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

BACKGROUND

The City of Boise is currently considering whether it may apply city ordinances to regulate the conduct of recreational floaters utilizing the navigable waters of the Boise River. Traditionally, the City has not enforced its municipal code on the navigable waters of the Boise River, based on the perception that law enforcement upon navigable waters falls within the jurisdiction of the Ada County Sheriff. Because the River winds through the heart of the City, and is bordered by the Boise Greenbelt and several City parks, there is an interest in ensuring that there is a consistent set of regulations governing conduct on both the water and the shores of the River. A particular focus is the consumption of alcohol by recreational users of the River. Existing city ordinances provide that, except as otherwise permitted by statute or ordinance, it shall be unlawful for any person to possess "any open container of any alcoholic beverage" or to "consume any alcoholic beverage . . . upon any public or private property open to the public." Boise Municipal Code § 6-01-36.

QUESTIONS PRESENTED

- (1) Whether the City of Boise may enforce city ordinances upon the navigable waters of the Boise River?
- (2) Whether state laws preempt the City of Boise from prohibiting recreational users of the Boise River from possessing and consuming alcoholic beverages while floating the River?

CONCLUSIONS

(1) The City of Boise may enforce city ordinances upon the navigable waters of the Boise River, provided it has taken the actions necessary to extend its corporate boundaries over the waters of the River.

(2) Because the State has not undertaken to regulate consumption of alcoholic beverages by recreational floaters such as those on the Boise River, the City of Boise may undertake to do so consistent with the authority granted to municipalities in Article XII, § 2 of the Idaho Constitution.

ANALYSIS

The Idaho Constitution grants municipalities the “authority to make police regulations not in conflict with general laws, coequal with the authority of the legislature to pass general police laws.” Clyde Hess Distributing Co. v. Bonneville County, 69 Idaho 505, 512, 210 P.2d 798, 801 (1949). The specific constitutional provision provides as follows:

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.

Idaho Const. Art. XII, § 2. This provision, in combination with fundamental constitutional restrictions on the exercise of police powers, results in:

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.”

Hobbs v. Abrams, 104 Idaho 205, 207, 657 P.2d 1073, 1075 (1983), quoting State v. Clark, 88 Idaho 365, 374, 399 P.2d 955, 960 (1965). For purposes of this analysis, we assume that any ordinances applied to users of the River, including a ban on public alcohol consumption, would be neither unreasonable nor arbitrary. Generally speaking, municipal police powers include the authority to prohibit or restrict the consumption of alcohol in public locations. 6A Eugene McQuillin, The Law of Municipal Corporations § 24.169 (3d ed. 1997).

Here, in determining the City’s authority to regulate the conduct of recreational floaters on the Boise River, the threshold inquiry is whether “the ordinance or regulation [is] confined to the limits of the governmental body enacting the same.” State v. Clark,

88 Idaho at 374, 399 P.2d at 960. The Legislature has granted cities limited authority to include navigable waterways within their limits:

Cities situated on navigable lakes and streams, when the corporate boundaries or limits of such cities extend to the shorelines of such lakes or streams, shall have power by ordinance to fix, determine or extend its corporate boundaries or limits over the waters of such lakes or streams for a distance of one fourth (1/4) of a mile from the low-water mark of such navigable lakes, and for a distance of seventy-five (75) feet from the low-water mark of such navigable streams.

Idaho Code § 50-221. In State v. Finney, 65 Idaho 630, 150 P.2d 130 (1944), the Idaho Supreme Court examined Idaho Code § 50-221 (then codified as 49-1149) in the context of a municipal ordinance that prohibited the mooring of residential houseboats offshore of the City of Coeur d'Alene. The Court held:

It was undoubtedly the intention of the Legislature in thus expressly authorizing incorporated cities and villages situated on navigable streams and lakes, to include portions thereof within their respective boundaries, as authorized by the Act, for the purpose of enabling the municipalities to exercise control over this included and added territory, to the same extent and for the same purpose as it is generally empowered with respect to other territory within the corporate boundaries.

Finney, 65 Idaho at 634, 150 P.2d at 131. Because the portion of the Lake involved had been "taken into and made a part of the City of Coeur d'Alene by Ordinance," id. at 633, 150 P.2d at 131, the Court upheld the prohibition on houseboats as a proper exercise of the City's police power.

