ATTORNEY GENERAL OPINION NO. 94-1

To: Honorable John Peavey
Idaho State Senate
STATEHOUSE MAIL
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Per Request for Attorney General's Opinion

QUESTIONS PRESENTED

House Bill 389 passed by the 1993 Idaho Legislature (1993 Idaho Sess. Laws 1473) amended Idaho Code § 63-202 to require that the State Tax Commission's administrative rules relating to assessment of property for ad valorem property taxes shall comply with the following:

> The rules shall provide that if property consists of six (6) or more lots within one (1) subdivision, and the lots are held under one (1) ownership and which lots are held for resale, the lots shall be valued under a method which recognizes the time period over which those lots must be sold in order to realize current market values for those lots until such time as a building permit is issued for each lot.

(Emphasis added.) The issue presented by your two requests for an Attorney General's opinion is whether this amendment to Idaho Code § 63-202 would require the State Tax Commission to adopt rules that violate either section 2 or section 5 of article 7 of the Idaho Constitution.

CONCLUSION

If the intent of Idaho Code § 63-202, as amended by House Bill 389, is to discount assessed values for some taxpayers, but not for others, owning similar parcels, it violates the proportionality and uniformity provisions of article 7, sections 2 and 5 of the Idaho Constitution. Appraisal methods that favor persons owning multiple lots and deny equal treatment to persons owning single lots of the same type are frequently referred to as "developers' discounts." Such discounts are not allowed by the Idaho Constitution. Unconstitutional results must be avoided. Therefore, a reasonable alternate interpretation

of H.B. 389 must be given if it is possible to construe the statute in a constitutional manner. In our opinion, H.B. 389 can be construed in a constitutional manner if construed consistent with State Tax Commission rules that already recognize the reasonable time to consummate a sale as to all taxpayers. H.B. 389 requires assessed values to reflect the reasonable time to consummate sales for persons owning six or more lots. Assuming this is not interpreted as providing a discriminatory assessment scheme and is merely recognition of the general rule which takes into account a reasonable time to consummate sales, the statute is valid. No change in State Tax Commission rules is necessary to carry out H.B. 389 in a constitutional manner.

ANALYSIS

1. Introduction

The 1993 session of the Idaho Legislature, by H.B. 389, amended Idaho Code § 63-202. 1993 Idaho Sess. Laws 1473. The question asked is whether the amendment violates either the proportionality provision of section 2 or the uniformity provision of section 5 of article 7 of the Idaho Constitution.

Section 2 of article 7 requires that property be taxed "in proportion to" its value. It provides:

> **Section 2. 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.

Section 5 requires that property tax levies "be uniform" on all nonexempt property within the boundaries of the governmental entity levying the tax. It provides in pertinent part:

> **Section 5. Taxes to be uniform--Exemptions.**--All taxes shall be uniform upon the 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 . . . .

The requirement that taxes be uniform applies to property taxes and is self-enacting. Orr v. State Board of Equalization, 3 Idaho 190, 28 P. 416 (1891).

The mandate of these two sections of the Idaho Constitution was concisely stated in Chastain's, Inc. v. State Tax Commission, 72 Idaho 344, 348, 241 P.2d 167, 171 (1952), when the Idaho Supreme Court stated:

> The Constitution requires that for tax purposes the ad valorem tax must be uniform and on the same basis of valuation as other property in the county, and if this requirement of uniformity has not been attained and retained, then the mandate of Article VII, Sections 2 and 5 of the Constitution, has been violated. Uniformity in taxing implies equality in the burden of taxation and this equality of burden cannot exist without uniformity in the mode of assessment as well as in the rate of tax.

(Citations omitted.) In Merris v. Ada County, 100 Idaho 59, 63, 593 P.2d 394, 398 (1979), 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.

Idaho Code § 63-202 requires the State Tax Commission to promulgate rules and distribute them to each county assessor and board of county commissioners directing the manner in which market value for assessment purposes is to be determined for the purpose of ad valorem taxation. The State Tax Commission must require each assessor to find market value for assessment purposes of all the property within his county using recognized appraisal methods and techniques.

As required by this statute, the State Tax Commission has promulgated such rules for county authorities to follow. State Tax Commission Property Tax Rule 204.01 states:

> Market value is that amount of United States dollars or equivalent for which, in all probability, a property would exchange hands between a willing seller, under no compulsion to sell, and an informed, capable buyer, with a reasonable time allowed to consummate the sale, substantiated by a reasonable down or full cash payment.

(Emphasis added.) This conforms with the command of Idaho Code § 63-202 to use recognized appraisal methods and techniques.[1]

With this introduction, it is possible to restate the question presented: May the State Tax Commission adopt rules that conform to this newly enacted statutory

requirement and that do not also violate section 2 and section 5 of article 7 of the Idaho Constitution?

