ATTORNEY GENERAL OPINION NO. 93-5

To: G. Anne Barker, Administrator
Division of Public Works
STATEHOUSE MAIL
Boise, ID 83720-1000

Per Request for Attorney General's Opinion

QUESTIONS PRESENTED

1. Impact Fees Assessed by Ada County Highway District.

    a. Are impact fees assessed by Ada County Highway District true fees, or unauthorized taxes in violation of article 7, sections 4 and 5, of the Idaho Constitution?

    b. Do the impact fees assessed by Ada County Highway District pursuant to Ordinance 184 meet substantive due process requirements of the constitution?

2. May Ada County Highway District, as a legislatively created taxing district, assess impact fees against the state without express authority from the state to do so?

CONCLUSION

1. Impact Fees Assessed by Ada County Highway District.

    a. The provisions of ACHD's Ordinance 184 allow for discretionary application of impact fees outside of designated benefit zones, require payment of fees with what appears to be no determination of need for services as a result of the new development, and lack clarity on accounting for revenues. Although, it is difficult to determine with certainty whether ACHD's impact fee ordinance allows for an assessment of a regulatory fee, or is a disguised tax in violation of article 7, sections 4 and 5 of the Idaho Constitution, the above stated provisions are indicia of a tax rather than a fee. It is recommended that the sweeping powers provided to the fee administrator in the ordinance and the failure to define within the ordinance procedures for collection and accounting of fees be reviewed and amended

by ACHD to clearly comport with the requirements in the enabling statute, chapter 82, title 67, Idaho Code.

b. To meet the requirements of substantive due process, the ordinance must provide a rational nexus between the impact fees assessed to a new development and the need for additional capital improvements. Further, there must be a rational nexus between the expenditure for capital facilities and the benefits accruing to the property in which the impact fees are assessed. The enabling statute requires that an ordinance establish a rational nexus between the expenditures for capital facilities and the benefits accruing to the property on which the charge is imposed. It is not clear that Ordinance 184 establishes a need resulting from the new development prior to assessing impact fees. In addition, it is not clear that Ordinance 184 complies with the earmarking and expenditure requirements of the "Idaho Development Impact Fee Act." As a result, it is not clear that Ordinance 184 meets the requirements of the enabling act or the rational nexus standard required by the constitution.

2. Statutes are subject to the rule of construction exempting government from their operation in the absence of a clear expression of intent on the part of the legislature to the contrary. The language contained in the "Idaho Development Impact Fee Act" does not indicate that the state was to be included for the purpose of payment of development impact fees. In fact, the fiscal note attached to H.B. 805 indicates that the legislative intent was not to include the state within the purview of the act. As such, the state is excluded from compliance with impact fee ordinances enacted pursuant to the "Idaho Development Impact Fee Act."

BACKGROUND

In September of 1991 the Ada County Highway District (ACHD) enacted Ordinance 184, effective April 15, 1992, requiring each new development in the county to pay an "impact fee" for capital expenditures to provide adequate roadway systems in the county.[1] Ordinance 184 divides developments by type and provides a formula which

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[1] ACHD cites as authority for its Ordinance 184, article 12, § 2, of the Idaho Constitution, which is the general grant of police powers to municipalities and counties. Since ACHD is merely a quasi-municipal corporation with limited objectives and powers granted to it by the legislature, it would not enjoy a direct grant of police powers from the constitution. *See generally,* McQuillan, Municipal Corporations § 213 *Quasi Municipal Corporations* (3rd ed. 1987). Generally, courts in other jurisdictions have held that municipalities or taxing districts attempting to establish impact fees need enabling legislation unless the local governmental entity has home rule authority. *See* Juergensmeyer and Blake, *Impact Fees: An Answer to Loc'l Gov'ts' Capital Funding Dilemma*, 9 Fla.

attempts to determine a new development's proportionate share of capital improvements resulting from the increase in use of the roadway due to the development. Ordinance No. 184, sections 6-10, and 14.

Pursuant to the ordinance, imposition and expenditure of impact fees are restricted to capital improvements within or immediately adjacent to eight "benefit zones" designated in the ordinance. *Id.* at section 14. However, it is in the fee administrator's discretion to determine that a particular development has countywide impact and, at that point, the fees may be used without regard to the designated benefit zone. *Id.*

Impact fees may be determined on an individual basis if an individual fee payer can establish that a proposed development is unique. *Id.* at section 10. Otherwise, fees are ascertained through the standardized fee schedule evidenced by Exhibit "A" to the ordinance, which determines the approximate impact on the roadways and assesses a fee for various types of developments. ACHD has attempted to assess impact fees against all developers within Ada County, including the state.

