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ATTORNEY GENERAL OPINION NO. 91-3

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TO: Stanley F. Hamilton
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QUESTION PRESENTED:

If the State Land Board acquires the Lindstrom Peak property which was the subject of Benewah County Ordinance No. 69, must the board abide by the terms of the county ordinance in its management activities, or should the department consider the constitutional endowment mandate as having precedence and manage accordingly without the restrictions of the ordinance?¹

CONCLUSION:

The State Land Board need not abide by the Benewah County Zoning Ordinance in managing state lands for school trust purposes. The Board, in its discretion, may look to the land use restrictions specified by the Benewah County Ordinance for advice and recommendation in determining the future use and administration of these lands.

ANALYSIS:

Before addressing the substance of your question, a short review of the facts may be helpful. As we understand it, the property in question involves several sections and portions of sections of land in Benewah County. This land was acquired by the Idaho Department of Fish and Game approximately 48 years ago, and has been managed since that time as a wildlife and recreation area. Recently, the Department of Fish and Game transferred the Lindstrom Peak lands to a private owner. The Department of Lands

¹For purposes of answering this question, we have assumed that the Benewah County ordinance was enacted in accordance with the requirements of the Local Planning Act.

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is now negotiating with the private owner to acquire the Lindstrom Peak lands. The Department has determined that if such lands are acquired by the state, the best use of the lands is for timber production.

At present, the Lindstrom Peak lands are not subject to a county wide zoning ordinance, and Benewah County has not completed the comprehensive planning process required by Idaho Code § 67-6508. Prior to completion of the transfer of the Lindstrom Peak lands to the Department of Lands, however, the Benewah County Board of County Commissioners adopted Ordinance No. 69. This ordinance stated that it was enacted in accordance with Idaho Code § 67-6523, which authorizes counties to adopt emergency zoning ordinances if a governing board finds that there is an imminent peril to the public health, safety or welfare. Ordinance No. 69 prohibits use of the Lindstrom Peak lands for any use other than wildlife management or recreation "pending a review of the area in context with a County Wide Zoning Ordinance to be developed by a newly appointed Zoning Commission."

Ordinance No. 69 has since expired and been replaced with an interim ordinance including the same terms, in accordance with Idaho Code § 67-6524. Other than the interim ordinance, there is no comprehensive plan or permanent zoning ordinance affecting the Lindstrom Peak lands.

The Local Planning Act

The Local Planning Act, Idaho Code §§ 67-6501 to 67-6537, addresses the extent to which state agencies must abide by local zoning ordinances:

The state of Idaho, and all its agencies, boards, departments, institutions, and local special purpose districts, shall comply with all plans and ordinances adopted under this chapter unless otherwise provided by law. In adoption and implementation of the plan and ordinances, the governing board or commission shall take into account the plans and needs of the state of Idaho and all agencies, boards, departments, institutions, and local special purpose districts.

Idaho Code § 67-6528 (emphasis added).

The section requires state agencies to comply with local zoning ordinances, but exempts state agencies from compliance if "otherwise provided by law." Such an exemption clearly exists for the state board of land commissioners (Land Board) by virtue

of art. 9, §§ 7 and 8, of the Idaho Constitution (governing management of endowment lands), and title 58, chapter 1, of the Idaho Code (governing management of the state's public lands).

The Idaho Constitution

The powers of the Land Board to manage state endowment lands are defined by art. 9, § 7, of the Idaho Constitution:

The governor, superintendent of public instruction, secretary of state, attorney general, and state auditor shall constitute the state board of land commissioners, who shall have the direction, control, and disposition of the public lands of the state, under such regulations as may be prescribed by law.