2. Presumption of Constitutionality

Statutes are presumed to be constitutional, and all reasonable doubts as to constitutionality must be resolved in favor of validity. Leonardson v. Moon, 92 Idaho 796, 451 P.2d 542 (1969). Appellate courts are obligated to seek an interpretation of a statute that will uphold its constitutionality. State v. Newman, 108 Idaho 5, 696 P.2d 856 (1985). An analysis of the constitutionality of the H.B. 389 amendment to Idaho Code § 63-202 must begin with the assumption that the amendment is constitutional. If doubts as to the amendment's constitutionality arise, an interpretation must be sought that will preserve the amendment's constitutionality. Cowles Publishing Co. v. Magistrate Court, 118 Idaho 753, 800 P.2d 640 (1990).

At the same time, when applying legislative acts, there is a duty to ascertain and give effect to the legislative intent. George W. Watkins Family v. Messenger, 118 Idaho 537, 797 P.2d 1385 (1980). Standard rules of statutory construction require giving effect to the legislature's intent and purpose, and to every word and phrase employed. Sweitzer v. Dean, 118 Idaho 568, 798 P.2d 27 (1990).

3. Effect of House Bill 389

Sponsors of H.B. 389 expressed an intent to require the State Tax Commission to mandate by rule the use of an appraisal method commonly known as the "developers' discount."[2] The rationale underlying the developers' discount is that valuing each lot independently and allowing a reasonable time to consummate the sale of each single lot does not yield current market value when many lots are on the market.[3] Supporters of the discount argue that a reasonable length of time necessary to sell a lot when only one lot is for sale is not the same period as a reasonable length of time necessary to sell a given lot when many lots are on the market. Mandating recognition of this difference when assessing six lots held under one ownership in a single subdivision is seen as necessary to correctly determine market values for such lots.

However, if the H.B. 389 amendment to Idaho Code § 63-202 is read to mean that the developers' discount is to be applied only to some taxpayers' properties, it creates a non-uniform mode of assessment that results in other taxpayers' properties bearing an unjust proportion of the property tax burden. This would be an unconstitutional result.

An example makes this clear. Suppose there are seven identical lots in the same subdivision for sale. Six of them are held by one owner. Another owner has only one lot. This reading of the H.B. 389 amendment to Idaho Code § 63-202 would require that

each of the six lots held under one ownership be assessed in a way designed to result in each of those lots having a market value for assessment purposes less than that of the single lot held under different ownership. The sole criterion for assessing one lot higher than the other six is ownership. Given the constitutional requirements of proportionality and uniformity, it is impossible to defend applying different assessment techniques to lots based solely on ownership.

The reason this is so was well illustrated very recently by the Utah Supreme Court in Board of Equalization v. Utah Tax Commission, No. 910310, 1993 WL 479711, at *4797 (Utah Nov. 18, 1993):

> Even more troublesome to us, however, is the fuzzy line of demarcation between a developer and the owner of a single lot. The premise of absorption valuation is that by listing all of his or her lots for sale, a developer gluts the market--the number of lots for sale exceeding the number of willing buyers. In this predicament, the developer is forced to sell lots over time as willing buyers become available. This reasoning, according to the Commission, justifies a developer discount reflecting the absorption period. However, the seller of a single lot is in the same predicament. By listing his or her single lot for sale, an owner competes with all other sellers of similar lots for a sale to a limited number of willing buyers. It is possible, and in many cases probable, that the single lot will not be sold in the first tax year. The number of sales the market will bear impacts single lot owners and developers uniformly, but the Commission, by granting an absorption discount, softens the blow exclusively for the developers.

Whether a reasonable length of time necessary to sell a lot when only one lot is for sale is or is not the same period as a reasonable length of time necessary to sell a given lot when many lots are on the market is irrelevant. What is relevant is that the alleged cure for this situation provided by reading the developers' discount into the H.B. 389 amendment applies only to that select group of lot owners who own six or more lots in a single subdivision. Thus, certain lot owners are favored by the discount while other property taxpayers bear that part of the tax burden which the favored taxpayers escape. This obviously violates the policy embodied in the Idaho Constitution, as elucidated by the Idaho Supreme Court, "that each taxpayer's property bear the just proportion of the property tax burden." Merris v. Ada County, 100 Idaho at 63, 593 P.2d at 398. It violates this policy by requiring non-uniformity in the mode of assessment. This is contrary to the dictates of article 7, sections 2 and 5 of the Idaho Constitution. *See* Chastain's, Inc. v. State Tax Commission, 72 Idaho 344, 241 P.2d 167 (1952).