Subsequent to ACHD's adoption of Ordinance 184, the legislature enacted H.B. 805, creating chapter 82, title 67, Idaho Code, entitled "Idaho Development Impact Fee Act." H.B. 805 went into effect on July 1, 1992, approximately two and a half months after ACHD implemented Ordinance 184. The purpose of the act is to empower governmental entities to adopt ordinances allowing the imposition of development impact fees under the parameters delineated in the act. ACHD contends the act contemplates assessment against all developers, including the state when the state acts to construct any new facility within the boundaries of Ada County.

ANALYSIS

In discussing the issue of the legality of ACHD's impact fee assessment it is helpful to have a definition of the term "impact fee." Impact fees are a relatively new local government technique for funding capital improvements needed to serve new development in high growth areas. They are typically designed to require that each development pay its proportionate share of the cost of providing offsite public services and facilities required by the new development. The following are elements of impact fees which distinguish these fees from other types of exactions, such as fees in lieu of mandatory dedication, connection fees and user fees:

St. U. L. Rev. 415 (1981). *See generally* Michael C. Moore, *Powers and Authorities of Idaho Cities: Home Rule or Legislative Control?* 14 Idaho L. Rev. 143 (1977).

An "impact fee" is a type of exaction which is:

> In the form of a predetermined money payment;
>
> Assessed as a condition to the issuance of a building permit, an occupancy permit or plat approval;
>
> Pursuant to local government powers to regulate new growth and development and to provide for adequate public facilities and services;
>
> Levied to fund large-scale, off-site public facilities and services necessary to serve new developments;
>
> In an amount which is proportionate to the need for the public facilities generated by the new development.

Bryan Blaesser and Christine Kentopp, Impact Fees: the Second Generation, 38 Wash. U.J. Urb. & Contemp. L. 55, 64 (1990).

When impact fees first appeared as an alternative to financing capital improvements, courts frequently struck down the fees on various constitutional grounds. However, in the last 20 years, a number of jurisdictions which previously found user fees or impact fees to be invalid have overruled or distinguished those earlier cases, and have found the assessment of impact fees or user fees, in certain circumstances, to be valid. *See* Bloom v. City of Fort Collins, 784 P.2d 304 (Colo. 1989); Homebuilders and Contractors' Ass'n of Palm Beach County, Inc., v. Board of Palm Beach Comm., 446 So. 2d 140 (Fla. App. 4th Dist. 1983); Holmdel Builders Ass'n v. Township of Holmdel, 583 A.2d 277 (N.J. 1990).

In construing impact fees, courts generally provide a two-tiered analysis. First, the issue of statutory or constitutional authority to assess the impact fee is addressed. Second, the ordinance is reviewed to determine if its application violates constitutional provisions of due process or uniform taxation. In this situation, the enactment of H.B. 805 authorizing governmental entities to adopt ordinances imposing development impact fees provides state statutory authority.

Since statutory authority is provided, the first issue addressed by this analysis is whether the impact fees assessed by ACHD are incidental to a regulation, or a disguised tax in violation of article 7, §§ 4 and 5, of the Idaho Constitution. If the fees are

determined to be incidental to a regulation, it must be determined whether the ordinance can withstand a challenge on the basis of constitutional due process requirements of reasonableness. The final issue addressed by this analysis is whether the statutory authorization provided by H.B. 805 contemplates an assessment of impact fees against the state.

A. Constitutional Considerations

1. Tax v. Regulatory Fee

The characterization of impact fees presents a complex problem. If the impact fees are found to be disguised taxes rather than fees, the ordinance, and possibly the enabling statute, would be in violation of article 7, § 4 (exempting public property from taxation) and § 5 (requiring uniform taxation) of the Idaho Constitution.

In reviewing the constitutionality of the "Idaho Development Impact Fee Act" chapter 82, title 67, Idaho Code, we are bound, as would be the judiciary, to treat with deference the legislature's classification of impact fees and to resolve any doubt concerning interpretation of the statute in favor of rendering the statute constitutional. *See* Olson v. J.A. Freeman Co., 117 Idaho 706, 791 P.2d 1285 (1990).

