

ATTORNEY GENERAL OPINION NO. 95-01

To: The Honorable Jim D. Kempton
Idaho House of Representatives
HAND DELIVERED

Per Request for Attorney General's Opinion

QUESTION PRESENTED

May a city council, pursuant to Idaho Code § 67-6526(a)(1) acting unilaterally and without parallel action by the board of county commissioners, pass an ordinance, the terms of which are enforceable upon land within the area of impact and outside of the city limits?

CONCLUSION

Only the board of county commissioners may exercise legislative powers in the unincorporated areas of the county. An ordinance enacted by a city pursuant to Idaho Code § 67-6526(a)(1) is not effective in the unincorporated area of impact until the county, by ordinance, adopts the terms of the city ordinance.

ANALYSIS

Statutory Authority

Chapter 65, title 67, Idaho Code, covers areas of impact and provides for the adoption of a planning zoning ordinance to cover an area of impact. The chapter provides that the ordinance governing the area of city impact must be adopted by the governing board of each county and of each city. The ordinance is to be based upon mutual agreement.

Pursuant to the statutory scheme found in chapter 65, title 67, Idaho Code, a governing board is a city council or a board of county commissioners. In Idaho Code § 67-6504, it is provided that the governing board may exercise all of the powers required and authorized by chapter 65 of title 67.

Pursuant to Idaho Code § 67-6505, the board of county commissioners and a city council are authorized to establish joint planning and zoning commissions governing an area of impact. The code section provides, in relevant part:

[T]he board of county commissioners of a county, together with the council of one or more cities within a county. . .are empowered to cooperate in the

establishment of a joint planning, zoning, or planning and zoning commission, hereinafter referred to as a joint commission. . .a joint commission is further authorized and empowered to perform any of the duties for any local members governing board when the duties have been authorized by that member government.

The authority of this joint commission is limited, however, by the language found in Idaho Code § 67-6504 “excluding the authority to adopt ordinances.” A joint planning and zoning commission may not exercise the legislative function of either of the member governing boards which created it.

The language of Idaho Code § 67-6526(a) is somewhat ambiguous and has been read by some municipalities as authorizing cities to act unilaterally and without the consent of counties in creating areas of impact. The language of that subsection (a) provides:

Areas of city impact—Negotiation procedure.—(a) The governing board of each county and each city therein shall, prior to October 1, 1994, adopt by ordinance following the notice and hearing procedures provided in section 67-6509, Idaho Code, a map identifying an area of city impact within the unincorporated area of the county. By mutual agreement, this date may be extended to November 1, 1994. A separate ordinance providing for application of plans and ordinances for the area of city impact shall be adopted no later than January 1, 1995. This separate ordinance shall provide for one of the following:

- (1) Application of the city plan and ordinances adopted under this chapter to the area of city impact; or
- (2) Application of the county plan and ordinances adopted under this chapter to the area of city impact; or
- (3) Application of any mutually agreed upon plan and ordinances adopted under this chapter to the area of city impact.

Areas of city impact, together with plan and ordinance requirements, may cross county boundaries by agreement of the city and county concerned if the city is within three (3) miles of the adjoining county.

In reading this subsection in conjunction with all of chapter 65 and, in particular, sections 67-6504, 67-6505 and the remainder of 67-6526, it is clear that the ordinance governing the area of impact must be adopted by both the city council and the board of

county commissioners. Section 67-6526(a)(1) merely states that a plan drafted by a city may be applied to the area of impact. The application of the city's plan to the area of impact only occurs when ordinances adopting such plan are enacted by the city council and the board of county commissioners.

Constitutional Limitations on Power

Statutes are to be construed as being consistent with constitutional limitations on power. Reading Idaho Code § 67-6526(a)(1) as giving cities the power to act unilaterally in adopting ordinances governing unincorporated areas of impact would render it unconstitutional as violating art. 12, sec. 2 of the Idaho Constitution.

