STATE OF IDAHO

OFFICE OF THE ATTORNEY GENERAL

LAWRENCE G WASDEN

September 27, 2005

VIA HAND DELIVERY

The Honorable Ben Ysursa
Idaho Secretary of State
Statehouse

RE: Certificate of Review
Proposed Initiative to Amend Idaho Code Section 63-205 Relating to Property Tax

Dear Mr. Secretary:

An initiative petition was filed with your office on August 30, 2005. Pursuant to Idaho Code § 34-1809, this office has reviewed the petition and prepared the following advisory comments. It must be stressed that given the strict statutory timeframe in which this office must respond and the complexity of the legal issues raised in this petition, this office's review can only isolate areas of concern and cannot provide in-depth analysis of each issue that may present problems. Further, under the review statute, the Attorney General's recommendations are "advisory only." The petitioners are free to "accept or reject them in whole or in part." The opinions expressed in this review are only those that may affect the legality of the initiative. This office offers no opinion with regard to the policy issues raised by this proposed initiative.

BALLOT TITLE

Following the filing of the proposed initiative, our office will prepare short and long titles. The ballot titles should impartially and succinctly state the purpose of the measure without being argumentative and without creating prejudice for or against the measure. If petitioners wish to propose language with these standards in mind, we recommend that they do so. Their proposed language will be considered in our preparation of the titles.

MATTERS OF SUBSTANTIVE IMPORT

The petition proposes to amend § 63-205, Idaho Code, by the addition of six new subsections numbered (3) through (8). The amendments are entitled the "Residential Property Tax Relief and Bonding Act." As currently composed, subsections (1) and (2) of § 63-205, Idaho Code, address the subject of "Assessment – Market value for

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assessment purposes." It provides the assessment date for property taxes and requires the property be assessed at market value as provided by statute and rules of the State Tax Commission.

1. **One percent limitation.** The proposed subsection (3) would limit to "one percent (1%) of the cash value" the total annual amount of property tax imposed on property "used as the primary residence of an Idaho resident. . .". It goes on to provide that "[t]he one percent (1%) tax is to be collected by the counties and apportioned according to law to the districts within the counties."[1]

The most serious problem with this proposal is one previously discussed in opinions issued by this office in regard to other proposals to limit the total amount of property tax imposed on a single property. The Attorney General's Office, under the administrations of three different Attorneys General, has issued three opinions addressing similar proposed limitations.[2] The conclusions expressed in those opinions concerning the previously proposed one percent limitations are equally applicable to the similar limitation in the currently proposed initiative. They conclude the requirement that property "tax shall not exceed 1% of Market Value" is inoperable because neither existing law nor the proposed initiative provide state or local governments with authority or instructions for adjusting the budget funded by property tax otherwise certified pursuant to statute to comply with the one percent limitation. The problem, as summarized in the 1991 opinion and reaffirmed in the 1996 opinion, is applicable to the current proposal:

> The basic problem here is that the drafters of the proposed One Percent Initiative frame a standard that is, at bottom, only a slogan: "taxation within the State of Idaho shall not exceed one percent (1%) of the actual market value of such property." However, they fail to provide any entity with authority to adjust tax levies to meet this standard. They also fail to provide any procedural mechanism to carry out their proposal.

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[1] The proposed subsection (3) states:

> (a) The maximum amount of ad valorem tax on real property used as the primary residence of an Idaho residence shall not exceed one percent (1 %) of the cash value of such property. The one percent: (1%) tax is to be collected by the counties and apportioned according to law to the districts within the counties.
>
> (b) The limitation provided for in subdivision (a) shall not apply to ad valorem taxes or special assessments 'to pay the interest and redemption charges on any indebtedness approved by the voters prior to the time this section becomes effective.

[2] Two of these Opinions may be found on the Attorney General's website: See 1991 Idaho Attorney General's Opinion 91-9 at http://www2.state.id.us/ag/ops_guide_cert/1991/op91-09.pdf and Idaho Attorney General's Opinion 96-3 at http://www2.state.id.us/ag/ops_guide_cert/1996/op96-03.pdf. See also Idaho Attorney General's Opinion 78-37 Published in 1978 Idaho Attorney General's Annual Report, p. 148.