Other states with uniformity provisions in their constitutions have also found the developers' discount to be incompatible with those provisions. The Michigan Supreme Court addressed the developers' discount in Edward Rose Building Co. v. Independence Township, 462 N.W.2d 325 (Mich. 1990). A developer owned 100 developed, vacant lots in a subdivision. The developer argued that he was entitled to a discount to reflect "holding of wholesale costs for marketing, financing and risk." He maintained that the lots should be valued as a group sales transaction. The local appraiser valued the lots by comparing sales of individual lots. The court held that the developers' discount violated the state constitution's uniformity requirement. The court said:

> It is well established that the concept of uniformity requires uniformity not only in the rate of taxation, but also in the mode of assessment. The "controlling principle" is one of equal treatment of similarly situated taxpayers.

462 N.W.2d at 333-34 (citations omitted).

The Oregon Supreme Court addressed the developers' discount twice. The first time the court dealt with the issue, Oregon's statutes did not provide for the discount. In First Interstate Bank v. Department of Revenue, 760 P.2d 880 (Or. 1988), the court held that the use of the developers' discount method of appraisal was inappropriate.[4]

In 1989, the Oregon Legislature enacted a developers' discount. It provided that four or more lots in a single subdivision held by a single owner were to be appraised using the developers' discount method. In Mathias v. Department of Revenue, 817 P.2d 272 (Or. 1991), the court held that the statute violated the uniformity requirements of the Oregon Constitution. Oregon's uniformity requirement provides that "all taxation shall be uniform on the same class of subjects within the territorial limits of the authority levying the tax." This language is virtually identical to that of the Idaho Constitution found in article 7, section 5.

4. Alternative Effects of House Bill 389

When the Idaho Legislature enacts a statute it should be presumed to have acted within the scope of its constitutional authority. Olson v. J.A. Freeman Co. 117 Idaho 706, 971 P.2d 1285 (1990). Thus, a statute will be construed so as to avoid conflict with the constitution. AFL-CIO v. Leroy, 110 Idaho 691, 718 P.2d 1129 (1986). In Union Pac. R.R. Co. v. Riggs, 66 Idaho 677, 166 P.2d 926 (1946), the Idaho Supreme Court construed a statute relating to refunds of fuels taxes to avoid attributing an unconstitutional intention to the legislature. The court said:

> Furthermore, a denial of refunds to all non-highway users would necessarily include appellant and other companies operating railroads in interstate commerce. We cannot attribute to the legislature an intent to deny refunds of the one cent per gallon additional tax to *all* non-highway users, because that would amount to holding the legislature designedly and willfully intended to violate the commerce clause of the Federal Constitution . . . by placing a direct burden on interstate commerce which, of course, it could not do.

66 Idaho at 688, 166 P.2d at 930 (citations omitted).

A statutory provision will not be deprived of its potency if a reasonable alternative construction is possible. State v. Gibbs, 94 Idaho 908, 500 P.2d 209 (1972). In this instance, a reasonable alternative construction is possible. Rather than find the legislature acted beyond its constitutional authority when it amended Idaho Code § 63-202 by H.B. 389, it is better to conclude that, as amended, that code section incorporates the principle that a proper determination of market value requires recognition of the time required to make a sale of property at a price that reflects its market value. *See* footnote 1 of this opinion. H.B. 389 directs the State Tax Commission to provide rules which recognize the time period over which lots must be sold. As previously discussed, the State Tax Commission's Property Tax Rule 204.01 already embodies appraisal practices that recognize a reasonable time in which to consummate a sale. Therefore, current rules already comply with the direction of H.B. 389. Further refinement of the State Tax Commission's rules and practice is unnecessary.

5. Implications for Taxing Districts

This construction avoids another practical difficulty for counties and taxing districts that rely on property tax revenues. There exists the possibility that taxing district finances may be adversely affected if the State Tax Commission's rules required and county assessors applied the developers' discounts. Should a group of lot owners who do not qualify for the developers' discount dispute their assessed valuations, the court may well hold that the appropriate remedy is to lower the valuations of the protesting lot owners to be in accord with the lots that do qualify for the discount. In In re Farmer's Appeal, 80 Idaho 72, 325 P.2d 278 (1958), the Idaho Supreme Court held this was the appropriate remedy for a property owner who rightfully complained that the methods used to assess his property resulted in an assessed valuation that was too high when compared with other similar property. The court said:

> Where certain property is assessed at a higher value than all other property and a standard in determining the value for assessment purposes is used, which does not conform to the standard generally used, the taxpayer

is entitled to a reduction in conformance to the standard used in assessing other property.

80 Idaho at 79, 325 P.2d at 285. The result would be loss of revenues and inequitable tax consequences to those who don't complain about the assessment methods.

