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ATTORNEY GENERAL OPINION NO. 90-6

TO: Gary H. Gould
Director of the Department
of Labor and Industrial Services
277 North 6th
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Per Request for Attorney General's Opinion

QUESTION PRESENTED:

Does the City of Boise have the authority to require the State of Idaho to obtain building permits when building or remodeling state buildings within the city?

Specifically, do the provisions of Idaho Code §§ 54-1001B (authorizing cities to assume primary responsibility for enforcement of the National Electrical Code within municipal limits) and 54-2620 (providing similar authority to cities to enforce the Uniform Plumbing Code) empower the city to require the state or its contractors to obtain electrical and plumbing permits?

CONCLUSION:

The statutory authority over state building projects granted to the Idaho Department of Administration and the Idaho Department of Labor and Industrial Services fully occupies the field of planning and construction of state buildings and thus preempts all municipal authority over state buildings. Any other interpretation would conflict with the provisions of Idaho Code § 67-5711. Furthermore, the statutes relied upon by the City of Boise do not expressly indicate that the State of Idaho has ceded its sovereignty to municipalities in regard to state buildings. Without such a clear expression of legislative intent, the City of Boise cannot expand its authority to include inspection and enforcement of plumbing and electrical codes to state buildings.

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ANALYSIS:

1. Municipal corporations have the general authority to enact building and safety codes and to enforce these codes on buildings within city limits. However, the state has preempted municipal authority over a state-owned building.

The well-established rule in Idaho is that municipal corporations are creatures of the state and possess no inherent powers other than those powers expressly or impliedly granted. Caesar v. State, 101 Idaho 158, 610 P.2d 517 (1980); Sandpoint Water and Light Company v. City of Sandpoint, 31 Idaho 498, 173 P. 972 (1918); 6A McQuillin, Municipal Corporations § 24.35 (3rd Ed.). All authority granted to a municipal corporation must be conferred either by the state constitution or by the legislature and the legislature has absolute power to change, modify or destroy those powers at its discretion. State v. Steunenberg, 5 Idaho 1, 45 P. 462 (1896). The extent of a municipal corporation's authority in relation to the State of Idaho's sovereign power was previously analyzed in Att'y Gen. Op. No. 76-3, and in Moore, "Powers and Authority in Idaho Cities: Home Rule or Legislative Control?" 14 Idaho Law Review 143 (1977).

The authority for a municipal corporation to enact and enforce building and safety codes is derived from the police power granted to municipalities in the Idaho Constitution, art. 12, § 2. See Caesar v. State, supra; 7A McQuillin, Municipal Corporations § 24.505 (3rd Ed.). Given this authority, the issue is whether the state is subject to the legitimate exercise of a municipal corporation's police power.

Two previous attorney general opinions concluded that the State of Idaho is not required to obtain building permits from local authorities prior to the construction of state projects. Att'y Gen. Op. Nos. 75-77 and 77-37. Copies of these opinions are attached. Since these opinions were issued, the Idaho Supreme Court has specifically addressed the applicability of municipal building and safety codes to state projects. Caesar v. State, supra. The controversy in Caesar arose after the construction of a football stadium at Boise State University. The central issue before the court was whether the state was obligated to construct the facility in compliance with Boise City's building codes. At the outset, the supreme court discussed the limitations of the police powers granted to cities by art. 12, § 2, of the Idaho Constitution:

Municipal corporations which enjoy a direct grant of power from the Idaho Constitution are, however, limited

in certain respects. The city cannot act in an area which is so completely covered by general law as to indicate that it is a matter of state concern. Nor may it act in an area where, to do so, would conflict with the state's general laws. (Citations omitted.)

101 Idaho at 161.

In light of these limitations, the court determined that the construction of the stadium was specifically controlled by Idaho statute and beyond the scope of the city's authority:

Taken as a whole, these statutes indicate that the area of state-owned buildings is completely covered by the general law and may not be subjected to an ordinance which is purely local in nature. ID. CONST. art. 12 § 2. To recognize the authority placed in the Boise City building inspector would conflict with the authority vested in the Idaho Industrial Commission and the Department of Labor by I.C. § 67-2312 and is thus impermissible. ID. CONST. art. 12, 2; *State v. Musser, supra*; *United Tavern Owners of Philadelphia v. School Dist. of Philadelphia, supra*; *Boyle v. Campbell, supra*. As a result, the Boise City Building Code cannot apply to state-owned buildings.

