of presently qualified electors in excess of half of those who did so vote, and does not disqualify any presently qualified elector from signing such a petition, or from having his or her signature counted, merely because they were not qualified electors at the time of the last general city election. See, generally, 5 McQuillin, *Municipal Corporations*, § 16.61.

We conclude, then, that any presently qualified city elector may sign a disincorporation petition under I.C. § 50-2201, and that such signatures must be counted in determining whether the petition is valid, whether or not such elector actually voted or was registered to vote in the last general city election.

AUTHORITIES CONSIDERED:

1. Idaho Code § 50-2201.
2. Idaho Code § 34-1805.
3. *Dredge Mining Control – Yes!. Inc. v. Cenarrusa*, 92 Idaho 480, 455 P.2d 655 (1968).
4. *Kerley v. Wetherell*, 61 Idaho 31, 96 P.2d 503 (1939).
5. *State ex rel. Stanley v. City Council of Avon*, 39 Ohio St. 2d 150, 314 N.E.2d 167 (1974).
6. 5 McQuillin, *Municipal Corporations* (3d Ed. Rev. 1969), § 16-61.

DATED this 29th day of October, 1979.

ATTORNEY GENERAL
State of Idaho
/s/ DAVID H. LEROY

ANALYSIS BY:

MICHAEL C. MOORE
Deputy Attorney General
Chief, Local Government Division

DHL:MCM:om

cc: Idaho State Library
Idaho Supreme Court
Idaho Supreme Court Library
Cameron Phillips, Deputy Kootenai County
Prosecuting Attorney

ATTORNEY GENERAL OPINION NO. 79-24

TO: Darrell V. Manning
Implementation Director
Governor's Management Task Force

Per Request for Attorney General Opinion

QUESTIONS PRESENTED:

If the State of Idaho were to elect to have the Internal Revenue Service collect its individual income tax pursuant to Internal Revenue Code §§6361 through 6365, and the regulations promulgated pursuant to those sections, would the election violate any provision of the *Idaho Constitution*? Without limiting the foregoing question, we ask that you particularly address three subsidiary questions. (1) Does the requirement that the State prospectively accept substantive Congressional changes to the Internal Revenue Code constitute a prohibited delegation of legislative authority? (2) Is it constitutional to grant to federal prosecutorial authorities sole responsibility and discretion for the prosecution of state tax crimes? (3) Can the State Tax Commission and the Governor, acting jointly, or other competent jurisdiction be empowered to adjust the Idaho individual income tax rates, as necessary to compensate for changes in federal law?

CONCLUSION:

Internal Revenue Code §§6361 through 6365 and corresponding regulations would require the State to prospectively accept substantive Congressional changes in the Internal Revenue Code as a condition of federal collection of state income taxes. Therefore, a constitutional amendment would be required to implement federal collection of state income taxes to avoid a prohibited delegation of legislative power.

A constitutional amendment would also assure that the federal collection proposal would not result in an impermissible delegation of judicial and prosecutorial functions.

ANALYSIS:**I.****DELEGATION OF LEGISLATIVE AUTHORITY**

Sections 6361 through 6365 of the Internal Revenue Code provide for the federal collection of state income taxes if certain requirements are met.

A state which elects to participate in federal collection must either impose its state income tax as a percentage of federal tax liability, or impose a single rate or series of graduated rates against federal taxable income, as defined in §63 of the Internal Revenue Code, with several mandatory adjustments.

A state electing federal collection is also permitted the following three optional adjustments:

1. A tax on the amount taxed pursuant to §§55 or 56 of the Internal Revenue Code (relating to the minimum tax for tax preferences).

2. A credit for state or local sales taxes.

3. A credit for income tax paid to another state or political subdivision thereof.

Consequently, upon electing federal collection of state personal income taxes, the structure of the state tax would be determined by the federal tax structure except as to tax rates applied and the optional adjustments chosen.

Section 6362 (f) (2) (A) of the Internal Revenue Code requires a participating state to adopt automatically any amendments to the federal personal income tax during the period of the federal-state agreement.

Changes made by the state regarding tax rates and optional adjustments must be enacted prior to November 1 of the year preceding the calendar year for which the changes are to be effective. §6362 (f) (2) (B).

The period of the federal-state agreement depends upon the date the state makes its election for federal collection and the date the state notifies the Secretary of the Treasury of its intent to withdraw from the agreement.

A state electing to enter into an agreement for federal collection must give notice of its election to the Secretary of the Treasury at least six (6) months prior to the January 1 on which federal collection will begin. §6363 (a), I.R.C.

A state may withdraw from the federal collection agreement by act or resolution of the legislature, notice of which is given to the Secretary of the Treasury at least six (6) months prior to the January 1 on which federal collection shall cease. §6363 (b), I.R.C.; Regulation 301.6362-2.

Therefore, upon electing federal collection of state income taxes, the Internal Revenue Service would collect the tax for a minimum of one calendar year. The termination of federal collection for any calendar year would require legislative action prior to July 1 of the preceding year.

Consequently, any changes in the Internal Revenue Code relating to taxable income which were adopted during the last six (6) months of any calendar year would automatically become a part of the income tax laws of Idaho during the succeeding calendar year.

If the Congressional changes were made from July through November, while the state could not affect the substance of the changes, it could mitigate the fiscal impact of the changes by altering its tax rates and notifying the Secretary of the Treasury prior to November 1. However, if Congressional changes were made during November or December, the state would be unable to address either the substance or fiscal impact of the changes until the changes had been in operation for one calendar year.

Without an amendment to the *Idaho Constitution*, such a delegation of legislative power would violate Article III, Section 1 of the *Idaho Constitution*, which provides in pertinent part:

The legislative power of the state shall be vested in a senate and house of representatives. . . .

The Idaho Supreme Court has construed this section in several cases involving questions of delegation of legislative power.

An analogous issue to that raised here was presented in the case of *Idaho Savings and Loan Association v. Roden*, 83 Idaho 128, 350 P.2d 255 (1960).

In that case, the Idaho Supreme Court considered legislative provisions which required Idaho savings and loan associations to insure their accounts with the Federal Savings and Loan Insurance Corporation in the State of Idaho. However, to obtain such insurance, savings and loan associations were required by federal law to abide by and conform with the National Housing Act and any amendments thereto, and the rules and regulations of the Federal Home Loan Bank Board.

Finding the legislation to be an unconstitutional delegation of legislative power the Court said:

The legal axiom that all legislative power is vested in the Legislature of the State of Idaho has been set forth in *State v. Nelson*, 36 Idaho 713, 213 P. 358. The legislature cannot delegate its authority to another government or agency in violation of our Constitution. *State v. Nelson*, *supra*; *State v. Heitz*, 72 Idaho 107, 238 P.2d 439.

* * *

Thus, it is demonstrated that the unconstitutional provisions delegating to the Congress and the Home Loan Bank Board the legislative power and function to make future laws and regulations governing appellant's business and its right to remain in business, are not severable from the provisions requiring appellant to obtain insurance of accounts by the Federal Savings and Loan Insurance Corporation. The provisions requiring such insurance are therefore unconstitutional and void. [82 Idaho at 134-135]

The rule which has developed in Idaho regarding delegation to other public bodies is that delegation is permissible where the legislature establishes the standard or defines the limits by which rulemaking or factfinding may be judged. However, it is impermissible for the legislature to delegate to another public body the power to set the standard itself. The rule has also been analyzed as a distinction between the delegation of legislative functions and executive functions. See, e.g. *Kerner v. Johnson*, 99 Idaho 433, 583 P.2d 360 (1978); *State v. Kellogg*, 98 Idaho 541, 568 P.2d 514 (1977); *Board of County Commissioners v. Idaho Health Facilities Authority*, 96 Idaho 498, 531 P.2d 588 (1975); *Boise Redevelopment Agency v. Yick Kong Corp.*, 94 Idaho 876, 499 P.2d 439 (1951).

In these cases it was held that the various agencies were factfinding or making rules consistent with a standard established by the legislature.

By way of contrast, election of federal collection of state personal income tax would require the delegation to Congress and the Secretary of the Treasury the right to set the standards by which income taxes would be imposed. Consequently, a tax collection proposal would require a constitutional amendment.

II.

TRANSFER OF PROSECUTORIAL FUNCTIONS

Section 6361 (d) of the Internal Revenue Code provides that the federal government will represent states electing federal collection of state income taxes in administrative and judicial proceedings, civil or criminal, relating to collection of the state's individual income tax.

Existing case law in Idaho does not provide a definitive answer to whether this provision would result in an unconstitutional delegation of powers of county prosecutors and the Attorney General pursuant to Article IV, Section 1, and Article V, Section 18, *Idaho Constitution*.

The only Idaho case bearing on the question is *Padgett v. Williams*, 82 Idaho 28, 348 P.2d 944 (1960). In that case, the Court held that it was permissible for the Board of Highway Directors to employ an attorney who was not an Assistant Attorney General as legal counsel to the Board.

However, Section 6361 (d), Internal Revenue Code, encompassing both civil and criminal proceedings, involves a far greater degree of delegation than existed in *Padgett*, *supra*. Moreover, important policy considerations would be involved in the delegation of criminal prosecutorial functions traditionally left to elected prosecutors and attorneys general.

Therefore, if a proposed constitutional amendment is drafted to allow for federal collection of the state's individual income tax, we would recommend that the proposed amendment contain language allowing for federal representation of Idaho's interests.

III.

NON-LEGISLATIVE ADJUSTMENTS OF TAX RATES

Internal Revenue Code §6263 (f) (2) (B) provides:

Any change made by the State in the tax imposed by the State will not apply to taxable years beginning in any calendar year for which the State agreement is in effect unless such change is *enacted* before November 1 of such calendar year. [Emphasis supplied.]

Neither the Internal Revenue Code nor the regulations interpreting this provision indicate whether the word "enacted" was used in its technical sense as in a legislative enactment, or in a more general sense meaning something performed, effected, or decreed.

Therefore, before a proposed constitutional amendment is referred to the voters to implement federal collection, we would recommend that a ruling be requested from the Internal Revenue Service in order to clarify this issue.

In terms of the *Idaho Constitution*, we find no problem with delegating to some factfinding administrative agency or committee the duty to establish the tax rates, provided that the legislature provides sufficient guidelines by which the rates will be determined.

IV.

OTHER CONSTITUTIONAL PROBLEMS

The only other potential constitutional problem which we have found regarding federal collection of taxes results from §6361 (b) of the Internal Revenue Code.

That section provides that the procedures for judicial review of state personal income tax determinations shall be the same as those provided for judicial review of federal income tax determinations. Such procedures replace judicial procedures under state law. The only exception is that state courts may decide matters dealing with the state constitution.

The requirement may result in an impermissible delegation of state judicial power.

Article V, Section 2, *Idaho Constitution*, provides in pertinent part:

The judicial power of the state shall be vested in a court for the trial of impeachments, a Supreme Court, district courts, and such other courts inferior to the Supreme Court as established by the legislature.

Article V, Section 20, *Idaho Constitution*, provides:

The district court shall have original jurisdiction in all cases, both at law and in equity, and such appellate jurisdiction as may be conferred by law.

Article V, Section 13, *Idaho Constitution*, provides in pertinent part:

The legislature shall have no power to deprive the judicial department of any power or jurisdiction which rightly pertains to it as a coordinate department of the government; . . .

In *Johnson v. Diefendorf*, 56 Idaho 620, 632, 57 P.2d 1068 (1936), *State v. Finch*, 79 Idaho 275, 281-282, 315 P.2d 529 (1957), and *Electors of Big Butte Area v. State Board of Education*, 78 Idaho 602, 610, 308 P.2d 255 (1957), the Idaho Supreme Court held that judicial power may not be delegated to executive agencies.

The Court has never considered a case involving delegation of judicial power to the federal judiciary. Consequently, while the rationale of the above cited cases could be extended to a case involving delegation to the federal judicial system, such a result is by no means certain.

Therefore, to avoid this potential problem, if a proposed constitutional amendment is drafted to allow for federal collection of state personal income taxes, it should contain language allowing for judicial review of contested cases by the federal judiciary.

AUTHORITIES CONSIDERED:

1. *Idaho Constitution*: Article III, Section 1, Article IV, Section 1, Article V, Sections 2, 13, 18 and 20

2. Idaho Cases:

Idaho Savings and Loan Association v. Roden, 83 Idaho 128, 350 P.2d 255 (1960)

Kerner v. Johnson, 99 Idaho 433, 583 P.2d 360 (1978)

State v. Kellogg, 98 Idaho 541, 568 P.2d 514 (1977)

Board of County Commissioners v. Idaho Health Facilities Authority, 96 Idaho 498, 531 P.2d 588 (1975)

Boise Redevelopment Agency v. Yick Kong Corp., 94 Idaho 876, 499 P.2d 439 (1951)

Padgett v. Williams, 82 Idaho 28, 348 P.2d 944 (1960)

Johnson v. Diefendorf, 56 Idaho 620, 57 P.2d 1068 (1936)

State v. Finch, 79 Idaho 275, 315 P.2d 529 (1957)

Electors of Big Butte Area v. State Board of Education, 78 Idaho 602, 308 P.2d 255 (1957)

3. Statutes:

§§6361-6365, Internal Revenue Code

DATED this 3rd day of December, 1979.

ATTORNEY GENERAL
State of Idaho
/s/ DAVID H. LEROY

ANALYSIS BY:

DAVID G. HIGH
Deputy Attorney General

DGH/to

cc: Idaho Supreme Court
Idaho Supreme Court Library
Idaho State Library

ATTORNEY GENERAL OPINION NO. 79-25

TO: Mr. Darrell Manning
Director, Department of Transportation

Mr. Dale R. Tankersley
Personnel Supervisor, Department of Transportation

Per Request for Attorney General Opinion

QUESTION PRESENTED:

Idaho Code § 67-5309C (c), (ii), states in part, . . . "However, such ingrade advancement shall not be construed as a vested right."

Question: Does this reference to non-vesting of ingrade advancement apply to ingrade attainment subsequent to July 1, 1979 only, or does it retroactively pertain to ingrade attainment prior to July 1, 1979?

CONCLUSION:

The reference to non-vesting of ingrade advancement refers only to movement forward in the pay plan from the steps previously attained.

With the enactment of House Bill 296, First Regular Session of the Forty-fifth Legislature, Ch. 192, 1979 Sess. L., p. 554, codified in Idaho Code §§ 67-5309C and 67-5316, the Idaho Legislature completely abandoned the previous statutory salary advancement process. The new process, part of which is quoted above, has specifically removed any vested right which an employee had to advancement based on meritorious service.

ANALYSIS:**I.****RELEVANT LEGISLATION AND CHANGES**

It must be initially noted that the above-quoted sentence is only part of the far-reaching changes in the state's personnel law the Forty-fifth Session of the Idaho Legislature enacted in 1979. The Legislature completely abandoned the previous automatic advancement based on one year of satisfactory performance. Idaho Code § 67-5309C, enacted in Ch. 376, 1976 Id. Sess. L., p. 1215. It has substituted for the old manner of advancement the concept of increases based solely on merit criteria, as established in Idaho Code § 67-5309C (c): "such as increased productivity, reliability, effectiveness and the ability to achieve the goals and objectives of the particular position."

The Legislature specifically addressed the question of the vested right to salary advancement it had previously conferred on employees, and, as quoted in the question presented, repudiated it. In addition, and significant to the analysis of the question presented, it abolished the right of the employees to appeal to the Idaho Personnel Commission the placement of their job classification in a pay grade and the employee's particular step within the pay grade assigned to the classification (Ch. 192, 1979 Id. Sess. L., Sec. 2, codified in Idaho Code § 67-5316).

Additionally, the departments in which the classified employees of the state are employed are constitutionally established (Id. Const., Art. 4, § 20). The Legislature has given to the various department directors considerable authority over salaries within the context of the classified personnel system:

(9) *Each department head may, subject to law, and the state merit system where applicable, transfer employees between positions, remove persons appointed to positions, and change the duties, titles, and compensation of employees within the department.* [Emphasis added.] Idaho Code § 67-2405

These statutes must be read together and viewed in the light of the relationship between the State of Idaho and its employees. When the statutes are subjected to the analysis necessitated by the recently developed standards regarding statutory entitlements as set out by the U.S. Supreme Court, it is clear they establish a new relationship between the State and its employees.

The three ways an appointing authority can reduce an employee's pay are discussed in this opinion. This is done to offer guidance to the appointing authority on this sensitive issue.

Moreover, the opinion will discuss in detail the reasons why the Idaho Code § 67-5309C (c), (ii) non-vesting provision cannot be applied retroactively, i.e., to the steps in the pay grade previously attained.

II.

RELATIONSHIP BETWEEN THE STATE AND ITS EMPLOYEES

The nature of the relationship between the State of Idaho and the employees affected by the changes found in Idaho Code § 67-5309C (c), is not established by custom, common law or contract. The relationship is wholly governed by statute (and applicable valid regulations) as set out in Title 67, Chapter 53, of the Idaho Code. "All departments of the state of Idaho and all employees in such departments, except those employees specifically exempt, shall be subject to this act and to the system of personnel administration which it prescribes." Idaho Code § 67-5303. "The purpose of [the] personnel system is to provide a means whereby classified employees of the state of Idaho shall be examined, selected, retained and promoted on the basis of merit and their performance of duties, thus effecting economy and efficiency in the administration of state government. The legislature declares that, in its considered judgment, the public good and the general welfare of the citizens of this state require enactment of this measure, under the powers of the state." Idaho Code § 67-5301.

The question presented raises issues which have not yet been considered by the Idaho Supreme Court, except to the extent that the Idaho Personnel Commission enabling legislation in Title 67, Chapter 53, establishes the authority for the procedures affecting the classified workforce of the State. *Swisher v. State Department of Environmental and Community Services*, 98 Id. 565, 569 P.2d 910 (1977).

In the civil service context similar to the one created in Title 67, Chapter 53, numerous cases in other jurisdictions have held that the terms and conditions of employment are fixed by statute and regulation and not by contract between the

public employer and the individual employee. See, e.g., *Personnel Division of Executive Department v. St. Clair*, 10 Or. App. 106, 498 P. 2d 809 (1972); *Miller v. State*, 18 Cal. 3d 808, 557 P. 2d 970 (1977); *Baker v. Civil Service Commission*, ____ W. Va. ____, 245 S.E. 2d 908 (1978); compare Idaho Attorney General Opinion 76-48. The Legislature, having the power to make changes in public employment relationships, may do so even if the changes result in diminishing the economic rights of civil service employees. *Miller, supra*; *McCarthy v. Sheriff of Suffolk County*, 336 Mass. 779, 322 N.E. 2d 758 (1975).

With regard to the question of compensation which has been presented, just as there is no vested right to public employment, there exists no vested right to a given level of compensation. *St. Clair, supra*, citing *Butterworth v. Boyd*, 12 Cal. 2d 140, 82 P. 2d 434 (1938), and *Halek v. City of St. Paul*, 227 Minn. 477, 35 N.W.2d, 705 (1949). The most recent case dealing precisely with this point is from the Supreme Court of Delaware. In *Grant v. Nellius*, ____ Del. ____, 377 A. 2d 354 (1977), salaried employees of the state brought a declaratory judgment action against the Secretary of Finance and others. The employees questioned the constitutionality of an act rescinding a statutory salary supplement. The act provided an automatic cost-of-living adjustment which was scheduled to be paid to the employees on a certain future date. The Court first decided there was no vested contractual right to the increase because the repealed act worked prospectively and any rights which might flow to the employees would accrue in the future. The rights to the salary supplement fell "within the category of future benefits which may be lawfully adjusted or eliminated by the State prior to the vesting date. Since that was accomplished in this case, plaintiffs never acquired any rights to the salary supplement" *Grant, supra*, at 358. The second question posed by the plaintiffs was whether the repeal of the supplement has deprived the plaintiffs of property without due process of law. Because the plaintiffs had not established a contract right to the supplement, "it follows that they did not possess a constitutionally protected property interest which was taken by the Act." *Id.* at 358.

Therefore, based on this authority, it is our opinion that the classified employees of the State of Idaho possess neither a vested right to employment nor a vested right to a certain level of compensation, except as it is fixed by statute.

III.

THE EFFECT OF SUPREME COURT DECISIONS ON THE RELATIONSHIP

While the power the State possesses over its employees' salaries may be seen as broad, is there a constitutional limit imposed by the Amend. XIV prohibition against taking property (the money an employee receives as compensation for services rendered in this question) without due process of law? (U.S. Const. Amend. XIV) Several recent U.S. Supreme Court cases suggest that, because of the nature of the relationship between the State and its employees, the answer is no. While the following cases discussed involve dismissals of public employees by public employers, the presented question and the possible diminution of salary presents a far less harsh action of the state against an employee. Of course, should the action be disciplinary in nature, the full panoply of due process protection established in the Personnel Commission Act would be invoked.

Prior to the development of the doctrine of statutory entitlement, government employment was seen as a privilege, which could be removed without due

process, and not as a constitutionally protected right. *Bailey v. Richardson*, 341 U.S. 918, 71 S. Ct. 669, 93 L. Ed. 1352 (1951), aff'g 182 F.2d 46 (D.C. Cir. 1950).

In the companion cases of *Board of Regents v. Roth*, 408 U.S. 564, 92 S.Ct. 2701, 33 L. Ed. 2d 548 (1972) and *Perry v. Sindermann*, 408 U.S. 593, 92 S.Ct. 2694, 33 L. Ed. 2d 570 (1972), the right-privilege doctrine was wholly abandoned. For the first time, the Court found that for Due Process Clause purposes a person could claim to have a property interest in a government benefit if they could establish a legitimate claim of entitlement to it. (*Roth*, 408 U.S. at 577) The entitlement rested on a mutual objective and reasonable expectancy of the continued receipt of the benefit which was founded in state law. In the dismissal context, *Roth* was found not to have a property interest because he was a probationary professor with a finite contract and no provision for renewal. *Sindermann*, under a similar system of year-to-year contracts, was found to have a property interest where he showed that the college had a de facto tenure system. The key to whether the reasonable expectation existed was found in "existing rules or understandings that stem from an independent source such as state law." *Roth*, 408 U.S. at 577.

Where government employment is concerned, the touchstone is the terms of employment read in light of state law. Where state law withholds entitlement to employment, the employee cannot acquire a property interest in employment sufficient to involve Amend. XIV due process protection. Therefore, the doctrine of entitlement [to the reasonable expectance of continued employment of an employee] is a two-edged sword. While the state can create a property interest subject to due process protection by creating entitlements, it can, by design, also deny entitlements to prevent accrual of protected property interests. *Comment*, 77 Wis. L.R. 575 at 584-5 (1977). The entitlement questioned here is the right to receive a certain step within the pay grade assigned to the employee's classification. As will be shown, the right is to receive the pay grade assigned to the classification and not to any particular step within a pay grade.

The effect of the second edge of the sword was seen in *Arnett v. Kennedy*, 416 U.S. 134, 94 S.Ct. 1633, 40 L. Ed. 2d 15 (1974). There the dismissed federal career civil servant waived a pre-termination hearing with the supervisor and appealed from the decision dismissing him. The procedure was established by Civil Service regulation. He claimed, instead, a right to a pre-termination hearing before an impartial hearing officer. The plurality opinion of Justice Rehnquist viewed the statute as a whole. While it gave certain rights, these rights were limited by Congress. The terms of the right were defined by statute, which created an interest inferior to a full property interest. *Arnett*, 416 U.S. at 154. While five Justices found the procedure to meet constitutional due process standards, the reasoning of the plurality opinion was rejected by six of the justices. The dissenters would have found an absolute entitlement to continued employment and, therefore, a property interest. It appears the dissenters would abandon the theory established in *Roth*, *supra*, that the relevant law is the source of the property interest in employment and ignored the lawmakers' intent to put limitations on it.

The final case in this analysis involves the dismissal of a police officer under the terms of a local ordinance. In *Bishop v. Wood*, 426 U.S. 341, 96 S.Ct. 2074, 48 L. Ed. 2d 684 (1976), the petitioner was dismissed from his job after failing to improve his performance. His only appeal right was to receive a written notice of the reasons for his dismissal. He alleged that, under *Roth* and *Sindermann*, there was an implied promise of continued employment which gave him a

property interest in his job. The majority opinion by Justice Stevens looked to the relevant state law for direction. Because the state law was found not to create an unqualified expectation of continued employment absent cause for dismissal, the employee did not acquire a property interest in the job. The court, ultimately, deferred to the creator of the interests: "... the ultimate control of state personnel relationships is, and will remain with the states; they may grant or withhold tenure at their unfettered discretion." *Bishop, supra*, 426 U.S. at 349, n. 14. The Court "accept[ed] the harsh fact that numerous individual mistakes are inevitable in the day-to-day administration of our affairs. . . . In the absence of any claim that a public employer was motivated by a desire to curtail or penalize the exercise of an employee's constitutionally protected rights, we must presume that official action was regular and, if erroneous, can best be corrected in other ways. *Id.* at 349-50.

The result in *Bishop* indicates that *Roth* can be read as providing a narrow avenue for creation of property interests in employment. If a property type entitlement is not clearly expressed in the statute defining the terms of employment, courts following *Bishop*, absent applicable custom or common law, are likely to find no protectable interest. It appears that the court, ultimately, will refer to the legislative enactment and determine whether what is given amounts to a property interest or not. Where the statute grants unqualified tenure, the court will find a property interest and due process protection will attach.

The range of interests protected by procedural due process is not infinite, as may be seen in *Bishop*. Even where the interest is protected by due process guarantees, the Court's inquiry will look to the nature of the interest rather than weight of the interest. *Ingraham v. Wright*, 430 U.S. 651, 79 S. Ct. 1401, 51 L. Ed. 2d 711 (1977). As noted above, the nature of the interest at stake in the question presented is the possible diminution in salary due to valid fiscal, budgetary or performance reasons. This interest is a far lesser one than the possibility of the termination of employment with the state.

IV.

THE STATUTE CANNOT BE APPLIED RETROACTIVELY

Generally, the Due Process clause does not prohibit retroactive civil legislation, unless the consequences are seen as particularly harsh or oppressive. *U.S. Trust Co. of New York v. New Jersey*, 431 U.S. 1, 97 S.Ct. 1505, 52 L. Ed. 92 (1977). Thus, while the effect of a reduction in salary may be seen as a hardship on an individual employee, it is far less harsh than the removal of the right to receive his or her salary.

However, in construing the various statutes of the State, the Idaho Supreme Court has on several occasions addressed the question of the retroactive effect of the statutes of the Idaho Legislature.

With regard to the presented question, two things must be noted. First, the statute refers only to "such ingrade *advancement*" (emphasis added) Idaho Code § 67-5309C (c), (ii), and makes no reference to any ingrade retreat. Second, the statute is mandatory (*Goff v. H.J.H. Co.*, 95 Id. 837, 521 P. 2d 661 [1974]) as to whether advancement is a vested right: "shall *not* be construed as a vested right." (emphasis added) Idaho Code § 67-5309C (c), (ii). The statute can now be

read to say: Even though an employee's performance may meet the merit criteria set forth in this statute, he/she has no absolute right to advance in salary. This is the major departure from the old system where satisfactory performance gave the employee a vested right to advancement.

It is well settled Idaho law that a statute affecting vested rights, in this question, the steps in the pay grade gained under the old automatic advancement for satisfactory performance, will be construed as operating prospectively only. *Ford v. City of Caldwell*, 79 Id 499, 321 P. 2d 589 (1958). The law would be retroactive if it took away or impaired vested rights acquired or transactions completed, i.e., the advancement in the pay grade, under the previously existing law. *Ohlinger v. U.S.*, 135 F. Supp. 40 (D.C. Id. 1955); *Frisbie v. Sunshine Mining Co.*, 93 Id. 169, 445 P. 2d 977 (1969). The Idaho Supreme Court has repeatedly stated that no law of Idaho will be applied retroactively in the absence of a clear legislative intent to that effect. See *Johnson v. Stoddard*, 96 Id. 230, 526 P. 2d 835 (1974); and *Edwards v. Walker*, 95 Id. 289, 507 P. 2d 486 (1973), and cases cited therein. As noted above, a retroactive construction is not prohibited. Where substantive rights are involved by a retroactive effect of the statute, the court will not construe or imply retroactivity. *Kent v. Id. Pub. Util. Comm.*, 93 Id. 618, 469 P. 2d 745 (1970).

Before a statute will be given retroactive and retrospective effect, the statute itself must contain words which indicate that the legislature intended the statute to have such an effect. *Application of Boyer*, 73 Id. 852, 248 P. 2d (1952). The words of the statute may be fairly said to remove the vested right to advancement for meritorious performance. It may not be implied from the words of the statute that the Legislature intended this statute to work retrospectively.

