STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL
BOISE 83720

JIM JONES
ATTORNEY GENERAL

TELEPHONE
(208) 334-2400

November 14, 1990

The Honorable Michael D. Crapo
Idaho State Senator
P.O. Box 50130
Idaho Falls, ID 83405

Dale W. Storer
City Attorney for Idaho Falls
P.O. Box 51630
Idaho Falls, ID 83405-1630

Dear Senator Crapo and Mr. Storer:

You have requested legal guidance from this office regarding Idaho Falls City Councilman Joseph Groberg and a business in which he is a part-owner, G.H.G. Investment Company (G.H.G.). G.H.G. has several business relationships with the City of Idaho Falls and concern has arisen over these relationships and Mr. Groberg's position on the city council.

EARLY ADOPTER PROGRAM AND SUPER GOOD CENTS PROGRAM

The Bonneville Power Administration (BPA) has initiated two energy conservation programs directed, in part, toward local contractors and home builders who choose to install electric space heating and air conditioning units exclusively in newly constructed residential buildings. These programs are officially administered and managed by the City of Idaho Falls. Both programs involve large grants of monies by BPA to Idaho Falls which in turn awards a portion of the funds to contractors and home builders who participate in these conservation programs. Program participation by the builders is voluntary in both instances.

The BPA Early Adopter Program provided funding to the City of Idaho Falls for voluntarily adopting and implementing the Model Conservation Standards (MCS). The program as it relates to

Celebrate IDAHO
1890 • CENTENNIAL • 1990

G.H.G. provides incentive payments to builders to assist them in meeting the MCS requirements. The incentive payments provided by the BPA through the City of Idaho Falls can amount to $3,400 per single-family residential structure or $3,400, plus $1,000 per living unit for multi-family residential buildings. The City of Idaho Falls is reimbursed by BPA for the administrative costs of the program which include ensuring MCS compliance by the builders prior to receiving their incentive payments. The Idaho Falls City Council makes the final approval of payment to the builders.

The other BPA program administered through the City of Idaho Falls is the Super GOOD CENTS Program. The Super GOOD CENTS Program is essentially a promotional program wherein electrically heated homes meeting the MCS requirements are entitled to display the Super GOOD CENTS logo. The primary purpose of the program is to create public identification with a standard of construction in relation to energy conservation. The program provides reimbursement of up to $1,000 per year for builders who advertise and promote the Super GOOD CENTS Program. The Idaho Falls City Council approves the payments made to the builders and has assumed responsibility for ensuring program compliance.

G.H.G. has participated and continues to participate in these programs. Due to Mr. Groberg's ownership interest in G.H.G. and his position on the Idaho Falls City Council the issue presented is whether payment of incentive payments and promotional costs under the programs would violate Idaho Code § 59-201. Idaho Code § 59-201 states in full:

> Members of the legislature, state, county, city, district and precinct officers, must not be interested in any contract made by them in their official capacity, or by any body or board of which they are members.

The Idaho Supreme Court has interpreted this statute strictly. Regardless of the intentions of the public servant toward the public body he serves, any contractual relationship is prohibited. The Supreme Court stated in McRoberts v. Hoar, 28 Idaho 163, 175, 152 P. 1046 (1915):

> There is no more pernicious influence than that brought about by public officials entering into contracts between themselves by virtue of which contracts the emoluments of their offices are increased and the time and attention which the law demands that they shall

> give to the performance of the duties of their offices are given to the performance of the duties required of them under such contracts. Justice, morality and public policy unite in condemning such contracts, and no court will tolerate any suit for their enforcement. The fact that the acceptance of such employment was without fraud and prejudice to the interest of the taxpayers is immaterial. Even in the absence of statutory provisions, such a contract is void; as a public official cannot make a contract to regulate his official conduct by considerations of private benefit to himself.
>
> * * * *
>
> It is the relation that the law condemns and not the results. It might be that in this particular case, public duty triumphed in the struggle with private interest, but such might not be the case again or with another officer; and the policy of the law is not to increase temptations or multiply opportunities for malfeasance in office.

In Nampa Highway District No. 1 v. Graves, 77 Idaho 381, 386, 293 P.2d 269 (1956), taxpayers challenged the payment to the highway commissioners for services performed pursuant to a contract between the highway district and the commissioners as private individuals. The Idaho Supreme Court stated:

> The contract of employment in question interferes with the unbiased discharge of respondents' duties to the public as commissioners and places them in a dual position inconsistent with their duties as trustees for the public and all such contracts are invalid even if there be no specific statute prohibiting them. The law invalidating such a contract is based on public policy and the contention that there was no loss to the Highway District is no defense.

See also, art. 7, § 10, Idaho Constitution; 10A McQuillin, Municipal Corporations § 29.97 (3rd Ed.). Therefore, both case law and statutory law clearly prohibit council members from entering into or benefitting from contractual relationships with the city they serve.