Id. at 162.

The statute upon which the court based its decision, I.C. § 67-2304, was repealed in 1974. The legislature enacted I.C. § 67-5711 in its place. 1974 Idaho Sess. Laws, Ch. 34 at 988. The state's exclusive authority over construction and maintenance of its buildings remains unchanged and the legal principles set forth in Caesar continue to be the binding authority on the issue. Envirosafe Services of Idaho, Inc. v. County of Owyhee, 112 Idaho 687, 735 P.2d 998 (1987).

Applying the Caesar principles to the facts of this case, we note that the Idaho State Legislature has passed legislation establishing uniform building standards throughout the state. I.C. §§ 39-4101 to 4129; I.C. § 54-1001; I.C. § 54-2601; I.C. § 44-2301 et seq. The state has not been exempted from compliance with these standards. On the contrary, Executive Order No. 87-18 directs that "State buildings being constructed or remodeled shall conform to all existing state codes...."

The Idaho Department of Administration is given the authority by statute to carry out this directive:

The director of the department of administration, or his designee, of the state of Idaho, is authorized and empowered, subject to the approval of the permanent building fund council, to provide or secure all plans and specifications for, to let all contracts for, and to have charge of and supervision of the construction, alteration, equipping and furnishing and repair of any and all buildings, improvements of public works of the state of Idaho....

I.C. § 67-5711.

The Idaho Department of Labor and Industrial Services is charged with the duty of state-wide inspection and enforcement of all uniform building and safety codes. I.C. § 39-4104; I.C. § 44-103; I.C. § 44-2303; I.C. § 54-1005; I.C. § 54-2607. In light of the promulgation of uniform building and safety codes by the legislature, the authority granted to the department of administration and the department of labor and industrial services, and the directive by the governor that such codes will apply to state projects, the state's authority over its projects is complete. There is simply no basis for local infringement.

Where it can be inferred from a state statute that the state has intended to fully occupy or preempt a particular area, to the exclusion of municipalities, a municipal ordinance in that area will be held to be in conflict with the state law, even if the state law does not so specifically state. *United Tavern Owners of Philadelphia v. School Dist. of Philadelphia*, 441 Pa. 274, 272, A.2d 868, 870 (1971); see *Boyle v. Campbell*, 450 S.W.2d 265, 267, (Ky.1970).

Caesar v. State, 101 Idaho at 161.

2. The state has not ceded its sovereignty to municipalities in regard to the enforcement and inspection of electrical and plumbing standards.

The City of Boise argues that the language of I.C. §§ 54-1001B and 54-2620 grants municipal corporations exclusive authority over the enforcement of electrical and plumbing work performed within the respective cities. The city argues further that since the state has delegated its authority to its cities, the preemption analysis enunciated above is not applicable.

I.C. § 54-1001B provides:

The provisions of this act relating to state inspection, except as provided in section 54-1001C, shall not apply within the corporate limits of incorporated cities and villages which, by ordinance or building code, prescribe the manner in which wires or equipment to convey current and apparatus to be operated by such current shall be installed, provided that the provisions of the National Electrical Code are used as the minimum standard in the preparation of such ordinances or building codes and provided that actual inspections are made.

Idaho Code § 54-2620 similarly provides:

It shall be unlawful for any person, firm, copartnership, association or corporation to do, or cause or permit to be done, after the adoption of this act, whether acting as principal, agent or employee, any construction, installation, improvement, extension or alteration of any plumbing system in any building, residence or structure, or service lines thereto, in the state of Idaho without first procuring a permit from the department of labor and industrial services authorizing such work to be done, except:

(a) Within the boundaries of incorporated cities, including those specially chartered, where such work is regulated and enforced by an ordinance or code equivalent to this act;...

At first glance, the city's argument appears to have merit. However, when the appropriate principles of statutory construction are applied it becomes clear that the state's sovereignty over its buildings has not been delegated to its municipalities.

The often cited rule of statutory construction against derogation of sovereignty is set forth in 82 C.J.S. Statutes § 391:

Statutes in derogation of sovereignty should be strictly construed in favor of the state, so that its sovereignty may be upheld and not narrowed or destroyed, and should not be permitted to divest the state or its government of any of its prerogatives, rights, or remedies, unless the intention of the legislature to effect this object is clearly expressed.

