



STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL
LAWRENCE G. WARDEN

March 28, 2006

VIA HAND DELIVERY

The Honorable Ben Ysursa
Idaho Secretary of State
STATEHOUSE

Re: Certificate of Review
Proposed Initiative Relating to Eminent Domain & Regulatory Takings

Dear Secretary of State Ysursa:

An initiative petition was submitted to your office on February 28, 2006. 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 time frame 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 following 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, this office will prepare short and long ballot titles. The ballot titles must impartially and succinctly state the purpose of the measure without being argumentative and without creating prejudice for or against the measure. While this office prepares the titles, if petitioners would like to propose language with these standards in mind, they are encouraged to do so. Any proposed language will be considered carefully.

MATTERS OF SUBSTANTIVE IMPORT

The submitted initiative seeks to amend Idaho Code §§ 7-701, 7-701A, 67-8002, and 67-8003. Chapter 7 of Title 7 of the Idaho Code addresses Eminent Domain. Chapter 80 of Title 67 addresses Regulatory Takings.

Amendments Should Be Printed In Full.

Article III, Section 18 of the Idaho Constitution prohibits any act from being "revised or amended by mere reference to its title, but the section as amended shall be set forth and published at full length." See Golconda Lead Mines v. Neill, 82 Idaho 96, 99-101, 350 P.2d 221, 222-23 (1960). We, therefore, recommend that the full text of Idaho Code §§ 7-701, 7-701A, 67-8002, and 67-8003 be reproduced in the proposed initiative, with amendments indicated appropriately by underscoring for additions and strikeouts for deletions. These underscoring and strikeouts, while not required constitutionally, may facilitate informed decision-making with respect to whether to sign the petition. After consultation with the petitioner, a draft containing the underlining was provided to this office. It is recommended that the underlined draft be used for circulation and collection of signatures in order to facilitate informed decision-making.

Unity of Subject.

Article III, Section 16 of the Idaho Constitution provides in part that "[e]very act shall embrace but one subject and matters properly connected therewith." The Idaho Supreme Court has held that "if the provisions of an act all relate directly or indirectly to the same subject, having a natural connection therewith, and are not foreign to the subject expressed in the title, they may be united in one act." Boise City v. Baxter, 41 Idaho 368, 376, 238 P. 1029, 1032 (1925); Accord Cole v. Fruitland Canning Ass'n, 64 Idaho 505, 511, 134 P.2d 603, 605 (1945). Inherent in this requirement is the need for the statute to "disclose, either by express declaration or by clear intendment, or at least portend the common object in order that it may be determined whether all parts are congruous and mutually supporting, and reasonably designed to accomplish the common aim." AFL v. Langley, 66 Idaho 763, 768, 168 P.2d 831, 833 (1946).

A question may be raised as to whether Eminent Domain and Regulatory Takings are rationally related to one another. Article 1, § 14 of the Idaho Constitution provides that private property may be taken for a public use. This section of the Idaho Constitution is self-executing, leaving to the legislature only the task of providing the procedure for implementation. Blackwell Lumber Co. v. Empire Mill Co., 28 Idaho 556, 568, 155 P. 680, 684 (1916). Idaho Code § 7-704 requires that any taking for a public use be necessary. Regulatory Takings are defined by Idaho Code § 67-8002(4), which "means a regulatory or administrative action resulting in deprivation of private property that is the subject of such action, whether such deprivation is total or partial, permanent or temporary, in violation of the state or federal constitution." These topics could arguably

be connected to one another by classifying both as takings of property—Eminent Domain is a complete taking, while Regulatory Takings are a partial taking of property.

A court could find that these issues are either directly or indirectly connected to one another. This office cannot predict, with certainty, whether a court would permit these topics to be linked in a challenge or whether this presents a constitutional technicality.

Initiated Legislation And Bicameral Legislation Share "Equal Footing."

It is settled that the "power of legislation, reclaimed by the people through the medium of [Article III, Section 1], did not give any more force or effect to initiative legislation than to legislative acts but placed them on an equal footing." Luker v. Curtis, 64 Idaho 703, 706, 36 P.2d 978, 979 (1943); Accord State v. Finch, 79 Idaho 275, 280, 315 P.2d 529, 530 (1957). Consequently, the constitutionality of a voter-approved initiative is determined "by the same standards as . . . if the legislature had enacted it." Simpson v. Cenarrusa, 130 Idaho 609, 611, 944 P.2d 1372, 1374 (1997).

The Initiative May Require Reconciliation With Laws Taking Effect July 1, 2006.

The initiative as proposed makes amendments to Idaho statutes. Since statutes can be amended by initiative, this initiative appears to address topics well within the province of the initiative power. Other than the constitutional issues presented above, there are a couple of minor points to consider with the proposed initiative:

1. *H 555 Creates a New Section*

Recently, House Bill 555 ("H555") was signed into law, creating a new Idaho Code § 7-701A, which will go into effect on July 1, 2006. The proposed initiative also creates a new Idaho Code § 7-701A. These provisions will have to be reconciled in some way, likely by the Idaho Code Commission. Additionally, the initiative appears to have used some of the same language as that used in H555 in its proposed Idaho Code § 7-701(12). If this initiative is enacted, these provisions will also likely need to be reconciled with one another, keeping in mind that the statute enacted later in time generally controls.

2. *Confusion May Result*

Within the proposed Idaho Code § 67-8003(6)(c), the initiative proposes to exempt land use law regulations that were enacted prior to the effective date of the law from its application. This could create confusion because no parameters defining what is meant by "enacted prior to the effective date" have been set forth. For example, if a land use law is amended, does the entire law become applicable or just the amendment? Would this result in a measuring by the court of the substantiveness of the amendment for applicability of this section? This has a strong likelihood of

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resulting in a significant amount of litigation to fully define the boundaries of this proposed statute. Although this is a policy question for the voters, it has significant legal ramifications that warrant its mention.

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 petitioner Laird Maxwell by deposit in the U.S. Mail of a copy of this certificate of review.

Sincerely,

A handwritten signature in black ink, appearing to read "L. Wasden", written in a cursive style.

LAWRENCE G. WASDEN
Attorney General

Analysis by:

Brian P. Kane
Deputy Attorney General