



STATE OF IDAHO

OFFICE OF THE ATTORNEY GENERAL

BOISE 83720

TELEPHONE  
(208) 334-2400

JIM JONES  
ATTORNEY GENERAL

ATTORNEY GENERAL OPINION NO. 88-3

TO: Mr. R. Keith Higginson, Director  
Department of Water Resources  
1301 North Orchard Street  
STATEHOUSE MAIL

Per Request for Attorney General's Opinion

QUESTION PRESENTED:

Does art. 8, § 3, of the Idaho Constitution require voter approval of municipal debt incurred to finance improvements to the Cascade water system?

CONCLUSION:

Under current law as expressed in Asson v. City of Burley and City of Pocatello v. Peterson, the proposed improvements to the Cascade water system would be ordinary and necessary expenses and therefore art. 8, § 3, would not require voter ratification of the debt.

ANALYSIS:

The issue is whether the City of Cascade must first receive approval from its voters before incurring the legal obligation to pay for improvements to its water system. Art. 8, § 3, of the Idaho Constitution requires that all debt exceeding a municipality's yearly income must first be approved by the voters. Only those expenses that are ordinary, necessary and authorized by law are exempt from the election requirement. Since cities are authorized by law to maintain a domestic water system, Idaho Code § 50-323, the only issue is whether the improvements are an ordinary and necessary expense.

Idaho Constitution, art. 8, § 3, provides in pertinent part:

No county, city, board of education, or school district, or other subdivision of the state, shall

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incur any indebtedness, or liability, in any manner, or for any purpose, exceeding in that year, the income and revenue provided for it for such year, without the assent of two thirds (2/3) of the qualified electors thereof voting at an election to be held for that purpose, . . . Provided, that this section shall not be construed to apply to the ordinary and necessary expenses authorized by the general laws of the state . . . and provided further, that any city or other political subdivision of the state may own, purchase, construct, extend, or equip, within and without the corporate limits of such city or political subdivision, water systems, sewage collection systems, water treatment plants, sewage treatment plants, and may rehabilitate existing electrical generating facilities, and for the purpose of paying the cost thereof, may, without regard to any limitation herein imposed, with the assent of a majority of the qualified electors voting at an election to be held for that purpose, issue revenue bonds therefor, the principal and interest of which to be paid solely from revenue derived from rates and charges for the use of, and the service rendered by such systems, plants and facilities, as may be prescribed by law; . . .  
[Emphasis added.]

The original draft of art. 8, § 3, presented to the Idaho Constitutional Convention was intended to prohibit absolutely any indebtedness without two-thirds voter approval. The delegates were acutely aware of problems with large municipal debt. In the nineteenth century local and state governments routinely backed private enterprises to encourage settlement. With the recurring recessions of the late nineteenth century, many municipalities were left holding the bills for failed private industry. Moore, Constitutional Debt Limitations on Local Government in Idaho, Article 8, Section 3, Idaho Constitution, 17 Idaho L.Rev. 55, 57-58 (1980). Consequently, the debates concerning the passage of art. 8, § 3, focused on the extent of debt limitation. In other words, the issue was not whether municipal liability should be restricted, but rather how strict the limitation should be. I Debates on the Idaho Constitutional Convention, at 584-94.

The "ordinary and necessary" language was inserted in art. 8, § 3, only after much debate. The exception was to insure that counties and cities would be "allowed in contingencies to abate them [the emergencies] immediately without waiting for an election to be ratified by two-thirds." Id. at 592. The delegates also

did not "want to leave any part of the ordinary legitimate expenses of running county [or city] government in doubt." Id. at 591. The fear was that yearly income fluctuations might cause a temporary shortfall that, without the ordinary and necessary language, would require the expense of an election. It did not make sense to expend \$900 for an election to approve a debt of \$500 incurred in the ordinary course of county or city government. Id.

The early twentieth century antipathy toward municipal debt is best reflected in Feil v. City of Coeur d'Alene, 23 Idaho 32, 129 P. 643 (1912). In Feil, the voters rejected the city's proposal to finance a much needed water system. Id. at 57. In order to circumvent the constitutional requirement of voter approval, the City of Coeur d'Alene proposed the modern day equivalent of a revenue bond. The city argued that because the bonds were payable only from the revenue generated by the water system, not from the general funds of the city, the proposed bonds were not a general indebtedness covered by art. 8, § 3. Id. at 35. In rejecting the "special fund" doctrine, the Idaho Supreme Court held that:

[T]he framers of the constitution meant to cover all kinds and character of debts and obligations for which a city may become bound, and to preclude circuitous and evasive methods of incurring debts and obligations to be met by the city or its inhabitants.