V.

FURTHER CONSIDERATIONS

Application of the above analysis to the question presented, thus, in our opinion, allows the State to give and remove certain rights. However, the case law of this State imposes certain limitations on what the law may give and remove.

The statutes of the Idaho Legislature prohibit reduction in rank or grade except for cause. Idaho Code § 67-5309 (n). The reduction in rank or grade found in this subsection obviously relates solely to those reductions imposed for disciplinary reasons. By creating a mutual reasonable expectancy of continued employment absent the statutory cause for discipline, the state would have otherwise imposed on it the obligations under the Due Process Clause necessitated by *Roth* and *Sindermann*. It has, instead, chosen to impose on itself a full panoply of due process obligations. The relevant statutory scheme begins with an elaborate departmental grievance procedure. Idaho Code § 67-5309A. It is followed by an appeal to the Idaho Personnel Commission in its quasi judicial capacity (Idaho Code § 67-5316(a)) which has a *limited* jurisdiction (Idaho Code § 67-5316(b)). Finally, appeal may be had to the District Court and ultimately to the Supreme Court. Idaho Code § 67-5316 (j).

The second way an appointing authority may reduce salaries is discussed in *St. Clair, supra*. An appointing authority, because of a shortage of funds, budgeting requirements, changes in programs or other similar, sufficient

reasons, may reduce salaries so long as it has the statutory authority to do so. This authority is found in Idaho Code § 67-2405. The Legislature, additionally, has the authority to modify its previous statutes relating to salary increases. *Grant, supra*.

The statutory scheme of grant and disenfranchisement is found in the state's salary setting process. The Idaho Personnel Commission is obligated to develop a plan for classifying the positions covered by the act according to their duties and responsibilities. Idaho Code § 67-5309 (a). The Commission must develop a comprehensive compensation scheme using the guide chart profile method developed by Hay Associates. Idaho Code §§ 67-5309 (b) and 67-5309B (a). Each classification is then placed in one of the pay grades found in Idaho Code § 67-5309C. Each of the pay grades provides a 35% salary range between the minimum and maximum salary and has seven steps. The decision regarding an employee's movement forward in the pay grade is given solely to the department director. Idaho Code § 67-2405.

Idaho Code § 67-5309C (c) begins as follows:

67-5309C (c) It is hereby declared to be the intent of the legislature that the advancement of an employee to steps providing an increased salary within each pay grade shall be based solely on merit, including factors such as increased productivity, reliability, effectiveness, and the ability to achieve the goals and objectives of the particular position. No employee shall advance to a higher step within a pay grade without an affirmative certification for such purpose by the employee's immediate supervisor, approved by the departmental director or the director's designee, in accordance with the following schedule and criteria:

(i) Step A in the salary schedule shall normally be the rate at which an employee is paid within a grade when originally employed. When necessary to obtain qualified personnel in a particular grade, however, upon petition of the appointing authority to the commission containing acceptable reasons therefor, a higher step or temporary pay grade may be authorized by the commission.

The question presented comes from the newly-enacted subparagraph (ii) of the section:

(ii) Each employee's work performance shall be evaluated six (6) months after initial appointment or promotion and annually thereafter by his or her immediate supervisor. *Employees may be eligible for advancement to step B after completion of six (6) months of service at step A, provided that such service is certified as meeting the merit requirement set forth in paragraph (c) above. Thereafter, employees may advance to steps C through G only if certified as meeting the merit requirements of paragraph (c) above on an evaluation form approved by the commission for that purpose. However, such in-grade advancement shall not be construed as a vested right. It shall be the specific responsibility of the supervisor and the departmental director to effect the evaluation prescribed in paragraph (c) above.* (Newly-enacted material underlined.)

The advancement of an employee meeting the criteria established for merit is within the discretion of the departmental director. Section 1 of House Bill 296 absolutely abandoned the concept of annual advancement based on satisfactory service and substituted for it the pay for performance concept. This cannot be read in the abstract because the Legislature, in Section 2 of House Bill 296, specifically removed the right of an employee to appeal to the Idaho Personnel Commission his or her placement in a pay grade or *step within a pay grade*. Chapter 192, 1979 Id. Sess. L., p. 557.

The Legislature has granted much, but concomitantly removed some of the rights which the employees had. It has vested in the employee the right to receive a certain pay grade based on his or her classification. Reductions in pay grade or step for disciplinary reasons are subject to the due process protections established by the statute. Reductions within the pay grade for fiscal, budgetary or program reasons may not be appealed. The employee is thus protected from the arbitrary actions of his or her supervisor by the department director and the procedures established to furnish him with the information necessary to arrive at a fair decision. The terms and conditions of employment are fixed by the statutes. "[The employee] ha[s] no vested right to have the terms of his employment continue untouched." *Rivas v. County of Los Angeles*, 195 Cal. App. 2d 406, 15 Cal. Rptr. 829 (1961).

The relationship between the State and its employees is based in the statutes which created and maintain the rights, obligations, entitlements and limitations. The employee of the State has no vested right to employment and its terms and conditions may be modified by statute. These modifications may create or dissolve rights which previously existed. The modifications may, at the discretion of the Legislature, give or remove due process protections as it determines necessary. The Idaho Legislature, thus, has created a property interest in employment where discipline and dismissal are subject to a full due process. The Legislature has mandated that an employee who is classified according to his or her duties and responsibilities be paid at a certain pay grade. But within the range provided by the pay grade, the decision regarding movement forward is given to the department director and the employee has no due process avenue to complain about it. The department director or appointing authority may be forced into a fiscal or budgetary decision to roll back salaries to preserve jobs, thus affecting the employee's pay. However, because the legislature gave the department director and appointing authority no clear mandate that the new language in Idaho Code § 67-5309C (c), (ii) was to be applied retroactively, those steps previously attained may only be removed for disciplinary or budgetary reasons and not for reasons based on performance.

The presented question highlights the problems inherent in the concept of pay for performance within the civil service context. Should the Legislature give to the department directors and appointing authorities the authority to place the employees anywhere in the assigned pay ranges, utmost care must be taken in the establishing of criteria for placement within the pay grades, and the application of those criteria to the individual employees. Like cases involving discipline, decisions which are arbitrary or capricious or based on illegal discriminatory motives may be challenged by the employee. The inherent delays and costs of litigation should not be encountered if the standards for the salary setting process are communicated by management to the employees.

This lengthy analysis is necessitated by the complexity of the various constitutional, statutory and personnel issues which come into play in the State's

decision to pay either a single employee or all its employees. An employee's pay may be reduced for disciplinary reasons and the employee may appeal that decision. All employees' pay could be reduced for budgetary reasons and there would be no appeal from that decision. As the law is presently written, an exemplary employee does not have a vested right to an increase. However, under that same statute, a below-average performer whose actions do not require discipline may not have his or her pay reduced for that performance. The Legislature has removed the ability of the employee to complain of his or her pay grade or step within a pay grade. In so doing, however, it has not given the various appointing authorities the right to remove steps previously attained for less than satisfactory performance.

Even within the broad discretion conferred on the department directors by the Legislature, there are limitations. The decision regarding salary is probably, except for dismissal, the one which most closely touches each employee of the State. Obviously, any arbitrary and capricious action, or one based on an illegal discriminatory motive, would remain grievable and appealable.

AUTHORITIES CONSIDERED:

1. Constitutional Provisions:

U.S. Const., Amend. XIV; Id. Const., Art. 4 § 20

2. Idaho Code Sections:

67-2405, 67-5301, 67-5303, 67-5309, 67-5309A, 67-5309B, 67-5309C, 67-5316

3. Idaho Session Laws:

1976, Ch. 376; 1979, Ch. 192

4. Cases — U.S.

Arnett v. Kennedy, 416 U.S. 134, 94 S.Ct. 1633, 40 L. Ed. 2d 15 (1974); *Bailey v. Richardson*, 341 U.S. 918, 71 S.Ct. 669, 93 L. Ed. 1352 (1951); *Bishop v. Wood*, 426 U.S. 341, 96 S.Ct. 2074, 48 L. Ed. 2d 684 (1976); *Board of Regents v. Roth*, 408 U.S. 564, 92 S.Ct. 2701, 33 L. Ed. 2d 548 (1972); *Ingraham v. Wright*, 430 U.S. 651, 79 S.Ct. 1401, 51 L. Ed. 2d 711 (1977); *Perry v. Sindermann*, 408 U.S. 593, 92 S.Ct. 2694, 33 L. Ed. 2d 570 (1972); *U.S. Trust Co. of New York v. New Jersey*, 431 U.S. 1, 97 S.Ct. 1505, 52 L. Ed. 92 (1977)

5. Cases — Idaho:

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Comment, 77 Wis. L.R. 575; Id. Atty. Gen. Opin. 76-48

DATED this 28th day of December, 1979.

ATTORNEY GENERAL
State of Idaho
/s/ DAVID H. LEROY

ANALYSIS BY:

W. B. LATTA, JR.
Deputy Attorney General
Idaho Personnel Commission

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Idaho Supreme Court
Idaho Supreme Court Library

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ATTORNEY GENERAL'S SELECTED LEGAL GUIDELINES FOR THE YEAR 1979



David H. Leroy
Attorney General

LEGAL GUIDELINES OF THE ATTORNEY GENERAL

January 22, 1979

The Honorable Lyman G. Winchester
State Representative, District 19
Building Mail

The Honorable Patricia L. McDermott
Minority Leader, House of Representatives
Building Mail

THIS IS NOT AN OFFICIAL ATTORNEY GENERAL OPINION,
AND IS SUBMITTED SOLELY TO PROVIDE LEGAL GUIDANCE.

Dear Representatives Winchester & McDermott:

We wish to respond, informally, to your questions concerning House Concurrent Resolution No. 4 that were contained in your letter to this office dated January 19, 1979. We have chosen to answer your questions informally, rather than issue a formal attorney general's opinion for two reasons:

1. It is the policy of this office to refrain from issuing formal opinions on bills or resolutions currently pending in the legislature.
2. A timely response to the questions raised prohibits the necessary in-depth analysis required for producing a full formal opinion.

The first question raised is whether or not the Legislature has the authority to do anything other than reject or reduce the compensation and expense levels recommended by the Citizens Compensation Commission as created by Article 3, Section 23 of the Idaho Constitution. Section 23, Article 3 in relevant part provides ". . . rates thus established shall be the rates applicable for the two year period specified unless prior to the 25th legislative day of the next regular session, by concurrent resolution, the Senate and House of Representatives *shall reject or reduce such rates* of compensation and expenses." Our research indicates that there are no additional relevant constitutional provisions that modify the legislature's authority on legislative compensation. It is our opinion that the relevant constitutional section is clear in mandating that the legislature has no authority to change the rates of legislative compensation and expenses other than to reject or reduce the recommended rates of compensation and expenses as established by the Citizens Committee on Legislative Compensation. The State Supreme Court in the case of *State ex. rel. Moon v. Jonasson*, 229 P.2d 755, 78 Idaho 205, stated that "A statute or constitutional provision . . . that is plain, clear, and unambiguous speaks for itself and must be given an interpretation that the language clearly implies." We are of the opinion that such case authority is controlling here: the constitutional language is plain, clear, and unambiguous relative to the question of whether the legislature has the authority to do anything other than reject or reduce the compensation and expense levels as set by the Citizens Committee. Clearly, it does not.

The next question presented is whether or not the Legislature has the authority to declare that the recommended level of compensation is null and void. Black's Law Dictionary, revised Fourth Edition, defines the phrase null and void, as used in a statute, as meaning "of no validity or effect." Lines 24 and

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25 of House Concurrent Resolution 24 reject and declare null and void the rates of compensation for members of the first regular session of the 45th Idaho Legislature as set by the Citizens Legislative Compensation Committee. As stated previously, Article 3, Section 23 of the Idaho Constitution clearly grants the authority to the legislature to reject or reduce recommended rates of compensation and expenses, but does not specifically give the legislature the authority to declare them null and void, that is to say, without validity. In our opinion, the more proper language to implement the constitutional rejection provision would simply be to use the words found in line 24, ("is hereby rejected or reduced") and delete the words null and void found in lines 24 and 25, page 1.

You have also posed the question as to whether or not the language found in lines 31 through 44 of page 1 and lines 1 through 48, Page 2 of House Concurrent Resolution No. 4 is an attempt by the legislature to unconstitutionally establish its own rate of compensation and expenses. Without knowing the rates of compensation and expenses as established by the Citizens Committee on Legislative Compensation, it is impossible for us to fully comment on the question of whether or not the legislature is attempting in this specific instance to unconstitutionally set its own rates of compensation and expenses.

This office, however, does perceive several potential problems of constitutional dimension arising from HCR #4 as written. They are:

1. Article 3, Section 23 is explicit on the question of legislative compensation and expense. In relevant part it states "The legislature will have no authority to establish the rate of its compensation and expense by law." If the above delineated portions of HCR #4 relating to rates of compensation establish rates greater than those established by the Citizens Committee on Legislative Compensation, the compensation rates prescribed in HCR #4 would clearly be without validity.

2. As previously stated, line 24 of Page 1, House Concurrent Resolution No. 4 provides that rates of compensation for services rendered by legislators is "hereby rejected." If it is the intent of the authors of HCR No. 4 to indeed reject the rates of compensation as set forth by the Citizens Committee, it is our opinion that Article 3, Section 23 of the Constitution clearly indicates what will next happen; "In the event of rejection, the rates prevailing at the time of the previous session shall remain in effect." The rates of compensation prevailing at the previous session of the legislature will then be effective, regardless of whatever provision to the contrary is contained in House Concurrent Resolution No. 4. That is to say that if the salary levels contained in lines 35 through 41, Page 1, House Concurrent Resolution No. 4 differ from those rates set at the previous session of the legislature, they clearly would be without force or effect. If the compensation rates are to be merely reduced from those set by the Citizens Committee, then the words "hereby rejected" on line 24 of Page 1 should be changed to read "hereby reduced," to make the rates set forth in the resolution effective from a constitutional viewpoint. Line 30, page 1, House Concurrent Resolution No. 4 confirms the rate of expenses established by the Citizens Committee. Article 3, Section 23 of the Constitution does not provide for any confirmation procedure as to rates of compensation or expenses as established by the Citizens Committee. It would appear that the language would be superfluous in that the constitutional provision does not provide for a confirmation procedure.

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Your fourth question concerns the effective date of Concurrent Resolutions as passed by the Legislature. In your question, you cited Idaho Code Section 67-510 as authority for the proposition that concurrent resolutions do not take effect until July 1 of the year of the regular session, or until sixty days from the end of the session, whichever date occurs last, unless there is an emergency clause in the preamble or body of the resolution.

Your question poses a problem that has never been addressed by the Idaho Supreme Court. Consequently, there is no Idaho case authority directly in point. Specifically the question is whether or not a concurrent resolution passed by the Legislature takes effect immediately upon passage by the legislature, or whether Idaho Code Section 67-510 is applicable to concurrent resolutions, thus mandating that for a concurrent resolution to become effective immediately upon its passage, it must contain an emergency enacting clause.

A review of general case authority in the majority of American jurisdictions shows that the general legal rule is that a concurrent resolution is not a statute. The preeminent legal treatise on statutory construction, *Sutherland on Statutory Construction*, notes in Chapter 29, Section 23, that "although a concurrent resolution speaks for the entire Legislature, it has only limited legal effect, and for most purposes is not law." American Jurisprudence Second, states, "The general rule is that a joint or concurrent resolution adopted by the Legislature is not a statute." 73 Am. Jur. 2d, Section 1, Page 270.

Black's Law Dictionary, Revised Fourth Edition, defines "act" in the legislative context as "a statute." Based upon this definition and applying the majority rule that concurrent resolutions are not statutes, or acts, it logically follows that 67-510 Idaho Code, as it relates to the effective date of an act, is not applicable to concurrent resolutions.

No act shall take effect until July 1 of the year of the regular session or sixty (60) days from the end at which the same shall have been passed, whichever date occurs last, except in the case of an emergency, which emergency shall be declared in the preamble or body of the law. 67-510
Idaho Code

A further consideration arises from the fact that concurrent resolutions do not have enacting clauses. Article 3, Section 1 of the Idaho Constitution in relevant part provides that "The enacting clause of every *bill* [our emphasis] shall be as follows: Be it enacted by the legislature of the State of Idaho." The previously cited *Sutherland* treatise states that a "bill is interpreted to mean only those legislative declarations which contain enacting clauses." Black's Law Dictionary defines bill, as used in legislation, as "a draft of an *act* [our emphasis] of the legislature before it becomes law."

Based upon these considerations, it is our opinion that a bill, not a resolution, properly becomes an "act" upon passage by both houses of the legislature and approval by the governor. As previously stated, we are of the opinion that 67-510 *Idaho Code* applies only to the effective dates of acts, or bills, and not concurrent resolutions. In sum, it is our opinion that concurrent resolutions become effective immediately upon passage of both houses of the legislature and signature by the respective presiding officers of both.

Your final question is whether or not House Concurrent Resolution No. 4 creates an inherent conflict with Article 3, Section 23 of the Idaho Constitution

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when contrasted with Article 4, Section 19 of the Constitution. Article 4, Section 19 provides that the Legislature may not diminish or increase the compensation of the Governor and other elected statewide officials during their term of office. From a legal viewpoint, it is our opinion that Article 4, Section 19 applies only to the Governor and other statewide elected officials, not members of the Legislature. Article 3, Section 23, obviously is applicable only to members of the Legislature, and is the constitutional method devised for compensation for members of that body. Although there is an apparent inconsistency between the two constitutional provisions, that is to say, elected officials will know specifically what their salary will be during their term of office, whereas members of the Legislature will not, it is our opinion that such a conflict or inconsistency is not of a constitutional dimension.

We sincerely hope that the above guidelines have been of assistance to you and we stand ready to assist you further in the future.

Very truly yours,
/s/ DAVID H. LEROY
Attorney General

DHL/tr

ANALYSIS BY:
ROY LEWIS EIGUREN
Deputy Attorney General

cc: Walter Little
Majority Leader, House of Representatives

cc: James E. Risch
Majority Leader, Senate

cc: C. C. Chase
Minority Leader, Senate

January 25, 1979

The Honorable Patricia L. McDermott
Minority Leader, House of Representatives
Statehouse Mail

Re: HCR-4

THIS IS NOT AN OFFICIAL ATTORNEY GENERAL OPINION,
AND IS SUBMITTED SOLELY TO PROVIDE LEGAL GUIDANCE.

Dear Representative McDermott:

We are in receipt of your letter dated January 22, 1979 in which you posed several questions concerning HCR-4. As indicated previously in our set of guidelines dated January 22, relative to HCR-4, a timely response precludes an

LEGAL GUIDELINES OF THE ATTORNEY GENERAL

exhaustive review of all legal authorities concerning the questions presented. The following discussion presents, in our opinion, a summation of the salient points of constitutional law relating to HCR-4 and the problems you have raised.

Your first question is "as drafted, what would be the effective date of HCR-4?" As indicated on Page 5 of our previous legal guidelines, it was our opinion that concurrent resolutions "become effective immediately upon passage by both houses of the legislature and signature by the respective presiding officers of both." The analysis relative to the effective dates of concurrent resolutions centered on two basic considerations:

1. The statutory language, concerning the effective dates of statutes, 67-510 *Idaho Code*, was not applicable to concurrent resolutions since the general rule of law is that concurrent resolutions are not classified as statutes or acts and 67-510, by its terms, applies only to acts.
2. Article 3, Section 1 of the constitution provides that a "bill" must have an enacting clause to properly become law. "Bill" is defined by Black's Law Dictionary as "a draft of an act." Consequently, it was our opinion that, since concurrent resolutions lacked an enacting clause, they were not properly classified as bills, and upon passage by the legislature were not properly acts for the purposes of 67-510, *Idaho Code*.

Absent any constitutional or statutory requirements concerning the effective dates of concurrent resolutions, we are of the opinion they become effective upon passage by both houses of the legislature and signature by the respective officers of both.

As you have indicated, our legal guidelines of January 22 did not address the question of whether or not House Rule 30 had any legal effect on the effective date of HCR-4. It is our general policy to leave the interpretation of a respective house's own rules to itself. In this case, however, we feel it appropriate to comment on this particular rule, as it potentially has a bearing on a question of substantive law.

House Rule 30 provides, in relevant part, that "Concurrent Resolutions shall be acted upon in the same manner as Bills." We are of the opinion that Rules of the House and Senate are procedural in nature, and have no legal effect on statutes, resolutions and other business of the legislature other than to guide their passage through the respective houses of the legislature. That such rules are procedural in nature is emphasized by the following quote:

The rules of parliamentary practice are merely procedural, and not substantive, and they do not have the force of the public law. They are merely in the nature of bylaws, prescribed for a deliberative body for the orderly and convenient conduct of its own proceedings, and the power that made them can unmake or disregard them.⁴ 59 Am. Jr. 2d § 2.

Your final question was phrased as follows:

If it would be effective immediately upon passage by both houses of the legislature and signed by the respective presiding officers, would the provisions of HCR-4 relate back to December 1, 1978, thereby neces-

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sitating legislators to refund checks already received or would the provisions be effective from whatever effective date HCR-4 might have, thereby simply reducing the compensation commission's recommendations?

Obviously, your question delineates the two (2) points in time that a rejection or reduction in legislative compensation and expense rates could become operative:

1. Upon passage by both houses and signatures of the respective presiding officers of both; or
2. On the date set by Article 3, Section 23 of the Idaho Constitution for newly established rates of compensation and expense to become effective.

Although argument can be made for adopting either point in time, it is our opinion that the better rule is that the provisions of HCR-4 concerning a rejection or reduction of compensation or expense relate back to the December 1 date.

Our opinion is based upon two considerations:

1. A reading of Article 3, Section 23 of the Constitution, and
2. The application of the appropriate rule of statutory construction.

Article 2, Section 23 of the Constitution in relevant part provides:

The committee shall . . . establish the rate of compensation and expenses for services to be rendered . . . *during the two-year period commencing on the first day of December* [our emphasis] . . . the rates thus established shall be the rates applicable for the *two-year period specified* [our emphasis] . . . unless . . . the senate and house of representatives shall reject or reduce. . . .

In our analysis we applied the "whole statute" interpretation rule of statutory construction. The rule, as defined by *Sutherland Statutory Construction, 4th edition* § 46.05 page 56, is ". . . construe it (a particular provision) with reference to the leading idea or purpose of the whole instrument."

Our interpretation of Article 3, Section 23, when taken as a whole, leads us to the conclusion that the legislature, in enacting this section, intended that rates of compensation and expenses were for a full two-year period — that is for a period commencing on December 1 and lasting for two full years. A legislative rejection or reduction in the rates, as set by the Citizens Committee, would apply to the rates "applicable for the two-year period specified," that is, from the period commencing on a particular December 1 date and lasting until December 1 two years hence.

At this point in time, we make no comment on the question of the refunding of legislative pay received to date at the rates established by the Legislative Compensation Committee.

LEGAL GUIDELINES OF THE ATTORNEY GENERAL

We sincerely hope that the above guidelines have been of assistance to you and we stand ready to assist you further in the future.

Very truly yours,
/s/ LARRY K. HARVEY
Chief Deputy Attorney General

LKH/tr

Analysis By:
ROY LEWIS EIGUREN
Deputy Attorney General

cc: Walter Little
Majority Leader, House of Representatives

cc: James E. Risch
Majority Leader, Senate

cc: C. C. Chase
Minority Leader, Senate

February 2, 1979

Ref. #59

Lawrence C. Seale
Administrator
Division of Budget, Policy
Planning and Coordination
Statehouse Mail

Dear Mr. Seale:

You have asked us five questions concerning platting and the Local Planning and Zoning laws. They are: (1) Do counties and cities have the authority to require land donations from subdividers; (2) May counties and cities require payments in lieu of land donations and what conditions and restrictions would apply to this authority; (3) Whether such land donations have to apply to all new developments equally; (4) Whether or not different payments or land donations requirements could be established according to the size of the subdivisions; and (5) Whether the above four matters concerning land donations and donations of funds instead of lands could apply to non-residential developments as well as residential developments.

To begin with, there are a number of good articles on this subject that cover almost all of the relevant American cases. 4 Anderson, American Law of Zoning, §§23.39 through 23.36, pp. 140-162; 5 Williams, American Land Planning Law, §§156.07 and 156.08, pp. 278-288. Also see 43 A.L.R.3d 847 and 11 A.L.R.2d 524. There is also a generalized article on this subject in 82 AmJur2d, Zoning and Planning, §163-168. There are no Idaho cases or statutes exactly on point.

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Section 67-6502, *Idaho Code*, states the general purposes of the Local Planning Act. Several of the purposes of the Act are to protect property rights and enhance property values to insure adequate public facilities and services and to protect and enhance environmental features. Section 67-6508, I.C. states the planning duties under this law and provides that the plan shall consider a long list of matters in relation to the planning duties. "C" of this list is land use; "D" relates to natural resources; "F" relates to public service facilities and utilities; "H" relates to recreation and provides for the possibility of an analysis showing a system of recreation areas, including parks, parkways, trailways, riverbank greenbelts, beaches, playgrounds, etc.; and "I" provides that special areas and sites shall be considered such as historical, archeological, architectural, ecological, wildlife, and scenic; "K" provides for considering landscaping, building design, tree planting, community development design, and beautification in general; "L" provides that among the planning duties the planners are to determine the actions, programs, ordinances, and methods of executing the components of the plan.

Section 67-6511 provides for passage of the zoning ordinance, one of the vehicles for carrying out a plan. The second paragraph of that statute reads as follows:

Within a zoning district, the governing board shall where appropriate, establish standards to regulate and restrict the height, number of stories, size, construction, reconstruction, alteration, repair or use of buildings and structures, percentage of lot occupancy, size of courts, yards, and open spaces; density of population; and the location and use of buildings and structures. All standards shall be uniform for each class or kind of buildings throughout each district, but the standards in one (1) district may differ from those in another district.

You will notice that the above section mentions "courts, yards, open spaces, density of population," and, in partial answer to your third question, requires that the standards shall be uniform for each class or kind of buildings throughout each district, but the standards in one district may differ from those in another."

Section 67-6512, *Idaho Code*, provides for special or conditional use permits within the zoning ordinance so as to allow particular things where otherwise prohibited within the conditions of this section. The section goes on to state that conditions may be attached to special use permits. The list of conditions in that statute reads as follows:

Upon the granting of a special use permit, conditions may be attached to a special use permit including, but not limited to, those:

- (a) Minimizing adverse impact on other development;
- (b) Controlling the sequence and timing of development;
- (c) Controlling the duration of development;
- (d) Assuring that development is maintained properly;
- (e) Designating the exact location and nature of development;
- (f) *Requiring the provision for on-site or off-site public facilities or services;*
- (g) Requiring more restrictive standards than those generally required in an ordinance.

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Section 67-6513 provides for subdivision ordinances and requires the procedure set forth in an earlier section, §67-6509, I.C. Section 67-6515, *Idaho Code*, provides for Planned Unit Developments, and states that Planned Unit Development Ordinances may include minimum area requirements, permitted use requirements, common open space requirements, requirements as to utilities, densities, arrangement of land uses, etc.

Section 67-6517, *Idaho Code*, provides for future use maps where the city or county wishes to adopt such. It is stated in this section that such maps may include and provide for public ways and facilities, proposed schools, airports and other public buildings, proposed parks or other open space, and land for other public purposes, and that upon receipt of a request for a permit or a building permit where such a future use acquisition map is being used by the city or county, that there is a procedure to be followed concerning notice to the interested agency and the possibility of acquiring the land.

Section 67-6518, *Idaho Code*, provides for standards within the various ordinances to be used. It includes the ability to provide standards for yards, courts, greenbelts, planning strips, parks and other open spaces, access to streams, lakes and viewpoints, standards for schools, hospitals, and other public and private developments.

Section 50-1306, *Idaho Code*, relating to approval for plats provides that as to plats situated within a mile outside the limits of any incorporated city, such plats shall first be submitted to the city, and if the city has adopted a subdivision ordinance and/or a comprehensive general plan, that these documents may be used as guidelines for approving such plats.

