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THIS CORRESPONDENCE IS A LEGAL GUIDELINE OF THE  
ATTORNEY GENERAL SUBMITTED FOR YOUR GUIDANCE

Re: Debt Financing by the Ada County Highway District  
for Bridge Repair and Replacement

Dear Mr. Mack:

In your letter of June 14, 1989, you question whether a highway district can issue long term bonds without voter approval in order to finance repairing or replacing numerous existing bridges. Article 8, section 3, of the Idaho Constitution requires voter approval for all debt that exceeds the district's annual income, unless the expense is "ordinary and necessary."

The most recent pronouncement on "ordinary and necessary" is Asson v. City of Burley, 105 Idaho 432, 670 P.2d 839 (1983), cert. denied, 469 U.S. 870 (1984), where the Idaho Supreme Court held that the extraordinary sums incurred by Idaho cities to support Washington Public Power Supply System were not ordinary. Id. at 443 ("One could conceive of a number of words to describe this undertaking but 'ordinary' would not be one of them"). The case did not address the meaning of "necessary." Id. In invalidating the cities' contracts, the court specifically affirmed City of Pocatello v. Peterson, 93 Idaho 774, 473 P.2d 644 (1970), characterizing the latter case as being in the long line of "repairs and maintenance" cases fitting the exception of "ordinary and necessary." 105 Idaho at 442. By reading the two cases together, which one must as they both appear to express current Idaho law, one can determine the factors necessary to define an "ordinary and necessary" expense:

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.

Attorney General Opinion No. 88-3. Added to these factors is the necessity that the expense be "ordinary," and not extraordinary. Asson, supra, at 443.

Under these factors, bonds used exclusively for repairs to existing bridges would probably be ordinary and necessary. The Ada County Highway District has a long standing involvement in the maintenance of the existing bridges in Ada County. Failure to repair existing bridges would certainly jeopardize the safety of the public. The potential for legal liability is clearly present. The only additional factor is the cost. Assuming that the debt does not reach the astronomical heights of Asson, the debt under current law would probably be characterized as "ordinary and necessary."

There are two old cases that held that construction of new bridges requires 2/3 voter approval. Dunbar v. Board of Commissioners, 5 Idaho 407, 49 P. 409 (1897); County of Ada v. Bullen Bridge Co., 5 Idaho 79, 47 P. 818 (1896). The supreme court cited those cases to reaffirm that proposition in Asson, supra, at 441. Both Bullen Bridge and Dunbar, however, involved new construction, not repair, of bridges. The distinction between new construction and maintenance of already-built structures is crucial:

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 [which are not ordinary and necessary] as opposed to repair, partial replacement or reconditioning of existing facilities [which are ordinary and necessary].

Asson, 105 Idaho at 441-42. As Asson makes clear, the Dunbar and Bullen Bridge cases are distinguishable from your situation. Both of those earlier cases involved new construction, which would not fall within the ordinary and necessary exception; the highway district, on the other hand, intends to repair and maintain existing bridges. Therefore, your situation would fall within the "'repair or maintenance' line of case authority," which was approved in Asson, supra, at 442.

The Bullen Bridge and Dunbar cases highlight an additional factor that was reiterated in Asson: cost. In determining the construction of new bridges did not fall within the ordinary and necessary exception, the Bullen Bridge court emphasized the extraordinary expense incurred:

We would suggest that an improvement involving an expenditure of nearly \$40,000, where the revenue of the county for the year was only about \$70,000 would not readily be classed as an "ordinary and necessary expense." It would be difficult, we apprehend, to name an expense under such a construction that would not be "ordinary and necessary."

Bullen Bridge, supra, at 90. That case also emphasized the policy of article 8, § 3, of the Idaho Constitution:

The object and purpose of the constitutional provision is clearly set forth therein and in the other sections of the article. It was to maintain the credit of the state and the counties by keeping them upon a cash basis. Warned by a fearful experience, the makers of the constitution were desirous of protecting the people from the cupidity and rapacity which past experience admonished them sometimes influences those who had the management and control of state and county finances, and for the accomplishment of these ends they made what they conceived to be sufficient provisions in the constitution.

Id. Dunbar also talked in terms of "the extraordinary expense of building the bridges." Dunbar, supra, at 414.

More recently, the astronomical amounts played a role in the holding of Asson:

We cannot conceive of an interpretation of Art. 8, Section 3 which would sanction the extensive, long-term indebtedness undertaken by the cities herein without an election.

. . .

It is unthinkable to suggest that a constitutional provision intended to require voter approval of any debt which exceeded the income provided for it during one year does not apply to a \$10.7 million debt for a city of 1,906 people. (Bonners Ferry, 1980 census).

Asson, supra, at 440 and n.16. The amount of the expense, an amount "unencountered in the history of these cities' power

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ventures," Id. at 443, played a role in the court's determination that the Asson debt was not ordinary. The court, however, did not provide any guidance as to either the weight of that factor or the means to evaluate the "ordinariness" of the cost. Therefore, the Ada County Highway District should ensure that the bridge repair program be of an "ordinary" cost and that the debt be used exclusively for repairs and renovation of existing bridges.

In conclusion, the proposed bridge repair program is probably within the "ordinary and necessary" exception of article 8, section 3. Therefore, a bond election would probably not be required. This conclusion assumes that the costs involved are reasonable, and not extraordinary, and will be used for the repair and maintenance of the existing bridges in Ada County.

Sincerely,

PRISCILLA HAYES NIELSON  
Deputy Attorney General