CONCLUSION

The amendment to Idaho Code § 63-202 cannot be interpreted to create what is commonly referred to as the developers' discount. If it did, it would violate article 7, sections 2 and 5 of the Idaho Constitution. Such a reading might also force other taxpayers to challenge their assessed valuations on the grounds that developers are systematically assessed at lower rates. The remedy might well be to lower the assessed values of the complaining taxpayers. A better interpretation is that the present State Tax Commission rules are in full compliance with the mandate of Idaho Code § 63-202 both before and after the 1993 amendment because those rules already require assessors to take into account a reasonable time allowed to consummate the sale of the property being assessed.

AUTHORITIES CONSIDERED

1. Idaho Constitution:

Article 7, section 2.
Article 7, section 5.

2. Idaho Statutes:

Idaho Code § 63-202.

3. Idaho Cases:

AFL-CIO v. Leroy, 110 Idaho 691, 718 P.2d 1129 (1986).

Chastain's Inc. v. State Tax Commission, 72 Idaho 344, 241 P.2d 167 (1952).

Cowles Publishing Co. v. Magistrate Court, 118 Idaho 753, 800 P.2d 640 (1990).

George W. Watkins Family v. Messenger, 118 Idaho 537, 797 P.2d 1385 (1980).

In re Farmer's Appeal, 80 Idaho 72, 325 P.2d 278 (1958).

Leonardson v. Moon, 92 Idaho 796, 451 P.2d 542 (1969).

Merris v. Ada County, 100 Idaho 59, 593 P.2d 394 (1979).

Olson v. J.A. Freeman Co., 117 Idaho 706, 971 P.2d 1285 (1990).

Orr v. State Board of Equalization, 3 Idaho 190, 28 P. 416 (1891).

Sprenger Grubb & Associates v. Idaho Board of Tax Appeals. *et al.*, Fifth Judicial District Case No. 17059.

State v. Gibbs, 94 Idaho 908, 500 P.2d 209 (1972).

State v. Newman, 108 Idaho 5, 696 P.2d 856 (1985).

Sweitzer v. Dean, 118 Idaho 568, 798 P.2d 27 (1990).

The Hosac Company, Inc., *et al.* v. Ada County Board of Equalization, Fourth Judicial District Case No. 96002.

Union Pac. R.R. Co. v. Riggs, 66 Idaho 677, 166 P.2d 926 (1946).

4. Other Cases:

Board of Equalization v. Utah Tax Commission, No. 910310, 1993 WL 479711, at *4797 (Utah Nov. 18, 1993).

Edward Rose Building Company v. Independence Township, 462 N.W.2d 325 (Mich. 1990).

First Interstate Bank v. Department of Revenue, 760 P.2d 880 (Or. 1988).

Mathias v. Department of Revenue, 817 P.2d 272 (Or. 1991).

DATED this 25th day of January, 1994.

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[1] J. Eckert, Ph.D., Property Appraisal and Assessment 53 (International Association of Assessing Officers, 1990):

> Market price approximates market value and value in exchange under the following assumptions:
>
> 1. No coercion or undue influence over the buyer or seller in an attempt to force the purchase or sale.
>
> 2. Well-informed buyers and sellers acting in their own best interests.
>
> 3. A reasonable time for the transaction to take place.
>
> 4. Payment in cash or its equivalent.

(Emphasis added.)

[2] If this is the intent, the "developers' discount" is by no means limited to developers. Under the statutory language added by H.B. 389, some developers may not qualify for the discount; some property owners who are not developers may qualify for it.

[3] There is another argument sometimes presented to justify the developers' discount. This argument is that developers often make multi-lot sales. Supporters of the discount maintain that it is inappropriate to value multi-lot sales using the single lot market. This position has flaws which need not concern us here since the multi-lot market argument does not support the developers' discount as embodied in the H.B. 389 amendment. Idaho Code § 63-202, as amended by H.B. 389, does not give the developers' discount to all lots held for multi-lot sale; nor does it deny the discount to lots that are not held for multi-lot sales. For example, six lots held by one owner, but located in different subdivisions, do not qualify for the developers' discount even if they are held for sale as a package. On the other hand, six lots held by one owner located in one subdivision do qualify for the discount even if they are on the market for single lot sales. The H.B. 389 amendment does not address the "different market" argument.

[4] Similarly, two Idaho district courts have recently refused to apply the developers' discount in cases for years prior to the effective date of the H.B. 389 amendment to Idaho Code § 63-202. The cases are The Hosac Company, Inc., *et al.* v. Ada County Board of Equalization, Fourth Judicial District Case No. 96002, and Sprenger Grubb & Associates v. Idaho Board of Tax Appeals *et al.*, Fifth Judicial District Case No. 17059.