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January 9, 1990

Major General James S. Brooks
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THIS CORRESPONDENCE IS A LEGAL GUIDELINE OF THE
ATTORNEY GENERAL SUBMITTED FOR YOUR GUIDANCE

Re: Constitutionality of Landowner Restrictions on
Right to Petition for Creation of Fire Protection
District Under Idaho Code §§ 31-1402 and 31-1403

Dear Major General Brooks:

In your letter to me you have asked about the constitutionality of landowner restrictions on the right to petition for the creation of a fire protection district under Idaho Code §§ 31-1402 and 31-1403. Under those sections, the formation of a fire protection district begins only if twenty-five "holders of title" of a certain amount or value of land in the proposed district sign and present a petition to the Board of County Commissioners in the county where the proposed district is situated.

Presentation of the petition is the first of a three step petition-hearing-election process necessary to create a fire protection district under Idaho Code title 31, chapter 14. Although the election allows all those who are electors and residents within the proposed district to vote in favor of or against the district's formation, the landowners have, through their petitioning rights, the exclusive power to determine whether the district formation and election process can begin.

On September 1, 1989, the Attorney General's Office issued a legal guideline concluding that a similar landowner restriction

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under Idaho Code § 31-1409 is unconstitutional. Section 31-1409 requires commissioners appointed and elected to the fire protection board in each district to be "freeholders." The guideline concluded that the freeholder qualification for commissioners violates article 1, § 20, of the Idaho Constitution, which provides, with certain exceptions, that "[n]o property qualifications shall ever be required for any person to vote or hold office."

The guideline further concluded that the freeholder qualification violates the Equal Protection Clause of the United States Constitution, which has been interpreted in United States and Idaho Supreme Court decisions to prohibit election restrictions based upon property ownership unless the purpose of the election is directly linked with land ownership. *Quinn v. Millsap*, ___ U.S. ___, 109 S. Ct. 2324, 105 L.Ed. 2d 74 (1989); *Johnson v. Lewiston Orchards Irrigation District*, 99 Idaho 501, 584 P.2d 646 (1978). The guideline reasoned that residents who do not own land have a considerable interest in fire protection districts and cannot be constitutionally excluded from holding the office of fire protection district commissioner.

The constitutional limitations on property qualifications restricting the right to vote have been held to apply to petitioning rights in cases where the decision affected by the petition is a matter finally decided by an election. In *City of Seattle v. State*, 103 Wash. 2d 663, 694 P.2d 641 (1985), the Washington Supreme Court held unconstitutional on equal protection grounds a statute that allowed property owners to block a city annexation election by filing a petition opposing the annexation. The court summarized annexation cases from other jurisdictions that have similarly struck down statutes giving landowners unequal influence over the elective process:

In cases in which the final decision on annexation was made in an election, the courts have not approved statutes which grant additional influence over the outcome to property owners.... In *Hayward v. Clay*, 573 F.2d 187 (4th Cir. 1978), the Fourth Circuit found invalid a statute which allowed rejection of annexation by the vote of property owners to override approval by the vote of all residents. Comparing the procedure to the dual election box procedure invalidated in *Hill v. Stone, supra*, the court focused on the effect of the statute, stating that:

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the statutes of both states create property-based classifications of voters in an election of general interest and empower those with property to override the votes of those without. It is this restriction of the *effective franchise* to a property owning class--not the mechanics of accomplishing the restrictions--that offends the equal protection clause.

(Italics ours.) *Hayward*, at 190.

We find particularly persuasive the reasoning in *Curtis v. Board of Supervisors*, 7 Cal.3d 942, 104 Cal.Rptr. 297, 501 P.2d 537 (1972). In *Curtis*, the California Supreme Court held invalid a statute very similar to RCW 35.13.165. The California statute allowed fifty-one percent of property owners to block an election on the incorporation of a new city by filing a petition opposing incorporation. The California court stated at 955, 104 Cal. Rptr. 297, 501 P.2d 537:

We conclude that a statute which confers power to halt an election, and thus to prevent all qualified voters from casting their vote, must be considered to "touch upon" and to "burden" the right to vote, and therefore must be examined under the strict equal protection standards.

(Footnote omitted.) We likewise are persuaded that RCW 35.13.165 restricts the effective franchise and burdens the right to vote.

694 P.2d at 646-47.

The fire protection district petitioning scheme under Idaho Code §§ 31-1402 and 31-1403 similarly gives landowners the power to block an election to form a district by choosing not to sign a petition for the district's formation. One law review comment specifically discusses why such restrictions on the right to sign initiating petitions are unconstitutional:

Some petition systems used in annexation do, however, discriminate against an independently identifiable group of voters. Commonly, eligible signers of the

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initiating petition are limited to persons from a single area, such as the area to be annexed, who thereby gain the power to block an annexation. When the election to come requires only single-majority approval, the effect of allowing only one area to initiate the election is to give that area a veto that the other lacks. While no annexation will be approved that a majority of those affected oppose, it is clearly possible that some annexations which are supported by a majority of those affected will never even be voted on. Such an increase in the power of residents of a single area would seem unconstitutional, given the Court's general prohibition of any weighting of the franchise which is not justified by a significant state interest.

Comment, The Right to Vote in Municipal Annexations, 88 Harv. L. Rev. 1571, 1606 (1975).

CONCLUSION:

Idaho Code §§ 13-1402 and 13-1403 provide landowners the power to prevent an election for the creation of a fire protection district. Therefore, the landowner restriction touches upon and burdens the fundamental right to vote on a matter in which all resident electors have a substantial interest. Accordingly, under the strict scrutiny standard mandated by the equal protection clause, the restriction must be "necessary to promote a compelling state interest" in order to survive constitutional attack. *Johnson v. Lewiston Orchards*, 584 P.2d at 648. As explained in *City of Seattle v. State*, it is well settled that a state does not have a compelling state interest in granting greater voting rights on the basis of property ownership, even if the results of the election will affect property taxes. 694 P.2d at 647. No other justification appears for granting landowners in the proposed district greater power over the decision to form a fire protection district. Thus, the landowner restriction on the right to petition for creation of a fire protection district under Idaho Code §§ 31-1402 and 31-1403 is unconstitutional.

If you have any further questions regarding this matter, please do not hesitate to call.

Sincerely,

Daniel G. Chadwick

DANIEL G. CHADWICK
Chief, Intergovernmental
Affairs Division

cc Chuck Holden