Section 50-1301, *Idaho Code*, defines a number of terms, including plat and subdivision, and Chapter 13 of Title 50, I.C., generally requires recordation of plats and subdivisions. Rather than citing the many cases on this subject I have cited above the general reference works in which these cases are cited. There are a number of observations that can be made from reading those cases. Before any attempt is made to require donation of lands or any donation of monies in lieu of lands, the entire matter should be covered in some length by the planning and zoning ordinance, or the subdivision ordinance, or whatever ordinance deals with this subject. Such ordinance should state the necessity to either complete the improvements or else the possibility to post bond in an amount necessary to pay for the improvements if the city or county must complete them. It must spell out the type of bond (that is, surety or cash) and it must spell out the terms and conditions necessary so that the subdivider may have notice in advance of what to expect. Unless this is done the use of the devices mentioned in your questions will be difficult, and in case of court action you may be hard pressed to sustain them. We also believe that it might be well to have statutes dealing generally with this subject. Most of the states that have upheld this type of action on the part of planners and zoners and these requirements have done so based upon statutes dealing generally with the subject of such donations, bonds or funds and allowing the city or county to set up a general system relating thereto. A very few cases have allowed this type of regulation without any specific authority. In any case, your ability to make such requirements and to have the courts approve them will be much enhanced if you have an ordinance or regulation making specific requirements and providing for these matters.

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Most, if not all, courts, have allowed some required dedications, particularly if the matter relates to streets, alleys, sidewalks, public utilities and public facilities. A number of courts, but not all of them by far, have allowed the requirement of bonds for completion of subdivisions. Quite a number of courts have disallowed the requirement of payments of money instead of land dedications. While the courts have been prone to allow requirements for grants of land dedications in regard to streets, facilities and utilities, not as many courts have allowed such requirements in relation to parks and recreational areas. Few courts have allowed land requirements in relation to schools unless there was a specific need for a school in a particular subdivision caused by that subdivision. The question of whether you can make requirements for land dedications or payment of funds instead of requiring dedications of lands is somewhat in doubt. Most of the cases where this has been allowed relate to a statute specifically providing for this requirement. One or two courts have allowed such a requirement without a specific statute. Quite a number of courts have refused to allow requiring payment of money in lieu of dedication of lands where there was no statute providing for it.

It should also be mentioned that where it can be shown that dedications of lands or payments of money in lieu of land are really done voluntarily by the developer, such agreements have survived court tests.

In regard to whether such donations of land for public use must be uniform I wish to repeat to you a warning of Justice Bakes found in 96 Idaho 630, at 633.

However, for the record, I think it is important to point out to zoning officials that zoning ordinances cannot be selectively applied unless it is pursuant to a variance set out in the ordinance and based upon ascertainable standards fixed by the ordinance. The indiscriminate application of zoning ordinances among citizens surely violates the equal protection of the laws guaranteed by the Fourteenth Amendment of the United States Constitution.

Thus, the requirements made for land donations etc. must provide for equal protection of the law in the class or category, and I would also refer you to what I previously said in regard to §67-6511, I.C., as to the requirement of equality within the statute.

There is one Idaho case, *State v. Clark*, 88 Idaho 365, 399 P2d 955 (1965) holding that a county subdivision ordinance was proper and valid even though at that time there was no law allowing for or providing for subdivision ordinances. The Court held that Ada County's previous subdivision ordinance, relating to subdivision of lands, giving the administrator the authority to inform the subdivider as to whether the proposed plan did or did not meet the regulations providing for regulating relating to subdivisions was not invalid as ambiguous or uncertain or as improper delegation of legislative power to the planning and zoning commission. This case is a fairly liberal case and tends to indicate that the Idaho Supreme Court will receive any well drafted ordinance or regulation of a city or county and if possible give it effect.

Another Idaho case having some relationship to this question is *State ex rel. Andrus vs. Click*, 97 Idaho 791, 554 P2d 969 (1976). This was a case where the Idaho Dredge Mining Law provided that anyone who wished to engage in dredge mining must obtain a permit and put up a bond and within a certain period of

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time after dredging restore the land dredged to a reasonable condition. The Court held that the act was valid and did not involve the taking of private property without compensation and that the act does not deny procedural due process or equal protection of law.

Considering the above two cases, it may be presumed that the Idaho Supreme Court would be reasonably liberal in dealing with ordinances relating to requirements of land donations in regard to subdivisions if the ordinance dealing with the subject is well drafted and sound.

Now, to answer your questions, as to question 1, counties and cities certainly have some power to require land donations for subdivisions, particularly in regard to streets, water, sewage, and that type of thing. There is some doubt, though, as to whether they can do this in regard to recreation. However, recreation is mentioned a number of times in the Planning and Zoning Act, and therefore there is at least a reasonable chance that a regulation providing certain dedication of lands for parks, recreation and open space could withstand a court test.

In regard to your second question, it is more doubtful whether counties and cities may require payment of fees in lieu of land dedications. However, in the statutes and cases above noted there are one or two indications that they may make other requirements. Only one or two courts, such as the Wisconsin Court, have allowed such requirements without a statute providing for them. It is possible that Idaho could do this, however we would suggest that it would be safer to obtain authority for it.

In answer to your third question, land donations would have to apply equally within classes as provided for by §67-6511, I.C. and the cautionary statement of Justice Bakes above quoted.

As to your fourth question, whether there could be different payments or requirements for dedication of lands to the public depending on the size of the subdivision, a number of the statutes in the field make such distinctions and have been held valid. We would suggest that you look at Anderson's above-referenced works, the A.L.R. citations in regard to this, and refer to the answer to the preceding question.

As to your fifth question about whether requirements for dedication of lands for parks and open spaces and whether requiring funds instead of such land dedications can be applied in non-residential developments as well as residential developments, I have been unable to find any case law exactly on point. Any ordinance relating to this matter would have to be carefully drafted so as to provide criteria and reasons for doing this, such as additional population and crowding. Perhaps if an ordinance was carefully thought out and provided specific reasons for doing so, and guidelines, the ordinance and such requirements would be upheld. It is, however, rather difficult to speculate on this subject since no cases have been found exactly on point.

This is not an official Attorney General's Opinion, and is provided solely to furnish legal guidance.

Sincerely,
/s/ WARREN FELTON

Deputy Attorney General

WF/dm

LEGAL GUIDELINES OF THE ATTORNEY GENERAL

February 15, 1979

Ref. #55

Roger Wright
Prosecuting Attorney
Clark County
P.O. Box 557
Idaho Falls, ID. 83401

Dear Roger:

Attorney General Leroy asked us to examine the question you posed about the collection by the sheriff of certain fees in criminal matters under *Idaho Code*, §31-3203.

The apparent intent of the statute is that those fees be assessed as costs and collected by the sheriff under writ of execution if necessary. *Idaho Code*, §31-3215. However, in light of the Idaho Constitution, certain other Idaho statutes, and the decisions of the Idaho Supreme Court, we strongly question whether the provisions contained in *Idaho Code*, §31-3203 for collection of fees in criminal matters are enforceable against criminal defendants.

While the Idaho Supreme Court has refrained from going so far as to hold that a convicted defendant in a criminal matter cannot be assessed any of the costs of the proceeding, the case of *State v. Hanson*, 92 Idaho 665, 448 P2d 758 (1968) raises serious questions about such practice. The Court in that case stated that assessment of costs in criminal cases is a statutory creation, unknown at common law. It held that cases from other jurisdictions which have determined that jury costs are a general expense of maintaining the system of courts and the administration of justice, and that such costs are more properly an ordinary burden of government, are the better reasoned cases and that our statutes should be so construed. The Court held that all costs assessed for the fees and expenses of jurors must be excluded from the costs bill chargeable to the defendant, and, in addition, the defendant must be given an opportunity to oppose other cost items should he so desire.

While this case leaves open the possibility of assessing other costs against a convicted defendant, we strongly question whether a defendant could be assessed the costs of making the arrest or transporting him as a prisoner. Assessing costs of serving subpoenas might be upheld if the defendant is not indigent. We do not question the power of the court to collect the statutory \$7.50 under §31-3201A (b).

The next question is whether the sheriff's costs in criminal matters can be assessed against the county. *Idaho Code*, §31-3302 (2) specifically provides that the compensation allowed by law to constables and sheriffs for executing process on persons charged with criminal offenses, for services and expenses in conveying criminals to jail, and for other services in relation to criminal proceedings, are county charges. Several Idaho cases have held or recognized that sheriffs' and constables' costs and expenses incurred in criminal matters are lawful claims against the county. *Warner v. Fremont County*, 4 Idaho 591, 43 Pac. 327 (1895); *Ellis v. Bingham County*, 7 Idaho 86, 60 Pac. 79 (1900); *Mombert v. Bannock County*, 9 Idaho 470, 75 Pac. 239 (1904). *Idaho Constitution*, Article

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XVIII, §7, expressly provides that all "actual and necessary expenses incurred by any county officer or deputy in the performance of his official duties" shall be legal charges against the county, and may be retained out of any fees which come into their hands. However, the right to receive fees is limited by the next sentence of Article XVIII, §7, which states:

All fees which may come into his [the officer's] hands from whatever source, *over and above his actual and necessary expenses*, shall be turned into the county treasury at the end of each quarter. [Emphasis added.]

In short, it is our view that the sheriff can require the county to pay his expenses for services in criminal matters. Any fees collected by the sheriff under §31-3203, *Idaho Code*, for such services over and above his actual and necessary expenses would have to be turned over to the county, as provided in the Constitution. Since the sheriff is clearly prohibited from keeping any such fees where the county is paying his actual costs and expenses, it appears pointless for the sheriff to attempt to collect the statutory fees from the county, since he would be required to remit them to the county.

It might be contended, however, that the sheriff could collect his statutory fees from the district court fund and remit them to the county general fund. *Idaho Code*, §31-867, which creates the district court fund, expressly provides that moneys in the fund "shall be expended for all *court expenditures*" (except courthouse construction and remodeling and salaries of the clerk's deputies). [Emphasis added.] It is possible that some of the fees enumerated in §31-3203, *Idaho Code*, could be viewed as "court expenditures" and charged to the district court fund. However, in light of the Court's statement in *State v. Hanson, supra*, to the effect that jury costs should be treated as a general expense or as an ordinary burden of government, it is equally possible that all court-related expenses referred to in §31-3203, *Idaho Code* would be viewed as properly being paid from general county funds rather than from the district court fund. §19-4701, *Idaho Code*, also seems to support the latter view that such fees would be chargeable against general county funds because it requires that all costs collected be paid to the county's current expense funds, as does *State v. Bell*, 84 Idaho 53, 370 P.2d 508. Stated from a somewhat different perspective, *Idaho Code*, §31-867 does not seem to be an adequate basis for concluding that the legislature intended that sheriff's fees were to cease being a normal expense of the Sheriff's office and county and become chargeable against the District Court Fund. In any event, it seems doubtful that fees for making arrests and for boarding and transporting prisoners would be viewed as court expenditures. We recommended against charging the district court fund for sheriff's fees under *Idaho Code*, §31-3203.

This is not an official Attorney General Opinion, and is furnished solely to provide legal guidance.

Sincerely,
/s/ MICHAEL C. MOORE
Deputy Attorney General
Chief, Local Government Division

/s/ WARREN FELTON
Deputy Attorney General
Local Government Division

MM/WF/dm

LEGAL GUIDELINES OF THE ATTORNEY GENERAL

March 5, 1979

Honorable Darwin Young
House of Representatives
Statehouse Mail

Re: H. B. #40

THIS IS NOT AN OFFICIAL ATTORNEY GENERAL OPINION,
AND IS SUBMITTED SOLELY TO PROVIDE LEGAL GUIDANCE

Dear Representative Young:

We are in receipt of your request for legal guidance relative to H. B. #40, the County Assistance Act of 1979. You have asked us to address the following questions:

1. Is the definition of the phrase "resources of the applicant" so vague and ambiguous as to render unconstitutional the section of the act imposing criminal liability on applicants who wilfully fail to disclose all resources available to them?
2. Whether the lien on real property provided for by the act is a violation of an applicant's constitutional equal protection and contract rights.

A discussion of the problem presented by question number one necessarily starts by defining the general rule of law pertaining to vague and ambiguous criminal statutes.

The Idaho Supreme Court, in the case of *State v. Lopez*, 98 Idaho 581 (1977) articulated the general rule followed in Idaho and the United States in general. At page 590, the Court states:

The concept of void-for-vagueness arose from a common law practice of refusing legislation deemed too indefinite to be applied. It has evolved to a protection generally regarded as embodied in a Due Process Clause and prohibits holding a person "criminally responsible for conduct which he could not reasonably understand to be proscribed." *U. S. v. Hariss*, 347 U. S. 612, 617, 74 S. Ct. 808, 812, 98 L. Ed. 989 (1954). In addition to this notion of "fair notice or warning" the doctrine is said to require reasonably clear guidelines to prevent "arbitrary and discriminatory enforcement" and to prescribe a precise standard for the adjudication of guilt. *Smith v. Goguen*, 415 U. S. 566, 94 S.Ct. 1424, 39 L.Ed. 2d 605 (1974). The principle consistently followed is that "a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law." *Conally v. General Construction Co.*, 569 U. S. 384, 391, 46 S.Ct. 126, 127, 70 L.E. 322 (1926).

The section of H. B. #40 directly in question is found in lines 26 through 30 on page two of the bill.

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(5) "Resources of the applicant" shall include, but not be limited to: cash, personal or real property, insurance, other forms of public or private assistance, borrowing power, social security benefits, veterans administration benefits, union benefits and anticipation of future income.

Application of a constitutional test enunciated by a court in a particular case to a new fact situation is a tenuous proposition. Since it is exclusively the province of the courts to determine whether a statute meets constitutional standards, it is only possible at this point to render an opinion on this statute's constitutionality based upon our reading of the appropriate constitutional standard in light of the proposed statutory language.

Argument can clearly be made that phrases such as "but not limited to," "borrowing power," and "anticipation of future income" inject sufficient ambiguity into the definition of applicant resources as to render a criminal prosecution pursuant to the act unconstitutional. However, it is our opinion that the statutory language in question is not sufficiently vague as to render criminal prosecution unconstitutional. Our opinion is based upon the belief that the questioned statutory language is sufficiently clear in its delineation of what constitutes applicant resources so that "men of common intelligence" need not "guess at its meaning."

Your second question relates to the constitutionality of the real property lien provided for in the proposed section 31-3412. There are two separate considerations relative to the constitutionality of the section:

1. Does the proposed statute violate the constitutional guarantee of equal protection of law by unreasonably and irrationally creating two classes of assistance applicants, i.e. those who own real property and those who do not?
2. Does the requirement of a forced agreement providing a security interest in an applicant's real property violate an applicant's constitutional guarantee against interference with contract rights?

In addition, there is posed one additional legal question not of constitutional dimension:

Does the requirement of a forced agreement provide the applicant with the valid contract defense of duress, thus preventing the attempted enforcement of the agreement?

Prior to July 1, 1979, Section 56-224 (a) *Idaho Code* required in language nearly identical to the proposed 31-3412, that recipients and applicants for old-age assistance who owned real property enter into an agreement pledging such property as security for repayment of assistance received.

The constitutionality of Section 56-224 (a) was challenged on substantially the same grounds as proposed 31-3412 is being challenged now. In the case of *Newland v. Child*, 73 Idaho 530, 259 P.2d 1066 (1953), the Idaho Supreme Court addressed one of the two considerations raised here:

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1. Denial of equal protection. In *Newland*, our court stated that the creation of two applicant classes, i.e. real property owners vs. non-owners, was not a denial of equal protection.

[11] It is also contended that appellants are denied equal protection of the law. Art. 1, § 2, Idaho Constitution. The contention is that they, as owners of real property, are discriminated against, in that they are required to grant a lien upon their property, whereas needy aged who have no real estate, but may own personal property, are granted aid without such requirement, and are therefore preferred. It is recognized that the legislature has broad discretionary power to make classifications of persons and property for all purposes which it may lawfully seek to accomplish. So long as the classifications are based upon some legitimate ground of difference between the persons or objects classified, are not unreasonable or arbitrary, and bear a reasonable relation to the legislative purpose, such classifications do not violate the constitution.

Although the above cited *Newland* case dealt with an interpretation of a statute no longer in existence, and did so some 26 years ago, it is our opinion that it is controlling concerning the question of whether the proposed county assistance act is violative of an applicant's right to equal protection of the law. We believe it controlling for two reasons: (1) it is the only Idaho case law concerning the constitutional questions presented by the creation and enforcement of liens on real property securing the repayment of welfare assistance payments to needy persons and (2) the Idaho Court in *Newland* used the same basic equal protection standard currently mandated by the U.S. Supreme Court in testing the constitutionality of social welfare legislation, i.e. the rationality test.

... [in] the operation of the equal protection clause in the field of social welfare law ... state laws and regulations must still be rationally based and free from invidious discrimination. *Hagans v. Lavine*, 415 U.S. 528, 589 (1974).

In addition, the Court addressed the issue of whether duress was a valid defense to enforcement of the lien provisions. The court in *Newland* determined the defense as not applicable to the lien process.

To be voidable because of duress, an agreement must not only be obtained by means of the pressure brought to bear, but the agreement itself must be unjust, unconscionable, or illegal. The essence of duress is the surrender to unlawful or unconscionable demands. It cannot be predicated upon demands which are lawful, or the threat to do that which the demanding party has a legal right to do.

We believe that by applying the above rule, an applicant who pledged his real property per the proposed act would not have a valid duress defense since the state is making a demand deemed lawful by statute.

The Court in *Newland* did not address the question of whether the lien process was violative of an applicant's constitutional right to contract without interference. However, the Idaho Supreme Court has articulated the fundamental rule of law relative to what degree the legislature may modify and regulate an

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individual's right to contract guaranteed by both the U.S. and Idaho Constitutions.

. . . It must be conceded, and this court has stated, that a regulation abridging or restricting the freedom of contract or regulating the right to engage in any lawful business in a lawful manner must be reasonable and must reasonably tend to accomplish or promote the protection and welfare of the public. Regulations which are arbitrary or capricious and which unreasonably restrict or interfere with the liberties of the citizen, without accomplishing or promoting a legitimate object of the police power, are invalid violations of the fundamental law. *Messerli v. Monarch Memory Gardens, Inc.* 88 Idaho 88, 96.

We believe that a strong argument can be made that the lien provision in the proposed act is a reasonable regulation restricting contract rights so as to promote the public health and welfare. It is our opinion that the proposed lien provision meets the constitutional test articulated in the *Messerli* case.

Once again, it is difficult to state with certainty whether a particular legislative act interferes with an individual's right of liberty of contract absent a judicial determination.

The courts must determine whether the legislative discretion to control the right of private contract has been exercised in such manner as to interfere unduly with the constitutional right of contract. As in other instances of court inspection of police regulation, no hard and fast rule can be laid down, and each instance must be determined by itself; there is no precise and universal formula for determining the validity of a regulation imposing conditions upon those contracts which are beyond the reach of the police power and those which are subject to prohibition or restraint. 16 Am. Jur. 2d Constitutional law § 290.

In sum, it is our belief that the lien process established by H.B. #40 would withstand a court challenge to its constitutionality relative to both the questions of equal protection and right to contract. As previously indicated, it is exceptionally difficult to say with certainty whether a particular statute or fact situation will in fact be ruled constitutional. Only an interpretation and ruling by a court of competent jurisdiction can ultimately decide the question.

Very truly yours,
/s/ DAVID H. LEROY
Attorney General

DHL/RLE/tr

Analysis by:
ROY L. EIGUREN
Deputy Attorney General

cc: Hon. Elaine Kearnes
House of Representatives

LEGAL GUIDELINES OF THE ATTORNEY GENERAL

March 12, 1979

Mr. James Baugh
Asst. Superintendent
Liquor Dispensary
Dept. of Law Enforcement
Statehouse Mail

Re: I.D. Requirement For The Sale Of Beer And Alcohol

Dear Mr. Baugh:

This letter is in reply to your request of January 29, 1979. You requested a clarification of the Idaho Code as to what forms of identification are needed to purchase alcoholic beverages in the state of Idaho. Before addressing certain specific questions that you have, a general discussion of the issue would seem warranted.

Idaho Code, §23-312 prohibits the sale of alcoholic beverages to persons under 19 years of age. *Idaho Code*, §23-1023 has a similar provision as to the sale of beer. The Idaho Code recognizes three types of acceptable identification for residents of this state. These are: (1) a valid driver's license, (2) a military identification card, or (3) an identification card issued by the Department of Law Enforcement. *Idaho Code*, §§23-929 and 23-1013.

Regulation 7-B of the Department of Law Enforcement provides that when a licensee or his agent is in doubt as to the age of the consumer who wishes to purchase beer (i.e., 19 years old), the exclusive means of determining age is by an official identification card issued by the Department of Law Enforcement. The validity of this regulation would tend to be in doubt for the reason that it appears to be in conflict with *Idaho Code*, §23-1025.

Idaho Code, §23-1025 provides that whenever a licensee is in doubt as to the age of a consumer, who wishes to purchase beer, he shall have the consumer execute a certificate that he is 19 or more years of age and also exhibit acceptable proof of age and identity. This certificate is applicable to both residents and non-residents of the state. When the certificate is used for a resident of Idaho, this does not relieve the licensee of the duty of checking either a driver's license, a military identification card or a Department of Law Enforcement identification card. It can be used for a resident of this state when the licensee is in doubt as to the authenticity of the identification.

The main purpose of the certificate of age is for non-residents who wish to purchase beer in Idaho. The certificate of age which you attached to the opinion request (form 231024-79) appears to be proper with the exception that the instructions speak to alcoholic liquor and the statute granting such authority only applies to sale of beer. The statute also provides, "The form of such certificate . . . shall be in accordance with such regulations as the director shall prescribe." *Idaho Code*, §23-1025. By way of a side observation, it occurs to us that the form should be adopted in accordance with Chap. 52, Title 67, to be assured that it will have a binding effect upon licensees.

Your request poses three specific questions upon which you seek clarification:

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Question No. 1:

Does a temporary Idaho driver's license satisfy as a valid license as stated in *Idaho Code* §23-1013?

A temporary driver's license is a valid form of identification and comes within the purview of *Idaho Code*, §23-1013. However, if a licensee sells beer to a person who has not reached the age of nineteen he will be in violation of the statute. The only defense he may have is discussed in question no. 2 below.

Idaho Code, §23-1013 provides:

It shall be unlawful for any person to sell, serve or dispense beer to or by any person under nineteen (19) years of age. . . .

The Idaho Supreme Court in *State v. Bush*, 93 Idaho 538, 466 P.2d 578 (1970), stated in reference to this Code section the following:

We find it unnecessary to decide whether mistake or ignorance of age is a defense to a charge of violation of this statute (see Annot. 12 ALR3d 991, §3 at p.995) . . . 93 Idaho at 540.

The court did not answer the question directly, but some insight can be gained from the annotation cited with approval by the court.

The statutes relating to sales of alcohol to minors tend to fall into two categories. The first category of statutes place a knowledge requirement upon the vendor, (i.e., no licensee shall knowingly sell). The second category of statutes provides that it shall be unlawful to sell. *Idaho Code*, §23-1013 appears to fall within this second category.

Cases dealing with this type of statute have held that ignorance or mistake of age is no defense to a prosecution for selling beer to a minor. Justice McQuade's concurring opinion in *Bush* seems to indicate that he interprets *Idaho Code*, §23-1013 in the same manner.

In summary, a temporary driver's license is a valid form of identification, but if the licensee has any doubt as to the authenticity of said license he may (and should) refuse to sell to that person.

Question No. 2:

Is the enclosed statement of age certificate useful in protecting our employees from prosecution and is it acceptable as proof of age and identification for a non-resident?

Idaho Code, §23-1025 provides in pertinent part:

Whenever any person licensed to sell beer, his agent or employee, shall have reasonable cause to doubt that any person who attempts to purchase or otherwise procure beer from or through such retail licensee, his agent or employee, is nineteen (19) or more years of age, such retail licensee, his agent or employee, shall require such person to execute a certificate that he or she is nineteen (19) or more years of age, and to exhibit acceptable proof of age and identity. . . .

LEGAL GUIDELINES OF THE ATTORNEY GENERAL

The Idaho Supreme Court in *Bojack's, Inc. v. Dept. of Law Enforcement*, 91 Idaho 189, 418 P2d 552 (1966), construed this provision of the Code and stated:

. . . We understand this contention to mean that a retail licensee in the case of a sale to a person under twenty years of age, acts at his peril, and has no defense unless he can show that he required the purchaser to exhibit an official identification card. Such a rule of strict liability is not applicable here for two reasons. First, §23-1025, by the provision above quoted, authorizes such a sale to a nonresident upon the exhibition of acceptable proof of age and identity. Good faith compliance with this provision protects the licensee from suspension of his license. Second, the statute providing for the suspension of a retail license, is penal in nature and will not be broadened or extended by construction to include or penalize acts or conduct not clearly within its terms. *State v. Fitzpatrick*, 89 Idaho 568, 407 P2d 309 (1965). 91 Idaho at 191.

Thus *Idaho Code*, §23-1025 provides a good faith defense for licensees who sell beer to a person under nineteen years of age, if the licensee and the consumer fill out the certificate of age form. *Black's Law Dictionary* defines "good faith" as "an honesty of intention."

This defense is a question of fact and in any prosecution or licensure revocation proceeding would be left up to the trier of fact. Again, it should be reiterated that if a licensee or his agent has any doubt as to the authenticity of the identification of the consumer, he may, and should, refuse to sell beer to that person.

Question No. 3:

If this statement of age is used, what protection is afforded to our employees in regard to liability under the Tort Claims Act?

The Idaho Tort Claims Act exempts from tort liability those governmental employees who, while acting within the scope of their employment (i.e., sale of beer), act without malice or criminal intent. *Idaho Code*, §6-904(I). This is to say that if an employee of the Department of Law Enforcement executes the certificate of age form, in good faith, before he sells beer to a person, he (and the State) are immune from tort liability.

If you have any further questions or concerns, please feel free to contact me.

THIS IS NOT AN OFFICIAL ATTORNEY GENERAL OPINION, AND IS SUBMITTED SOLELY TO PROVIDE LEGAL GUIDANCE.

Sincerely yours,
/s/ Steven M. Parry
Deputy Attorney General
Administrative Law and Litigation
Division

SMP:lb

LEGAL GUIDELINES OF THE ATTORNEY GENERAL

May 7, 1979

Helen M. Miller
State Librarian
Idaho State Library
325 West State Street
Boise, Idaho 83702

THIS IS NOT AN OFFICIAL ATTORNEY GENERAL OPINION,
AND IS SUBMITTED SOLELY TO PROVIDE LEGAL GUIDANCE.

Dear Ms. Miller:

We are pleased to respond to your letter of April 4, 1979 requesting clarification of procedures to be used for the establishment of new library districts now that the 1% initiative and HB 166 have been passed.

Many of your questions concerning the impact of the 1% initiative and HB 166 on the formation of new taxing districts are answered by Attorney General Opinion No. 79-7 which was issued last week. You will find a copy of this Opinion enclosed for your information. In particular, the opinion stresses that neither the 1% initiative as originally passed nor HB 166 preclude the formation of a new taxing district such as a library district. The more difficult question — may such a district once formed obtain ad valorem tax dollars for its "operating budget" during 1979 and 1980? — is addressed at length in the enclosure.

Opinion 79-7, however, does not discuss the election procedure for overriding the budget freeze provisions of H.B. 166. Thus, we will endeavor to outline our interpretation of statutes relating to the formation of new library districts.

In addition to posing the general problem, you have given particular facts for our consideration. Petitions have been signed by qualified resident electors equalling fifty-one percent (51%) of those voting in the last gubernatorial election in the area of proposed library districts. Further, assuming those petitions have been verified and filed with the Clerk of the Board of County Commissioners of the county in which the proposed district is located, we advise that the commissioners of that county are directed by Idaho statute to do the following:

A. Pass a resolution declaring that a petition to create a library district has been so filed;

B. Set a time for a hearing, which time shall not be less than three (3) nor more than six (6) weeks from the date of the presentation and filing of the petition;

C. Publish notice of time of hearing once a week for two (2) weeks previous to the time set for the hearing in a newspaper or general circulation within the county. The notice must state that a library district is proposed to be organized, giving the proposed boundaries and name, and that any resident elector or any taxpayer owning real property within the proposed boundaries of the proposed district may appear and be heard in regard to:

1. The form of the petition;

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2. The genuineness of the signatures;
3. The legality of the proceedings; and
4. Any other matters in regard to the creation of the library district.

D. No later than five (5) days after the hearing, make an order thereon with or without modification, based upon the public hearing and their determination of whether such proposed library district would be in keeping with the declared public policy of the state of Idaho in regard to library districts as more particularly set forth in §33-2701, *Idaho Code*; and, accordingly fix the boundaries and certify the name of such proposed district in the order granting the petition. The boundaries so fixed shall be the boundaries of said district after its organization.