With these considerations in mind, we turn to the question whether the ACHD assessment is a fee or a disguised tax. Fees imposed by a governmental entity tend to fall into one of two principal categories: user fees based upon the rights of the entity as a proprietor of the instrumentality used (*see* Kootenai County Property Association v. Kootenai County, 115 Idaho 676, 769 P.2d 553 (1989); Loomis v. City of Hailey, 119 Idaho 434, 807 P.2d 1272 (1991)), or regulatory fees founded on the police power to regulate particular businesses or activities (*see* Foster's Inc. v. Boise City, 63 Idaho 201, 118 P.2d 721 (1941); Brewster v. City of Pocatello, 115 Idaho 502, 768 P.2d 765 (1988)).

Proprietary fees, such as fees for sewer and water systems, do not implicate the taxation power if they are reasonably related to the cost of construction and maintenance of the facilities used and there is statutory authorization for such fees. Kootenai County Property Ass'n v. Kootenai County, *supra;* Loomis v. City of Hailey, *supra.* Similarly, regulatory fees are not taxes if the "funds generated thereby . . . bear some reasonable relationship to the cost of enforcing the regulation." Brewster, 115 Idaho at 504; State v. Nelson, 36 Idaho 713, 213 P. 358 (1923); Foster's Inc. v. Boise Idaho, *supra.* The general rule is that the fee may properly be fixed with the intent of reimbursing the local governmental entity for all expenses imposed upon it as a result of the regulation.

User fees and regulatory fees share traits that distinguish them from taxes. First, fees are charged in exchange for a particular governmental service rendered to a particular consumer which benefits the party paying the fee in a manner "not shared by other members of society." National Cable Television Ass'n v. United States, 415 U.S. 336, 341, 94 S. Ct. 1146, 1149, 39 L. Ed. 2d 370 (1974); Brewster, 115 Idaho at 505. Second, fees are not a forced contribution, Brewster v. City of Pocatello, *supra.* Finally, fees charged are collected not to raise revenues but to compensate the governmental entity for its expenses in providing the services. Foster's Inc. v. Boise City, *supra*; Loomis v. City of Hailey, *supra*. Thus, there is a three-pronged analysis for the determination of whether an exaction is appropriately defined as a fee or a tax.

a. Providing a Benefit Not Shared By Members of the General Public

To meet the first prong of the analysis, ACHD's ordinance must convey a benefit not shared by the general traveling public. The enabling statute also requires conveyance of a benefit to the new development. The "Idaho Development Impact Fee Act" defines development impact fee as follows:

> [A] payment of money imposed as a condition of development approval to pay for a proportionate share of the costs of system improvements needed to serve development. . . .

Idaho Code § 67-8202(9) (emphasis added).

Idaho Code § 67-8207 requires that:

> The development impact fee imposed must not exceed a proportionate share of the costs incurred or costs that will be incurred by the governmental entity in the provision of system improvements to serve the new development.

In addition, Idaho Code § 67-8204(11) requires that a development impact fee ordinance provide improvements for the "benefit of the service area in which the project is located."

In its "intent and purpose" section, Ordinance 184 states that one of the purposes of the ordinance is to require that "each new development bear its proportionate fair share of the costs of capital expenditures necessary to provide adequate roadway systems in Ada County." Ordinance 184, section 3B. However, ACHD assesses an impact fee on

all new development. *Id.* at sections 6, 8, 9 and Schedule "A." The ordinance does not appear to require a determination that the new development necessitates changes or additional construction of new roadways prior to making an assessment.

In Brewster v. City of Pocatello, *supra*, the Idaho Supreme Court reviewed a case involving an ordinance enacted by the city of Pocatello purporting to impose a "street restoration and maintenance fee" upon all owners of property adjoining streets. Like the fee in Ordinance 184, owners were to be assessed based upon a formula reflecting the traffic generated by the particular property. The court held the charge was a tax rather than a fee, stating:

> We view the essence of the charge at issue here as a tax imposed on occupants or owners of property for the privilege of having a public street abut their property. In that respect it is not dissimilar from a tax imposed for the privilege of owning property within the municipal limits of Pocatello. The privilege of having the usage of city streets which abuts [sic] one's property is in no respect different from the privilege shared by the general public in the usage of public streets.