> We conclude that neither the existing statutes nor any provision of the One Percent Initiative expressly grants authority to the State Tax Commission to adjust levies and apportion taxes. Neither the Idaho Constitution nor the Idaho Code would permit imposition of such a duty on the courts. Finally, any attempt to centralize such authority in the boards of county commissioners would make the boards into local taxing czars and virtually destroy all the other independent taxing districts that now answer to the local electorate.
>
> It follows that the One Percent Initiative cannot be implemented as written. It is our opinion that a reviewing court faced with the options of striking down the One Percent Initiative or upholding the initiative by creating from whole cloth a new tax apportionment system for the State of Idaho would choose the former option.

Whatever method of implementing the one percent tax limitation the petitioners choose, the resulting tax levies must conform to the requirement of the Idaho Constitution that "All taxes shall be uniform upon the same class of subjects within the territorial limits, of the authority levying the tax, ..."[3] This means that each taxing district's levy (whether it is a levy by a county, city, school district or other local government authorized to levy property taxes) must apply equally to all taxable property in each district. The tax owed is calculated by multiplying this uniform levy rate times the value of the individual property, however that value is determined. As explained by the Idaho Supreme Court:

> A constitutional rule of uniform ad valorem taxation forbids legislative classifications of property for the purpose of imposing a greater burden of ad valorem taxation on one class than on another; that is, all property not exempt from taxation must be assessed at a uniform percentage of actual cash value, and a single fixed rate of taxation must apply against all taxable property.[4]

See the discussion under "Question 4" of Opinion 91-9 for one possible mechanism that is consistent with the requirement for a uniform levy.[5]

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[3] Art. 7 § 5, Idaho Constitution, see footnote 12.

[4] *Idaho Telephone Co. v. Baird*, 91 Idaho 425 (1967)

[5] See also 1995 Idaho Attorney General's Opinion 95-03 at http://www2.state.id.us/ag/ops_guide_cert/1995/op95-03.pdf

2. **Limitations on value.** The proposed subsection (4)(a) would establish a definition of the term "full cash value."[6] The intent of this language appears to be that the one percent limitation of subsection (3) would apply to the taxable value of residential property as that value appeared on the assessment notice for either 2001 or 2002 (which is unclear) or its "appraised value" if the property is constructed, purchased or changes ownership after 2002. In the event that property has not yet been assessed to the level appropriate for either 2001 or 2002, it may be reassessed to that level. Proposed subsection (4)(b) thereafter permits certain inflationary adjustments to the "fair market value base" not to exceed two percent.

Initially, there are several definitional and technical problems with this language. First, paragraph (a) defines the term "full cash value" while paragraph (b) uses the term fair "market value." "Market value" is defined in § 63-201(10), Idaho Code, inconsistently with the definition of "full cash value" in paragraph (a). This inconsistency is further confused by the introduction of the undefined term "appraised value." Ordinarily, a change in wording in a statute implies a change of sense.[7] Although the rule is universal,[8] in this context whether "appraised value" is intended to mean "full cash value" or "market value" is unknown. Finally, § 63-308, Idaho Code, requires the assessor deliver to taxpayers a "valuation assessment notice" each year no later than the first Monday of June. Thus, reference to the "2001-2002 Assessment Notice" leaves unclear which value is intended.

A more serious problem is that this value limitation conflicts with the requirements of the Idaho Constitution. The initiative process in Idaho is limited to proposing and adopting changes in statutory law.[9] Statutes adopted by initiative are subject to the same constitutional requirements and constraints as other statutes.[10] Thus, for the initiative to ultimately succeed in its goal of reforming the property tax, its provisions must comport with the provisions of the Idaho Constitution relating to property taxation. The Idaho Constitution, in Art 7, §§ 2[11] and 5,[12] requires that property taxes be uniform and in

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[6] The proposed language states:

> The full cash value means the County Assessors valuation of rea1 property as shown on the 2001-2002 Assessment Notice under 'Net Taxable Property Value" after the homeowners exemption has been deducted, or thereafter, the appraised value of real property when purchased, newly constructed, or a change in ownership has occurred after the 2002 assessment. All real property not already assessed up to the 2001-2002 tax levels may be reassessed to reflect that valuation.