E. Within five (5) days from entry of the order creating a library district, appoint the members of the first board of trustees.

Alternatively, where a fact situation is presented which indicates that a verified petition signed by fifty (50) or more qualified electors of a proposed library district is filed with the clerk of the county commissioners pursuant to §33-2704, *Idaho Code*, the county commissioners of the county of the proposed library district would be obligated to do the following:

- A. Set notice of and conduct a public hearing pursuant to §§33-2704 (a), (b) and (c), *Idaho Code*.
- B. Conduct an election pursuant to §33-2705, *Idaho Code*.

Once a library district is formed under either of these two enumerated procedures, then §63-2220, *Idaho Code*, prescribes that to provide funding up to the 3 mill maximum levy of §33-2714, *Idaho Code*, a *subsequent* election authorizing such levy must be approved by a 2/3 majority of the qualified resident electors of the library district voting on that question. We stress that the override vote must be separate from and subsequent to an election for the purpose of creating a new library district.

We have reviewed this matter with the Secretary of State and his office concurs in our analysis.

Should you require additional assistance in this matter, we invite you to call our office at 384-2400 in Boise.

Very truly yours,
/s/ LARRY K. HARVEY
Chief Deputy Attorney General
State of Idaho

/s/ JOHN ERIC SUTTON
Deputy Attorney General
Division Chief
State Finance Division

LEGAL GUIDELINES OF THE ATTORNEY GENERAL

May 21, 1979

Ref. #687

John O. Cossel
Prosecuting Attorney
for Shoshone County
Courthouse
Wallace, ID 83873

Dear Mr. Cossel:

Attorney General Leroy asked me to reply to your letter of May 4, in which you posed certain questions concerning the duties and responsibilities of the county recorder. Taking your questions in order:

"(1) What is the Recorder's responsibility in regard to assuring that an instrument to be recorded has the proper acknowledgment?"

Although the statutes do not specifically state that the recorder must examine each instrument and determine whether it is proper for recording, they clearly so imply. Idaho Code § 55-805 specifically states that, before an instrument may be recorded, its execution must be acknowledged by the person executing it. The Idaho Supreme Court has held that, if an instrument is not properly acknowledged, it cannot be filed for record, and, if it is filed, such filing is ineffective to give notice of such filing or recording. *Jordan v. Securities Credit Corp.*, 79 Idaho 284, 314 P.2d 967 (1957).

Obviously, someone has to determine whether the instrument is proper for recording. The recorder is the proper person to do so. Before accepting the instrument, then, he should examine it and determine whether the acknowledgment complies with Idaho Code §§ 55-710 through 55-715. If in doubt, he should check with the county prosecutor's office.

It does not appear that the recorder has any duty, however, to do more than check the instrument for proper form of acknowledgment. He need not attempt to determine whether the signatures are genuine, etc.

"(2) Can [should] the recorder refuse to record improperly acknowledged instruments?"

Yes. He can and should refuse to record them. Idaho Code § 55-805; *Jordan v. Securities Credit Corp.*, *supra*.

"(3) Would any liability attach to the recorder if an improperly acknowledged instrument is recorded?"

It is possible that a recorder could be held liable, if some person is actually damaged by the wrongful recording.

I have located no cases in Idaho holding a recorder liable in damages for wrongful recording, and most of the cases from other states involve a negligent *failure* to record or index, rather than a negligent recording. See Annotation: 94 A.L.R. 1303, and 66 Am. Jur. 2d, *Records and Recording Laws* §§ 194-198. It

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would probably be unusual for this type of litigation to arise, because it would be difficult, in most circumstances, for someone to prove that he has been damaged by the recording of an instrument.

Nevertheless, Idaho Code § 31-2417 appears to leave open the possibility of such liability. It provides that the recorder is liable to the party aggrieved for three times the amount of damages if he, among other things, "2. Records any instruments, papers or notices untruly, or in any other manner as hereinbefore directed. . . ."

Therefore, to the extent that a person could prove that he has been damaged, the recorder might be held liable for a wrongfully recorded instrument.

"(4) Is a jurat acceptable on an instrument to be recorded in lieu of the requirements of Idaho Code 55-700 et seq.?"

No. Idaho Code § 55-709 provides that the officer (notary) taking the acknowledgment of an instrument must endorse thereon a certificate in the form set forth in Idaho Code §§ 55-710 through 55-715. Idaho Code § 55-805 provides that an instrument must be so acknowledged before it can be recorded. If it is not, its "recording" is ineffective. *Credit Bureau of Preston v. Sleight*, 92 Idaho 210, 440 P.2d 143 (1968); *Jordan v. Securities Credit Corp.*, 79 Idaho 284, 314 P.2d 967 (1957); *Harris v. Reed*, 21 Idaho 364, 121 P. 780 (1912).

A jurat is simply the clause written at the bottom of an affidavit, stating when, where, and before whom such affidavit was sworn. Black's Law Dictionary. It does not comply with Idaho Code §§ 55-710 through 55-715. Therefore, an instrument with only a jurat, not acknowledged as required by statute, is not proper for recording and should not be recorded.

This is not an official Attorney General's opinion, and is furnished solely to provide legal guidance.

Sincerely,
/s/ MICHAEL C. MOORE
Deputy Attorney General
Chief, Local Government Division

MCM/dm

LEGAL GUIDELINES OF THE ATTORNEY GENERAL

May 24, 1979

Ref. #641

Steve Anderson
Audit Section
Idaho Department of
Parks and Recreation
Statehouse Mail

RE: Sandpoint Project
HCRS #16-00291

Dear Steve:

The questions you present are:

1. Does the City of Sandpoint have authority to construct a breakwater?
2. Is the contract between the City of Sandpoint and F.M. Bailson one for construction or one for the rental of equipment and purchase of materials?

Answer:

1. Idaho Code § 50-341 requires that when any expenditure contemplated by a city will exceed \$5,000.00, the city shall resort to competitive bidding and let the contract for work to the lowest responsible bidder.

There are several exceptions to the bidding requirement. First, § 50-341A states that nothing in the competitive bidding section shall prevent a city from doing the work by its own employees. Second, according to § 50-341J, if a city has gone through the bid process and no bids have been received, "the council may make the expenditure without further compliance with this section."

Since the City of Sandpoint advertised the project and received no bids, it can lawfully disregard the requirements of Idaho Code § 50-341. If the city chose to do the work with its own employees it could also disregard § 50-341.

It should be noted that Idaho Code § 54-1903 exempts cities from the requirements of the Public Works Contractors Act. The city, in doing its own public works, is not required to obtain a contractor's license.

2. The second question you present is more difficult. It is necessary to examine the contract and the surrounding circumstances to ascertain the true intent of the parties.

In this case, the contract is of the printed form type with particular provisions typed in. The City of Sandpoint is referred to as the "owner" and F.M. Bailson is referred to as the "contractor." Clause I of the contract states:

The Contractor shall do all work and furnish all tools, materials, and equipment for *Hired labor, equipment and material to construction of Park at City Breakwater Program. The work under this agreement shall be as directed by the City Engineer on a day to day program. The Project was approved by City Council for the City Engineer to contract and direct to work.* (Underlined portion was typed in on form contract.)

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There appears to be, in the reading of this clause, a conflict between the inserted (typed) portion and the printed form part of the contract. According to the printed form, Bailson is the contractor for the construction of the breakwater. However, according to the typed portion of the contract, the City is the contractor with the city engineer directing the work. Bailson is merely "hired labor and equipment," i.e., an employee of the contractor city. How do we resolve the conflict between the form and the typed expression?

According to the general rules of construction in contract law, a contract must be given effect according to its terms, *Durant v. Snyder*, 65 Idaho 678 (1944); and a contract must be construed according to the plain language used by the parties, *McCallum v. Campbell-Simpson Motor Co.*, 82 Idaho 160 (1960). When the language in the contract is ambiguous or subject to varying interpretations, the interpretation placed on it by the parties thereto should be given great weight in ascertaining their understanding of its terms, *Cottle v. Oregon Mut. Life Ins. Co.*, 60 Idaho 628 (1939); and, in any case, the intention of the parties to a contract controls its interpretation, *Interform Co. v. Mitchell*, 575 F.2d 1270 (D. Idaho 1978); *Caldwell State Bank v. First Nat. Bank*, 49 Idaho 110 (1930). Idaho Code § 29-109 provides that where a contract is partly written and partly printed, the written language will prevail. *Wecter v. Reynolds*, 48 Idaho 611 (1930) holds that typewritten parts of a contract prevail over the printed parts.

When we apply the aforementioned rules to the apparent conflict in the contract, we must resolve it in favor of the typewritten language. Although Bailson is referred to as the "contractor" in the form language, it is clearly the intent of the typewritten language to classify him as "hired labor." Further evidence of the intent of the parties is contained in a letter written by the city engineer, wherein he explains the city was the contractor and Bailson was hired labor. It seems evident that the contract was one for rental of equipment and purchase of materials and not a contract for construction.

Further support for this position may be found by examining the relationship between the city engineer and Bailson. If Bailson were an independent contractor, he would be responsible for all phases of construction and for presenting a finished project to the city without any supervision. If he were an employee, the city engineer would supervise the day to day activity of the work and he would be responsible for the finished product. In this case, according to the contract and the letter from the city engineer, Bailson was to be supervised in his activities on a "day to day program" and the city engineer was responsible for all phases of construction. This evidences an employer-employee relationship rather than an independent contractor.

Finally, it should be noted that if the city is Bailson's employer, it is responsible for complying with all federal and state laws as they relate to workmen's compensation, equal opportunity, etc., even as to Bailson's employees.

This is not an official Attorney General's opinion, and is furnished solely to provide legal guidance.

Sincerely,
ROBIE G. RUSSELL
Deputy Attorney General
Natural Resources Division

RGR/dm

LEGAL GUIDELINES OF THE ATTORNEY GENERAL

May 31, 1979

Ref. #763

The Honorable Emory M. Dietrich
Mayor
City of Hailey
Hailey, ID 83333

Dear Mayor Dietrich:

Attorney General Leroy asked me to reply to your letter concerning the provision in the proposed initiative and referendum ordinance for payment of costs of the election by the petitioners.

We have found no statutes or constitutional provisions covering this question, nor have we located any appellate court decisions in point. There are several fairly recent United States Supreme Court decisions holding that the right to vote is fundamental and that any restriction upon such right must promote some compelling state interest in order to survive a constitutional attack. *Hill v. Stone*, 421 U.S. 289, 95 S. Ct. 1637, 44 L. Ed. 2d 172 (1975); *City of Phoenix v. Kolodziejcki*, 399 U.S. 204, 90 S. Ct. 1990, 26 L. Ed. 2d 523 (1970); *Kramer v. Union Free School Dist. No. 15*, 395 U.S. 621, 89 S. Ct. 1886, 23 L. Ed. 2d 583 (1969). Based on this line of cases, an argument could be made that the proposed ordinance provision unreasonably interferes with the fundamental right to vote. However, as we understand the proposal, it does not attempt to place any restriction upon the right of any individual to vote, but imposes upon the petitioners the cost of holding the election. In the absence of any cases deciding whether this particular requirement unduly interferes with the right to vote, we are unable to say, whether the proposed ordinance provision is constitutional or not. The Idaho Constitution (art. 3, § 1) and the statute providing for city initiative and referendum elections (Idaho Code § 50-501) are silent as to this particular question.

We have been informed by the sponsor of this legislation, Representative Gary Ingram, that it was not his intent, nor, as far as he knows, the intent of the Legislature, to require the petitioners for an initiative to bear the cost of the election. We also find some general statements of law that, unless the statute otherwise specifically provides, the cost of a referendum on a municipal question should be borne by the municipality. 5 McQuillin, *Municipal Corporations* § 16.59, at 228, citing *Abercrombie v. City of Chattanooga*, 203 Tenn. 357, 313 S.W.2d 256 (1957), and *City of Red Bank - White Oak v. Abercrombie*, 202 Tenn. 700, 308 S.W.2d 469 (1957). However, these two cases are not directly in point, either.

Idaho statutes requiring petitioners to bear the costs of organizational elections for special districts have existed unchallenged for many years. Idaho Code § 31-1432 (fire districts); Idaho Code § 43-104 (irrigation districts). However, the U.S. Supreme Court has held that elections involving special service districts whose principal purposes are to provide services to the property within the district rather than to the public at large are different from elections involving the general public interest [*Saylor Land Co. v. Tulare Lake Basin Water Storage Dist.*, 410 U.S. 719, 93 S. Ct. 1224, 35 L. Ed. 2d 659 (1974)], so the validity of these statutes would not necessarily ensure the validity of Hailey's proposed ordinance.

LEGAL GUIDELINES OF THE ATTORNEY GENERAL

My personal view is that, in the absence of legislation specifically authorizing a city to require the petitioners for an initiative to bear the cost of the election, the courts would probably strike down such a provision in a city ordinance. However, the question does not appear to have been decided, and only a test case before the courts could provide a definite answer.

This is not an official Attorney General's opinion, and is furnished solely to provide legal guidance.

Sincerely,
/s/ MICHAEL C. MOORE
Deputy Attorney General
Chief, Local Government Division

MCM/dm

cc: Representative Gary Ingram

May 31, 1979

Ref. #654

Mr. Fred Snook
City Attorney
P.O. Box 1227
Salmon, ID 83467

Dear Mr. Snook:

You have requested an opinion from this office as to how the City of Salmon may legally levy taxes to raise funds to meet emergency expenditures incurred because of damage to the city water system occasioned by the severe weather conditions of the past winter. You also inquired as to the effects of the 1% initiative on such expenditures and tax levy.

Nothing in the 1% initiative or in the amendatory legislation subsequently enacted by the 1979 Idaho Legislature (Chapters 18 and 285, 1979 Idaho Session Laws) makes any exceptions, either from the 1% limitation or the interim budget freeze, for emergency expenditures. However, in our opinion, Salmon is probably not barred by the 1% legislation from borrowing to meet these expenditures or from levying to pay such borrowed funds, due to the particular timing of the expenditures and the effective date of the 1% legislation.

The 1% initiative passed by the voters in November, 1978, as applicable to tax levies of local governments, provided for an effective date "for the tax year beginning October 1 following the passage of this statute." This was repealed by H.B. 166 of the 1979 Legislature and replaced with an interim freeze on those portions of operating budgets funded by ad valorem taxes, to be effective for the fiscal year commencing October 1, 1979. No provision was made for the repeal of any existing statutes governing city budgets and appropriations. Therefore, neither the 1% initiative nor the freeze on operating budgets required by H.B. 166 was in effect at the time Salmon incurred the emergency expenditures. In

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our opinion, the emergency expenditures are governed by the Idaho constitutional and statutory provisions then existing and in effect, not by the 1% legislation.

Of particular application to Salmon's situation is art. 8, § 3, Idaho Constitution, and Idaho Code § 50-1006. Art. 8, § 3, prohibits the incurring of any indebtedness or liability beyond the current year's revenues except where authorized by a two-thirds vote of the electors, and except for "ordinary and necessary" expenses authorized by the laws of the state. In our opinion, Salmon's expenditures fall within the "ordinary and necessary" exception. Your situation is very similar to the case of *Hickey v. City of Nampa*, 22 Idaho 41, 124 P. 280 (1912), which held that, where the city lost its water mains during a major fire, it could replace the water lines and levy a tax to pay the cost thereof, without a vote of the people, as an "ordinary and necessary" expense, even though the expenditures exceeded the current year's revenues and had not been budgeted for the year. The Idaho Supreme Court, both in the *Hickey* case and in the later case of *City of Pocatello v. Peterson*, 93 Idaho 774, 473 P.2d 644 (1970), observed that an expenditure, although not of a frequently recurring nature, may nonetheless be "ordinary and necessary." Therefore, it is our opinion that Salmon's emergency expenditures probably qualify as "ordinary and necessary" and do not violate art. 8, § 3, Idaho Constitution.

Idaho Code § 50-1006 provides, among other things, that a city may exceed its annual appropriation ordinance, by a vote of one half plus one of the full city council, in order to effect the repair or restoration of any improvement, "the necessity for which was caused by casualty or accident after such annual appropriation is made." That section further authorizes the borrowing of a sufficient sum to provide for the expenses necessary to be incurred in making any repair or restoration, which amount shall be added to the amount to be raised in the next general tax levy. In our opinion, it is within the power of the city council to declare damages caused by a severe freeze to be a "casualty or accident" within the meaning of Idaho Code § 50-1006. *Ramstedt v. City of Wallace*, 55 Idaho 1, 36 P.2d 772 (1934) (continuous floods over several months constituted "casualty" or "accident" within the meaning of this section). Therefore, we view § 50-1006, Idaho Code, as authorizing the borrowing of funds for the purpose of repairing the water system, and the adding of a tax on the next levy to repay such funds, even though such funds were not originally budgeted and appropriated. See also Idaho Code § 50-1018 for provisions on borrowing of funds.

It may be contended that the budget freeze limitations of H.B. 166 (Ch. 18, 1979 Idaho Session Laws, as amended by Ch. 285), although not in effect when the expenditures were made or the indebtedness incurred, will be in effect by the time the tax levy is made and the taxes collected in late 1979, and will therefore prevent a tax levy for such purposes. We see several answers to this contention. First, since the indebtedness was lawfully incurred prior to the effective date of the freeze provisions, it might well constitute an unconstitutional impairment of contract to prohibit a tax levy to pay it. (In this regard, please refer to the material on impairment of contracts which Warren Felton previously mailed to you.) Secondly, we find no indication of legislative intent to repeal the existing provisions of law relating to casualties and accidents. Thirdly, we doubt that these particular expenditures would be considered part of the "operating budget" within the meaning of the freeze provisions of H.B. 166, even though they probably are "ordinary and necessary" expenses within the meaning of art. 8, § 3, Idaho Constitution. In other words, we do not view the 1% and budget

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LEGAL GUIDELINES OF THE ATTORNEY GENERAL

freeze limitations as restricting the city's power to borrow and tax in this instance.

The city could also hold an override election, as authorized by Idaho Code § 53-2220 (1) (b) (Chapters 18 and 285, 1979 Idaho Session Laws), but, in light of the above analysis, we do not view that as being necessary in order to borrow the funds and to levy a tax to repay them.

We conclude, then, that the expenditures in question most likely would be held to be "ordinary and necessary" expenses within the meaning of art. 8, § 3, Idaho Constitution; that the city can probably utilize Idaho Code § 50-1006 to incur the indebtedness and to levy the tax to repay the funds; that borrowing for such purpose is authorized under the provisions of Idaho Code §§ 50-1006 and 50-1018; and that the provisions of the 1% initiative and the budget freeze effective October 1, 1979, probably would not prevent a tax levy to repay the borrowed amount.

This is not an official Attorney General's opinion, and is furnished solely to provide legal guidance.

Sincerely,
MICHAEL C. MOORE
Deputy Attorney General
Chief, Local Government Division

WARREN FELTON
Deputy Attorney General
Local Government Division

MCM/dm

May 31, 1979

Pat Riceci
Administrator of Motor Vehicles
Department of Law Enforcement
Statehouse Mail

THIS IS NOT AN OFFICIAL ATTORNEY GENERAL OPINION AND
IS SUBMITTED SOLELY TO PROVIDE LEGAL GUIDANCE.

Dear Pat:

In your letter of May 4, 1979 you asked for our opinion on two questions relating to Chapter 24, Title 49, *Idaho Code*. The questions were as follows:

1. Does a new motor vehicle broker fall within the definition of a "motor vehicle dealer" as defined in Section 49-2402 (3), *Idaho Code*?

2. If the answer to No. 1 above is in the affirmative, is it your opinion that such brokers must comply in all respects with the Motor Vehicle Dealer and Salesman Licensing Act, Section 49-2401, *et seq.*, *Idaho Code*?

LEGAL GUIDELINES OF THE ATTORNEY GENERAL

As Chapter 24, Title 49 does not deal specifically with new motor vehicle brokers we believe that it is more appropriate to treat only the particular request submitted by Mr. O'Donnell in relation to International Auto Brokers Association (International) and not to execute a formal opinion in this matter. We have reviewed the materials you forwarded with your letter and have examined the provisions of Chapter 24, Title 49, *Idaho Code*.

It is our view that a new motor vehicle broker, operating under the arrangements set forth in Mr. O'Donnell's letter of April 12, 1979, and its accompanying documents, does not fall within the definition of a motor vehicle dealer as defined in 49-2402 (3), *Idaho Code*.

A motor vehicle dealer is defined in §49-2402 (3), *Idaho Code*, as follows:

"Motor Vehicle Dealer" shall mean any person engaged in the business of selling or exchanging new or new and used motor vehicles, or who buys and sells, or exchanges three (3) or more new or new and used motor vehicles in any one (1) calendar year.

It is clear from this subsection that in order to be classified as a motor vehicle dealer the following criteria must be met:

There must be a person within the meaning of the act who either:

1. is engaged in the business of selling or exchanging new or new and used motor vehicles, or
2. who buys and sells or exchanges three or more new or new and used motor vehicles in any one calendar year.

The definition of "person" at §49-2402 (2) is quite broad, encompassing International, as a corporation, and brokers in virtually any form in which they do business. International and its affiliated brokers will therefore be considered as persons within the meaning of the act for the purpose of this analysis. In order to be subject to the licensing requirements, however, these persons must be engaged in an activity described in the second or third criterion above.

In his letter of April 12 and the attachments accompanying it, Mr. O'Donnell has described an operation in which International Auto Brokers Association, a corporation, acts as a servicing agent for brokers. The brokers in turn act as "purchasing agents" for persons who wish to purchase new automobiles. Under this procedure, the consumer contacts the broker and explains the make, model and accessories of the automobile he wishes to order. The broker quotes a price and if satisfactory to the customer, a new vehicle purchase authorization is completed and signed by each party. The new vehicle purchase authorization and a five percent (5%) down payment are sent by the broker to International. The down payment is placed in an escrow account and International contacts a participating dealer who orders the automobile. The automobile is sent by the manufacturer to the dealer who then ships the automobile to a dealer near the customer. The customer goes to the dealer's place of business to view the automobile. If he approves, the remainder of the purchase price is sent to International and the automobile is released by the dealer. International pays the dealer who ordered the auto and the dealer sends the manufacturer's statement of origin to the customer.

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Under the agreement between the broker and his customer, the broker is specifically authorized to act as the purchasing agent of the customer for the purpose of buying the car described in the new vehicle purchase authorization. The brokerage agreement between International and the broker is a contract which creates a relationship in which International is the servicing agent for the broker.

"A broker is one who for a commission or fee brings parties together and assists in negotiating contracts between them." *Devereaux v. Cockerline*, 179 Or. 229, 170 P.2d 727, 735. Although it has been said that the nature of services which a person provides will determine whether he is a broker (*Rhode v. Bartholomew*, 94 C.A. 2d 272, 210 P.2d 768, 772), it is universally held that "a person whose business it is to bring buyer and seller together is a broker." *Id.* See also *Stank v. Michaelson*, 32 Colo. App. 75, 506 P.2d 757 and *Pierce v. Nichols*, 50 Tex. Civ. App. 443, 110 S.W. 206, 208 citing *Keys v. Johnson*, 68 Pa. 42.

Thus, if a person simply aids a buyer in locating a seller and does no more than negotiate a contract between them he is a broker. If at any time during the transaction the broker takes possession of the goods which are the subject of the brokerage agreement, however, he becomes a dealer. *Cartier v. Doyle*, 269 F. 647, 650 (D.C. Mich.); *Moore v. Turner*, 137 W.Va. 299, 71 S.E. 2d, 342; *Williams v. Kinsey*, 74 Cal. App. 2d 583, 169 P.2d 487, 493. The broker's possession may be actual or constructive. A California corporation was deemed a dealer when it received the original bill of lading and invoice although the goods were never in its physical possession. *Meyer v. State Board of Equalization*, Cal. App., 256 P.2d 375, 377. If the goods enter the broker's possession he becomes a dealer "who buys something in order to sell it." *Brown & Zortman Machinery Co. v. City of Pittsburgh*, 375 Pa. 250, 100 A. 2d, 98, 101.

Given the present set of facts, it would appear that International and its brokers are not dealers within the meaning of §49-2402 (3), *Idaho Code*, but are brokers. They neither sell nor exchange automobiles. They perform the service of finding automobiles for customers and negotiating contracts between the customers and auto dealers. All transactions are in the name of the customer, with the brokers exercising the power of attorney. The five percent down payment which they have in escrow is forwarded to the dealer upon completion of the sale as is the balance due under the contract.

Other states have classified brokers as dealers but have had the aid of statutes such as California Vehicle Code, Section 285 which states:

" 'Dealer' is a person . . . who: (a) for commission, money or other thing of value, sells, exchanges, buys, or offers for sale, negotiates or attempts to negotiate, a sale or exchange of an interest in, a vehicle subject to registration under this code, or induces or attempts to induce any person to buy or exchange an interest in any vehicle and, who receives or expects to receive a commission, money, brokerage fees, profit, or any other thing of value, from either the seller or purchaser of said vehicle. . . . "

However, the definition of dealer in *Idaho Code* § 49-2402 (3) is not so broad as the California law and does not include brokers. It is our view, therefore, that International and its brokers are not dealers within the meaning of *Idaho Code*

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§ 49-2402 (3) and are not subject to the Motor Vehicle Dealer and Salesman Licensing Act.

Very truly yours,
/s/ JOHN MICHAEL BRASSEY
Deputy Attorney General
Division Chief
Business Regulation Division

July 17, 1979

Greg H. Bower
Chief Criminal Deputy
Ada County Prosecutor's Office
Ada County Courthouse
Boise, Idaho 83702

Capt. Vernon L. Bisterfeldt
Acting Director
Valley Division
Boise Police Department
Boise, Idaho 83704

Sgt. James E. Thompson
Valley Division
Boise Police Department
7200 Barrister Dr.
Boise, Idaho 83704

Control Nos. 912 & 913

Gentlemen:

In your recent separate correspondence, you have all asked for an opinion on essentially the same question, to wit: Can an individual acting as a receiver of what he believes to be stolen property be guilty of a violation of Idaho's receiving stolen property statute (§18-4612) when the property had been previously recovered by a law enforcement agency before delivery to the receiver?

It is the conclusion of this office that the receiver of such recovered property is not guilty of receiving "stolen" property under *Idaho Code*, §18-4612, because the property lost its character as stolen property once it was recovered by the police. However, the receiver may be prosecuted for attempted receiving of stolen property.

Since 1914 when the Idaho Supreme Court ruled in the case of *State v. Janks*, 26 Idaho 567, 144 P. 779, it has been the law in Idaho that before a defendant could be convicted under *Idaho Code*, §18-4612, the State must establish that the property in question was "stolen" property. Since the *Janks* case, there have been no Idaho Supreme Court decisions addressed to the issue of when stolen property loses its character as such. However, other jurisdictions with comparable statutes provide ample judicial precedent relating to the question. *People v. Rojas*, 55 Cal.2d 252, 358 P.2d 921; *People v. Moss*, 55 Cal.App.3d 179, 127

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Cal.Rptr. 454; *State v. Para*, 120 Ariz. 26, 583 P.2d 1346; *State v. Niehuser*, 533 P.2d 834; *Darnell v. State*, 558 P.2d 624. Also, there is an annotation directly on point found at 85 ALR2d 252, and an informative discussion of the subject is found in *Criminal Law*, by LaFave & Scott, at p.685, and Vol. 2 of *Wharton's Criminal Law and Procedure*, §573.

From the above-cited authorities and treatises, it is fairly clear and well settled that if at the time of the alleged offense the property has lost its stolen character through a recovery by the owner or a law enforcement agency, the receiver cannot be held guilty of receiving stolen property, even though he receives it believing it to be stolen, but may be held responsible for attempted receipt. However, the ability to prosecute under similar circumstances for attempted receipt of stolen property is not so unanimously sanctioned by the courts. For example, in the case of *Booth v. State*, 398 P.2d 863, the Court of Criminal Appeals of Oklahoma held that if it was legally impossible to commit the offense of receipt of stolen property, due to the property losing its stolen character, then the defendant could not be convicted of attempting to commit a crime that was legally impossible for him to commit. Oklahoma's precedent, fortunately, appears to be in the minority. The great majority of jurisdictions judicially sanctioned prosecution for attempted receipt of stolen property, even though the property is not considered stolen at the time it is received.

The treatise entitled *Criminal Law*, by LaFave & Scott, contains the following good summarizing statement of the subject at p.685:

Sometimes the owner, or a policeman acting on the owner's behalf, catches the thief with the stolen property before he has had time to pass it on to his receiver. In order to be able to prosecute the receiver, the owner or policeman may return the property to the thief, who, cooperating with his captors in order to reduce his own punishment, then sells the property to the receiver. In such a case the receiver is not guilty of receiving "stolen" property, for the property in question was not "stolen" at the moment he received it; it lost its character as stolen property once it had been recovered by the owner or the policeman.