The primary regulatory authority to manage state trust lands is vested in the Land Board. See, e.g., *Barber Lumber Co. v. Gifford*, 25 Idaho 654, 139 P. 557 (1914). Past attempts by the legislature to vest the management of state lands in bodies other than the Land Board have failed. For example, in 1935, the legislature created a State Water Conservation Board and vested it with the power to acquire and sell or otherwise dispose of rights of way, easements or property. The court ruled the statute unconstitutional, in part because: "it may well be said that the legislature has no power to divest the Land Board of the 'control and disposition of the public lands of the state' or of the right of 'protection, sale or rental' of state lands." *State Water Conservation Bd. v. Enking*, 56 Idaho 722, 735, 58 P.2d 779, 784 (1936), overruled on other grounds, *State Dept. of Parks v. Idaho Dept. of Water Administration*, 96 Idaho 440, 530 P.2d 924 (1974), and *Idaho Water Resource Bd. v. Kramer*, 97 Idaho 535, 548 P.2d 35 (1976).

The direction and control of state trust lands, however, is subject to "such regulations as may be prescribed by law." Although the scope of this constitutional provision has not been subject to court interpretation, a similar provision in art. 15, § 7, was addressed in *Idaho Power Co. v. State*, 104 Idaho 570, 661 P.2d 736 (1983). At the time, art. 15, § 7, provided:

There shall be constituted a Water Resource Agency, composed as the Legislature may now or hereafter prescribe, which shall have the power to formulate and implement a state water plan for optimum development of water resources in the public interest . . . all

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*under such laws as may be prescribed by the
Legislature. (Emphasis added.)*

The decision in *Idaho Power Company* involved a challenge to a 1977 statute requiring the water resource board to submit the state water plan to the legislature for adoption, rejection, or amendment by concurrent resolution. The legislature argued that:

[T]he concluding phrase in Art. 15, § 7, "all under such laws as may be prescribed by the legislature," subordinates the powers of the agency to those of the legislature, giving the legislature authority to amend or reject the formulated water plan of the Board.

Idaho Power Co., 104 Idaho at 572, 661 P.2d at 738. The court rejected this argument, holding instead that the final phrase "all under such laws as may be prescribed by the legislature" applies primarily to procedural matters, and "not to the specific, substantive grants of power enumerated in Art. 15, § 7." *Id.* at 573, 661 P.2d at 739.

Similarly, the constitutional powers vested in the board of regents of the University of Idaho by art. 9, § 10, which states that the regents shall act "under such regulations as may be prescribed by law," are not subject to substantive legislative regulation:

The regulations which may be prescribed by law and which must be observed by the regents in their supervision of the university, and the control and direction of its funds, refer to methods and rules for the conduct of its business and accounting to authorized officers. Such regulations must not be of a character to interfere essentially with the constitutional discretion of the board, under the authority granted by the constitution.

State v. State Board of Education, 33 Idaho 415, 427, 196 P. 201, 204 (1921).

An analysis similar to that employed in *Idaho Power Company* and *State Board of Education* applies to art. 9, § 7. The phrase "under such regulations as may be prescribed by law" must be read to avoid substantive conflicts with the primary constitutional directives for the management of trust lands found in art. 9, § 8:

It shall be the duty of the state board of land commissioners to provide for the location, protection, sale or rental of all lands heretofore, or which may hereafter be granted to or acquired by the state by or from the general government, under such regulations as may be prescribed by law, and in such manner as will secure the maximum long term financial return to the institution to which granted or to the state if not specifically granted (emphasis added).

Besides the constitutional duty to manage state lands in a manner that ensures long-term financial gain, the state retains trust responsibilities founded in federal law. State endowment lands were granted to Idaho to support public schools by two acts of Congress: the Organic Act of the Territory of Idaho, and the Idaho Admission Bill. By granting the lands to the state to be used for the benefit of a named beneficiary, the federal acts created a trust that must be used solely for the benefit of public schools within Idaho. The allowable limits on state administration of the school lands are established through fundamental principles of trust law:

The grant of lands for the various purposes by the federal government to the state constitutes a trust and the state board of land commissioners is the instrumentality created to administer that trust, and is bound upon principles that are elementary to so administer it as to secure the greatest measure of advantage to the beneficiary of it.

Barber Lumber Co. v. Gifford, 25 Idaho 654, 666, 139 P. 557, 561 (1914).