Id. at 50. In other words, the court refused to distinguish revenue bonds from general obligation debt - both were subject to the restrictions of art. 8, § 3.

In Feil, there was no statutory authority for the special fund doctrine. In a later case, Straughan v. City of Coeur d'Alene, 53 Idaho 494, 24 P.2d 321 (1932), the court considered the constitutionality of two ordinances passed under statutes permitting revenue bonds. The court held the statutes, and consequently the ordinances, to be unconstitutional. Id. at 500-503.

It was not until 1949 that the constitution was amended to permit revenue bonds for municipal water and sewer systems. H.J.R. No. 9, S.L. 1949, p.598, ratified in the 1950 general election. According to the Attorney General's Explanation of Purpose printed on the ballot:

The purpose of the proposed amendment is to allow municipalities to issue bonds and other securities without limitation as to amount for the purpose of purchasing or constructing water systems, sewage systems, water and sewage treatment plants and off-street parking facilities. The bonds and securities would be retired exclusively from the revenues derived from the charges for the use of such facilities and will not be considered general obligations of the municipality issuing them.

The Attorney General's Explanation of Purpose, as quoted in the Idaho Sunday Statesman, November 5, 1950, at p.18. The year after ratification, the legislature passed the Revenue Bond Act, which granted municipalities the authority to issue revenue bonds, as distinct from general obligation bonds. S.B. No. 7, S.L. 1951, at 57-65.

When art. 8, § 3, was amended in 1950 to include revenue bonds, the "ordinary and necessary" clause was not changed. That clause reads: "Provided, that this section shall not be construed to apply to the ordinary and necessary expenses authorized by the general laws of the state. . . ." (Emphasis added.) Thus, the ordinary and necessary clause of "this section" of the constitution applies to projects financed by general obligation debt as well as to the enumerated projects for which governmental entities are authorized to issue revenue bonds.

The Idaho Supreme Court adopted this analysis in the City of Pocatello v. Peterson, 93 Idaho 774, 473 P.2d 644 (1970). There the court characterized the issue as "whether the repair and improvement of the municipal airport by the City of Pocatello is an ordinary and necessary expense falling within the pertinent constitutional provision." 93 Idaho at 776. In order to reach that issue the court assumed, albeit sub silentio, that the "ordinary and necessary" exception modified the entire § 3 of art. 8. Therefore, the process for analyzing the constitutionality of municipal debt under art. 8, § 3, is to determine, first, whether the municipality has the legal authority to incur the debt; if not, of course, the discussion is at an end. Second, we determine whether the debt exceeds yearly income; if not, the project can be financed out of the annual budget and no constitutional problems arise. Next, we determine whether the expense is ordinary and necessary. If it is found to be ordinary and necessary, there is no requirement of an election. If, however, the expense is not ordinary and necessary, voter approval

is required (two-thirds for general obligation debt, a simple majority for the enumerated revenue bond projects).

Before the law can be applied to the Cascade water project, "ordinary and necessary" must be defined. The Idaho Supreme Court most recently discussed ordinary and necessary in Asson v. City of Burley, 105 Idaho 432, 670 P.2d 839 (1983), cert. denied, 469 U.S. 870 (1984). The court reviewed the rationale of early Idaho cases and concluded: "Comparison of these earlier cases reveals one clear distinction between those expenses held to be ordinary and necessary and those held not to be: new construction or the purchase of new equipment or facilities as opposed to repair, partial replacement or reconditioning of existing facilities." Id. at 441-442 (emphasis in original). Thus, the early cases distinguished between construction of new facilities (the financing of which requires voter approval) and the repair of existing structures, which is an ordinary and necessary expense of government and thus exempt from the requirement of voter approval. Compare, Woodward v. City of Grangeville, 13 Idaho 652, 92 Pac. 840 (1907) (purchase of a new water system requires voter ratification); Hickey v. City of Nampa, 22 Idaho 41, 124 Pac. 280, (1912) (repairs to water system are ordinary and necessary). Compare, Board of County Commissioners v. Idaho Health Facilities Authority, 96 Idaho 498, 510, 531 P.2d 588 (1975) ("expenditures made for the purpose of improving the structure of the hospital so that it will comply with state safety standards is an ordinary and necessary expense"); General Hospital, Inc., v. City of Grangeville, 69 Idaho 6, 13-14, 201 P.2d 750 (1949) (construction of hospital needs two-thirds voter approval). Compare, Thomas v. Glindeman, 33 Idaho 394, 398, 195 P. 92 (1921) (maintenance of streets is ordinary and necessary); McNutt v. Lemhi Co., 12 Idaho 63, 71, 84 P. 1054 (1906) (construction of wagon road requires two-thirds voter approval).