Art. 12, sec. 2 of the Idaho Constitution provides:

2. Local Police Regulations Authorized.—Any 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.)

The power of cities and counties to enact or amend ordinances only exists within the limits of the city or county. For a city, this means within the city's incorporated limits and for a county, this means the unincorporated area lying outside a city. The issue presented by art. 12, sec. 2, has been described by the Idaho Supreme Court as an issue not of conflicts but of power. In Clyde Hess Distributing Co. v. Bonneville County, 69 Idaho 505, 210 P.2d 798 (1949), the court held:

It also appears to be conceded that county 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.

Id. at 511, 210 P.2d at 804 (emphasis added; citations omitted). The court went on to note that because this is a question of power and constitutional provision, it makes no difference whether or not the legislature, by statute, authorizes a county or a city to undertake the thing it is doing:

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.

Id. at 512, 210 P.2d at 805.

In Hobbs v. Abrams, 104 Idaho 205, 657 P.2d 1073 (1983), the court reconfirmed its earlier ruling in Hess. In addition, the court went on to set forth the restrictions which apply to an exercise of power by a county or municipality under art. 12, sec. 2 of the Idaho Constitution:

This Court has stated that there are three general restrictions that apply to ordinances enacted under the authority conferred by this constitutional provision: “(1) the ordinance or regulation must be confined to the limits of the governmental body enacting the same, (2) it must not be in conflict with other general laws of the state, and (3) it must not be an unreasonable or arbitrary enactment.”

104 Idaho at 207, 657 P.2d at 1075 (citation omitted).

Art. 12, sec. 2, was applied to the issuance of a building permit by a county upon land which was subsequently annexed by the City of Boise in Boise City v. Blaser, 98 Idaho 789, 572 P.2d 892 (1977). In that case, the builders obtained a building permit for multi-unit housing which was to be constructed outside the city limits. Construction was delayed due to inclement weather and when Blaser attempted to resume construction, the land had been annexed by Boise City. The construction project was ultimately allowed to proceed but on grounds of estoppel. In the course of its opinion, the court discussed art. 12, sec. 2, and the effect it has upon the validity of county building permits issued on land within an incorporated city. Regarding the effectiveness of a county building permit within the city limits, the court stated:

Generally speaking, to give effect to a county permit within city limits would be to violate the separate sovereignty provisions of Idaho Const. art. 12, § 2, and the careful avoidance of any county/city jurisdictional conflict or overlap which is safeguarded therein.

Id. at 791, 572 P.2d at 895.

Under the statutory scheme found in chapter 65, title 67, Idaho Code, the governing board for an unincorporated area, including the area of impact, is the board of county commissioners. The legislative power possessed by the board of county commissioners may only be exercised by the board. Likewise, the legislative power of a city council is limited to the city's corporate limits. Any reading granting a city the power to enact land use ordinances affecting unincorporated areas is inconsistent with chapter 65 of title 67. The exercise of legislative power beyond the corporate limit is also a clear violation of art. 12, sec. 2 of the Idaho Constitution.

AUTHORITIES CONSIDERED

1. Idaho Constitution:

Art. 12, sec. 2.

2. Idaho Code:

§ 67-6504.

§ 67-6505.

§ 67-6509.

§ 67-6526(a).

§ 67-6526(a)(1).

§ 67-6526(d).

3. Idaho Cases:

Boise City v. Blaser, 98 Idaho 789, 572 P.2d 892 (1977).

Clyde Hess Distributing Co. v. Bonneville County, 69 Idaho 505, 210 P.2d 798 (1949).

Hobbs v. Abrams, 104 Idaho 205, 657 P.2d 1073 (1983).

DATED this 9th day of March, 1995.

ALAN G. LANCE
Attorney General

Analysis by:

WILLIAM A. VON TAGEN
Deputy Attorney General

Director, Governmental and Public Affairs