

September 19, 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: Home Rule/Charter Form of County Government

Dear Representative Stone and Senator Wheeler:

You have requested that the Office of the Attorney General render an opinion on whether home rule or charter form (“home rule”) of county government is prohibited by the Idaho Constitution. For the reasons set forth herein, it is the opinion of this office that allowing a limited form of home rule as an optional form of county government would not contravene the Idaho Constitution.

The traditional definition of the source of the powers of counties has been “Dillon’s rule.” This rule states that a county possesses only those powers which are expressly granted or those which can be necessarily or fairly implied to the powers expressly granted. On the other hand, home rule allows counties the right of self-government in local affairs. An excellent discussion of home rule powers of cities in Idaho, which is also somewhat applicable to counties, is found in Moore, Powers and Authorities of Idaho Cities: Home Rule or Legislative Control, 14 Id. L. Rev. 143 (1976). In his law review article, Moore compares and contrasts the various forms of home rule:

There are two types of home rule. Under “constitutional” home rule, the guarantees of local home rule proceed directly from the state constitution. These guarantees are theoretically immune from incursions by the state legislature. Only the people, by amending the constitution, can deprive a city of its home rule powers. Under “legislative” home rule, a city’s home rule powers proceed from state legislative enactments or legislatively authorized home rule charters. Legislatively granted powers are not considered vested, and may be changed by the legislature at will.

Under some “home rule” grants, cities are permitted to exercise all powers and authorities within the area of local or municipal concern, so long as the exercise of these powers does not conflict with state law. Under this type of home rule grant, the exercise of power: (1) must be within the scope of local or municipal (as opposed to purely statewide) concern; and (2) must not be in conflict with state law. As we shall see later, a “conflict” may arise not only where the state has expressly prohibited cities from acting in a particular area, but also: (a) where the state has directed that cities exercise powers granted to them in a certain manner, and a city seeks to perform in a different manner; or (b) where the state has expressly or impliedly pre-empted the field, to the exclusion of municipalities.

In contrast, under “true” home rule systems, if a subject is within an area of purely local concern, the legislature *cannot* legislate in that area and thereby pre-empt the city. State-wide enactments dealing with local concerns do not apply to true home rule cities.

Id. at 148-49.

Art. 12, sec. 2 of the Idaho Constitution already gives counties some self-governing powers in the area of governmental (police) as opposed to proprietary powers.¹ Art. 12, sec. 2, 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.) This grant of power is similar to the type of home rule grant of power discussed above, which is not the “true” form of home rule.

Although somewhat ambiguously, Idaho courts have generally reaffirmed counties’ constitutional status in the exercise of police power. In State v. Clark, 88 Idaho 365, 399 P.2d 955 (1965), the court held that art. 12, sec. 2, directly conferred authority upon counties to enact subdivision control ordinances in the presence of enabling legislation enacted by the legislature. In Moore, *supra*, the author concludes:

It is clear, then, that Idaho cities [counties] have a direct grant of the police power from the people under art. 12, sec. 2, of the Idaho Constitution, and are not dependent upon the state legislature for a grant of express authority while acting under the police power. However, the grant of police powers is not unlimited. If a city enactment conflicts with other constitutional guarantees or with state law, it will be held invalid. Further, the grant of police powers under art. 12, sec. 2, is not a grant of any taxing or other

fiscal power, nor does it include a grant of any private or proprietary powers.

Id. at 155.

Thus, art. 12, sec. 2, already provides a source of self-governing powers as it relates to governmental (police) powers. Because any further home rule powers given to counties in Idaho would be “legislative” home rule powers, those powers could not exceed those given in art. 12, sec. 2. In other words, counties would have to continue to comply with art. 12, sec. 2, and its “conflict” limitations in the exercise of governmental powers. Although not included in art. 12, sec. 2, the home rule provision as it relates to proprietary powers should probably be drafted with the same limitations in place as found in art. 12, sec. 2, for equal application purposes. In reviewing the draft legislation prepared by the Idaho Association of Counties, this is precisely what has been drafted. The draft legislation states, “[t]he grant of powers under this act is intended to be as broad as consistent with the construction of the Constitution of the State of Idaho and the statutes relating to local government.” (Emphasis added.) This wording appears to be in conformity with this opinion.

Home rule powers also allow the county to organize itself as it wishes, subject, of course, to the overriding requirement that the governing body be democratically elected, *i.e.*, a republican form of government. Because art. 18, sec. 12 of the Idaho Constitution overrides the other constitutional provisions relating to county organization, there is no constitutional prohibition against counties organizing their government in any form.

In conclusion, there is no constitutional prohibition to legislatively allowing counties to enact a home rule or charter form of government if, at least with respect to governmental powers, the grant of self-governing powers does not exceed the limitations imposed in art. 12, sec. 2 of the Idaho Constitution. No other constitutional provisions would prohibit the legislature from allowing counties home rule powers.

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

Very truly yours,

THOMAS F. GRATTON
Deputy Attorney General
Intergovernmental & Fiscal Law Division

¹ As stated in Moore, *supra*, “police power may be defined as the power, inherent in the state, to make laws to restrict and regulate, within the bounds of reasonableness and constitutional rights, the conduct and business of individuals for the protection and promotion of the public health, safety, property, morals, and welfare.” *Id.* at 145.

Proprietary powers, in some cases, have been “defined as a voluntary or discretionary function of government, as opposed to a governmental function which is required or commanded by law. In other cases, a city is said to act in its proprietary capacity where it undertakes some benefit for itself or its own citizens which could be and sometime is performed by private business.” *Id.* at 146.