Brewster, 115 Idaho at 504-05 (emphasis added). *See contra,* Bloom v. City of Fort Collins, *supra* (a transportation utility fee imposed upon owners or occupants of any developed lots for the purpose of providing revenues for maintenance of local streets was not a property tax but a special fee).

In distinguishing its ordinance from the ordinance discussed in Brewster, ACHD notes provisions of its ordinance which, it contends, establish it as a fee and not a disguised tax. The ordinance in Brewster provided for assessment for the maintenance and repair of existing streets and was assessed against existing developments, whereas ACHD's ordinance is used "exclusively for capital improvements or expansion of transportation facilities as identified by the adopted capital improvement plan" and is only assessed against new development. Ordinance 184, section 15. In addition, ACHD contends that its impact fee reasonably relates to and pays for the actual cost of construction of new highways as a result of increased use from the new development. However, as previously noted, it is not clear what procedure is used by ACHD to make a determination that road construction is necessitated as a result of new development. ACHD further notes that revenues generated by impact fees must be spent within or immediately adjacent to the "benefit zone within which the fees were raised." However, the fee administrator may, in his discretion, determine that a particular development has a countywide impact and, with that determination, the fees may be used anywhere in the county without regard to benefit zones. *Id*. at section 14.

In Eastern Diversified Properties, Inc. v. Montgomery County, 570 A.2d 850 (Md. 1990), the Maryland Court of Appeals determined that a "development impact fee" was a tax that the county lacked authority to impose. Montgomery County imposed a monetary payment upon prospective land developers in order to "regulate growth by obtaining partial funding of construction costs for roads which the county, based upon the cumulative impact of new development, has determined will be necessary." *Id*. at 851. The ordinance established an impact fee formula requiring payment of the fee prior to the issuance of the building permit and calculating the fee based upon the type of structure to be built. The plaintiff developer maintained that the impact area for the use of the fees was so large that there was no assurance that the revenue generated by the fee would actually be used for the construction of the highways claimed to be impacted by the development of plaintiff's property. *Id*. at 853. The court noted the nexus that must exist to substantiate the fee as a regulatory measure:

> The relationship between the fee and the benefit to the property owner necessary for the measure to be regulatory in effect is not just that the property owner receive some benefit from the improvement, as the County asserts, but . . . "[t]he amount must be reasonable and have some definite relation to the purpose of the Act."

570 A.2d at 855; Homebuilders v. Board of Palm Beach Comm., 446 So. 2d 140, 143-144 (Fla. App. 4th Dist., 1983) (development impact fee assessed to defray cost of constructing new roadways due to additional traffic not a tax where fee does not exceed cost of improvements required by new development and the improvements adequately benefit the development which is the source of the fee). *See also* Foster's Inc. v. Boise City*, supra*.

If ACHD exercises its authority under the ordinance broadly, *i.e.*, assessing impact fees without determining a need arising from the new development and applying revenue from fees on a countywide basis instead of within benefit zones, the ordinance does not meet the first prong of the test. Without additional information concerning the application of ACHD's ordinance, it is not possible to determine with certainty whether the ordinance provides a benefit to new development not shared by the general traveling public.

b. Fee Not Forced Contribution

The second prong of the analysis requires that the fee not be a forced contribution. The fees assessed by ACHD are only assessed against developers building in the Ada

County area. The enabling statute limits the authority granted governmental entities to assess impact fees to the proportionate share of cost of services to the new development. *See* Idaho Code § 67-8202(9). A developer may voluntarily choose not to build, or may choose not to build in the Ada County area and thus forego the assessment. As such, the fee does not appear to be an involuntary contribution as was the fee in Brewster v. City of Pocatello*, supra*. *See also* City of Casa Grande v. Tucker, 169 Ariz. 143, 817 P.2d 947 (Ct. App. 1991). Thus, the enabling statute and ACHD's ordinance meet the second prong of the test.

c. Compensation For Expenses In Providing Services.