It is hoped that the above discussion of your mutual question will be of assistance to you.

THIS IS NOT AN OFFICIAL ATTORNEY GENERAL OPINION, AND IS SUBMITTED SOLELY TO PROVIDE LEGAL GUIDANCE.

Sincerely yours,
Michael B. Kennedy
Deputy Attorney General
Chief, Criminal Justice Division

MBK:lb

LEGAL GUIDELINES OF THE ATTORNEY GENERAL

July 19, 1979

Vivian Taggart
Executive Secretary
Public Works Contractors Board
Statehouse Mail

Re: Prefabricated buildings

Dear Vivian:

This letter is in response to your inquiry of July 17, 1979. Your question is, does a contractor who builds a prefabricated building and places that building on a set of blocks so it is movable, fall within the purview of the public works contractors licensing law, Title 54, Chapter 19, *Idaho Code*. As I understand the present situation, a school district desires to purchase a prefabricated building to be used as a classroom. One of the features of this building would be that it could be dismantled and moved to another location with little difficulty. This type of building can be compared to a mobile home, but on a much larger scale. Also, it should be noted that the building is wired for electricity and presumably heating of some sort.

Public works construction is defined in *Idaho Code*, §54-1901 (c). This Code section states in part:

(c) "Public works construction" includes any or all of the following branches:

* * *

(3) Building construction, which is defined as all work in connection with any structure now built, being built, or hereafter built, for the support, shelter and enclosure of persons, chattels, personal and movable property of any kind, requiring in its construction the use of more than two unrelated building trades or crafts.

Subsection (1) of this Code section defines "heavy construction" and the definition includes foundations. For the reason that the legislature made the distinction between buildings and foundations, it would appear that it was the intent of the legislature to require licensure for this type of construction. This conclusion is bolstered by the fact that the above-quoted definition refers to "any structure" and not just structures with foundations.

Concluding that this type of structure falls within the definition of "public works construction" we must look to the exemptions written into the Public Works Contractors Licensing Act. The only exemption which might be applicable is §54-1903 (d) which states:

Exemptions. — This act shall not apply to: —

(d) The sale or installation of any finished products, materials or articles of merchandise, which are not actually fabricated into and do not become a permanent fixed part of the structure.

The normal rule for statutory construction is that where there are express statutory exceptions, e.g. exemptions from licensure, the exemptions are strictly

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construed. Sutherland, *Statutory Construction*, §47.33. In interpreting a licensing statute such as the public works contractors licensing law, the presumption would be against the exemption. *Herndon v. West*, 87 Idaho 335, 393 P2d 35 (1964). Also see *McKay Construction Company v. Ada County Bd. of County Commissioners*, 99 Idaho 235, 580 P2d 412 (1978).

Applying these rules of statutory construction to this question, it becomes apparent that *Idaho Code*, §54-1903 (d) is not applicable and that a public works contractor's license is required. This conclusion is bolstered by the fact that one of the purposes of the Public Works Contractors Licensing Act is to protect the public from poorly constructed public buildings. This should be particularly true when schools and school children are involved. It would seem to be putting form over substance if the State required licensure and bonding for those individuals who build a classroom that is securely fastened to a foundation and not require licensure or bonding for those individuals who construct a classroom which is not secured by a foundation.

THIS IS NOT AN OFFICIAL ATTORNEY GENERAL OPINION, AND IS
SUBMITTED SOLELY TO PROVIDE LEGAL GUIDANCE.

Sincerely yours,
/s/ Steven M. Parry
Deputy Attorney General
Administrative Law and Litigation
Division

SMP:lb

August 8, 1979

Ref. #1036

Mr. Jack A. Buell, Chairman
Board of County Commissioners
Benewah County
Courthouse
St. Maries, ID 83861

Dear Mr. Buell:

This is in response to your request for an opinion concerning the provision of ambulance services within your county.

Your first question is whether an ambulance service can be operated by a fire district organized pursuant to Idaho Code §§ 31-1401 and following. In our view, the answer is no. Fire protection districts are public corporations and possess only those powers which are expressly granted to them by statute or those which can reasonably be implied as necessary to carry out the express powers. 3A Antieau, *Local Government Law*, §§ 30D.00, 30D.03. Idaho Code § 31-1414 provides, in part:

Every fire protection district upon being organized as provided in this chapter shall be a governmental subdivision of the State of Idaho and a

LEGAL GUIDELINES OF THE ATTORNEY GENERAL

body politic and corporate, *and as such has the power specified in this chapter.* . . . [Emphasis added.]

We have examined Chapter 14, Title 31, Idaho Code, and especially §§ 31-1414, and 31-1415 and 31-1416, containing the general grants of power to fire protection districts, and find no grant of power, either express or reasonably implied, to conduct an ambulance service as part of or in addition to fire protection services. On the contrary, in addition to the above-quoted portion of Idaho Code § 31-1414, which provides that fire districts shall have the power specified in Chapter 14, Idaho Code § 31-1416 provides that the general powers of boards of fire protection commissioners include making and adopting rules and regulations for "carrying out the purposes of this law," (i.e., the fire protection district law) and conducting the business and affairs of the district. Thus, both sections limit the powers of the district to those expressed in the fire district law, which, as already noted, contains no grant of power to conduct an ambulance service.

Idaho Code § 31-1401, which is also part of the fire district law, provides that "the protection of property against fire *and the preservation of life*, are hereby declared to be a public benefit, use and purpose." [Emphasis added.] Although the provision of ambulance services certainly would further the purpose of preservation of life, we do not view the statement of this general *purpose* as containing a grant of *power*, express or implied, to conduct an ambulance service.

We conclude, then, that fire protection districts are not authorized to maintain ambulance services. We find further support for this conclusion in the specific provisions for county ambulance service contained in Chapter 39, Title 31, Idaho Code, to which your letter also refers. To state it another way, we find it unlikely that a court would find an implied grant of power for a special or single-purpose district to conduct an ambulance service in a chapter of the code which is generally unrelated to that subject, when a later chapter deals specifically with that subject and authorizes a general governmental entity (the county) to provide the service.

Your second question is whether an independent (private) ambulance service could be operated in the county, without county involvement. Idaho Code § 31-2901 authorizes (but does not require) counties to provide ambulance service "whenever existing ambulance service is not reasonably available to the inhabitants of the county or any portion thereof. . . ." This appears to contemplate that private ambulance services may be available in some areas, and we find no Idaho Code provision which would prohibit such service. We are enclosing a copy of Attorney General Opinion No. 70-29, dated April 6, 1970, which is relevant to this question. However, we call attention to Idaho Code §§ 39-131 through 39-145, which grants the Department of Health and Welfare the power to regulate emergency medical and ambulance services, and we strongly recommend that private services be established only in strict compliance with those regulations. Secondly, since ambulance services involve matters of public health and safety, we view it as within the police powers of counties and cities to regulate such services by franchise as well. You should consult with the prosecuting attorney if your commission wishes to pursue this possibility.

Your next question concerns possible liability if a private ambulance service does not comply with applicable Idaho Code provisions. I assume that your

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concern here is with possible tort claims against the county if a private ambulance service fails to comply with the law or negligently causes injury or damage. Generally, counties are liable only for their own negligent acts (Idaho Code §§ 6-901 et seq.), or those of their employees and agents, not for acts or omissions of independent contractors or private individuals or companies, even of those acting under contract or franchise with the county. However, these are matters which should clearly and carefully be spelled out in any contract or franchise agreement.

Your fourth question is whether the 1 mill levy authorized by Idaho Code § 31-3901 is included in the total county levy or separated out as a special taxing unit. This will depend upon whether the service is provided as a county function under Idaho Code § 31-3901, or whether an ambulance district is established pursuant to Idaho Code § 31-3908. In the first situation, the 1 mill levy would be part of the total county levy. However, an ambulance district established under Idaho Code § 31-3908 is an independent taxing entity even though it is administered by the county commissioners, and its levy is separate from and in addition to the county's levy.

Your fifth question concerns the budgeting of revenues for ambulance services. We see no requirement in the statutes that more revenues be budgeted in one area of the county than in another because of valuation differences. The commissioners have reasonable discretion as to where the ambulances will be stationed and how the revenues will be applied.

Your next question is whether, if an ambulance district is established pursuant to Idaho Code § 31-3908, do the provisions of § 31-3904 (adoption of schedule of fees, accounting and expenditure of funds, etc.) apply to the district? Idaho Code § 3908 (3) provides that, where an ambulance district is created, the board of commissioners shall be the governing board and "shall exercise the duties and responsibilities provided in Chapter 39, Title 31, Idaho Code." In our view, this provision does make Idaho Code § 39-3904 applicable to ambulance districts.

Your final question is whether money derived from non-ad valorem tax sources such as fees, donations, and special fund raising events must be deposited with the county treasurer and in the ambulance service fund. In our view, the answer is yes, as long as the service is being operated by the county or as a county ambulance district. All such revenues should be treated as county funds and deposited, budgeted, and accounted for accordingly. To the extent that the funds are not derived from ad valorem tax revenues, they are probably exempt from the budget freeze provisions of Idaho Code § 63-2220, enacted by the 1979 Idaho Legislature, however.

We hope this will be of assistance to you in reaching a decision as how best to provide necessary ambulance services in your county. This is not an official opinion of the Attorney General and is provided for future legal guidance.

Sincerely,
MICHAEL C. MOORE
Deputy Attorney General
Chief, Local Government Division

MCM/dm

Encl.

cc: Gregory E. Keller
Benewah County Prosecuting Attorney

LEGAL GUIDELINES OF THE ATTORNEY GENERAL

August 8, 1979

Ref. #1130

Daniel Smith
BROWN, BUILLERMO & AWES, AIA
117 South Sixth Street
Boise, ID 83702

Dear Mr. Smith:

Idaho Code § 50-901 permits cities to adopt by reference "nationally recognized codes such as but not limited to those establishing rules and regulations for the construction, alteration or repair of buildings, the installation of plumbing, the installation of electric wiring, fire prevention, gas piping installations, sanitary regulations, health measures, and statutes of the state of Idaho. . . ." Idaho Code § 31-715 contains a similar provision for counties.

The Code for Energy Conservation which you sent to me appears to be a "nationally recognized code" similar to those enumerated in Idaho Code §§ 31-715 and 50-901, and probably could be adopted by reference as long as the other formalities required by those statutes are observed. Any amendments to the code would have to be specifically set forth in the ordinance in the manner provided by statute.

The model ordinance you enclosed appears to be in compliance with Idaho Code §§ 55-901 and 50-902, although I notice that no provision is made in it for amending the code at the time of adoption. The ordinance would have to be revised for use by a county. In addition, we strongly recommend that the adopting ordinance be carefully reviewed (and, preferably, drafted) by the city attorney or county prosecutor of the adopting entity.

This is not an official Attorney General's Opinion, and is furnished solely to provide legal guidance.

Sincerely,
MICHAEL C. MOORE
Deputy Attorney General
Chief, Local Government Division

MCM/dm

LEGAL GUIDELINES OF THE ATTORNEY GENERAL

August 9, 1979

Ref. #1060

Mr. Hugh Mossman
Boise City Attorney
P.O. Box 500
Boise, ID 83701

Mr. William L. Mauk
Attorney at Law
409 W. Jefferson Street
P.O. Box 1353
Boise, ID 83702

RE: Idaho Code § 63-2220 limitations

Dear Hugh and Bill:

You have posed questions concerning the application of the ad valorem tax freeze limitations of Idaho Code § 63-2220 to Boise's tax levies to be certified in 1979 and 1980. Boise apparently operates on a deficit-financing basis, using tax-anticipation borrowing and issuing registered warrants during the fiscal year, then certifying a tax levy based upon the current, rather than the ensuing, fiscal year's budget.

Bill's contention, as I understand it, is that, since Boise levies in 1979 for the fiscal year commencing in 1978, and in 1980 for the fiscal year commencing in 1979, then the tax levy to be certified in 1979 is not limited to the ad valorem tax levy certified in 1978 (which was actually levied for the 1977-78 fiscal year budget), but can include the full ad valorem tax amount of the 1978-79 fiscal year budget. Likewise, in 1980, Boise can certify a tax levy up to the amount certified in 1979, since the 1980 certification is actually for the fiscal year 1979-80.

Idaho Code § 63-2220 (1) (a) provides:

63-2220. Limitation on budget requests — Limitation on tax charges — Exceptions. — (1) (a) For its fiscal year commencing in 1979 and ending in 1980, no taxing district shall certify a budget request to finance the ad valorem portion of its operating budget that exceeds the dollar amount of ad valorem taxes certified for that same purpose in 1978.

Idaho Code § 63-2220 (2) (a) provides:

For its fiscal year commencing in 1980 and ending in 1981 no taxing district shall certify a budget request to finance the ad valorem portion of its operating budget that exceeds the lesser of:

- (i) the dollar amount of ad valorem taxes certified for that same purpose in 1978; or
- (ii) when combined with the budget requests from all other taxing districts imposing taxes on the same property, the limitation imposed by section 63-923 (1), Idaho Code.

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Bill's argument has a good deal of plausibility, especially considering the introductory words, "for its fiscal year. . . ." If the 1979 levy certification is for the 1978-79 fiscal year, then, if those words are considered alone, it should make no difference when the actual levy for that year is certified. The difficulty with Bill's contention, as we read it, is that the statute itself goes on to limit the levy to the dollar amount certified for that purpose *in 1978*. The statute does not limit it to the levy *for the fiscal year commencing in 1978*, but to the *levy certified in 1978*. We feel that this distinction is crucial in determining the legislative intent. That intent, as expressed in the statute, is, in our view, to limit the amount certified in 1979 to not more than the amount certified for the ad valorem portion of the operating budget in 1978, regardless of whether or not the certifying authority is on a cash basis. In our view, this was an essential component of the compromise solution reached by the legislature, whereby full implementation of the 1% Initiative was postponed until 1980, but no more tax monies would be raised for operating purposes in 1979 than were raised for such purposes in 1978.

We recognize that it is possible to read the language of the statute in the manner Bill suggests, but we view the legislative intent, as expressed in the statute, as being to limit the levy certification in the manner stated above. This is consistent with our recent Attorney General Opinion No. 79-15, dated July 11, 1979, wherein we stated, at page 6, that the apparent intent of the legislature in enacting Idaho Code § 63-2220 was to limit ad valorem taxes for operating purposes in 1979 *to the amount so certified in 1978*.

This is not an official Attorney General's opinion and is furnished solely to provide legal guidance.

Sincerely,
MICHAEL C. MOORE
Deputy Attorney General
Chief, Local Government Division

MCM/dm

August 15, 1979

Ref. #1088

Bruce F. Thompson
Executive Director
Panhandle Area Council
Box 880
Coeur d'Alene, ID 83814

Dear Mr. Thompson:

This is in response to your letter requesting an opinion on whether or not an Idaho county has the authority to construct and operate, or to contract or otherwise provide for the construction and operation of, a sanitary sewer system, including a wastewater treatment plant, within a part of the unincorporated area of the county. For the reasons set forth below, I believe that Idaho counties, in the proper exercise of their police powers, do have such authority.

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Since there appear to be applicable statutory and constitutional provisions in addition to those mentioned in your letter, I am taking the liberty of grouping your specific questions under the following general categories: (1) Do counties in Idaho have constitutional or statutory authority, under their police powers or otherwise, to construct and operate a sanitary sewer collection and treatment system? (2) If they have such authority, do they also have the authority, either express or implied, to establish sewer service fees and capital improvement funds, receive grants-in-aid, etc? (3) Are counties authorized to enter into inter-governmental service agreements with other entities, such as cities, for the provision of wastewater collection and treatment within the unincorporated portions of the county? (4) Do any other alternative methods exist by which sanitary sewer service can be provided to built-up but unincorporated areas of a county?

At the outset, I want to make it clear that, since the Idaho constitutional and statutory provisions do not explicitly answer most of these questions, and since the Idaho Supreme Court has not had occasion to rule upon a question of county authority to provide sanitary sewers, the opinions set forth in this letter are necessarily restricted to a personal view as to the probable direction the Idaho Supreme Court would go if presented with such questions under the existing constitutional and statutory provisions. Future constitutional or statutory changes, or relevant court decisions, could change the views expressed in this letter. Secondly, the questions as posed, and as restated above, are necessarily general in nature. Many subsidiary questions as to procedure, financing, and implementation of various alternative methods discussed below would have to await the development of a definite proposal. I strongly advise close consultation with the local prosecuting attorney, city attorney, or other local counsel at all stages of such development.

Please note that we are discussing here the powers of *counties themselves*, not the powers of independent entities such as sewer districts, which have specific statutory authority in this area.

As a general rule, counties, as public corporations and political subdivisions of the state, possess and can exercise only those powers which are expressly granted to them by law, or which can reasonably be implied from such express powers. Some Idaho cases, such as *Prothero v. Board of County Commissioners*, 22 Idaho 598, 127 P. 175 (1912), have held that counties have only those powers expressly or impliedly conferred by statute, although, as noted below, later decisions hold that counties have a grant of police power directly from the Idaho Constitution, not dependent upon statute. Our first inquiry, then, is whether Idaho law confers such powers upon counties.

Most, but not all, of the statutory provisions governing counties are contained in Title 31, Idaho Code. Although that title contains certain general statements of county powers (Idaho Code §§ 31-602, 31-604, 31-801, et seq.), and does, at Idaho Code § 31-714, authorize counties to adopt ordinances and regulations to provide for and promote public health and safety, we find nothing expressly granting or denying the power of counties to provide sewers.

However, there are two sets of statutes outside of Title 31 which may be helpful. The first is Chapter 36 of Title 39, contained in the state health code, which, at Idaho Code § 39-3603, authorizes the state to make grants to municipalities to assist in the construction of sewage treatment works. Idaho

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Code § 39-3602 (D) defines "municipality" as "any *county*, city, special service district, or other governmental entity having authority to dispose of sewage, industrial wastes, or other wastes." [Emphasis added.] It is possible to view this as at least an implied grant of authority to counties to construct sewage treatment facilities. The other statutes are in the local improvement district code, Title 50, Chapter 17, Idaho Code. Idaho Code § 50-1702 (a) specifically includes counties under the definition of "municipality" authorized to carry out the powers granted by the chapter. Idaho Code § 50-1703 provides that sanitary sewers and treatment systems are included among the improvements which counties are authorized to provide through the local improvement district method. It is possible to view either of these sets of statutes as providing at least some authority to counties in the provision of sanitary sewers.

It may not be necessary to rely entirely upon statutory authority, however, in light of the provisions of the Idaho Constitution relating to counties. I find two constitutional provisions in point, art. 8, § 3, and art. 12, § 2. (You also specifically inquired about the applicability of art. 8, § 3A, which provides for issuance of county revenue bonds for environmental pollution control facilities, "... to be financed for, or to be sold, leased or otherwise disposed of to, persons, associations, or corporations other than municipal corporations or other political subdivisions. . . ." I do not view this section as a general grant of power to counties to provide environmental pollution control facilities. Rather, it appears to be only a limited exemption from the financial restrictions of art. 8, §§ 3 and 4, and art. 12, § 4, Idaho Const., specifically for the purpose of providing county revenue bonds as a financing vehicle for funding pollution control efforts of non-governmental entities.)

Art. 8, § 3, Idaho Constitution, contains a prohibition against counties or other subdivisions of the state incurring indebtedness or liability in any year beyond the revenues provided for it for that year, without approval of two-thirds of the voters, except for "ordinary and necessary expenses." An amendment to that section which was approved by the voters of Idaho in 1972 reads, in pertinent part, as follows:

... and provided further, that any city or other political subdivision of the state may own, purchase, construct, extend, or equip, within and without the corporate limits of such city or political subdivision, water systems, sewage collection systems, water treatment plants, sewage treatment plants . . . and for the purpose of paying the cost thereof, may, without regard to any limitation herein imposed, with the assent of a majority of the qualified electors voting at an election to be held for that purpose, issue revenue bonds therefor. . . . [Emphasis added.]

Although no decisions of the Idaho Supreme Court have yet interpreted the 1972 amendment, it appears to authorize counties, which are political subdivisions of the state (*Strickfaden v. Greencreek Highway Dist.*, 42 Idaho 738, 248 P. 456), to purchase and construct sewage collection systems and sewage treatment plants and to issue revenue bonds for such purpose when so authorized by a vote of the electors. A more difficult question is whether it also authorizes counties to construct sewage systems and treatment plants without a vote and without issuing revenue bonds, as long as some other lawful means of financing is available. I have examined the ballot question and the Attorney General's Statement of Meaning and Purpose which accompanied this amendment at the 1972 general election (H.J.R. No. 73), and I find no expression of intent there to

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grant counties any new authority other than to issue revenue bonds. However, the wording of the 1972 amendment itself certainly appears to grant authority both to construct facilities *and* (also) to issue revenue bonds (if necessary). In my view, the 1972 amendment to art. 8, § 3, does authorize counties to construct sewage facilities, with or without revenue bonds, if other lawful financing devices are available.

The construction which the Idaho Supreme Court has given to counties' powers under Idaho Constitution art. 12, § 2, tends to support the view that counties possess independent constitutional authority to provide sanitary sewage systems. Art. 12, § 2, provides that any county or city may make and enforce, within its limits, all such local police, sanitary, and other regulations as are not in conflict with the general laws. The Idaho Supreme Court has, on several occasions, held that this is a direct grant of police power to counties, which can be exercised by counties without the necessity of further enabling legislation. *Dawson Enterprises, Inc. v. Blaine County*, 98 Idaho 506, 567 P.2d 1257 (1977); *County of Ada v. Walter*, 96 Idaho 630, 533 P.2d 1199 (1975); *State v. Clark*, 88 Idaho 365, 399 P.2d 955 (1965); *Garland v. Talbott*, 72 Idaho 125, 237 P.2d 1067 (1951).

Whether this constitutional police power includes the power to construct and maintain a sewer system as well as to enact regulatory ordinances is a question which has not yet been decided by the Idaho Supreme Court. Normally, the operation of a sewage system is regarded as a proprietary, rather than a governmental, function. *Schmidt v. Village of Kimberly*, 74 Idaho 48, 256 P.2d 515 (1953). That same case, however, recognized that the establishment of an adequate sewage disposal system was an appropriate method of promoting the public health under the police powers, and many cases have regarded the establishment and maintenance of a sewer system by a municipality as an exercise of its general police powers. 11 McQuillin, *Municipal Corporations* § 31.10; *New Orleans Gas Light Co. v. Drainage Comm.*, 197 U.S. 453, 25 S. Ct. 471, 49 L. Ed. 831 (1905); *Paulsen v. City of Portland*, 149 U.S. 30, 13 S. Ct. 750, 37 L. Ed. 637 (1893). The California courts, in construing a constitutional provision virtually identical to Idaho's art. 12, § 2, have consistently held that the grant of authority to adopt police and sanitary regulations includes the power to construct and maintain sewers. *Harter v. Berkley*, 158 Cal. 742, 112 P. 556 (1910); *Longridge Estates v. City of Los Angeles*, 6 Cal. Rptr. 900 (1960). And the Idaho Supreme Court, while not discussing art. 12, § 2, Idaho Const., directly, recognized, in *Wilson v. Boise City*, 6 Idaho 391, 55 P. 887 (1899), that a city's power to provide for the health and cleanliness of the city grants power to cause sewers and drains to be constructed to carry the waste outside the city. Another Idaho case upheld the exercise by a city, pursuant to the powers granted by art. 12, § 2, of police power activities other than mere passage of regulatory ordinances. In *Foster's, Inc. v. Boise City*, 63 Idaho 201, 118 P.2d 721 (1941), installation of parking meters as a method of regulating traffic was upheld under art. 12, § 2, even though the city incidentally derived revenue from the meters.

Based upon these decisions, it appears likely that a county can rely upon art. 12, § 2, Idaho Constitution, as a source of power to establish and operate a sanitary sewage system within the unincorporated area of the county, or some portion of it. However, I recommend that any ordinance establishing such a system contain express findings that the public health and safety require the installation of sanitary sewers within the area to be served, so that it is clear that the county is exercising its police powers for public health purposes.

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It appears to be well established that, where a municipality has the authority to establish a public utility service, it also has the authority, either express or implied, to establish reasonable rates or charges and to do whatever else is reasonably necessary to carry out the grant of power. See, generally, 11 McQuillin, *Municipal Corporations*, §§ 35.37 et seq. The Idaho Supreme Court has recognized that municipalities possess implied powers arising from powers which are expressly granted. "A grant of power carries with it authority to do those things necessary to the exercise of the power granted." *Wilson v. Boise City*, 6 Idaho 391, 397; 55 P. 887 (1899). *Boise Dev. Co. v. Boise City*, 30 Idaho 675, 167 P. 1032 (1917). In *Jack v. Village of Grangeville*, 9 Idaho 291, 74 P. 969, (1903), the Idaho court recognized the implied power to enter into contracts for water service from an express grant of power to establish waterworks. See also *Continental Oil Co. v. City of Twin Falls*, 49 Idaho 89, 286 P. 353 (1930). The power to establish reasonable fees or charges under the police power has also been recognized. *Foster's, Inc. v. Boise City*, 63 Idaho 201, 118 P.2d 721 (1941). The California courts have also, in interpreting the California Constitution's provision which is nearly identical to Idaho's art. 12, § 2, recognized the implied power to make reasonable charges, etc. *Longridge Estates v. City of Los Angeles*, *supra*; *Harter v. Berkley*, *supra*.

From this, it appears reasonable to conclude that, if counties have the power to establish sewage systems, they also have the power to establish rates, etc. However, such implied powers cannot override express constitutional and statutory budget limitations, so the provisions of art. 8, § 3, Idaho Const., the County Budget Law, and other applicable statutes must be complied with.

It also appears that Idaho Code §§ 39-3602 (D) and 39-3603 authorize counties to receive grants in aid for sewage treatment works.

Turning to the question of authority to enter into joint service agreements, assuming that counties have the authority to establish and maintain sanitary sewer systems, they appear to be authorized under Idaho Code § 67-2328 to enter into joint service agreements with cities or other governmental entities to provide such service. That statute provides that any power or authority authorized by the Idaho Constitution, statute, or charter, held by a public agency, may be exercised jointly with any other public agency having the same power or authority.

The final question is what other alternatives are available to provide sewers. These include:

- a. Establishment (with voter approval) of a sewer district or water and sewer district under Title 42, Chapter 32, Idaho Code.
- b. Creation of local improvement districts under Title 50, Chapter 17, Idaho Code.
- c. Extension of existing city sewer systems outside the corporate boundaries, possibly pursuant to Idaho Code § 50-606 (exercise of police powers beyond corporate limits).

To summarize, counties probably have direct constitutional authority under art. 8, § 3, and art. 12, § 2, Idaho Constitution, and possibly statutory authority as well, to establish sanitary sewer systems, subject, of course, to financial and other limitations imposed upon them by the constitution and statutes. It is

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likely that they also possess authority to establish fees and charges and to do whatever else is reasonably necessary to operate the system, consistent with other laws, and to enter into joint service agreements with cities for sewage collection and treatment.

I hope this letter will provide some assistance in meeting the problems faced by Benewah County. This is not an official Attorney General's opinion and is furnished solely to provide legal guidance.

Sincerely,
MICHAEL C. MOORE
Deputy Attorney General
Chief, Local Government Division

MCM/dm

cc: Gregory Keller
Tom Morris

August 17, 1979

Ref. #1072

Helen M. Miller
State Librarian
Idaho State Library
Statehouse Mail

Dear Ms. Miller:

This letter is in reply to your request for an opinion concerning the powers of cities and city library boards under Idaho law, particularly under Idaho Code §§ 33-2602 through 33-2608. In addition to the questions originally posed in your letter, three more questions arising out of the recent Lewiston City Library dispute have been added, two of which you discussed with me by telephone, and one of which was raised by Mr. Gene Mueller of the Lewiston City Council.

Attorney General Dave Leroy and I have discussed this entire matter at some length, and this letter will address the specific questions only within the context of applicable state law. We are not in a position to analyze local ordinances or personnel policies which may be relevant, since our information on those matters may be incomplete or out of date, and local attorneys are in a much better position than we are to consider the intent and applicability of such local ordinances and policies. In addition, it is not the policy of this office to involve ourselves in, or to attempt to arbitrate, purely local disputes. To the extent, however, that we can be of assistance in interpreting applicable state statutes for the legal guidance of local officials, we are happy to do so.