[7] *United States Pacific Insurance Company v Bakes*, 57 Idaho 737 (1937).

[8] *Penrod v Cowley* 82 Idaho 511 (1960)

[9] See Chapter 18, Title 34, Idaho Code

[10] *Westerberg v Andrus*, 114 Idaho 401 (1988).

[11] Art 7, § 2 provides:

proportion to value. The Idaho Supreme Court has interpreted these provisions to mean the tax must be based on the property's current market value. Two examples illustrate the Court's understanding of these provisions:

> 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 and cannot stand. [Emphasis added.][13]

> We interpret the language of Art. VII, § 2 - 'every person * * * shall pay a tax in proportion to the value of his, her, or its property * * *' - as meaning that every property owner shall receive equal treatment under the ad valorem tax laws; for example, if owner A possesses $100.00 of property which is taxed $1.00, then owner B with $400.00 of taxable property shall be taxed in the same proportion, or $4.00.[14]

> Revenue to be provided by taxation. The legislature shall provide such revenue as may be needful, by levying a tax by valuation, so that every person or corporation shall pay a tax in proportion to the value of his, her, or its property, except as in this article hereinafter otherwise provided. The legislature may also impose a license tax, both upon natural persons and upon corporations, other than municipal, doing business in this state; also a per capita tax: provided, the legislature may exempt a limited amount of improvements upon land from taxation.

[12] Art 7, § 5 provides:

> Taxes to be uniform -- Exemptions. 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.

[13] *Merris v. Ada County,* 100 Idaho 59, 63 (1979).

[14] *Idaho Telephone Co. v. Baird,* 91 Idaho 425 (1967)

The inevitable effect of the valuation system proposed by the initiative will be an impermissible discrimination in valuation between property subject to tax on its "full cash value" and property taxed on its value when "purchased, newly constructed, or a change in ownership has occurred after the 2002 assessment." This office noted in previous opinions about property tax initiatives that value limitations similar to the limits in this proposal, should be offered by means of a constitutional amendment, not by statutory changes. As a result, we advised that "[t]he only sensible and certain safeguard is that of deleting the distinction made in Sect Two[15] of the initiative between property purchased, newly constructed or subjected to change of ownership on the one hand and property which has not experienced any of those circumstances on the other hand."[16] Nothing in Idaho's Constitution or in the development of our constitutional jurisprudence counsels any different recommendation today.

3. Limitations on legislative enactments increasing state revenue. The proposed subsection (5) would limit the ability of the legislature to increase "revenues collected . . . by increased rates or changes of methods of computation" by requiring the legislature to enact such changes by "two-thirds of all members elected to each of the two houses of the legislature. . .". It also prohibits the legislature from enacting any "new ad valorem taxes on real property, or sales or transactional taxes on the sales of real property."[17]

This section is of no legal effect. As noted earlier, the initiative process in Idaho is limited to proposing and adopting changes in statutory law.[18] Initiative legislation is on equal footing with the legislation enacted by the Idaho legislature.[19] Like any other statute, a statute enacted by initiative may be repealed or amended by the legislature.[20]

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[15] The reference is to section 2 of "Initiative 1" passed at the general election of November 7, 1978, "Restricting Governmental Ability to Change Property Valuations or Taxes" on file at the Office of the Idaho Secretary of State.

[16] AG Opinion 78-37 pg 155 *supra* at footnote 2

[17] The proposed subsection (5) provides:

> From and after the effective date of this article, any changed in State taxes enacted for the purpose of increasing revenues collected pursuant thereto by increased rates or changes of methods of computation must be imposed by an Act passed by not less than two-thirds of all members e1ected to each of the two houses of the Legislature, not just those present and voting, except that no new ad valorem taxes on real property or sales or transaction taxes on the sales of real property may be imposed.

[18] See footnote 9.