The final prong of the analysis requires that to meet the definition of a fee, the charges collected must be collected not to raise revenue but to compensate the governmental entity for its expenses in providing the services. In Foster's Inc. v. Boise City*, supra*, the Idaho Supreme Court found a parking fee ordinance allowing for the installation of parking meters intended by the city of Boise as a means of traffic and parking regulation to be valid and enforceable. In so holding, the court found:

> The fact, that the fees charged produced more than the actual costs and expense of the enforcement and supervision (of traffic and parking regulation), is not an adequate objection to the exaction of the fees. The charge, however, must bear a reasonable relation to the thing to be accomplished.
>
> 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 licensed tax measure.

Id. at 219 (citations omitted). *See also* Loomis v. City of Hailey*, supra*.

The enabling act requires that an ordinance imposing development impact fees must segregate the fees and provide accounting records to establish that the expenditures of the fees were made only for the "category of system improvements within, or for the benefit of, the service area for which the development impact fee was imposed . . . ." Section 67-8210(1), (2), Idaho Code. Ordinance 184 requires that the revenues from impact fees be used "exclusively for capital improvements or expansion of transportation facilities" and shall not be used for "roadway improvements that are needed to address deficiencies existing on the effective date of the ordinance" or for maintenance and repair of existing roadways. Ordinance 184, section 15.

It is not clear from the ordinance how ACHD accounts for its expenditures of revenues garnered from impact fees and whether these fees are segregated and accounted for by benefit zones. Since ACHD's ordinance fails to delineate a method for segregating and accounting for the revenues collected, it is unclear whether ACHD could establish that expenditures of impact fees are reasonably related to the cost of providing services to the new development. It is, therefore, not clear whether the ordinance complies with the final prong of the test.

In conclusion, the provisions of ACHD's Ordinance 184 allow for discretionary application of the fees outside the benefit zones, require payment of fees with what appears to be no determination of need for services as a result of the new development and lack clarity as to how revenues are accounted. As a result, it is difficult to determine with certainty whether ACHD's impact fee ordinance allows for an assessment of a regulatory fee or is a disguised tax. It is recommended that the sweeping powers provided to the fee administrator and the failure to define within the ordinance procedures for collection and accounting of fees be reviewed and amended by ACHD to clearly comport with the requirements provided in the enabling statute and discussed in this analysis.

If a court finds that the application of impact fees pursuant to Ordinance 184 is in fact the assessment of a fee and not a disguised tax, it may then analyze whether it violates constitutional provisions of substantive due process.

2. Substantive Due Process/Needs Nexus Analysis.

An impact fee regulation can also be challenged on substantive due process grounds. The inquiry here is whether the police power has exceeded its constitutional limits. State courts apply a variety of different standards to determine whether impact fees meet the substantive due process provision of the constitution.

Three standards are most frequently applied. The strictest is the "specifically and uniquely attributable test," applied in Illinois and a few other jurisdictions. *See* Pioneer Trust and Savings v. Village of Mount Prospect, 22 Ill. 2d 375, 176 N.E.2d 799 (1961). The most liberal test is the "reasonable relationship" standard which is used in California. *See* Associated Homebuilders v. City of Walnut Creek, 94 Cal. Rptr. 630, 484 P.2d 606 (1971). However, the majority of states employ a "rational nexus" standard. Under this test, there must be a rational nexus between the development project and the need for the additional capital improvements. There must also be a rational nexus between the expenditure for capital facilities and the benefits accruing to the property on which the

charge is imposed. *See* Contractors and Builders Ass'n v. City of Dunedine, 329 So. 2d 314 (Fla. 1976).

The "Idaho Development Impact Fee Act" establishes that all development impact fee ordinances enacted by any governmental entity must require that: (1) fees be collected within or for the benefit of the service area in which the project is located; (2) the fees be segregated from other funds and earmarked for expenditure on improvements within the benefit zones; (3) the construction, improvement, expansion or enlargement of new or existing public facilities for which the fee is imposed be attributable to the demands generated by the new development; and (4) the development impact fee shall not exceed the proportionate share of the cost of the system improvements. *See* Idaho Code §§ 67-8204(1), (2), (8), (11); 67-8207; 67-8210. Thus, built into the enabling statute is a requirement that the ordinance establish a rational nexus between the expenditure for the capital facilities and the benefits accruing to the property on which the charge is imposed.