One of the "elementary principles" necessitated by the creation of the school lands trust is that the trustees owe a duty of undivided loyalty to the trust beneficiaries, to the exclusion of all other interests. *County of Skamania v. State*, 102 Wash. 2d 127, 685 P.2d 576, 580 (1984). Such elementary principles of trust law require that management decisions be made by bodies whose loyalties are not divided by their duty to promote the welfare of local constituencies. It follows that the Land Board, in exercising its duty as trustee of trust lands, is not bound by local zoning ordinances.

Other state Attorneys General addressing this question have reached similar conclusions. The Attorney General of Utah, for example, found that "it is doubtful that the state could even constitutionally authorize local zoning of trust lands in any manner contrary to the state's trust responsibility. That is, a statute or practice which purports to authorize local zoning of trust lands is probably not valid if it results in suppression of value to the benefit of other unrelated public or private interests." Utah Attorney General Op. No. 87-44 (June 23, 1989).

The Arizona Attorney General has similarly found that local zoning authorities must yield to management decisions made by the primary trustee of school lands:

A trustee must act with undivided loyalty to the trust beneficiaries, to the exclusion of all other interests. The proper and orderly management of trust lands located state-wide and of state-wide importance requires the Commissioner to be responsible to state officials rather than to the officials of each local jurisdiction.

Arizona Attorney General Op. No. I87-157 (December 10, 1987).

Given the state's trust responsibilities and the restrictions placed on the legislature's regulation of the Land Board's management powers, the Local Planning Act cannot be interpreted as subjecting the management of state lands to the substantive provisions of local zoning ordinances.

Idaho Statutes

The same conclusion is reached by an analysis of the more specific provisions in the Idaho Code directing how land-use decisions are made for state lands. Where two statutes address the same subject matter, the more specific will prevail. *State v. Wilson*, 107 Idaho 506, 508, 690 P.2d 1338, 1340 (1984).

Although the Legislature cannot enact substantive statutes that conflict with the constitutionally-vested trust responsibilities of the Land Board, it can vest the Board with additional powers to regulate the state's public lands. *State ex rel. Andrus v. Click*, 97 Idaho 791, 804, 554 P.2d 969, 982 (1976); *St. Joe Improvement Co. v. Laumierster*, 19 Idaho 66, 70, 112 P. 683, 684 (1910). One of the additional statutory duties of the Board is to "integrate and unify the policy and administration of land use in the state" by classifying public lands with respect to their value for forestry, reforestation, watershed protection and recreational purposes. Idaho Code § 58-

132. Such authority extends to "state land now owned or hereafter acquired." *Id.*

Idaho statutes carefully define the relative roles that the Land Board and boards of county commissioners are to play in such land use decisions:

[I]t shall be the duty of the state board of land commissioners . . . to determine the best use or uses, viewed from the standpoint of general welfare, to be made of state land now owned or hereafter acquired

In determining the best use or uses of land, the state board of land commissioners may call upon the Idaho division of tourism and industrial development and/or other state departments, divisions and agencies for inventories, classifications, maps and other data relative to land, and said Idaho and other state departments, divisions, and agencies shall furnish the said board with inventories, classifications, maps and other data upon request of the board. *Said board may also call upon the boards of county commissioners in counties wherein the lands are situated for advice and recommendations in determination of future use and administration of said lands.*

Id. (emphasis added).

The Idaho Code also provides a specific procedure to be followed when acquiring new tracts of land:

The state board of land commissioners may select and purchase, lease, receive by donation, hold in trust, or in any manner acquire for and in the name of the state of Idaho such tracts or leaseholds of land as it shall deem proper, and after inventory and classification as provided herein, shall determine the best use or uses of said lands
. . . .

Idaho Code § 58-133.

These sections demonstrate the legislature's determination that management of state lands would be hopelessly fragmented if local governments were allowed to dictate the uses to be made of

such lands. Therefore, in order to "integrate and unify" the management of such lands, the legislature vested the Land Board with the exclusive authority to determine the best uses to be made of such lands.