[19] *Westerberg v. Andrus,* 114 Idaho 401 (1988)

[20] *Luker v Curtis*, 64 Idaho 703 (1943); *Gibbons v. Cenarrusa*, 140 Idaho 316 (2002).

Furthermore, the quorum necessary for the legislature to conduct business is established by Art 3, § 10 of the Idaho Constitution as the "majority of each house." A statutory attempt to require action by two-thirds of all members of each house deprives the legislature of its constitutionally granted authority "to do business" based on a quorum of all legislators. A statute may not usurp a constitutionally granted power.[21] Thus, nothing prevents the Idaho legislature from repealing, amending, or simply ignoring the provisions of subsection (5).[22]

The proposed subsection (5) may also be subject to challenge on another constitutional ground. While proposed subsections (3), (4) and (6) are limited to addressing issues of only local taxation, subsection (5), purports to limit the legislature's authority to increase revenues by changes in state taxes. This may contravene the Constitution's requirement that legislation "shall embrace but one subject."[23] Because initiative legislation is on equal footing with the legislation enacted by the legislature, it must comply with the same constitutional requirements as legislation enacted by the Idaho legislature.[24] While the standard the Idaho Supreme Court applies to determine whether provisions of an enactment are sufficiently related is a liberal one,[25] the court will invalidate an enactment when it is unable to identify a purpose that sufficiently unites all of the provisions of the statute.[26]

The limitation on increases in state funding in the proposed subsection (5) may also impose impermissible restriction on duties constitutionally imposed on the legislature.

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[21] *Williams v. State Legislature o f Idaho*, 111 Idaho 156 (1986). "The legislature may not usurp the power of a constitutionally created executive agency . . ."

[22] A statute may be repealed by enactment of another statute that, by irreconcilable inconsistency with a prior statute, makes the legislature's intent that the two statute cannot operate contemporaneously clear. *Chapple v Madison County Officials*, 132 Idaho 76 (1998).

[23] *Idaho Constitution,* Art 3, § 16.

[24] *Westerberg v. Andrus, supra* n. 10.

[25] "[T]here must be a common object, and that all parts of a statute relate to and tend to support and accomplish the indicated object." *American Federation of Labor v. Langley*, 66 Idaho 763 (1946).

[26] Two examples of cases in which the Idaho Supreme Court has invalidated a statute based on the single subject rule are *American Federation of Labor. supra* n 25 and *State v. Banks,* 37 Idaho 27, (1923). The former case involved a statute with provisions that required labor unions to file income and expenditure statements, forbade labor union members from entering agricultural premises to collect fees or solicit memberships and prohibited picketing on certain agricultural premises. The court found the single subject provision was violated since the court was unable to identify a purpose that united all of the provisions of the statute. The latter invalidated a statute that authorized the use of money from the state's general fund to pay the expenses of the negotiation and sale of both general fund treasury notes and refunding bonds. The court found there were two separate and distinct subjects, noting that general fund notes had nothing to do with the indebtedness of the state.

For example the Idaho Constitution requires the legislature to "to establish and maintain a general, uniform and thorough system of public, free common schools."[27]

4. Authorization of "special taxes." The proposed subsection (6) would authorize the imposition of "special taxes" by a two-thirds votes of the "qualified electors" of a city, county or "special district." However, the authorization does not include ad valorem taxes on real property or transaction or sales taxes on real property.[28]

This office has previously addressed the difficulty of implementing a requirement that an election authorizing a tax be enacted by two-thirds votes of the "qualified electors" of the local government holding the election.[29] We said:

> One problem with this super-majority requirement stems from the fact that it is impossible to identify the number of qualified electors in a given district on a particular date. Many special taxing districts--such as hospital districts, irrigation districts, fire protection districts and recreation districts--base voter qualification upon residency within the district and do not require voter registration. In order to vote in these taxing districts, electors need only sign an oath form affirming their residency. The elector's oath need not be signed until just before the elector enters the polling booth. For example, Idaho Code § 42-3202[30] establishes voter qualification for water and sewer district elections:
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> > A "qualified elector" of a district, within the meaning of and entitled to vote under this act, unless otherwise specifically provided herein, is a person qualified to vote at general elections in this state, and who has been a bona fide resident of the district for at least thirty (30) days prior to any election in the district. No registration shall be required at any election held pursuant to this act, but each voter shall be

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[27] Art 9, § 1, Idaho Constitution.