Of particular difficulty in answering these questions is the inherent tension between Idaho Code §§ 33-2602 through 33-2608, which establish city library boards of trustees which are somewhat independent of city administrative control, and the statutes governing other city activities, most of which are

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contained in Title 50, Idaho Code. The former (Title 33) statutes were passed long before enactment of the present municipal code, and probably long before modern municipal fiscal, accounting, and personnel practices were developed. As written, the library statutes are somewhat inconsistent with the apparent intent of the municipal code, which generally vests control of city affairs in elected city councils and in city administrative officers rather than in independent commissions. An example of the difficulty of attempting to reconcile these statutes will be seen in comparing Idaho Code § 33-2604, which provides, in part, that city library expenditures need not be independently audited, with Idaho Code § 50-1010, which explicitly mandates that *all* financial transactions of the city be fully, completely, and independently audited each year. The two statutes appear to be irreconcilable, and, unfortunately, this is not the only such example.

With this background, I will attempt to answer the specific questions, to the extent that the statutes provide any answers.

1. Is the city council empowered to shift funds from the library fund to other city accounts?

Idaho Code § 50-1014 provides that city councils may transfer an unexpended balance in one fund to the credit of another fund. On its face, this appears to be a broad and inclusive power. However, even in states which have such statutes, the law appears to be well settled that money raised for a special municipal purpose, specifically limited to a particular use, cannot lawfully be used for some other purpose. 15 McQuillin, *Municipal Corporations*, § 39.50.

Idaho Code § 33-2602 provides that a city council may levy and cause to be collected a tax to constitute a library fund, ". . . which shall be kept by the treasurer separate and apart from other moneys of the city . . . and be used *exclusively* for the purchase of books, periodicals, necessary furniture and fixtures, and whatever is required for the maintenance of such library. . . ." [Emphasis added.]

Since the statute provides that the library fund be used exclusively for library purposes, it appears to come within the special-fund doctrine mentioned above, in which case it cannot be transferred to other purposes. (One possible exception, recognized in some cases is a purely *temporary* borrowing for other essential governmental functions, where the funds are returned to the original fund as soon as they are available. *Town of Thornton v. Winterhoff*, 406 Ill. 113, 92 N.E.2d 163; 15 McQuillin, *supra*, § 39.50.

With this one possible exception, then, we conclude that a library fund created under Idaho Code § 33-2602 is not subject to transfer under Idaho Code § 50-1014.

2. Is interest earned on library funds to be added to the library account (fund) or to the general city funds?

The statutes do not appear to provide an answer to this question, nor do we find any general case law on the subject. Since Idaho Code § 33-2602 does establish the library fund as a special fund, however, it would appear that the more prudent course would be to treat any interest on legally-invested library funds as being part of the special library fund. Investment of library funds is discussed below.

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3. If the city certifies a levy of a certain dollar amount for the library fund, can such certification be reduced by the county commissioners or the city council later under the 1% limitation?

Since the legislature has not yet enacted the necessary implementing legislation to provide a method for reducing (if necessary) a city certification to meet the 1% requirements, it is not possible to provide a definite answer to this question. However, current law (Idaho Code § 63-2220, enacted in 1979) imposes a tax freeze upon the 1979 ad valorem tax levy for operating purposes, limiting it to the amount levied in 1978 for that purpose. The city council has some flexibility in determining the amounts of individual levies within the total operating budget (see our recent Attorney General Opinion No. 79-15), and the law does appear to leave the amount to be certified for library purposes, or any other city purpose, within the discretion of the city council.

4. Are library trustees empowered to withdraw the library fund from the city treasurer periodically and deposit it in a bank, to draw interest and to use to pay library bills?

Idaho Code § 33-2604 gives the library trustees the exclusive control of the *expenditure* of library funds (subject, of course, to the stated purposes contained in Idaho Code § 33-2602), but contains no grant of authority for *investment* of library funds. Since the specific statutes governing library boards are silent on the question, we assume that investment of library funds is governed by Idaho Code § 50-1013. The latter section provides that the *treasurer* shall keep all funds on deposit, and provides that funds may be invested by the treasurer in certain types of securities, including time certificates of deposit or public depositories.

Therefore, we conclude that library trustees are not empowered to withdraw library funds from the city treasurer, other than for expenditures, as provided by Idaho Code § 33-2604, for library purposes. Investment of library funds may be accomplished only as set forth in Idaho Code § 50-1013.

5. Is the city required to allocate sales tax money to the library fund?

We assume that this question refers to the sales tax refund account established under Idaho Code § 63-3638, which provides for allocations of some sales tax revenues to taxing districts to replace the old business inventory ad valorem tax. Idaho Code § 63-3638 (h) (2) merely provides that such sales tax moneys "may be considered by the counties and other taxing districts and budgeted against at the same time, in the same manner and in the same year as revenues from taxation . . . which these moneys replace." We do not read this statute as requiring that the sales tax moneys be budgeted for any particular purpose, nor do we find any other statute requiring that any amount of sales or other tax revenues be budgeted for library purposes. Idaho Code § 33-2602 provides that city councils *may* levy up to five mills for a library fund. The matter is within the discretion of the city council, and the council is not required to allocate sales tax revenues to the library fund.

6. May the library board deposit in a bank funds collected from library fees, fines, lost books, etc., and expend as needed for library purposes?

We presume that the concern here is whether the library trustees may establish a bank account which is separate and apart from the city funds and is not

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subject to control of the city treasurer. We find nothing in Idaho Code §§ 33-2602 through 33-2608 which authorizes the board of library trustees to establish an independent fund. Since the legislature has required strict accounting controls of other city moneys (see especially Idaho code §§ 50-208, 50-1010, 50-1011, 50-1012, and 50-1013), and has not required that library trustees be bonded, we doubt that the legislature intended to exempt city library funds from such requirements. We conclude that funds collected from library fees and fines, etc., must be deposited with the city treasurer, and not in a separate, independent account.

Assuming that the funds are properly budgeted and appropriated as required by law, the board of library trustees may then expend those funds as needed for library purposes after they are deposited in the library fund.

7. Who has the authority to hire and fire city library personnel, the board of library trustees or the city administrative officers (mayor or city manager, as the case may be)?

Idaho Code § 33-2604 expressly provides that the board of library trustees "... may appoint a librarian and assistants, and prescribe rules for their conduct." Under the general rule of law that, absent some contrary statutory provision, the power to appoint includes the power to remove (*Gowey v. Siggelkow*, 85 Idaho 574, 382 P2d 764), the board of library trustees presumably has the power to hire or fire library personnel.

However, since the question specifically arose out of the Lewiston City Library situation, we would caution the local officials there to consider whether the library board itself, by adopting the city's general personnel policy for the library's employees, has granted the library personnel certain rights not otherwise available under state law. Also, we doubt that great reliance should be placed on the *Gowey v. Siggelkow* decision cited above. That case dealt with the removal of a village trustee from his position as chairman of the board. It did not involve a removal of the trustee from the village council. The court emphasized that no definite term of office (as chairman) was involved, nor was there any indication that other property rights were involved. In light of such cases as *Buckalew v. City of Grangeville*, 97 Idaho 168, 540 P2d 1347 (1975), matters of termination of public employment should be handled carefully and upon advice of counsel, both for the protection of the employee's rights and for the protection of the city and the library board.

8. May a member of a library board of trustees be removed at the will of the city council, with or without cause?

The case of *Gowey v. Siggelkow*, cited under the last question above, stated the general rule that the power to remove is incident to the power to appoint, and that the authority to appoint an officer carries with it the authority to remove such officer, in the absence of any constitutional or statutory restriction. As noted above, the court emphasized that the chairman who was removed had been appointed to no definite or fixed term of office. We note that Idaho Code § 33-2603, in contrast with the statutes involved in the *Gowey v. Siggelkow* case, does provide for appointment of trustees for a five-year term of office. Idaho Code § 33-2603 further provides that no compensation shall be paid or allowed to any trustee in any manner whatsoever. While this fact undoubtedly distinguishes the removal of a trustee from the situation posed by the firing of a compensated

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employee, we again caution that the *Gowey* case not be unduly relied upon. This question also arose from the Lewiston situation, and should be answered by local counsel in light of the city ordinances as well as general state law.

9. What is the status of a library board member whose term has expired, but no replacement has been appointed and qualified?

Idaho Code § 33-2603 provides: "Such trustees shall hold their office for five (5) years from the date of appointment, *and until their successors are appointed. . . .*" (Emphasis added.) In addition, Idaho recognizes the "holdover" rule that public officers continue in office until their successors are elected or appointed and qualify for office. Therefore, a member of the library board continues to hold that office, even after expiration of his or her term, until a successor is duly appointed by the city council.

I hope this letter will be of assistance. This is not an official Attorney General's opinion, and is furnished solely to provide legal guidance.

Sincerely,
MICHAEL C. MOORE
Deputy Attorney General
Chief, Local Government Division

MCM/dm

cc: William J. Fitzgerald, Jr.
Gene Mueller

September 28, 1979

T. F. Terrell
Executive Director
Idaho Public Employee Retirement System
Statehouse Mail

THIS IS NOT AN OFFICIAL ATTORNEY GENERAL OPINION AND
IS SUBMITTED SOLELY TO PROVIDE LEGAL GUIDANCE.

Dear Tommy:

In John Sutton's absence, I am responding to your letter requesting an opinion as to whether the Retirement System should accept or reject the Idaho Education Association's contribution for September and thereafter, where the System has been expressly put on notice of the IEA's intent to pay the employees', as well as the employer's, contribution to the system.

As you are aware, this office has twice issued informal opinions to the effect that the employer cannot, under I.C. §§ 59-1301 et seq., lawfully pay the employees' required contributions in addition to its own. For the reasons set forth below, we continue to adhere to that opinion.

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I.C. § 59-1303 (1) provides, in part, that each active member "shall contribute" toward the cost of the benefits of the system and that this contribution "shall be made in the form of a deduction from salary."

We note that nothing in Chapter 13, Title 59, Idaho Code, appears expressly to prohibit the employer from making the employees' contributions. Further, the making of such contributions by the employer would not, in light of recent federal legislation and I.R.S. revenue rulings, appear to jeopardize the status of the Retirement System as an approved and qualified retirement plan. Section 414 (h), I.R.C., Revenue Ruling 77-462. In addition, we have taken into consideration the fact that, had the I.E.A. not notified the Retirement System of its intended course of action, the System would probably have no basis to question the source of monthly contributions of I.E.A. and its employees. The fact remains, however, that I.E.A. has so notified the System and has thereby sought a determination of the validity of its proposed course of action.

The question is whether Chapter 13, Title 59, by *implication* prohibits the employer from making such contribution. Byron Johnson, counsel for I.E.A., has called our attention to an opinion of the Wisconsin Attorney General, dated October 22, 1970, which, while recognizing that this is a difficult issue to resolve, concludes that such contributions by the employer can validly be treated as the employees' contributions. We have examined that opinion and respectfully disagree. The opinion cites no court decisions as authority for this particular conclusion, but merely examines the purpose of the retirement act and concludes that, since the purpose of the act is to provide a retirement system for teachers, not merely to make deductions from compensation paid to teachers, allowing employers to make the employees' contributions does not defeat the purposes of the act. We find this reasoning to be overly simplistic and evasive of the real issues. Of course, the purpose of the legislation is to provide a retirement system, but what kind of a system? It is generally held that retirement systems are either contributory (in which the employees are required to contribute) or non-contributory (in which the employer makes the entire contribution and the employee is not required to contribute). 60 Am. Jur. 2d, Pension and Retirement Funds, § 48; *Driggs v. Utah State Teachers Retirement Board*, 105 Utah 417, 142 P2d 657. The importance of this distinction is that in the non-contributory type of system, the pension is not considered a vested, contractual obligation, but a gratuitous allowance which can be altered or terminated at will.

We view Chapter 13, Title 59, Idaho Code, as creating a fully *contributory* system, in which the employees' rights become fully vested after five years' membership service. If the terms of contribution were to be altered so that the employee makes no contribution from salary, but receives a tax-free contribution paid by his employer, it is at least arguable that the employee's pension is no longer a vested right, but purely a gratuity which can be altered or abolished at will. This was not the apparent intent of the legislature. In addition, administrative problems not contemplated by the legislature could easily arise under such a system. Separate records of the contributions would have to be kept not only on behalf of each employee, as is presently the case, but also separated into pre-September, 1979, contributions and post-September, 1979, contributions, and taxes would have to be calculated and withheld accordingly when pension payments are made. While this is hardly an insurmountable problem, we find no indication that the legislature intended to permit such a result. On the contrary, we believe that the apparent legislative intent was just the opposite, that is, to create a fully contributory system funded in part by after-tax dollars withheld from the employee's salary.

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We have also examined the contract between I.E.A. and the Retirement System, dated March 25, 1972, and find that it supports the above conclusion. The contract, at paragraph 2, expressly provides that the Clerk or other like officer *shall deduct and withhold from salary payments* paid to each employee the monthly contributions required by statute.

We conclude, then, that both the statutes and the contract require that the employees' contributions be made by the employees by deduction from salary, and that, by necessary implication, the employer is prohibited from "picking up" the employees' contributions.

There remains to be answered the question of what action the System should now take. Again, the statutes provide no express answer. However, I.C. §§ 59-1327 and 59-1329 grant broad powers to the Board to manage the System and to adopt rules and regulations for its proper administration. It appears that the Board could properly refuse to accept a contribution which is not made in compliance with the statute. If I.E.A. is aggrieved by such action, I.C. § 59-1329 provides a full administrative remedy with the right to appeal to the district court.

Our advice, then, is to reject the contribution and to notify I.E.A. of the reason for such rejection. It will then have ample opportunity to seek administrative and judicial determination of the legal issues involved.

Sincerely,
MICHAEL C. MOORE
Deputy Attorney General
Chief, Local Government Division

MCM:om

cc: M.S. Merrill
Byron Johnson

October 12, 1979

The Honorable Marjorie Ruth Moon
State Treasurer
Statehouse Mail

THIS IS NOT AN OFFICIAL OPINION OF THE ATTORNEY GENERAL, BUT IS SUBMITTED SOLELY TO PROVIDE LEGAL GUIDANCE.

Dear Miss Moon:

In the absence of John Sutton, I am replying to your inquiry concerning the applicability of Idaho Code § 26-1919 to investments by the Endowment Fund Investment Board.

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In my opinion, the restriction upon investments in savings and loan associations' passbook accounts or time certificates of deposit to an amount not to exceed the insurance provided by the Federal Savings and Loan Insurance Corporation applies to investments made by the Endowment Fund Investment Board.

I.C. § 26-19¹ authorizes trustees and fiduciaries, the State of Idaho, and every agency and political subdivision of the State to deposit funds in savings and loan associations. The applicable portion of I.C. § 26-1919 reads as follows:

Notwithstanding any provisions to the contrary contained in titles 57 and 67 of the Idaho Code as the same now are or as the same may be hereafter amended, the State of Idaho and every agency and political subdivision of the State of Idaho and every municipal and quasi-municipal corporation and improvement district and school district, of every kind, character or class now or hereafter created, and authorized by law to levy taxes and special assessments, for which the county treasurer does not act as treasurer and every county may deposit its state and public funds in any savings and loan association, either state or federal, located within the geographical boundaries of the depositing unit, in either passbook accounts or time certificates of deposit *in an amount not to exceed the insurance provided by the Federal Savings and Loan Insurance Corporation*. . . . [Emphasis added.]

I.C. § 57-718 creates and establishes in the office of the governor an investment board. I.C. § 57-720 authorizes this board to formulate investment policy regulations governing the investment of permanent endowment funds of the state. I.C. § 57-722 sets forth the investment powers of the investment manager, which powers include the investment of funds in time certificates of deposit and savings accounts. I.C. § 72-1416 provides that the investment board shall invest surplus funds of the firemen's retirement fund, and further provides that surplus funds accumulating in said fund shall be invested in the same securities and investments authorized under I.C. § 57-722. I.C. § 67-1210 provides that idle moneys in the state treasury, other than moneys in the public endowment funds, may be invested, among other things, in time certificates of deposit and passbook accounts of state or federal savings and loan associations "... in amounts not to exceed the insurance provided by the Federal Savings and Loan Insurance Corporation."

These statutes, when read together, clearly evince a legislative intent that (1) state funds may be invested in passbook accounts or time certificates of deposit of state or federal savings and loan associations, but (2) in an amount not exceeding the insurance provided by the Federal Savings and Loan Insurance Corporation.

In light of the express application of I.C. § 26-1919 to *any* state agency or subdivision, the prefatory words "Notwithstanding any provisions to the contrary contained in titles 57 and 67 of the Idaho Code as the same now are or as the same may be hereafter amended . . . ," are probably superfluous. However, their existence in the statute may raise a question whether the restrictions apply to an investment board created *after* the amendment to I.C. § 26-1919.

I.C. § 26-1919, as presently worded, was amended and reenacted by 1969 Session Laws Ch. 175, § 1, approved March 18, 1969. It was made effective

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immediately upon its passage and approval. Present Idaho Code §§ 57-715 through 57-726, creating and setting forth the power of the investment board, were created by 1969 Session Laws Ch. 244, approved March 25, 1969, and also made effective immediately upon its passage and approval. The latter act repealed Ch. 7, Title 57, Idaho Code, as it existed prior to March 25, 1969, and substituted present sections 57-715 through 57-726 therefor. However, as already noted, I.C. § 26-1919 clearly applies to the State of Idaho and every agency and political subdivision of the State. It cannot seriously be contended that the investment board created by I.C. § 57-718 is not an agency of the state. The fact that this section and the remainder of present Ch. 7, Title 57, were created by a new enactment, rather than by express amendment of then existing sections of Ch. 7, Title 57, does not, in my opinion, exempt that chapter from the powers and restrictions of I.C. § 26-1919. The legislature clearly intended to apply its provisions to the state or to any of its agencies or subdivisions.

I interpret the language referring to titles 57 and 67 "as the same now are or as the same may be hereafter amended" as applying equally to any state agency thereafter created, unless expressly exempted. The well-recognized rule of statutory construction is that where a statute is repealed by a new statute which relates to the same subject matter, and which substantially re-enacts the earlier statute in whole or in part, and the repeal and re-enactment occur simultaneously, the provisions of, or applicable to, the original statute are not interrupted in their operation by the repeal. They are regarded as having been continuously in force. *State v. Webb*, 76 Idaho 162, 279 P.2d 634 (1955); Annotation: 77 A.L.R. 2d 336, § 3[a], pp. 341-346. The simultaneous repeal and re-enactment of substantially the same statutory provision is to be construed, not as a true repeal, but as an affirmation and continuation of the original provision. *Ellenwood v. Cramer*, 75 Idaho 338, 272 P.2d 702 (1954). 1A Sutherland, *Statutory Construction*, §§ 23.28, 23.29. In addition, it is a general rule that statutes relating to the same subject matter passed at the same session of the legislature are to be construed *in pari materia*, i.e., they are to be construed together. *State v. McBride*, 33 Idaho 124, 190 P. 247 (1920); 2A Sutherland, *Statutory Construction*, § 51.03.

Applying these well-established rules of construction, I conclude that the legislature did not intend to exempt the investment board from the provisions of I.C. § 26-1919, but, on the contrary, intended that those powers and restrictions apply to acts of the investment board.

It should also be noted that I.C. § 57-723 specifically provides that the investment board and its manager shall be governed by the Idaho Prudent Man Investment Act, Ch. 5, Title 68, Idaho Code. This is consistent with I.C. § 57-715, which provides that permanent endowment funds are trust funds "of the highest and most sacred order," and shall be managed and invested "in accordance with the highest standard." The Prudent Man Investment Act, at I.C. § 68-502, provides that, in investing property, a fiduciary "shall exercise the judgment and care under the circumstances then prevailing, which men of prudence, discretion and intelligence exercise in the management of their own affairs, not in regard to speculation but in regard to the permanent disposition of their funds, considering the probable income as well as the probable safety of their capital." Although there appear to be no Idaho cases specifically holding that investment of funds in passbook accounts or time certificates of deposit beyond insurable limits violates the prudent man investment rule, there is some judicial recognition that, under some circumstances, a trustee may be deemed liable for loss of funds invested in depository which fails. Annotation: 60 A.L.R. 488. It is possible

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that loss of funds beyond the insured amount could be deemed to be a violation of the prudent man investment rule resulting in liability of the trustee. This could, of course, be prevented by limiting the amount of deposit in any one account or certificate to the insured amount.

The provisions of I.C. § 18-5701 (4), which prohibits the deposit of public funds in any bank except as authorized by law, and which declares such act to be a felony, should also be noted.

Sincerely,
MICHAEL C. MOORE
Deputy Attorney General
Chief, Local Government Division

MCM:om

cc: William S. Hepp

October 15, 1979

Willard M. Overgaard, Ph.D.
Director, State Executive Institute
801 Reserve Street
Boise, ID 83702

THIS IS NOT AN OFFICIAL ATTORNEY GENERAL OPINION AND
IS SUBMITTED SOLELY TO PROVIDE LEGAL GUIDANCE.

Dear Dr. Overgaard:

QUESTION PRESENTED:

Whether a member of the Idaho Supreme Court or any other elective or appointive state officer may be legally allowed to accept an honorarium for professional services to another state agency, namely, the State Executive Institute, in a manner in which such professional services are not considered as part of the normal activities of the salaried position.

CONCLUSION:

Idaho law does not preclude a member of the State Supreme Court or any other elective or appointive state officer from receiving an honorarium for professional services rendered to the State Executive Institute, provided that such services are not considered a part of the officer's ordinary course of employment.

ANALYSIS:

The analysis of this question involves reference to several pertinent sections of the Idaho Code. The first applicable statutory provision is Idaho Code Section 59-511, which in relevant part provides:

Each executive and administrative officer shall devote his entire time to the duties of his office and shall hold no other office or position of profit.

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Section 59-511 refers to a specific type of public official, i.e., executive and administrative officers. The distinction between executive and administrative officers is not clearly marked. Article 4, Section 1, of the Constitution of the State of Idaho delineates those individuals in state government who are classified as executive officers. Article 4, Section 1, in relevant part provides:

The executive department shall consist of a governor, lieutenant governor, secretary of state, state auditor, state treasurer, attorney general and superintendent of public instruction.

An administrative officer is not defined by the terms of the constitution or by any relevant statute. The question as to what officials constitute executive and administrative officers within the meaning of Idaho Code Section 59-511 was addressed in a formal opinion issued by Attorney General Kidwell in 1975. The relevant portion of that opinion, Attorney General Opinion No. 41-75, is quoted below:

There are numerous and varied definitions of the classes of executive and administrative officers which encompass terms of vague and varying import if used without reference to the intention of the statute in question and the specific matter to which the terms are addressed. These terms are not defined in Title 59, Chapter 5 of the *Idaho Code*, and no precise legal or technical definition would be correct absent a definitive statute or a controlling Idaho Supreme Court interpretation. Therefore, at best, the powers and functions attached to each executive and administrative position would seem to manifest its definitional character when one is attempting to determine if a certain public officer has such attributes as to become an "executive or administrative officer" within the meaning of Idaho Code Section 59-511.

As seen from the above quoted portion of official opinion 41-75, it is difficult to present a specific definition of what classes of public officers constitute the executive and administrative officer class. We believe that the above quoted portion of Opinion 41-75 presents the best test available for you to determine whether or not a particular individual falls within the executive and administrative officer class. Idaho statutory law makes it abundantly clear that members of the judicial branch are not classified as executive or administrative officers. Idaho Code Section 67-301 in its entirety reads:

Classification of Officers. — The public officers of this state are classified as follows: 1. Legislative. 2. Executive. 3. Judicial. 4. Ministerial Officers and officers of the courts. But this classification is not to be construed as defining the legal powers of either class.

The provisions of Idaho Code Section 59-511 refer only to executive and administrative officers.

The next question that arises is, does Idaho Code Section 59-511 prohibit executive and administrative officers from accepting compensation for services performed outside the scope of their regular employment? Official Opinion 41-75 also addressed that particular question. (A full copy of that opinion is appended to this guideline for your information.) It was the conclusion of the authors of Opinion 41-75 that Section 51-511 should have a limited construction. Quoted below is the conclusion found in Opinion 41-75 relative to this topic:

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A rational and sensible construction of Section 59-511 would be to limit the prohibition, forbidding executive administrative officers therein from holding other offices or positions of profit, to outside direct employment of incompatible subordinate positions which interfere with the actual performance of the duties of the said officer.

We concur with the conclusion reached by the writer of Opinion 41-75. Based thereon, it is our opinion that Section 59-511 would not prohibit an elective or appointive state officer from accepting an honorarium for professional services rendered to the State Executive Institute, provided however, that the services rendered do not in any way directly interfere with the performance by the officer of the duties regularly assigned to the office he occupies.

The next statutory section relevant to our analysis of your question is Idaho Code Section 59-512, (which is exactly the same as Idaho Code Section 67-2508). Those statutory sections in their entirety read:

Compensation for public service. — No employee in the several departments, employed at a fixed compensation, shall be paid for any extra services performed by such employee in the ordinary course of his employment, unless expressly authorized by law.

Whenever the public interest may be served thereby, an employee of any department, with the written approval of the employing director, may be permitted to accept additional employment by the same or another department in any educational program conducted under the supervision of the State Board of Education or the Board of Regents of the University of Idaho, when such additional employment is not in the ordinary course of the employment of such employee and will be performed in addition to, and beyond the hours of service required in the ordinary course of employment. The written approval of the employing director shall be filed with the secretary of the State Board of Examiners together with a statement that such additional employment is not in the course of an employee's employment and was performed in addition to the statutory hours of employment.

Sections 59-512 and 67-2508 refer to all employees in state government. No distinction is made between executive, administrative and judicial officers.

The dictates of 59-512 and 67-2508 are clear. Any state government employee, including judicial officers and executive and administrative officers, are prohibited from receiving compensation for extra services performed by them in the ordinary course of their employment. However, in your letter of August 20, 1979 requesting this opinion, you clearly indicate that the individuals receiving honorariums for professional services to the State Executive Institute are rendering the type of professional services that are not considered a part of the "normal activities of the salaried position." Consequently, it is our opinion that Idaho Code Section 59-512, and Section 67-2508 would not prohibit state employees from receiving honorariums for rendering professional services to the institute. This conclusion is also supported by a definition of honorarium found in an informal opinion written by former Deputy Attorney General Michael Southcombe, dated June 9, 1965. In relevant part, that opinion stated:

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"Honorarium" in common understanding means voluntary reward for that for which no remuneration could be collected by law. *Cunningham v. Commissioner of Internal Revenue*, 67 F.2d 205.

It is apparent then that an honorarium is something different than a salary or compensation for services rendered. [Emphasis added.]

The conclusion reached is clearly in line with the prevailing majority view of American case authority. The prevailing majority rule of law provides that public employees are not forbidden additional compensation for extra services where those services have no connection whatsoever with the duties of the office held. *Converse v. U.S.*, 21 HOW (U.S.) 463, 16 L.ed 192, *Sullivan County v. Spencer*, 369 Mo. 97, 259 S.W.2d 804.

Very truly yours,
ROY L. EIGUREN
Deputy Attorney General

RLE/tr

October 23, 1979

Lawrence C. Seale
Administrator
Division of Budget, Policy Planning and Coordination
Statehouse Mail

THIS IS NOT AN OFFICIAL OPINION OF THE ATTORNEY GENERAL, AND IS SUBMITTED SOLELY TO PROVIDE LEGAL GUIDANCE.

Dear Mr. Seale:

You have posed several questions concerning the authority of cities and counties under I.C. § 67-6526, relating to the area of city impact within the unincorporated areas of counties in Idaho.

Your first question is whether cities have extraterritorial authority, with county authorization, under I.C. §§ 50-1306 and 67-6526 (a) (1), to implement a city comprehensive plan through their zoning and subdivision ordinance. This raises the problem of whether cities, under the grant of police powers contained in Article 12, § 2, Idaho Constitution, can exercise their powers beyond their corporate limits. Article 12, § 2, provides:

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 the general laws. [Emphasis added.]