The Lindstrom Peak lands are not currently owned by the state, however, and some parties may assert that the Land Board, if it acquires such lands, must take them subject to any present zoning restrictions. The land use decision process in Idaho Code §§ 58-132 and 58-133, however, expressly extends to newly acquired lands. The Land Board is not required to abide by any land-use designation that may have been imposed on such lands prior to their coming into state ownership, but is authorized and directed to determine the best use of such lands upon their acquisition.

Idaho Code § 58-132 addresses local land-use planning concerns by including a mechanism for discretionary consultation with county commissioners, stating that the Land Board "may" call upon county commissioners for "advice and recommendations." This consultation process, however, does not require compliance with local zoning ordinances. The word "may," when examined in the context of Idaho Code § 58-132, is used in a directory, not a mandatory, sense. "If a statute is merely a guide for the conduct of business and for orderly procedure rather than a limitation of power, it will be construed as directory." 1A Sutherland, *Statutory Construction*, § 25.03 (4th ed. 1984).

Further evidence that the word "may" is used in a directory sense is that the word "shall" is used in the same paragraph of Idaho Code § 58-132 to require state departments, divisions, and agencies to cooperate with the Land Board in the classification of lands. When mandatory and directory verbs are used in the same paragraph of a statute, it can be fairly inferred that the legislature intended the verbs to have their ordinary meaning. 2A Sutherland, *supra*, § 57.11. "This is especially true where 'shall' and 'may' are used in close juxtaposition under circumstances that would indicate that a different treatment is intended for the predicates following them." *Id.*

Given the specific provisions of Idaho Code §§ 58-132 and 58-133, and the limited consultation role specified therein for county commissioners in the assignment of land-use designations to state lands, it can only be concluded that the Land Board is not bound by the terms of the Local Planning Act and is not required to abide by county zoning ordinances.

AUTHORITIES CONSIDERED:

Idaho Constitutional Provisions

Idaho Constitution art. 9, § 7.
Idaho Constitution art. 9, § 8.
Idaho Constitution art. 9, § 10.
Idaho Constitution art. 15, § 7.

Idaho Statutes

Idaho Code § 58-132.
Idaho Code § 58-133.
Idaho Code § 67-6508.
Idaho Code § 67-6523.
Idaho Code § 67-6524.
Idaho Code § 67-6528.

Idaho Cases

Barber Lumber Co. v. Gifford, 25 Idaho 654, 139 P. 557
(1914).

Idaho Power Co. v. State, 104 Idaho 570, 661 P.2d 736
(1983).

Idaho Water Resource Bd. v. Kramer, 97 Idaho 535, 548 P.2d
35 (1976).

State ex rel. Andrus v. Click, 97 Idaho 791, 554 P.2d 969
(1976).

State v. State Board of Education, 33 Idaho 415, 196 P. 201
(1921).

State v. Wilson, 107 Idaho 506, 690 P.2d 1338 (1984).

State Water Conservation Bd. v. Enking, 56 Idaho 722, 58
P.2d 779 (1936).

St. Joe Improvement Co. v. Laumierster, 19 Idaho 66, 112 P.
683 (1910).

Other Cases

County of Skamania v. State, 102 Wash. 2d 127, 685 P.2d 576
(1984).

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Other Authorities

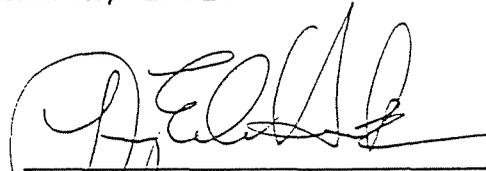
Arizona Attorney General Op. No. I87-157 (December 10, 1987).

Benewah County Ordinance No. 69.

1A and 2A Sutherland, *Statutory Construction*, §§ 25.03 and 57.11 (4th ed. 1984).

Utah Attorney General Op. No. 87-44 (June 23, 1989).

DATED this 7 day of March, 1991.



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SWS/cjc