

September 8, 1995

Honorable Ruby Stone
Idaho House of Representatives
6604 Holiday Drive
Boise, ID 83709

Honorable Ralph Wheeler
Idaho State Senate
659 Gifford Avenue
American Falls, ID 83211

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

Re: City/County Consolidation

Dear Representative Stone and Senator Wheeler:

You have requested that the Office of the Attorney General render an opinion on whether city/county consolidation can be an optional form of county government under any proposed legislation. For the reasons set forth herein, it is the opinion of this office that city/county consolidation cannot be added as an optional form of county government in legislation absent other constitutional and statutory changes.

An analysis of the issue of city/county consolidation requires review of: (1) art. 12, sec. 2 of the Idaho Constitution and supporting case law; (2) art. 18, sec. 12, H.J.R. 17 and the Legislative Council's Statement of the Meaning and Purpose, the effect of adoption, and the statements for and against H.J.R. 17; and (3) other states' constitutional provisions.

Art. 18, sec. 12, which contains the optional forms of county government constitutional provision, states:

§ 12. Optional forms of county government. - The legislature by general law may provide for optional forms of county government for counties, which shall be the exclusive optional forms of county government. No optional form of county government shall be operative in any county until has been submitted to and approved by a majority of the electors voting thereon in the county affected at a general or special election as provided by law. The electorate at said election shall be allowed to vote on whether they shall retain their present form of county

government or adopt any of the optional forms of county government. In the event an optional form shall be adopted, the question whether to return to the original form or any other optional forms, may be placed at subsequent elections, but not more frequently than each four years. When an optional form of county government has been adopted, the provisions of this section supersede sections 5, 6, and 10 of this article and sections 16 and 18 of article V.

No mention is made in art. 18, sec. 12 of the city/county consolidation. Obviously, it does not specifically mention any optional form, but the lack of specificity with regard to city/county consolidation is relevant when other provisions of the Idaho Constitution, as well as constitutional provisions of other states are considered.

Art. 12, sec. 2 of the Idaho Constitution appears to preclude city/county consolidation. That section states, “[a]ny county or incorporated city or town may make and enforce, within its limits, all such local police, sanitary and other regulations as are not in conflict with its charter or with the general laws.” (Emphasis added.) In interpreting this provision, the Idaho Supreme Court set forth clear standards as to the bounds of power of cities and counties outside their respective boundaries. In Clyde Hess Distributing Co. v. Bonneville County, 69 Idaho 505, 210 P.2d 798 (1949), the court stated:

[I]n the exercise of the powers granted by such constitutional provision [art. 12, sec. 2], a county cannot make police regulations effective within a municipality.

[C]ounty regulations passed under such constitutional grant of power, cannot be enforced in a municipality in a field reserved to municipalities under the constitution, whether such field has been occupied by municipal ordinance or not. Therefore, the fact that it does not appear that the regulation in question is in conflict with any existing ordinance of a municipality, is not important. The question is one of power and not one of conflict.

69 Idaho at 510-11, 210 P.2d at 713-14 (citations omitted).

Significantly, the court held that the legislature is without power to allow such county regulations to be enforced within a municipality’s limits as argued by Bonneville County and the State of Idaho as *amicus curiae* in Clyde Hess:

The position of appellants and Amicus Curiae overlooks the fact that a municipality, under the constitutional provision in question, has authority

to make police regulations not in conflict with general laws, coequal with the authority of the legislature to pass general police laws. The legislature can pass a general law effective upon all, but it cannot restrict the constitutional right of a municipality to make police regulations not in conflict or inconsistent with such general law. An attempt by the legislature to grant authority to a county to make police regulations effective within a municipality would be an infringement of such constitutional right of a municipality. A police regulation made by a county is not a general law for a municipality within the meaning of the constitution.

69 Idaho at 512, 210 P.2d at 715 (emphasis added; citations omitted).

The Clyde Hess decision leaves little doubt that a county cannot make and enforce laws within a municipality and vice versa. Moreover, any attempt by the legislature to allow such ordinances violates art. 12, sec. 2 of the Idaho Constitution. When a city and county are consolidated in the sense of one government governing both entities, the boundaries and limits of the city and county are still in effect. The only difference is the government. Because the two entities remain intact, one government is regulating the county and the city. Such an arrangement violates art. 12, sec. 2. A government for the county is making and enforcing laws within the city limits, and the government for the city is making and enforcing laws within the county's unincorporated areas.