The Idaho Supreme Court has, in several cases, held that Article 12, § 2, establishes cities and counties as separate sovereignties, and that counties

cannot impose regulations which are effective within incorporated cities on any subject which is within a city's police powers, whether or not a city has actually legislated on that particular subject. *State v. Robbins*, 59 Idaho 279, 81 P.2d 1078 (1938); *Barth v. De Coursey*, 69 Idaho 469, 207 P.2d 1165 (1949) (concurring opinion of Taylor, J.); *Clyde Hess Distributing Co. v. Bonneville County*, 69 Idaho 505, 210 P.2d 798 (1949); *Ben Lomond, Inc., v. City of Idaho Falls*, 92 Idaho 595, 448 P.2d 209 (1968); *Boise City v. Blaser*, 98 Idaho 789, 572 P.2d 892 (1977). The Court does not appear to have had occasion to decide whether, in light of Art. 12, § 2, a city can validly be empowered to apply its police regulations, including zoning and subdivision regulations, to areas outside of the corporate limits, as contemplated by such statutory grants of authority as those contained in I.C. §§ 50-606, 50-1306, or 67-6526. There is language in the above-cited cases which seems to support the proposition that the legislature cannot empower either a county or a city to exercise police power jurisdiction except within their own boundaries. An older Washington Supreme Court decision, *Brown v. City of Cle Elum*, 145 Wash. 588, 261 P. 112 (1927), held that, under Wash. Const. Art. 11, § 11, (which is identical to Idaho Const. Art. 12, § 2), the legislature could not authorize a city to exercise police power beyond its corporate boundaries. In other words, that court viewed the constitutional provision as a *limitation on*, as well as a grant of, powers of cities. There are, however, decisions under different constitutional provisions, which hold that extra-territorial grants of police powers to cities are not unconstitutional. See *Holt Civic Club v. City of Tuscaloosa*, (U.S. S. Ct., 1978), 58 L. Ed. 2d 292.

However, even if the Idaho Supreme Court were to adopt the Washington view (which is by no means certain), and to hold that legislative grants of extra-territorial grants of power to cities are unconstitutional, it does not necessarily follow from this that cities could not, *with county approval*, expressed by ordinance, enforce city zoning and subdivision ordinances within agreed-upon areas of city impact. It appears to us that, if a *county*, by ordinance, provided that a *city's* zoning and subdivision ordinances should apply to an area of city impact, there would be no violation of Art. 12, § 2, even under the more restrictive interpretation of the Washington Supreme Court.

In order to avoid the possible constitutional problem, then, we recommend that, where agreement is reached, pursuant to I.C. § 67-6526, that a city's zoning and subdivision ordinances should apply within an area of city impact, the county should so provide by ordinance, in the manner provided by I.C. §§ 67-6526 and 67-6509.

Your second question is whether planning and zoning commission members appointed to serve on a city commission as required by I.C. § 67-6526 (g) would have authority to vote on all planning and zoning matters coming before the commission, or whether they would be limited to matters which affect only the areas of city impact. The statute expresses no limitation, and we find no expression of intent to limit the matters upon which such members may vote. Indeed, it would be difficult for us to accept an argument that the application and interpretation of an ordinance within a city's boundaries would have no effect upon the area of city impact, especially where the same ordinance applied to both areas. It is our opinion that, where planning and zoning commission members are appointed pursuant to I.C. § 67-6526 (g), they are full members of the commission, with the power to vote on all matters properly before the commission, whether or not those matters relate solely to the area of city impact.

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Your third question is whether or not it is mandatory that cities and counties which have not yet complied with the deadlines imposed by I.C. § 67-6526 proceed to appoint the 9-member committee provided by I.C. § 67-6526 (b). The language does appear to be mandatory, and it appears probable that, if either the city or the county were to take steps to initiate this procedure, the other body would have no alternative but to comply. However, as long as both bodies are in agreement to continue the negotiation procedure, and are proceeding in good faith and making reasonable progress toward resolution, we doubt that a court would require that such negotiations cease and that the recommendatory committee be appointed. Statutory time limitations have often been viewed by the courts as directory rather than mandatory in nature, and, where there is substantial compliance, courts often do not hold public officials to the letter of the statutory time requirement. *Boise City v. Better Homes*, 72 Idaho 441, 243 P.2d 303 (1952); *Harrison v. Board of County Cmrs*, 68 Idaho 463, 198 P.2d 1013; *Weisgerber v. Nez Perce County*, 33 Idaho 670, 197 P. 562.

Your fourth question is whether a city could administer a *county* comprehensive plan, zoning ordinance and subdivision ordinance within an area of city impact. I.C. § 67-6526 (a), which allows for (1) application of the city ordinances, or (2) application of the county ordinances, or (3) application of "any mutually agreed upon plan and ordinances" clearly appear to allow for this alternative. Again, however, we recommend that the county ordinance creating the area of city impact reflect that the ordinances will be administered by the city.

Your final question is whether future amendments of comprehensive plans and implementation ordinances within the area of city impact would require action by both the city and county governing bodies. As a general principle of law, an amendment to an ordinance must be enacted by the same method as the original ordinance. *Harrell v. City of Lewiston*, 95 Idaho 243, 506 P.2d 470 (1973); *Beem v. Davis*, 31 Idaho 730, 175 P. 959 (1918). This requires the same notice, publication, and hearing procedures, etc. In the case of the area of city impact, where county ordinances have been adopted and the area is under the county's enforcement, only the county would be required to take appropriate action as to the area of city impact.

Sincerely,
MICHAEL C. MOORE
Deputy Attorney General
Chief, Local Government Division

C.A. "SKIP" SMYSER
Deputy Attorney General
Natural Resources Division

MCM:CAS:om

LEGAL GUIDELINES OF THE ATTORNEY GENERAL

October 30, 1979

W.C. Hamlett
Latah County Prosecuting Attorney
Courthouse
Moscow, Idaho 83843

THIS IS NOT AN OFFICIAL OPINION OF THE ATTORNEY GENERAL, AND IS SUBMITTED SOLELY TO PROVIDE LEGAL GUIDANCE.

Dear Bill:

You have requested an opinion from this office as to whether the Good Samaritan Village, owned and operated by the Evangelical Lutheran Good Samaritan Society at Moscow, Idaho (hereafter referred to as "GSV"), qualifies for tax exemption status under I.C. §§ 63-105C and 63-105K, and, if so, whether there exists any method under which the county may compel a payment in lieu of taxes.

Based upon the information submitted, we find no basis for denial of tax-exempt status, either wholly or in part, nor are we aware of any method by which the county could legally compel payments in lieu of taxes.

At the outset, however, we emphasize that any tax exemption question must depend upon the facts of the particular case, and that, in our function of providing legal guidance to local officials, we do not and cannot operate as determiners of factual questions. For purposes of this opinion, we accept certain factual allegations as to the charitable and non-profit nature of GSV's activities, although we have no actual evidence, beyond that provided in your letter and in the brief and attachments submitted by GSV's attorneys. In no sense should this letter be considered as determinative of such facts. Should the tax-exempt status of GSV be challenged in an appropriate administrative or legal action, such questions would necessarily have to be determined by the appropriate finders of fact, such as the State Tax Commission or court of law, based upon competent and admissible evidence.

From the allegations of fact submitted to us, it appears that GSV, which is owned, operated, and controlled by the Evangelical Lutheran Good Samaritan Society, operates a facility at Moscow consisting of (1) a nursing care center, and (2) a home for the aged. There is no discrimination on the basis of race or religion. Apparently payments for services are charged in at least some cases, and there does not appear to be any restriction of services only to the poor. No evidence of the number of indigent patients or residents has been submitted, nor do we have any information concerning the monthly or other fees or charges made to patients or residents. It is alleged that GSV derives no profit from its activities, and distributes no profits or dividends.

I.C. § 63-105C provides that property belonging to any fraternal, benevolent, or charitable corporation or society and used *exclusively* for purposes for which such corporation or society is organized is exempt from ad valorem taxation. That section further provides that if any such property is leased by such owner, or if such corporation or society uses such property for business purposes from

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which a revenue is derived which, in the case of a charitable organization, is not directly related to the charitable purposes for which the organization exists, then the property shall be assessed and taxed as any other property.

I.C. § 63-105K provides that hospitals and refuge homes, their furniture and equipment, owned, operated, and controlled by any religious or benevolent corporation or society, with the necessary grounds used therewith, and from which no gain or profit is derived, is exempt from taxation.

These two sections must be read in conjunction with each other, not disjunctively. In other words, if part of an operation qualifies under one exemption and part under another, the entire operation is exempt, and it is not necessary that the entire operation qualify under one or the other. *North Idaho Jurisdiction of Episcopal Churches, Inc. v. Kootenai County*, 94 Idaho 644, 496 P.2d 105 (1972).

It appears to be well established that nursing homes and refuge care facilities owned and operated by charitable or benevolent organizations qualify for tax exemption under laws similar to Idaho's; and that such exemption will not be denied merely because fees are charged. *Stanboro v. Baptist Home Assoc.*, 172 Colo. 572, 475 P.2d 23 (1970); *Evangelical Lutheran Good Samaritan Soc. v. County of Gage*, 181 Neb. 831, 151 N.W. 2d 446 (1967); Annotation: 45 A.L.R. 3d 610, 615, § 3. The above cases held that this principle is true even under a statute (as I.C. § 63-105C) which requires "exclusive" use for charitable, hospital, etc., uses. An early Idaho case, *Bistline v. Bassett*, 47 Idaho 66, 272 P. 696 (1928) denied tax-exempt status for a hospital, but that case is clearly distinguishable because (1) there, the facility was apparently not owned by a charitable or benevolent society or association, and (2) it was clearly operated for profit, with profits being distributed to the physicians who owned and operated the hospital.

Here, a somewhat more difficult question is, however, presented by the additional operation of the home for the aged, including non-indigent aged. Again, we have no evidence as to the amounts charged for home care, the actual cost of providing the care, or the use of any excess so charged, although we infer from the material submitted that such funds are used to operate, and to retire the indebtedness on, the entire facility, and that they are not distributed as dividends or profits. The question is whether, where, as part of the entire operation, revenue and income is produced, would such fact preclude tax-exempt status for this portion of the facility. Under our view of I.C. § 63-105C and the many cases from other jurisdictions upon this question, it would not. I.C. § 63-105C, although requiring that the property be devoted *exclusively* to benevolent or charitable purposes, would deny tax exemption only where a revenue is derived which is not directly related to the charitable purpose for which the organization exists. We have no indication that any such revenues of GSV are not directly related to such purposes.

There appears to be considerable divergence in the cases from other jurisdictions as to whether, under a requirement that property be used exclusively for charitable or similar purposes, tax-exempt status will be granted to a facility for the aged where the resident paid all or part of the cost of their accommodations. Annotation: 37 A.L.R. 3d 565, 584 et seq., §§ 6[a] through 6[d]. Some cases have held that, where the facilities are generally or exclusively restricted to self-supporting persons, tax exemption would not be granted. *United Presbyterian Assoc. v. Board of County Comr's*, 448 P.2d 967 (Colo. 1969); *Presbyterian Homes of Synod v. Division of Tax Appeals*, 55 N.J. 275, 261 A. 2d 143 (1969); 37

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A.L.R. 3d 565, 584-588, § 6[a]. However, many cases hold that, where homes for the aged are open both to persons able to pay fees for their accommodation and those able to pay little or none, such homes nevertheless qualify for tax exemption. *Topeka Presbyterian Manor, Inc. v. Board of County Comr's*, 195 Kan. 90, 402 P.2d 802 (1965); *Evangelical Lutheran Good Samaritan Soc. v. County of Gage*, 181 Neb. 831, 151 N.W. 2d 446 (1967); 37 A.L.R. 3d 565, 590-592, § 6[c].

Again, we have no evidence as to the amount charged for the accommodations, or the percentage, if any, of actual indigents who are accepted in spite of lack of ability to pay. However, in light of I.C. § 63-105C, we doubt that tax-exempt status would be denied merely because some, or many, of the residents were able to pay for their accommodations. I.C. § 63-105C clearly contemplates that an otherwise charitable facility can have income and revenue, as long as it is directly related to the charitable purposes for which the organization exists, and I.C. § 63-105K, relating to hospitals and refuge homes, only requires that no *gain or profit* be derived. We construe this as referring to *net* gain or profit, and, in light of *North Idaho Jurisdiction of Episcopal Churches, Inc. v. Kootenai County*, 94 Idaho 644, 496 P.2d 105 (1972), we view it as likely that the taxing authorities and courts would be required to view GSV's activities as an entirety, and could not focus upon and deny tax-exempt status to one portion of the operation merely because fees and other revenues were derived therefrom. In short, we view it as likely that the Idaho courts would tend to follow that line of cases which upholds tax exemption of homes for the aged even though fees for accommodations are charged. This view is based, of course, upon the assumption that GSV derives no profit from such charges, but utilizes such moneys for operation of the entire facility and reduction of any indebtedness thereon.

In light of the foregoing principles, and based upon these factual assumptions, we find no basis for denial of tax-exempt status.

You also inquired whether the county has authority to compel payments in lieu of taxes. We find no statutory basis for compelling any payments in lieu of ad valorem taxes from charitable or benevolent organizations.

Sincerely,
MICHAEL C. MOORE
Deputy Attorney General
Chief, Local Government Division

MCM:om

cc: W.E. Anderson
Eugene T. Hackler

LEGAL GUIDELINES OF THE ATTORNEY GENERAL

November 7, 1979

Patrick Riceci, Administrator
Motor Vehicle Division
Department of Law Enforcement
Statehouse Mail

Control #1424

Re: Transfer of title of motor vehicles

Dear Mr. Riceci:

This letter is in response to your letter dated October 18, 1979, in which you pose two questions. These questions are:

1. "May the Department of Law Enforcement deny issuance of titles to motor vehicles sold pursuant to the summary provisions of Sections 45-805, 45-806 and 49-592, Idaho Code?"
2. "May the Department of Law Enforcement, through duly promulgated rules and regulations, establish requirements for issuance of titles to purchasers of abandoned, towed or repaired motor vehicles including the requirements that must be met for the sale of those vehicles in accordance with generally recognized tenets of due process?"

Your questions will be addressed in the order that they are above written. This letter is written in place of an official Attorney General's opinion for the reason that the analysis of the questions presented draws into issue the constitutionality of certain statutes. This office is reluctant to question the validity of state statutes in formal opinions. If the statutes are challenged in the courts, this office would in all likelihood have the responsibility of defending their constitutional status.

It is my conclusion that pursuant to *Idaho Code*, §45-805, the Department of Law Enforcement has discretion in transferring of title of motor vehicles which are sold pursuant to the various lien laws of the state of Idaho. The statute states that the department may transfer title upon presentation of satisfactory proof. If the Department of Law Enforcement was not satisfied that the sale comported with the requirements of procedural due process, then it can exercise its discretion and refuse to transfer title.

As to your second question, the Department of Law Enforcement has the rule-making authority over this subject matter pursuant to *Idaho Code*, §49-409.

Question No. 1

The analysis of this question is based upon the application of *Idaho Code*, §§45-805, 45-806 and 49-916. *Idaho Code*, §45-806 provides in pertinent part:

Lien for making, altering, or repairing personal property. — Any person, firm or corporation, who makes, alters or repairs any article of personal property, at the request of the owner or person in legal posses-

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sion thereof, has a lien, which said lien shall be superior and prior to any security interest in the same for his reasonable charges for work done and materials furnished, and may retain possession of the same until the charges are paid. If not paid within two (2) months after the work is done, the person, firm or corporation may proceed to sell the property at public auction, by giving ten (10) days' public notice of the sale by advertising in some newspaper published in the county in which the work was done; . . .

Idaho Code, §45-805 provides the same mechanism for attachment and execution of a lien on personal property, but is limited to labor or storage. The Department of Law Enforcement may transfer title to automobiles pursuant to *Idaho Code*, §49-416. This section states in part:

Transfer of ownership by operation of law — Liens — Vehicles registered in foreign state — Certificates of title. — In the event of the transfer of ownership of a motor vehicle by operation of law . . . or execution sale . . . or whenever a motor vehicle is sold to satisfy storage or repair charges . . . the department of law enforcement may . . . upon presentation of satisfactory proof to the department of an application for a certificate of title, issue to the applicant a certificate of title thereto. Only an affidavit by the person or agent of the person to whom possession of the motor vehicle so passed, setting forth facts entitling him to such possession and ownership, together with a copy of the . . . instrument upon which such claim of possession and ownership is founded, shall be considered satisfactory proof of ownership and right of possession. If the applicant cannot produce such proof of ownership he may apply directly to the department of law enforcement and submit such evidence as he may have, and the department of law enforcement may thereupon, if it finds the evidence sufficient, issue a certificate of title to the applicant.

Reading these two Code sections together, the following result occurs. Owner takes his automobile to a garage for repairs or service. The garage makes the repairs and notifies the owner by mail. Sixty days elapse and the owner does not pay the bill for the repairs. The garage publishes notice in a newspaper of general circulation of a public auction to be held more than ten days after the notice.

The automobile is ultimately auctioned to a subsequent purchaser. The subsequent purchaser executes an affidavit in accordance with *Idaho Code*, §49-416, together with supporting documentation and the Department of Law Enforcement issues a new title to the subsequent purchaser. This chain of events can be completed in approximately two and one half months.

Idaho Code, §49-592, provides a similar type of lien procedure for abandoned vehicles. The analysis is the same for this type of lien as the general lien statutes. See: *Stypmann v. City & Cty. of San Francisco*, 557 F.2d 1338 (9th Cir. 1977).

In order for procedural due process rights to attach, two issues must be addressed and answered in the affirmative. These are:

1. Do the provisions of *Idaho Code*, §§45-805, 45-806 and the provisions for transfer of title by the Department of Law Enforcement (I.C.

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\$49-416), when used together, constitute "state action" within the Fourteenth Amendment to the United States Constitution?

2. If this procedure constitutes state action, then does the Fourteenth Amendment require a hearing preceding a permanent taking of an owner's automobile.

1. *State Action.*

Section 1 of the Fourteenth Amendment to the United States Constitution provides in part:

Nor shall any state deprive any person of life, liberty, or property, without due process of law.

Before the provisions of procedural due process become applicable, the activity must be classified as "state action." One of the leading cases on state action is *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 6 L.Ed.2d 45, 81 S.Ct. 856. Justice Clark explained the rationale of the Fourteenth Amendment with the following:

The Civil Rights Cases, 109 U.S. 3, 27 L.ed 835, 3 S Ct 18 (1883), "embedded in our constitutional law" the principle "that the action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States. That Amendment erects no shield against merely private conduct, however discriminatory or wrongful." Chief Justice Vinson in *Shelley v. Kraemer*, 334 U.S. 1, 13, 92 L ed 1161, 1180, 68 S Ct 836, 3 ALR2d 441 (1948). 365 U.S. at 721

The Supreme Court of California in *Adams v. Department of Motor Vehicles*, 113 Cal.Rptr. 145, 520 P.2d 961 (1974), analyzed this very issue with the following:

The vehicle service lien and the procedures for its enforcement are created and governed by statute. The procedure is administered by the Department of Motor Vehicles, and transfer of title to the lien sale purchaser is ultimately recorded by the department. Thus, although a private individual retains and sells the car, his power to do so arises from and is subject to specific provisions of state statute and his exercise of that power is supervised by the department. . . . 520 P.2d at 965.

The California court went on to explain that at common law a possessory lienholder had no right to sell the property until after a judgment was rendered and a writ of execution was obtained. Idaho is in accord with this view. See, *Gould v. Hill*, 43 Idaho 93, 251 P. 167 (1926). In other words, absent the lien statutes, a lienholder had no right to sell a person's property to satisfy the lien.

In addition to the state's involvement in the liens, the Department of Law Enforcement, State of Idaho, is the party which actually transfers title of an automobile from one owner to another.

It should be noted that the Third Circuit Court of Appeals struck down Pennsylvania's lien law statutes with relation to motor vehicles in *Parks v. Mr.*

Ford, 556 F.2d 132 (3rd Cir. 1977). In finding "state action" the third circuit did not rely upon the state's involvement in transferring title to motor vehicles, but instead found the state involvement in the lien laws and in particular the power of a private party to sell a motor vehicle for which he has a possessory lien. The circuit court analyzed the question with the following:

... we believe that state action is present when a garageman sells a customer's vehicle under the statutory scheme just described. First, the garageman's power to sell property retained under his common law lien, unlike the lien itself was not authorized prior to the enactment of the statute in 1925 [footnote omitted] and arises solely from that legislation. Pub.L. No. 557, §1 (May 7, 1925). The statute not only extended the power of sale to the garageman but also directed him to follow the same procedures employed by a sheriff or constable. In addition, the statute decreed that the effect of the sale was to be as conclusive as that of a sheriff or constable. By thus authorizing sales to take place, directing how they are to be carried out, and giving them the effect of judicial sales, Pennsylvania has quite literally delegated to private individuals, powers "traditionally exclusively reserved" to sheriffs and constables. In our view, that grant of power has the same effect for state action purposes as if Pennsylvania had endowed private individuals with the same authority to arrest suspects and to execute warrants as state and local police possess. *Cf. Griffin v. Maryland*, 378 U.S. 130, 84 S.Ct. 1770, 12 L.Ed.2d 754 (1964). 556 F.2d at 141.

The Ninth Circuit Court of Appeals in *Stypmann v. City & Cty. of San Francisco*, 557 F.2d 1338 (9th Cir. 1977), faced a similar question. In *Stypmann*, the plaintiffs were challenging a state statute authorizing the removal of privately owned vehicles from streets and highways by peace officers. The peace officer would contact a towing company who would remove the car from the street and take it to a garage. The towing company and the garage would then have a possessory lien upon the automobile. The automobile could then be sold under the same provisions discussed in *Adams v. Department of Motor Vehicles*, *supra*.

The Ninth Circuit expressly approved of the analysis of the *Adams* decision and further found "state action" with regard to the towing garageman lien. Several federal district courts have found "state action" in connection with the factual question presented in this letter. A representative sample of these cases are *Cockerel v. Caldwell*, (D.C.Ky. 1974) 378 F.Supp 491; *Ford v. Dean's O.K. Tire Store, Inc.* (D.C.Nev. 1973); *Mason v. Garriss*, (D.C.Ga. 1973) 360 F. Supp. 420, and (D.C.Ga.) 364 F.Supp. 452.

It is my opinion that when a motor vehicle is sold pursuant to *Idaho Code*, §§45-805 or 45-806, and the Department of Law Enforcement transfers title to that motor vehicle pursuant to *Idaho Code*, §49-916, "state action" exists and for this reason the protections of the Fourteenth Amendment apply.

2. Procedural Due Process.

In 1969 the United States Supreme Court struck down Wisconsin's prejudgment garnishment statute in *Snidach v. Family Finance Corp.*, 395 U.S. 337, 23 L.Ed.2d 349, 89 S.Ct. 1820 (1969). This case marked the beginning of a series of decisions by the Supreme Court dealing with the Fourteenth Amendment and

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debtor-creditor relations. The current status of procedural due process can best be explained by analyzing three recent cases. These are, *Fuentes v. Shevin*, 407 U.S. 67, 32 L.Ed.2d 556, 92 S.Ct. 1983 (1972); *North Georgia Finishing, Inc. v. D.T. Chem, Inc.*, 419 U.S. 601, 95 S.Ct. 719, 42 L.Ed.2d 751 (1975); *Mitchell v. W.T. Grant Co.*, 416 U.S. 600, 94 S.Ct. 1895, 40 L.Ed.2d 406 (1974).

In *Fuentes*, *supra*, the court struck down the prejudgment replevin statutes of both Florida and Pennsylvania for the reason that no prior hearing was afforded the debtor. The court in *Fuentes*, laid down the following broad ruling:

For more than a century the central meaning of procedural due process has been clear: "Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified." *Baldwin v. Hale*, 68 US 223, 233, 17 L Ed 531, 534. See *Windsor v. McVeigh*, 93 US 274, 23 L Ed 914; *Hovey v. Elliott*, 167 US 409, 42 L Ed 215, 17 S Ct 841; *Grannis v. Ordean*, 234 US 385, 58 L Ed 1363, 34 S Ct 779. It is equally fundamental that the right to notice and an opportunity to be heard "must be granted at a meaningful time and in a meaningful manner." *Armstrong v. Manzo*, 380 US 545, 552, 14 L Ed2d 62, 66, 85 S Ct 1187.

* * *

The constitutional right to be heard is a basic aspect of the duty of government to follow a fair process of decision-making when it acts to deprive a person of his possessions. The purpose of this requirement is not only to ensure abstract fair play to the individual. Its purpose, more particularly, is to protect his use and possession of property from arbitrary encroachment — to minimize substantively unfair or mistaken deprivations of property, a danger that is especially great when the State seizes goods simply upon the application of and for the benefit of a private party. . . . 407 U.S. at 80-81.

In *North Georgia Finishing, Inc.*, *supra*, the Supreme Court struck down Georgia's prejudgment garnishment procedures. While in *Mitchell*, *supra*, the court upheld Louisiana's sequestration statutes. The court in *Mitchell* found the following procedures to be constitutional:

1. A creditor was required to file an affidavit stating specific facts entitling him to possession.
2. The writ could only be issued by a judge.
3. The creditor had to file a bond to protect the debtor from all damages.
4. The debtor was entitled to dissolve the writ and regain possession by filing his own bond.
5. The debtor was entitled to an immediate hearing upon issuance of the writ.

It should be remembered that this statutory scheme required a judicial judgment before permanent deprivation could occur. While Idaho's lien laws allow the sale (i.e. permanent deprivation) to occur with no type of hearing or judicial determination, *Idaho Code*, §§45-805 and 45-806 have none of the "saving characteristics," 419 U.S. at 607, which the Louisiana statutes had.

LEGAL GUIDELINES OF THE ATTORNEY GENERAL

For these reasons it is my opinion that the Department of Law Enforcement may properly exercise its discretion by denying transfer of title of a motor vehicle which was sold pursuant to any one of the three lien law statutes discussed in this letter, absent a showing of "notice" and "opportunity of a hearing" to the original owner, prior to the time of sale. This analysis and conclusion should in no way be interpreted as bringing into question possessory liens which were recognized at common law and later codified in *Idaho Code*, §§45-805 and 45-806.

Question No. 2

Your second question concerns whether or not the Department of Law Enforcement has the authority to adopt rules and regulations which would establish guidelines of when and how the department would exercise its discretion pursuant to *Idaho Code*, §49-416. The department does have rule-making authority in this area pursuant to *Idaho Code*, §49-409, which states in part:

Procedure for the transfer of motor vehicles and the issuance of certificates of title not otherwise expressly provided for by this chapter, may be provided for by regulations issued by the department. . . .

By enacting rules and regulations with the "notice" and "opportunity to be heard" requirements of procedural due process, the Department of Law Enforcement can take two different approaches. First, it could require that the lienholder obtain a judgment from a court of competent jurisdiction prior to the time of sale. The second alternative would be to set up a procedure of administrative hearings to determine the nature and validity of the lien. It is my opinion that the Department of Law Enforcement would be wise not to institute a procedure of administrative hearings. The rule-making authority granted to the Department of Law Enforcement is not a broad grant of authority from the legislature but instead is a narrow provision to fill in any gaps the motor vehicle statutes may have. I do not think that this provision of the Code gives the Department of Law Enforcement authority to adjudicate property rights between private individuals. In any event, notice and opportunity to be heard would have to occur prior to the time publication of the public auction occurs.

A lien created pursuant to *Idaho Code*, §49-592, would need to have a different set of procedures. This type of possessory lien is different from the general lien statutes in that the owner of the motor vehicle does not transfer possession to the lien holder. Instead, possession is transferred pursuant to an order by a peace officer.

In *Stypmann v. City & Cty. of San Francisco, supra*, the Ninth Circuit Court of Appeals struck down the regulatory scheme of the defendants. The defendants had an ordinance which provided for a hearing on a possessory lien similar to *Idaho Code*, §49-592, within five days of creation of the lien. On this point the court stated:

Nor is the statute saved by the San Francisco ordinance. [footnote omitted] A five-day delay in justifying detention of a private vehicle is too long. Days, even hours, of unnecessary delay may impose onerous burdens upon a person deprived of his vehicle. *Lee v. Thornton, supra*, 538 F.2d at 33, a case involving seizure and detention of automobiles in comparable circumstances, [footnote omitted] held that due process

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required action on a petition for rescission or mitigation within 24 hours, and, if the petition was not granted in full, a hearing on probable cause within 72 hours.

Although a five-day delay is clearly excessive, the record in this case does not contain the information necessary for a more precise determination of the exact schedule that would best balance the private and public interests involved. . . . 557 F.2d at 1344.

With this type of lien, the lienholder would still need to resort to the judiciary in order to sell the motor vehicle to satisfy the lien.

THIS IS NOT AN OFFICIAL ATTORNEY GENERAL OPINION, AND IS SUBMITTED SOLELY TO PROVIDE LEGAL GUIDANCE.