Since a needs/benefit rational nexus analysis is required for both constitutional and statutory compliance, the next step in the analysis is to determine whether Ordinance 184 complies with these requirements. The purpose of the ordinance is to "assist in the implementation of . . . the transportation plan adopted by the Ada Planning Association." It is further noted that the intent of the ordinance is to require each new development to bear its "proportionate fair share of the cost of capital expenditures" and that the assessment of fees be done in a manner which is fair. Ordinance 184, section 3(a), (b), (c). However, section 8 of the ordinance establishes a fee schedule which divides developments into categories and establishes an impact fee for each category. The ordinance thus assumes that each development results in a need for road expansion or construction; it does not require an individualized determination of an actual need for road expansion as a result of the new development.

In Lee County v. New Testament Baptist Church of Ft. Meyers, Fla., 507 So. 2d 626 (Fla. App. 2d Dist. 1987), the court applying the rational nexus test found the ordinance unconstitutional. Property owners in new developments whose property abutted certain streets would have been required to give the county enough land to meet minimum right-of-way requirements established by the county, regardless of the impact the proposed development had on the roadway. The court stated:

> The ordinance does not comply with the rational nexus test because it does not require any reasonable connection between the requirement that the land be given to the county and the amount of increased traffic, if any, generated by the proposed development.

507 So. 2d at 629.

In New Jersey Builders Ass'n v. Bernard Township, 108 N.J. 223, 528 A.2d 555 (1987), the New Jersey Supreme Court invalidated a transportation fee ordinance that required new developers to pay a pro rata share of the township's long-term $20 million dollar road improvement plan. The court held that the revenue raised through impact fees of this nature did not pay for improvements which arose as a direct consequence of the particular subdivision or development for which the money was assessed.

Based upon the requirements of chapter 82, title 67, Idaho Code, and the case law interpretations, ACHD must establish a need resulting from the new development in order to comply with the rational nexus standard. It is not clear that ACHD can meet this requirement.

Another indication of compliance with the rational nexus standard would be confining the use of the funds to a benefit zone. Although ACHD's ordinance establishes benefit zones as required by the "Idaho Development Impact Fee Act," it does not require use of the fees assessed within that benefit zone. In addition, it is not clear that Ordinance 184 complies with the earmarking and expenditure requirements of Idaho Code § 67-8210 requiring that expenditures of development impact fees be made only within or for the benefit of the service area for which the fee was assessed and not be used for any purpose other than system improvement cost resulting from new growth.

In conclusion, it appears that the guidelines established in the "Idaho Development Impact Fee Act" comply with the rational nexus standard. However, it is not clear that Ordinance 184 meets the requirements of the act or the rational nexus standard required by the constitution.

B. ACHD's Authority to Assess "Impact Fees" Against the State Pursuant to the Enabling Legislation

The final issue requires an analysis of whether the state should be assessed impact fees where there is no clear authorization allowing for assessments against the state in the "Idaho Development Impact Fee Act." Some statutory provisions are written in general language and are reasonably susceptible to being construed as applicable both to government and private parties. Such statutes are subject to the rule of construction which exempts government from their operation in the absence of a clear expression of intent on the part of the legislature. *See* Sutherland, Statutory Construction, *Statutes in Derogation of Sovereignty*, § 62.01 *et seq.* (1992). McQuillan, Municipal Corporations,

§ 2.13 *Quasi Municipal Corporations*, (3rd ed. 1987). In his treatise on statutory construction, Sutherland distinguishes between situations where the right of the sovereign is asserted against an individual from those where it is interposed against another agency of government, finding that there are sound constitutional policy reasons for intergovernmental immunities. Sutherland, *supra* at § 62.03, p. 223.

Idaho courts, in accord with the above stated general rule of statutory construction, have held that broad language in the statute will not be interpreted to include government, or affect its rights, unless that construction is clear and indisputable on the face of the statute. Local Union 283, Intn'l Brotherhood of Electrical Workers v. Robison, 91 Idaho 445, 423 P.2d 999 (1967); Wilcox v. City of Idaho Falls, 23 F. Supp. 626 (D.C. Idaho 1938).

In Local Union 283, the Idaho Supreme Court discussed the basis for this rule of statutory construction:

> Legislative acts are normally directed to activities in the private sector of society and effect a modification, limitation, or extension of the private individual's rights and duties. Under our political system, the individual is relatively free to pursue his own self-interest, but the government, which is representative of the people, must act in a disinterested manner in the public interest. . . . A judicial rule of statutory construction, whereby broad language in a statute is construed to govern the conduct of the state and its political subdivision, would undoubtedly result in dire consequences. Therefore, in order to maintain the operations of state and local government on an efficient, unimpaired basis, this court will not interpret broad language in a statute "to include the government, or affect its rights, unless that construction be clear and indisputable upon the text of the act."