The Asson court, however, did not adopt the bright-line distinction of new construction versus repairs. In reviewing City of Pocatello, supra, the Asson court found other factors relevant:

In its opinion [in City of Pocatello v. Peterson] the court stressed the upkeep and maintenance aspect of the city's expenditure. The court noted that the passenger terminal was an "unsound structure." Thus, while construction of a "wholly new terminal building" (see dissent of McFadden, J., Id. at 779, 473 P.2d at 649) might be viewed as an expenditure not traditionally considered ordinary and necessary, the

court's emphasis on the obsolescence and unsafe condition of the twenty-year-old facility places it within the "repair or maintenance" line of case authority. The court may have considered the expenditure in light of the city's obligation to maintain a safe, sound structure and the concomitant potential legal liability for failure to do so, which liability might itself create an ordinary and necessary expense.

Asson, supra, at 442. Justice Bakes, who, like the Asson majority, accepted the continuing validity of City of Pocatello, enumerated the factors underlying the court's 1970 decision:

This court [in City of Pocatello v. Peterson] considered several factors in the peculiar factual circumstances and concluded that the city's lease of the airport facility was ordinary and necessary. Several of the factors considered were: (1) the fact that the city was authorized by law to operate an airport; (2) that the city had in fact been operating an airport for a considerable period of time; and (3) that the existing facilities were inadequate and would in the future become obsolete and unsafe. The court then concluded that for all of these reasons the repair and improvement of Pocatello's airport facility constituted an ordinary and necessary expense, thus falling within the exception to art. 8, § 3.

Asson v. City of Burley, supra, at 445 (Bakes, J., dissenting).

Recent cases construing the "ordinary and necessary" clause, therefore, do not make a simple distinction of whether the project is the construction of a new building or the repair of an old one. Rather, the court will find an expense to be "ordinary and necessary" if a governmental entity has had a long-standing involvement in a given enterprise; if the existing facilities are obsolete and in need of repair, partial replacement or reconditioning; if failure to upgrade facilities would jeopardize the safety of the public; and if failure to do so would create potential legal liability.

Finally, in deciding whether the contracts of WPPS nuclear power plants #4 and #5 were ordinary, the Asson court also found it pertinent to discuss the amount of the expense:

It was a colossal undertaking, fraught with financial risk. It was open-ended: the cities could not have known what their ultimate debt or liability would be. One cannot stretch the meaning of "ordinary" to include an expense for which there could not be, until years later, certainty of limits. The funding agreement left the Idaho cities with extensive indebtedness - yet no ownership, and minimal control, and only the possibility of electricity. Further, the agreement was for the construction of nuclear power plants, at an expense unencountered in the history of these cities' power ventures. One could conceive of a number of words to describe this undertaking, but "ordinary" would not be one of them.

Asson v. City of Burley, supra, at 443. The Asson discussion of the size of the indebtedness harks back to the earlier cases where "[t]he court often looked to the amount of the expense in proportion to the city or county's revenue for that year." Id. at 441. Asson, however, does not provide any guidance to evaluate the amount of debt, as a ratio to the annual budget, which would be deemed extraordinary.

Therefore, in determining whether an expense is ordinary and necessary, one must look to the nature and the amount of the expense. Repairs to an existing structure clearly are ordinary and necessary. If the municipality proposes to finance a new structure, one must also consider whether the structure replaces an inadequate existing facility and whether the expense is exorbitant, whether the project is for an on-going municipal obligation, and whether the municipality may face legal liability if the facility is not maintained.

#### Facts of Cascade

The City of Cascade currently is faced with a water system fraught with serious problems. The water cannot consistently meet the turbidity standards of the state's drinking water regulations. Feasibility Study of Water Supply and System Improvements for the City of Cascade (hereinafter "Feasibility Study"), at 4. Contamination by *Giardia lamblia* from an adjacent water system is a possibility, which would render Cascade's only water treatment plant inoperable. See, id., at

4,9. There is currently insufficient water pressure and volume to provide adequate fire flow protection. Id. at 3,9. Furthermore, Cascade is dependent on only one source of water. A routine pipeline or mechanical failure would shut off Cascade's water supply. Id. at 9.

In order to resolve these problems, the Feasibility Study recommends the following system wide improvements: (1) distribution improvements to the upper pressure distribution system to address the "considerable low pressure problems and an inability to provide adequate fire flow protection," id. at 3; (2) improvements to the existing water treatment plant to address the "increased potential for contamination of Cascade's only water source [from Giardia lamblia] and the impact this would have on tourism," id. at 4; and (3) addition of a new well in southeast Cascade to provide the necessary "separate and backup source of water supply for the city of Cascade," id. at 9. The total cost of the improvements is \$465,583, with costs divided as follows: (1) \$56,400 for the upper zone distribution system improvements; (2) \$180,845 for the water treatment facility improvements; and (3) \$228,338 for the water supply improvements. Id. at Appendix B.