See also City of Jackson v. Mississippi State Building Commission, 350 So.2d 63 (Miss. 1977). A review of Idaho Code

§§ 54-1001B and 54-2620 indicates that there is simply no expression of legislative intent delegating the state's sovereign control over state building projects to local municipal authorities.

The Supreme Court of Kentucky addressed a nearly identical issue in City of Bowling Green v. T & E Electrical Contractors, 602 S.W.2d 434 (Ky. 1980). In that case, the City of Bowling Green claimed the authority to inspect electrical work being performed upon state buildings. The city also demanded inspection fees of \$2,895.00 for one state project. The statute on which the City of Bowling Green was relying directed the city to "provide for safe construction, inspection and repair of all private and public buildings in the city." KRS 84.240(2) (emphasis added). The City of Bowling Green argued that all public buildings included state buildings within its municipal limits.

The Kentucky Supreme Court rejected this argument and interpreted "public buildings" to mean buildings in which the general public congregated such as theaters, churches, etc. The court would not stretch the term to include state-owned buildings. After quoting the general rule found in *Corpus Juris Secundum* the court stated:

If the legislature desired to cede its power to regulate buildings owned by the Commonwealth, it would have said so expressly in words such as "all private and public buildings, including those owned by the Commonwealth or its subdivisions." It did not choose to do so. Consequently, the City of Bowling Green as a city of the second class has not been granted the power to inspect this building for electrical code compliance and it, certainly, can not require the state to pay for an inspection made gratuitously. See *Board of Regents v. City of Tempe*, 88 Ariz. 299, 356 P.2d 399 (1960); *Paulus v. City of St. Louis, Mo.*, 446 S.W.2d 144 (1969); 7 *McQuillin, Municipal Corporations* sec. 24.519; 13 *Am.Jur.2d Buildings* sec. 7.

602 S.W.2d at 436, see also City of Jackson v. Mississippi State Building Commission, *supra*; Kentucky Institution for Education of the Blind v. City of Louisville, 123 Ky. 767 97 S.W. 402 (1906).

The principles enunciated by the Kentucky Supreme Court are applicable to the present matter. The statutes relied upon by the City of Boise should not be construed so as to delegate the state's sovereign authority over its buildings to municipalities when no such legislative intent has been expressed. The doctrine

of preemption does apply this instance. Therefore, the City of Boise has no authority over the electrical and plumbing work being performed upon state buildings within the Boise City limits.

AUTHORITIES CONSIDERED:

1. Constitutions

Idaho Constitution art. 12, § 2.

2. Statutes

Idaho Code §§ 39-4101 through 39-4129.
Idaho Code § 44-103.
Idaho Code § 44-2301.
Idaho Code § 44-2303.
Idaho Code § 54-1001.
Idaho Code § 54-1001B.
Idaho Code § 54-1005.
Idaho Code § 54-2601.
Idaho Code § 54-2607.
Idaho Code § 54-2620.
Idaho Code § 67-5711.

1974 Idaho Sess. Laws, Ch. 34 at 988.

3. Cases

Caesar v. State, 101 Idaho 158, 610 P.2d 517 (1980).

City of Bowling Green v. T & E Electrical Contractors,
602 S.W.2d 434 (Ky. 1980).

City of Jackson v. Mississippi State Building Commission,
350 So.2d 63 (Miss. 1977).

Envirosafe Services of Idaho, Inc. v. County of Owyhee,
112 Idaho 687, 735 P.2d 998 (1987).

Kentucky Institution for Education of the Blind v.
City of Louisville, 123 Ky. 767 97 S.W. 402 (1906).

Sandpoint Water and Light Company v. City of Sandpoint,
31 Idaho 498, 173 P. 972 (1918).

State v. Steunenberg, 5 Idaho 1, 45 P. 462 (1896).

4. Other

Attorney General Opinion 75-77.
Attorney General Opinion 76-3.
Attorney General Opinion 77-37.

82 C.J.S. Statutes § 391.

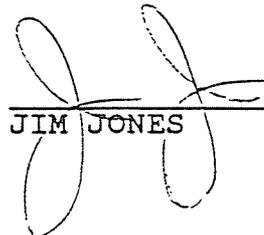
6A McQuillin, Municipal Corporations § 24.35
(3rd Ed.).

7A McQuillin, Municipal Corporations § 24.505
(3rd Ed.).

Moore, "Powers and Authority in Idaho Cities: Home
Rule or Legislative Control?" 14 Law Review 143 (1977).

DATED this 13th day of August, 1990.

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Analysis By:

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