91 Idaho at 447-48 (citations omitted).

To assess impact fees against the state, in essence, is a general assessment against the taxpayers of the state. Taxpayers fund the workings of government, including the construction of the state government buildings which house state operations. The intent of development impact fees is to avoid placing further tax burdens on the general public as a result of new development. Assessment of impact fees against the state would be in derogation of the general intent behind the establishment of impact fees.

In addition, the language contained in the "Idaho Development Impact Fee Act" does not indicate that the state was to be included for the purposes of payment of

development impact fees. In fact, the fiscal note attached to H.B. 805 indicates that the legislative intent was not to include the state within the purview of the act. The comment under the section delineating the fiscal impact on the state was that "there will be no fiscal impact on the general fund." The assessment of impact fees against the state would have an obvious impact on the general fund. Thus, it would appear clear that the legislative intent was to exclude the state from compliance with impact fee ordinances enacted pursuant to the act.

AUTHORITIES CONSIDERED

1. Idaho Constitution:

Article 7, sections 4 and 5.
Article 12, section 2.

2. Idaho Code:

Title 67, chapter 82.
§ 67-8202(9).
§ 67-8204(11).
§ 67-8207.
§ 67-8210.

3. U.S. Supreme Court Cases:

National Cable Television Ass'n v. United States, 415 U.S. 336, 94 S. Ct. 1146, 39 L. Ed. 2d 370 (1974).

4. Idaho Cases:

Brewster v. City of Pocatello, 115 Idaho 502, 768 P.2d 765 (1988).

Foster's Inc. v. Boise City, 63 Idaho 201, 118 P.2d 721 (1941).

Kootenai County Property Association v. Kootenai County, 115 Idaho 676, 769 P.2d 553 (1989).

Local Union 283, Intn'l Brotherhood of Electrical Workers v. Robison, 91 Idaho 445, 423 P.2d 999 (1967).

Loomis v. City of Hailey, 119 Idaho 434, 807 P.2d 1272 (1991).

Olson v. J.A. Freeman Co., 117 Idaho 706, 791 P.2d 1285 (1990).

State v. Nelson, 36 Idaho 713, 213 P. 358 (1923).

5. Other Cases:

Associated Homebuilders v. City of Walnut Creek, 94 Cal. Rptr. 630, 484 P.2d 606 (1971).

Bloom v. City of Fort Collins, 784 P.2d 304 (Colo. 1989).

City of Casa Grande v. Tucker, 169 Ariz. 143, 817 P.2d 947 (Ct. App. 1991).

Contractors and Builders Ass'n v. City of Dunedine, 329 So. 2d 314 (Fla. 1976).

Eastern Diversified Properties, Inc. v. Montgomery County, 570 A.2d 850 (Md. 1990).

Holmdel Builders Ass'n v. Township of Holmdel, 583 A.2d 277 (N.J. 1990).

Homebuilders and Contractors' Ass'n of Palm Beach County, Inc., v. Board of Palm Beach Comm., 446 So. 2d 140 (Fla. App. 4th Dist., 1983).

Lee County v. New Testament Baptist Church of Ft. Meyers, Fla., 507 So. 2d 626 (Fla. App. 2d Dist. 1987).

New Jersey Builders Ass'n v. Bernard Township, 108 N.J. 223, 528 A.2d 555 (1987).

Pioneer Trust and Savings v. Village of Mount Prospect, 22 Ill. 2d 375, 176 N.E.2d 799 (1961).

Wilcox v. City of Idaho Falls, 23 F. Supp. 626 (D.C. Idaho 1938).

6. Other Authorities:

Ada County Highway District Ordinance No. 184.

Bryan Blaesser and Christine Kentopp, Impact Fees: the Second Generation, 38 Wash. U.J. Urb. & Contemp. L. 55 (1990).

McQuillan, Municipal Corporations, § 213 *Quasi Municipal Corporations* (3rd ed. 1987).

Sutherland, Statutory Construction, *Statutes in Derogation of Sovereignty*, § 62.01 *et seq*. (1992)

DATED this 7th day of April, 1993.

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