[28] The specific language is:

> "Cities, counties, and special districts, by a two-thirds vote of the qualified electors of such district, may impose special taxes on such district, except ad valorem taxes on real property or a transaction tax or sales taxes on the sale of real property within such City, County, or special district are prohibited."

[29] See AG Opinion 91-9, *supra* n 2.

[30] Since AG Opinion was issued, this section of Idaho Code has been amended. However, we note that similar provisions currently appear in § 43-113, Idaho Code.

> required to execute an oath of election attesting his qualification. [Emphasis added in Opinion 91-9]

Under this electoral system, it is impossible to determine the number of "qualified electors" in the district. The number of qualified electors is constantly in flux and the required number of votes needed for approving a "special tax" changes every time someone moves into or out of the district.

The two-thirds super-majority voting requirement is likewise impossible to follow in districts that do have voter registration, such as counties, cities and school districts.

No precise figures of qualified electors are available in these districts either. If a registered voter moves from a county and the county clerk is not aware of the change, the voter's registration at his or her former address will remain on the county rolls for up to four years. Idaho Code § 34-435. Thus, voter registration does not provide exact numbers of "qualified electors" within a county at any given time and cannot be relied upon to establish voter approval thresholds for "special tax" elections.

We therefore conclude, based on the practical problems facing the two-thirds super-majority voting requirement, that this provision of the One Percent Initiative cannot be enforced as written. The courts must either strike section 2 of the initiative in its entirety as inoperable (thus leaving no means for the public to exempt levies from the initiative) or interpret and apply section 2 in a manner at odds with its literal wording and the announced intent of its sponsors.

Regardless of the approach taken by the courts, in our opinion the courts would not allow the two-thirds super-majority provision to stand as written. Requiring the approval of two-thirds of all qualified electors—whether they vote or not—turns every non-vote into a "No" vote. It systematically frustrates those who do exercise the franchise and even takes away from those who choose to abstain the right not to have their votes counted.

This requirement of the One Percent Initiative violates the basic principle of participatory democracy guaranteed to every Idahoan by art. 6, § 1, of the Idaho Constitution ("All elections by the people must be by ballot.") A reviewing court would not allow such a requirement to stand.

The language of proposed subsection (6) presents some other difficulties. First, it authorizes the imposition of "special taxes" but the term is undefined except by exclusion. Special taxes are not ad valorem taxes on real property or transaction or sales taxes on real property. Standards and safeguards that are "built in" to the statute

must accompany any delegation of authority to local governments.[31] Subsection (6) fails to explain the scope of delegation (*e.g.*, could it include local income taxes?) or provide standards such as defining the incidence of the tax, setting forth applicable exemptions, setting the maximum amount which may be imposed, and delineating administration and collection provisions of the special tax that rulings of the Idaho Supreme Court have cited as necessary to such an enabling statute.[32]

Similarly, the term "special district" is not defined. The qualifier "special" implies not all taxing districts receive the authorization to impose "special taxes," but which do and which do not is left unstated.

Paragraph (b) of subsection (6) contains a puzzling requirement that all bond elections must be held only at general elections. This is puzzling because elections under subsection (6) are specifically prohibited from imposing the ad valorem property taxes used to fund the issuance of bonds.

CONCLUSION

I HEREBY CERTIFY that the enclosed measure has been reviewed for form, style and matters of substantive import and that the recommendations set forth above have been communicated to the petitioner, Fritz R. Dixon, by deposit in the U.S. Mail of a copy of this certificate of review.

Sincerely,

LAWRENCE G. WASDEN
Attorney General

Analysis by:

Theodore V. Spangler, Jr.
Deputy Attorney General

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[31] *Greater Boise Aud. v. Royal Inn of Boise,* 106 Idaho 884, 684 P.2d 286 (1984); *Sun Valley Co. v. City of Sun Valley* 109 Idaho 424, 708 P.2d 147 (1985).

[32] *Id.*