The contracts in this instance are unilateral and are created by the performance of G.H.G. in compliance with the terms of both programs. Deer Creek v. Clarendon Hot Springs Ranch, 107 Idaho 286, 688 P.2d 1191 (Idaho App. 1984). When Mr. Groberg

assumed his position on the Idaho Falls City Council his interest in G.H.G. placed him in a dual position of acting as a trustee for the public and as a businessman with considerations of private benefits to himself. This division of interest is precisely the type of relationship prohibited by Idaho Code § 59-201 and strongly condemned by Idaho case law. Therefore, any contractual relationship between G.H.G. and the City of Idaho Falls arising subsequent to Mr. Groberg's taking office is prohibited pursuant to Idaho Code § 59-201.

It has been noted that the action taken by the city council in approving payments under both programs is perfunctory in nature. This fact may be true, but the statute and case law speak to the actual relationship rather than the performance aspects of the relationship. There are no good faith nor de minimus exceptions to the statute. "It is the relation that the law condemns. . . ." McRoberts v. Hoar, 28 Idaho at 175.

ANNEXATION AGREEMENTS

In addition to residential construction, G.H.G. also develops large tracts of real property in the Idaho Falls area. In the process, G.H.G. is concerned with annexation and zoning issues that come before the Idaho Falls City Council. In the past, G.H.G. has entered into annexation agreements with the city and the question has arisen whether G.H.G. can continue to enter into these agreements.

The annexation agreements are contracts. The Village of Orland Park v. First Federal Savings, 481 N.E.2d 946 (Ill.App. 1985). Since the agreements are ultimately approved by the city council, Idaho Code § 59-201 prohibits G.H.G. from entering into annexation agreements with the city when one of its owners is a city council member.

Mr. Groberg has expressed concern over annexation agreements that were made by the City of Idaho Falls and G.H.G. prior to his being elected to the city council. These contracts remain executory and the actual annexation of the property has not occurred. Since the contracts were entered into prior to Mr. Groberg's election, they are not prohibited by Idaho Code § 59-201. Independent School District #5 v. Collins, 15 Idaho 535, 98 P. 857 (1908). Any participation by Mr. Groberg in performance of the contracts on behalf of the city would be controlled by Idaho Code § 67-6506 as well as chapter 7, title 59, Idaho Code. Idaho Code § 67-6506 deals with conflicts of interest within the framework of local planning and zoning. This section states:

> A governing board creating a planning, zoning, or planning and zoning commission, or joint commission shall provide that the area and interests within its jurisdiction are broadly represented on the commission. A member or employee of a governing board, commission, or joint commission shall not participate in any proceeding or action when the member or employee or his employer, business partner, business(,) associate, or any person related to him by affinity or consanguinity within the second degree has an economic interest in the procedure or action. Any actual or potential interest in any proceeding shall be disclosed at or before any meeting at which the action is being heard or considered. A knowing violation of this section shall be a misdemeanor.

The Ethics in Government Act of 1990, Idaho Code § 59-701 et seq., deals with conflicts of interest in public service and is much broader in scope than Idaho Code § 67-6506. A conflict of interest for the purpose of this chapter is defined in Idaho Code § 59-703(4):

> (4) "Conflict of interest" means any official action or any decision or recommendation by a person acting in a capacity as a public official, the effect of which would be to the private pecuniary benefit of the person or a member of the person's household, or a business with which the person or a member of the person's household is associated, . . .

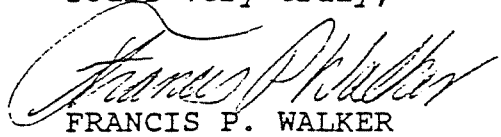
Clearly, any action taken by a city councilman with respect to annexation of property being developed or owned by a business in which a councilman is a part-owner poses a real conflict of interest. In such circumstances Idaho Code § 59-704(4) requires the councilman to disclose the conflict. If zoning issues are involved in the proceeding Idaho Code § 67-6506 prohibits any participation by Mr. Groberg.

Finally, if the existing contracts are not complete in their terms and require further negotiation, the contracts cannot be considered antecedent to Mr. Groberg's taking office and would be prohibited. Idaho Code § 59-201. See also City of Imperial Beach v. Bailey, 103 Cal. App. 3d 191 (1980). Similarly, the contracts cannot be modified or renegotiated without violating Idaho Code § 59-201.

Issues separate from matters concerning Mr. Groberg have been raised in each of your letters. I will respond to those issues in separate correspondence.

This letter is provided to assist you. The response is an informal and unofficial expression of the views of this office based upon the research of the author.

Yours very truly,



FRANCIS P. WALKER
Deputy Attorney General

FPW/tg