This conclusion also finds support in the language of H.J.R. 17 and the Legislative Council's Statement of Meaning and Purpose, which are the only relevant "legislation" and "interpretation" to date that bears on the issue of whether city/county consolidation can be one of the options under any proposed enabling legislation. H.J.R. No. 17 states:

Shall Article XVIII, of the Constitution of the State of Idaho be amended by the addition of a New Section 12, Article XVIII, to allow the Legislature to provide for optional forms of county government, and to allow the electors of any county to retain their present form of county government or select an optional form of county government by majority vote of that county's electors voting thereon?

The Legislative Council's Statement of Meaning and Purpose to H.J.R. No. 17 states:

The purpose of the proposed amendment to Article XVIII of the Constitution of the State of Idaho, is to allow the Legislature to provide optional forms of county government which could be adopted by a majority vote of the electors of the county voting on the question. Currently, the form of county government, consisting of a three member board of county

commissioners, and an elected sheriff, county assessor, clerk of the district court, county coroner, county treasurer and prosecuting attorney, is specified in the Constitution. No county may deviate from this mandated form. With the adoption of this amendment, the Legislature could provide alternative forms. The electors of a county could choose to adopt any of the alternatives. If an alternative form were adopted, the electors could later choose to return to the original form.

Effect of Adoption

The effect of adopting this amendment would be to allow electors of a county a choice among optional forms of county government authorized by the Legislature. No change in the form of county government could be made unless adopted by the electors of the county. The existing form of county government would be available as one option, while other options might eliminate some elected officers, make some officers appointed, or consolidate some offices.

Clearly, neither H.J.R. No. 17 nor the Legislative Council's Statement of Meaning and Purpose mention cities or optional forms which might include changes to city government. This suggests that enabling legislation dealing with optional forms of county government should be limited to dealing exclusively with counties, and city/county consolidation should be separate constitutional and statutory matters.

A study of constitutional provisions from other states also support the conclusion that city/county consolidation cannot be added as an optional form of county government at the present time. Both California and Washington have provisions almost identical to art. 12, sec. 2 of the Idaho Constitution. Art. 11, sec. 7 (formerly sec. 11) of the California Constitution states, "[a] county or city may make and enforce within its limits all local police, sanitary, and other ordinances and regulations not in conflict with general laws."

Similarly, art. 11, sec. 11 of the Washington Constitution states, "[a]ny county, city, town or township may make and enforce within its limits all such local police, sanitary and other regulations as are not in conflict with general laws." Significantly, both Washington and California have constitutional provisions specifically allowing some sort of city/county consolidation. *See* art. 11, sec. 6 (and former art. 11, sec. 7), California Constitution; art. 11, sec. 16, Washington Constitution. Therefore, those states have specific constitutional provisions which allow city/county consolidation and which supersede the police powers provision.

Further, the Montana Constitution, which is a model that has been examined by the committee, specifically allows city/county consolidation. Montana's optional forms of government constitutional provision applies to all "local government units" as opposed to counties or cities. Article 11, sec. 3 states:

(1) The legislature shall provide methods for governing local government units and procedures for incorporating, classifying, merging, consolidating, and dissolving such units, and altering their boundaries. The legislature shall provide such optional or alternative forms of government that each unit or **combination of units** may adopt, amend, or abandon an optional or alternative form by a majority of those voting on the question.

(Emphasis added.)

It is significant that Washington, California, and Montana (as well as many other states) contain specific constitutional provisions governing city/county consolidation. This is a recognition that allowing such a consolidation is a change so fundamental to the structure of the traditional county and city form of government that it should be included in the constitution.

For the reasons set forth above, city/county consolidation cannot become an "option" which can be inserted into the draft legislation which is presently being considered. However, a city and county are not prohibited by the Idaho Constitution from achieving "consolidation" by the city disincorporating. Disincorporation procedures are already spelled out in title 50, Idaho Code. However, city/county consolidation cannot occur where the city maintains its incorporated status.

I hope this opinion is of assistance to you. If you have any questions, please feel free to contact me.

Very truly yours,

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