Sincerely yours,
/s/ STEVEN M. PARRY
Deputy Attorney General
Administrative Law and Litigation
Division

SMP:lb

November 20, 1979

Mr. Clayton Andersen
Attorney at Law
P.O. Box 1180
Homedale, Idaho 83628

THIS IS NOT AN OFFICIAL ATTORNEY GENERAL OPINION,
AND IS SUBMITTED SOLELY TO PROVIDE LEGAL GUIDANCE.

Dear Mr. Andersen:

You have posed the question whether the city council may do business with a particular business where a member of the city council is a stockholder in that business.

Although there do not appear to be any Idaho cases precisely in point, it appears to be the generally-recognized rule of law that a corporate shareholder interest is sufficient to invalidate a contract between the corporation and the governing body of a municipality or other governmental entity of which the stockholder is a member.

The pertinent Idaho statutes are I.C. § 59-201, which provides that city 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; I.C. § 59-202, which provides that city officers must not be purchasers at any sale nor vendors at any purchase made by them in their official capacity; and I.C. § 59-203, which provides that every contract made in violation of the preceding two statutes is voidable.

LEGAL GUIDELINES OF THE ATTORNEY GENERAL

It has been held, in Idaho and elsewhere, that these statutes merely express the common-law policy against conflict of interest, and such contracts are invalid even if no specific statutes prohibit them. *Nampa Highway Dist. v. Graves*, 77 Idaho 381, 293 P.2d 269 (1956); *McRoberts v. Hoar*, 28 Idaho 163, 152 P. 1046 (1915); 63 Am. Jur. 2d, *Public Officers and Employees*, § 315. The fact that there is no actual dishonesty or self-dealing involved, or that there is no loss to the governmental entity, is immaterial. *Nampa Highway Dist. v. Graves*, *supra*; *McRoberts v. Hoar*, *supra*.

The general rule appears to be that the interest of a public officer as a stockholder in a corporation entering into a contractual relation with the public is a prohibited interest within the meaning of statutes or the common-law rule prohibiting a public officer from being interested directly or indirectly in any contract with the public body of which the stockholder is a member, even where the stockholder's ownership interest is relatively small. 10 McQuillin, *Municipal Corporations*, § 29.99; 63 Am. Jur. 2d, *Public Officers and Employees*, § 316; Annotation: 140 A.L.R. 344 (1942); *State v. Robinson*, 71 N.D. 463, 2 N.W. 2d 183 (1942). One of the leading cases on this point is *Stigall v. City of Taft*, 58 Cal. 2d 565, 375 P.2d 289 (1962), where it was held that a contract with a corporation was voidable where one corporation, even though the councilman resigned from the council before the contract was actually signed (he had been a member during the preparation of bid specs, the call for bids, and the bid opening). And see, especially, the cases annotated at 140 A.L.R. 344, 345-349 and the enclosed sections from McQuillin, *Municipal Corporations*, §§ 29.97-29.99.

Based upon the foregoing principles, and upon the corollary principle that the object of the statutes and the common-law rule is to avoid even the possibility of any personal influence, directly or indirectly, upon an official's decisions, I conclude that it would be improper for the city to enter into any contracts with the corporation in question as long as the stockholder remains a member of the council. In light of *Stigall v. City of Taft*, *supra*, and other cases cited in the annotation, it does not appear that the problem could be avoided even if the council member abstained from voting on any particular contract.

Sincerely,
MICHAEL C. MOORE
Deputy Attorney General
Chief, Local Government Division

MCM:om
Enc.

LEGAL GUIDELINES OF THE ATTORNEY GENERAL

November 26, 1979

Ref. # 1585

Gary L. Morgan
Attorney at Law
1124 Albany Street
Caldwell, Idaho 83605

THIS IS NOT AN OFFICIAL ATTORNEY GENERAL OPINION,
AND IS SUBMITTED SOLELY TO PROVIDE LEGAL GUIDANCE.

Dear Mr. Morgan:

We recently conferred by telephone about your question concerning the power of the City of Homedale to grant a mortgage upon certain property of the city, in favor of a private lending institution, for the benefit of the Homedale Rural Fire Protection District.

For the reasons set forth below, it is my view that cities in Idaho do not have authority to encumber city-owned property by mortgage, either for themselves, or in aid of another public corporation.

The general rule is that, in the absence of statutory authority, a municipal corporation has no authority to mortgage or pledge municipal property. 10 McQuillin, *Municipal Corporations*, § 28.41; I Dillon, *Municipal Corporations*, § 199; Annotation: 71 A.L.R. 828. The general power to own, hold, and convey real property does not grant the implied or necessary power to encumber it. McQuillin,, *supra* (Cf. Idaho Code § 50-301).

Although Idaho cities have statutory grants of power to acquire, hold, lease, sell, exchange, or convey property (I.C. §§ 50-301, 50-1401), there does not appear to be any grant of authority to cities to mortgage or encumber their property. In light of the case we discussed, *Boise-Payette Co. v. School Dist. No. 1*, 46 Idaho 403, 268 P. 26 (1928), there appears to be some doubt whether the legislature could empower cities to do so under the Idaho Constitution. In that case, the Idaho Supreme Court held unconstitutional, under Art. 8, § 3, Idaho Const., application of the statutory laborer and materialmen's lien to public property, citing with approval *Palmer v. City of Albuquerque*, 19 N.M. 285, 142 P. 929, which held the lien of a mortgage to be an indebtedness in excess of the constitutional limitation.

It thus appears likely that the Idaho Supreme Court, if presented with the question, would hold a mortgage of city property to be in violation of Art. 8, § 3, Idaho Const., even if cities had statutory authority to encumber property.

Cities do have statutory authority to encumber certain property, such as the revenue of certain public works, to pay revenue bonds (I.C. §§ 50-1037), 50-1039), but this authority is limited to that particular constitutionally authorized circumstance and cannot be viewed as a general grant of authority to mortgage other city property.

Sincerely,
MICHAEL C. MOORE
Deputy Attorney General
Chief, Local Government Division

MCM:om

LEGAL GUIDELINES OF THE ATTORNEY GENERAL

December 12, 1979

Jim Harris
Ada County Prosecuting Attorney
Courthouse
Statehouse Mail

THIS IS NOT AN OFFICIAL OPINION OF THE ATTORNEY GENERAL, AND IS SUBMITTED SOLELY TO PROVIDE LEGAL GUIDANCE.

Dear Mr. Harris:

We understand that the Ada County Commissioners have prepared a proposed personnel ordinance. You have asked the office the following questions: (1) Whether the Board of County Commissioners has the inherent power pursuant to its authority under Idaho Code § 31-802 or other statutory and constitutional basis, to adopt an all-pervasive county grievance system to be imposed upon all other constitutionally elected county officers. (2) Assuming the County Commissioners have the authority to adopt such an ordinance, is it constitutionally and statutorily acceptable pursuant to the constitutional basis upon which the various elected officials of county government perform their duties, to allow a Board of County Commissioners to demand a specific action by another elected official with regard to an employee, where that action is, in the opinion of that elected official, contrary to the best interests or statutory and constitutional function of his department. The Ada County Commissioners have contacted us and suggested that a formal opinion upon this issue might be premature as the ordinance is still in the drafting stage. Thus we offer these observations as informal guidelines only, rather than issue the formal opinion which was sought.

The county commissioners have also written to us in regard to the specifics of this matter, stating that: "The Board realizes that the current ordinance 'draft' contains many discrepancies which we are currently trying to eliminate. Be assured that is not the intention of the Board to *mandate* that other elected officials follow the advice of the Commissioners' Personnel Advisory Council. Rather, it is our intention to utilize our Personnel Advisory Council as an advisory mechanism for the Commissioners. Through the utilization of such a council we can make personnel decisions with the knowledge that professionals in the personnel field have reviewed and made suggestions as to what our appropriate action should be. Once we arrive at a decision, we would make our *recommendation* to the appropriate elected official or department head. In any event, we are not about to suggest, let alone mandate, that an elected official violate the Idaho Constitution as it relates to his office."

Because of the judicial construction given to the Idaho statutes and Constitution, it is our view that it is most likely that county commissioners cannot adopt a mandatory or all-pervasive personnel and grievance system to be imposed upon the other county officers named in Art. 18, § 6, Idaho Constitution. Once county commissioners have determined the need for deputies or other employees and their pay rates, the other elective county officers control their own deputies and employees, and they may retain or discharge these deputies and employees as they determine to be best for the interests of their various offices.

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It would be possible validly to set up suggested personnel guidelines and recommended procedures so long as control of each county office and its employees is left in the hands of the various elected county officers, and they are each left free to determine what is best for the interests of their various offices.

If the last clause of Art. 18, § 6 of the Idaho Constitution stood alone, with no other case law or statutes, arguably the county commissioners could set up a mandatory personnel ordinance. However, that is not the complete state of the law in Idaho.

In the case of *Gowey v. Siggelkow*, 85 Idaho 574, 382 P.2d 764 (1963), the Idaho Supreme Court dealt with the office of chairman of a village board of trustees under previous Idaho law. The former chairman of the village board brought an action claiming the village board had no right to replace him as chairman. He asked to be reinstated as such. The court in discussing this matter noticed the similarity of this situation to that of chairman of the board of county commissioners. General law throughout the nation and Idaho law in particular was discussed at great length. There was no term of office set up for the chairman of the board of village trustees. It was held that where the statutory law provides only for appointment, and no duration or term of office is established by the statutes, the appointing authority may employ or discharge employees at its pleasure. The Court discussed officers in general and specifically overruled a contrary case relating to county commissioners, *Pritchard v. McBride*, 28 Idaho 346, and adopted the view of *Caldwell v. Culdesac*, 13 Idaho 575, 92 P. 533. The *Gowey v. Siggelkow* case has been mentioned since that time in *Buckalew v. Grangeville*, 97 Idaho 68, 540 P.2d 1347 (1975). The Buckalew case was quite different in that there was a definite term of appointment.

Section 31-2003, *Idaho Code*, provides that the elected county officers, other than the county commissioners, may appoint such deputies as may be necessary for the fulfillment of the duties of the county offices. Article 18, § 6 of the Idaho Constitution, and § 31-3107, *Idaho Code*, provide in part that the county commissioners are to determine the necessity for deputies and clerical assistance in the other county offices and set the rates of pay for such employees. This statute and this constitutional section have been construed by a number of Idaho cases to mean that the setting of salaries and the necessity for deputies and clerical assistance in such offices is a question for the county commissioners, but that control of deputies and employees is within the province of the other elective county officials, not the county commissioners. Other than the above cited cases, the more important cases are as follows: *Campbell v. Board of Comr's*, 5 Idaho 53, 46 P. 1022 (1892); (sheriff cannot appoint deputy without approval of county commissioners); *Taylor v. Canyon County*, 6 Idaho 466, 56 P. 1681 (1899) and 7 Idaho 171, 61 P. 521 (1900); (the county commissioners are to determine the need for their deputies and to fix their salaries); *Gowey v. Siggelkow*, *supra*; *Meller v. Board of County Comr's*, 4 Idaho 44, 35 P. 712 (1894) (commissioners cannot take over duties of other elective officers); *Fremont County v. Branden*, 6 Idaho 482, 56 P. 246 (1899) (county commissioners cannot create county offices other than those set out in the constitution); *Stokey v. Board of County Comr's*, 6 Idaho 542, 57 P. 312 (1899) (county commissioners are to set the salaries of other county officers and the deputies and employees). See also on this subject, *Criddle v. Board of County Comr's*, 42 Idaho 811, 248 P. 465 (1926); *Atter v. Board of County Comr's*, 44 Idaho 192, 255 P. 1095 (1927); *Huffaker v. Board of County Comr's*, 54 Idaho 715; *Dygert v. Board of County Comr's*, 64 Idaho 160, 129 P.2d 660 (1942) (this case concerns the prosecuting attorney's ability to appoint

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deputies and the county stenographer and § 31-2609, *Idaho Code*); *Lansdown v. Washington County*, 16 Idaho 618, 102 P. 344 (1909); and *State v. Leavitt*, 44 Idaho 739, 260 P. 164 (1927). The last two cases concern the power of the sheriff and district court to employ extra help without prior approval of the county commissioners in emergency situations and the county's duty to pay for such help. *Clayton v. Barnes*, 52 Idaho 418, 16 P2d 1056 (1932) (if a county officer employs extra assistance without the county commissioners' approval, the county is not liable to pay for the same); *Dexter Horton Trust and Savings Bank v. Clearwater County*, 235 F. 743, 248 F. 401, (county commissioners cannot appoint a person to carry out the duties of another county officer); *State v. Malcom*, 39 Idaho 185, 226 P. 1083; and *State ex rel Wright v. Hedrick*, 65 Idaho 148, 139 P2d 761 (the above two cases relate to the fact that the legislature cannot decrease or take away the duties of constitutional county officers).

Sections 31-847 and 31-2005, *Idaho Code*, provide that the county commissioners can authorize absences of county officers, in which case the county officers are to appoint deputies to fill their positions, and that if they do not do so the county commissioners can appoint such deputies. Section 31-2006, *Idaho Code*, provides for appointment by county officers of senior deputies. Section 31-2007, *Idaho Code*, requires such appointments to be in writing. Sections 31-2602, *Idaho Code*, provides that prosecuting attorneys may appoint deputies and their salaries are to be fixed by the county commissioners.

Section 31-802, *Idaho Code*, makes it the duty of the county commissioners to supervise the official conduct of the other county officers as relates to revenue and monetary matters and to see that they perform their duties. An early Idaho case held that county commissioners could not pass on misfeasance or malfeasance of a county officer. *Gorman v. Board of County Comr's* 1 Idaho 553, appeal dismissed, 86 U.S. 661 (1874). Section 63-2308, *Idaho Code*, allows for removal of a county officer in regard to revenue matters and states that such removal is to be done in a manner prescribed by law. Because of the *Gorman v. Board of County Comr's* case, *supra*, we take this to mean that legal action is necessary to remove such officers. The county treasurer may be suspended by the county commissioners under § 67-1035, *Idaho Code*, in regard to revenue matters.

These statutes, §§ 31-802, 63-2008 and 67-1035, *Idaho Code*, refer only to the elective officials named in Art. 18, § 6, and § 31-2001, *Idaho Code*. No Idaho law has been found providing that the county commissioners have control of the deputies and employees within the other county offices. The word "supervision" in § 31-802 *Idaho Code* gives the county commissioners the right to supervise the other county officers, not to carry on the functions of those offices. *Meller v. Board of County Comr's*, 4 Idaho 44, 35 P. 712 (1894); *Reynolds v. Board of County Comr's*, 6 Idaho 787, 59 P. 730 (1899); *Bailey v. Board of County Comr's*, 29 Idaho 212, 158 P. 322; *Dexter Horton T&S Bank v. Clearwater County*, 235 F. 743, 248 F. 401.

Section 67-5310, *Idaho Code*, allows the personnel commission to contract to furnish services to political subdivisions of the state, but it does not go on to authorize any officers to control the employees of other offices, nor does it appear to change the other county laws.

For the above reasons it is concluded that each of the elective county officers named in Art. 18, § 6, of the Idaho Constitution, other than the county commissioners, have the power to determine who will work within that office. A

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mandatory "civil service," "merit," or "personnel" system could not be effectively instituted by county commissioners under present Idaho law. However, nothing would appear to prevent the county commissioners from establishing guidelines and generalized procedures for personnel on a countywide basis to be used by the commissioners and other county officers to aid them in administering their various duties and offices, so long as the ordinance does not attempt to dictate such matters to the elective county officers, but leaves control of the offices and personnel of the various county offices within the hands of elective county officers. Article 12, § 2, Idaho Constitution; § 31-714, *Idaho Code*; *Prothero v. Board of County Comrs*, 22 Idaho 598, 127 P. 175 (1912).

Sincerely,
WARREN FELTON
Deputy Attorney General
Local Government Division

WF:om

December 19, 1979

Honorable James D. Golder
State Representative, District #16
8965 Amherst
Boise, ID 83704

THIS IS NOT AN OFFICIAL ATTORNEY GENERAL OPINION,
AND IS SUBMITTED SOLELY TO PROVIDE LEGAL GUIDANCE.

Dear Representative Golder:

This office is in receipt of your request for an opinion relative to the following question: May the State of Idaho tax nuclear materials imported into and stored within the State of Idaho on a federal reservation?

This opinion has been prepared in legal guideline form pursuant to the established policy of the Attorney General relative to formal opinions. It is our existing policy to refrain from rendering formal opinions on potential or pending legislation. This policy, based upon the constitutional doctrine of separation of powers, is formed in the belief that a formal opinion concerning a point of law by a member of the executive branch would be an improper intrusion into the deliberative processes of the legislative branch. However we are pleased to supply this *informal guideline* for your use during those deliberations.

The answer to the question you posed requires an analysis of two separate considerations: (1) A determination of the type or method of taxation that could potentially be levied against the nuclear materials in point or their transportation and storage; (2) A determination of whether the materials produced, imported and stored in the state results from the exercise of a federal governmental function.

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Relative to the first question involved in our analysis, three separate types or methods of taxation must be considered in any state taxation scheme on nuclear materials. Those types or methods of taxation are:

1. Property tax; levying a tax on the materials themselves.
2. Sales or use tax; levying a tax on the storage of the materials.
3. License or privilege tax; levying a tax on the privilege of activities involved with the transport or storage of such materials.

Regardless of the type of scheme of state taxation that might potentially be used in the taxation of such materials, a determination of whether the production, importation and storage of nuclear materials is resultant from the proper exercise of a federal governmental function is critical. If such production, importation or storage is deemed a federal governmental function, then clearly it cannot be subject to any state or local taxation whatsoever, unless the Congress has specifically consented to the taxation of either the federal property or governmental function in point. Such a rule has been repeatedly articulated by the United States Supreme Court:

... A state may not directly and materially hinder the exercise of constitutional powers of the United States by demanding in opposition to the will of Congress that a federal instrumentality pay a tax for a privilege of performing its functions. *Fidelity and Deposit Co. v. Pennsylvania*, 240 U.S. 319, 321, 6 L.Ed. 664, 36 S.Ct. 298 (1916).

Without congressional action there is immunity from state and local taxation, implied from the constitution itself, of all properties, functions and instrumentalities of the federal government. *Smith v. Davis*, 323 U.S. 111, 113, 89 L.Ed. 107, 65 S.Ct. 157 (1944).

The question then becomes: Has Congress consented to a scheme of state taxation over various properties and activities of the federal government in relation to nuclear energy? Each type or method of taxation will be considered in turn, in light of relevant Congressional action and applicable case authority.

As to the question of whether a property tax might be levied on nuclear waste materials themselves, there are two relevant considerations.

1. Congress has specifically precluded the payment by the federal government of property taxes on properties owned and operated by the federal government on federal nuclear reservations:

Payments in lieu of taxes. — In order to render financial assistance to those states and localities in which the activities of the commission are carried on, and in which the commission has acquired property previously subject to state and local taxation, the commission is authorized to make payments to state and local governments in lieu of property taxes. Atomic Energy Act of 1947 § 168, 42 U.S.C. § 2208 (1954).

Thus, there is Congressional action impliedly recognizing the constitutional immunity from state and local taxation found by the Supreme Court in the above cases. In fact, there is a specific Congressional expression that state and

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local property taxes are not to be paid on properties owned and operated by the federal government in the field of nuclear energy.

2. In addition, a property tax cannot be levied in Idaho on the property of the United States because such property is exempted by Idaho Const., Art. VII, § 4:

Public Property Exempt From Taxation. — *The property of the United States, except when taxation thereof is authorized by the United States, the state, counties, towns, cities, villages, school districts, and other municipal corporations, public libraries shall be exempt from taxation.* [Emphasis added.]

Accordingly, since the taxation of such property is not authorized by the United States and is precluded by our state constitution, such a scheme of taxation is unavailable to tax nuclear materials owned by the federal government.

That analysis leaves two other methods of taxation which remain to be considered; sales or use taxes and privilege or license taxes. Under current Idaho law, materials purchased or used in nuclear operations conducted at the Idaho National Engineering Laboratory (INEL) are exempt from the provision of the Idaho Sales and Use Tax Act.

... except that the term "use" does not include the sale of that property in the regular course of business, *or the use of that property primarily or directly used or consumed in connection with the following items when exclusively financed by the United States in connection with the Idaho National Reactor Testing Station.* (1) Research, development, experimental and testing activities and/or (2) the reprocessing of special nuclear materials and the use of such properties shall be an exempt use. Idaho Code § 63-3615. [Emphasis added.]

Idaho's law is silent on the question of a privilege or license tax relative to the conduct of the nuclear energy operations in Idaho.

Obviously, the Legislature can amend Idaho statutes to remove the sales and use tax immunity on INEL operations as well as to provide a form of license or privilege tax to be placed on nuclear activities. However, regardless of the method of taxation sought to be employed by a state, if the production, importation or storage of nuclear materials is accomplished by a federal governmental agency as a part of its Congressionally subscribed responsibilities, then the Supreme Court has clearly stated that such functions are immune from State and local taxation absent Congressional action to the contrary. *Smith v. Davis*, supra. *Fidelity and Deposit Co. v. Pennsylvania*, supra.

Our discussion now must turn to a further discussion of our second major analytical consideration: Whether the activities in question are resultant from the exercise of a government function by a federal agency. The United States Supreme Court and other federal appellate courts have created a noteworthy exception to the previously discussed federal governmental immunity to state and local taxation. An exception exists for independent contractors who are providing supplies or performing certain services for the federal government.

... purchases by independent contractors of supplies for government construction, or other activities, do not have federal immunity from

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taxation, . . . when governmental immunity is not waived by Congress. *Kern – Limerick v. Scurlock*, 347 U.S. 110, 122, 98 L.Ed. 546, 74 S.Ct. 403 (1954).

Unfortunately, there is no general test for determining whether a state tax on a federal contractor is in violation of the government's implied constitutional immunity. As a general rule, resort must be made to existing case authority and to the courts to determine whether the activities of a federal contractor are taxable by the state or local government.

Unquestionably, the federal courts have been exceptionally reluctant to allow a state to tax the activities of contractors employed by the federal government in the field of atomic energy.

In the case of *U.S. v. Livingston*, 179 F. supp. 9, (D.S.C. 1959), a three federal judge district court panel ruled that a corporation which had entered into a contract to provide technical services to a federal nuclear facility was immune from ordinary state sales and use taxes. In making its determination the court reviewed the nature of the contract in question. Pursuant to the terms of the contract, the contractor was given a substantial amount of authority to actually operate the federal nuclear facility in question. As a part of that operating authority, the contractor was required to purchase certain materials and goods used in the operation. The court determined that the title to the materials purchased eventually enured to the federal government and, as a consequence, a sales or use tax on the purchase and use of such materials would be a tax on the federal government itself.

A determination of whether a sales or use tax could ultimately be levied upon nuclear materials is dependent upon the type of fact situation under which such materials are produced and stored. If title to such materials ultimately vests in the federal government, clearly a tax could not be levied. The situation could potentially be the reverse if the production and storage resulted in ultimate title to the materials vesting in a private contractor.

Additionally, a state may tax personal property situated on land owned by the United States within its limits, provided that such personal property does not belong to the United States or is not otherwise exempt from taxation. Private property not held or used as an incident of military service, which is within a military reservation which has neither been excepted from a jurisdiction of the state in which it lies at the time of remission or established upon lands purchased thereof with consent of our legislature may be subjected to other taxation like other private property within the state. *Humble Pipeline Co. v. Wagoner*, 376 U.S. 369, 11 L.Ed2d 782, 84 S.Ct. 857; *Offutt Housing v. Sarpy*, 51 U.S. 253, 100 L.Ed 1151, 76 S.Ct. 814. Accordingly, nuclear materials produced or stored upon a federal reservation within the state might be subject to property taxation if the title to such materials vested in someone other than the federal government.

The same rationale is applicable to a license or privilege tax. That is, a tax may not be directly levied against a federal governmental entity fulfilling a specific governmental function absent Congressional consent. However, such a tax potentially could be levied against a contractor carrying out particular functions on behalf of the federal government.

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Originally, Congress prohibited any and all activities of the Atomic Energy Commission (now Department of Energy and Nuclear Regulatory Commission) from being taxed by state and local entities.

The Commission, and the property, activities, and income of the Commission, are hereby expressly exempted from taxation in any state, county, municipality or any subdivision thereof. Atomic Energy Act of 1946 § 9 (b), 60 Stat 765, 42 U.S.C. § 1809 (b).

Such a blanket immunity to taxation was also extended to federal contractors operating under contract to the Atomic Energy Commission in the nuclear energy field. *Carson v. Roane-Anderson Co.*, 342 U.S. 233, 96 L.Ed. 259 (1952). Congress later amended the statute to prohibit only the payment of property taxes by the Atomic Energy Commission (Department of Energy) on federal nuclear reservation properties. Atomic Energy Act of 1946 § 9 (b), 60 Stat 765, 42 U.S.C. § 1809 (b).

The federal courts have determined that the amendment was designed to allow the Atomic Energy Commission (Department of Energy) to continue its implied constitutional immunity to state taxation (activities of governmental function by a federal instrumentality) and "to leave it, with respect to such taxes, on the same basis as other governmental agencies and authorities." *U.S. v. Livingston*, 179 F. Supp. 9, 19 (1959).

As a broad general rule persons who contract with the federal government and are subject to the complete control and domination of the federal government (as a servant rather than an independent contractor) are considered agents of the federal government, and their property and activities are thereby immune from state taxes. *U.S. v. Boyd*, 378 U.S. 39 (1964).

In sum, a determination of whether any form of a state tax could be levied against nuclear materials produced, stored or transported onto a federal reservation depends upon the fact situation involved in such production, storage or transportation. As you know this office has solicited such facts from the relevant federal agencies by Freedom of Information Act requests. We have not yet received any appropriately detailed replies to permit this legal analysis.

Your question to us also concerned the taxation consequences of materials shipped in interstate commerce. Pursuant to the Commerce Clause of the United States Constitution, Congress has plenary power to authorize or forbid state taxation that affects interstate commerce. In the absence of relevant federal legislation, a court would review a state tax affecting interstate commerce to insure that it was not discriminatory and that it struck a proper balance between a state's need to obtain revenue against the burden the tax imposed on the free flow of commerce.

In closing, brief reference is made to other potential state regulatory schemes aside from taxation relative to the production, transportation and storage of nuclear materials within the boundaries of a state. The United States Supreme Court has determined that the federal government may obtain exclusive jurisdiction over federal property and reservations in one of three ways:

1. By transfer of jurisdiction pursuant to U.S. Const. Art. I, § 17;
2. By cession from the state to the federal government and proper acceptance and notification of the latter; or

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3. By reservation by the federal government upon admission of a state into the Union.

Where the United States acquires property within the boundaries of a state without the consent of the state and other than by purchase, its jurisdiction may not be exclusive. 77 Am. Jur. 2d *United States* § 76 (1974).

Further historical research would need to be conducted concerning the method by which the federal government acquired a particular federal reservation prior to making a legal determination of whether the federal government has something less than exclusive jurisdiction over activities conducted within such a reservation. If it was determined that exclusive jurisdiction did not rest with the federal government, a state regulatory scheme concerning the use of nuclear materials on a federal reservation could be considered. However, such a scheme could not interfere with the performance of explicit federal governmental duties by either a federal agency or contractor. *James v. Dravo Contracting Co.*, 302 U.S. 134, 82 L.Ed 155, 48 S.Ct. 208 (1937). In addition, the question of whether or not the federal government, through a pervasive statutory and administrative regulatory scheme, has totally pre-empted and precluded the state from any regulatory authority in the area of atomic energy would have to be considered. As a general rule Congress has the power to bar or permit state regulation of federal property or activities. But in the absence of a statement by Congress, the instrumentalities and agents of the federal government are immune from state regulation if the regulation might interfere with, or impair, the functions performed by the federal government, or if the regulation is inconsistent with the policy of the federal statute involved. *State v. Click*, 97 Idaho 791, 554 P.2d 969 (1976).

Finally, mention should be made of the possibility of a state regulatory scheme concerning the transport of nuclear materials over the highways of a state. Inspection by state officers of vehicles transporting nuclear materials over state highways is potentially available to a state in the exercise of its police power where designed to insure the public health, safety and welfare. Such an inspection program has recently been enacted in the State of Washington. The Bureau of National Affairs, Inc., *Environmental Reporter*, § Current Developments p. 1435. Such a program could not, however, totally preclude the shipment of such materials in interstate commerce or the exercise of a right granted by federal legislation.

Very truly yours,
/s/ ROY L. EIGUREN
Deputy Attorney General
Division Chief — Administrative/
Legislative Affairs

RLE/tr

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