The issue is, therefore, whether the financing of the proposed water system improvements requires ratification by the Cascade voters. Relying on the three-step analysis discussed above, we note first that the city has the legal authority to operate a municipal water system under Idaho Code § 50-323. Second, it is clear that the costs will exceed Cascade's annual budget. The city does not have any reserve capital improvement funds in its current yearly budget. Id. at 20. The only remaining issue is whether the expenses are "ordinary and necessary" under Asson, supra and City of Pocatello, supra.

Even under the older case law, cited with approval in Asson, supra, at 440-442, the proposed work to the upper pressure zone distribution system and to the treatment plant are clearly repairs and maintenance to an existing system. As such, they are ordinary and necessary, and therefore not subject to voter approval.

The addition of a groundwell, however, is not as clearly characterized as "repair or maintenance." If the court had not defined "ordinary and necessary" in City of Pocatello and Asson, then the applicable authority would be the constitutional language requiring majority approval for extensions to water systems. Under City of Pocatello and Asson,

however, new construction or extensions that are ordinary and necessary are not subject to voter ratification. The balancing test of City of Pocatello and Asson supports characterizing the new well as ordinary and necessary. The \$228,000 cost is significantly less than the \$1.44 million price for the ordinary and necessary airport in Pocatello. The total proposed debt is less than the yearly payments for any city in Asson. Like the Pocatello airport, the water system is an on-going municipal obligation. Although the well has not been built, it is better characterized as a system wide improvement more similar to Pocatello's airport than to the unbuilt electrical generating plant of Asson. Indeed, the Cascade facts are even more persuasive than those of City of Pocatello. The service in Cascade is a water system, an absolute necessity to every municipality. The municipal liability for an inadequate and potentially contaminated water system is as significant, if not more so, than the potential liability for an obsolete airport. See, Asson, supra, at 442. Therefore, the new well would also be ordinary and necessary under current Idaho law.

AUTHORITIES CONSIDERED:

Constitutions

Article 8, § 3, Idaho Constitution

Idaho Statutes

Idaho Code § 50-323

Cases

Asson v. City of Burley, 105 Idaho 432, 670 P.2d 839 (1983), cert. denied, 469 U.S. 870 (1984)

Board of County Commissioners v. Idaho Health Facilities Authority, 96 Idaho 498, 510, 531 P.2d 588 (1975)

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

Feil v. City of Coeur d'Alene, 23 Idaho 32, 129 P. 643 (1912)

General Hospital, Inc. v. City of Grangeville, 69 Idaho 6, 13-14, 201 P.2d 750 (1949)

Hickey v. City of Nampa, 22 Idaho 41, 124 Pac. 280 (1912)

McNutt v. Lemhi Co., 12 Idaho 63, 71, 84 P. 1054 (1906)

Straughan v. City of Coeur d'Alene, 53 Idaho 494, 24 P.2d 321 (1932)

Thomas v. Glindeman, 33 Idaho 394, 398, 195 P. 92 (1921)

Woodward v. City of Grangeville, 13 Idaho 652, 92 Pac. 840 (1907)

#### Other

Attorney General's Explanation of Purpose, as quoted in the Idaho Sunday Statesman, November 5, 1950, at p.18

Feasibility Study of Water Supply and System Improvements for the City of Cascade, at 4

H.J.R. No. 9, S.L. 1949, p.598, ratified in the 1950 general election

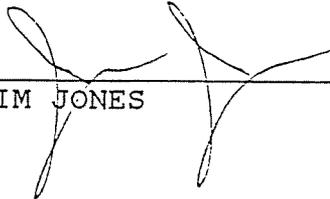
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Moore, Constitutional Debt Limitations on Local Government in Idaho, Article 8, Section 3, Idaho Constitution, 17 Idaho L.Rev. 55, 57-58 (1980)

S.B. No. 7, S.L. 1951, at 57-65

DATED this 19th day of May, 1988.

JIM JONES  
Attorney General  
State of Idaho

  
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JIM JONES

Analysis by:

David G. High  
Deputy Attorney General  
Chief, Business Regulation and  
State Finance Division

Daniel G. Chadwick  
Deputy Attorney General  
Chief, Intergovernmental Affairs Division

Priscilla Hayes Nielson  
Deputy Attorney General

cc: Idaho Supreme Court  
Supreme Court Library  
Idaho State Library  
Jim Weatherby, Association of Idaho Cities  
Chuck Holden, Idaho Association of Counties  
Mike Moore