Under Idaho Code § 50-221 and Finney, the threshold determination in any exercise of municipal jurisdiction over conduct on the Boise River is whether the City has taken affirmative action "to fix, determine or extend its corporate boundaries or limits over the waters of" such stream. If the City has failed to take such action, the inquiry is at an end.

We have not, for purposes of this opinion, undertaken the detailed analysis of City ordinances fixing and determining the boundaries of the City of Boise that would be necessary to determine which portions of the Boise River, if any, have been included within the limits of the City of Boise pursuant to Idaho Code § 50-221. Such an inquiry is best undertaken by the City itself. Rather, for purposes of analysis only, we assume that the City's inquiry is limited to those portions of the River over which the City has extended its limits.

If, in fact, Boise has extended its corporate boundaries or limits over the waters of the Boise River, the sole remaining inquiry is whether prohibitions on the possession and consumption of intoxicating beverages are “in conflict with . . . the general laws” of the state addressing the use of navigable waterways. Conflict may arise in two circumstances. First, a conflict may be direct, “expressly allowing what the state disallows, and vice versa.” Envirosafe Services of Idaho v. County of Owyhee, 112 Idaho 687, 689, 735 P.2d 998, 1000 (1987); *see also* State v. Barsness, 102 Idaho 210, 628 P.2d 1044 (1981) (city ordinance requiring emergency vehicles to have *both* sirens and flashing lights preempted due to explicit conflict with statute requiring emergency vehicles to display *either* sirens *or* flashing lights). Second, a conflict may be implied where the state has fully occupied or preempted a particular area of regulation to the exclusion of local governmental entities. This doctrine of implied preemption applies when “the state has acted in the area in such a pervasive manner that it must be assumed that it intended to occupy the entire field of regulation.” Envirosafe, 112 Idaho at 689, 735 P.2d at 1000; *see e.g.*, Caesar v. State, 101 Idaho 158, 610 P.2d 517 (1980) (state’s comprehensive regulation of the safety of state-owned buildings preempted application of Boise City Building Code to Bronco Stadium). Preemption may also be implied “where uniform statewide regulation is called for due to the particular nature of the subject matter to be regulated.” Envirosafe, 112 Idaho at 689, 735 P.2d at 1000.

The statutory provisions governing use of navigable waters for recreational purposes are found in Idaho Code § 36-1601, Title 58 of the Idaho Code, and Chapter 70, Title 67, of the Idaho Code (“Idaho Safe Boating Act”). Section 36-1601 defines navigability and declares that navigable streams “shall be open to public use as a public highway for travel and passage, up or downstream, for business or pleasure, and to exercise the incidents of navigation – boating, swimming, fishing, hunting and all recreational purposes.”

A city ordinance banning consumption of alcohol while using a navigable stream does not appear to conflict or interfere with the incidents of navigation defined in Idaho Code § 36-1601. River users remain free to engage in the core recreational activities of boating, swimming and fishing. Thus, no actual conflict exists between a municipal ban on public consumption of alcohol and Idaho Code § 36-1601. And, since Idaho Code § 36-1601 provides no comprehensive regulatory scheme for the use of navigable waters, it cannot be interpreted as an attempt to occupy the field of permissible regulation of such uses.

Recreational uses of navigable waters are also addressed in Title 58 of the Idaho Code. Idaho Code § 58-104 authorizes the State Board of Land Commissioners (“Land Board”) to “regulate and control the use or disposition of lands in the beds of navigable lakes, rivers and streams, to the natural or ordinary high water mark thereof, so as to provide for their commercial, navigational, recreational or other public use.” Idaho Code

§ 58-104(9). The Land Board's primary responsibility, however, is regulation of encroachments upon the beds and banks of navigable waters in order to protect recreation, navigation, and other public interests. Idaho Code § 58-1301. Aside from regulating encroachments, the Land Board has not undertaken to regulate navigational or recreational uses of navigable waters.

A more comprehensive regulatory scheme governing public use of navigable waters appears in the Idaho Safe Boating Act, Chapter 70, Title 67, Idaho Code. The Safe Boating Act includes a broad array of regulations intended to "improve boating safety [and] foster the greater development, use and enjoyment of the waters of this state by watercraft." Idaho Code § 67-7001. As part of its scheme of regulating boating safety, the Act includes provisions addressing the use of alcohol while engaging in certain uses of navigable waters. Section 67-7034 makes it unlawful for any person with an alcohol concentration of 0.08 or more to "be in actual physical control of a vessel on the waters of the state of Idaho." The reach of this statute, however, excludes many of the devices used by recreational floaters on the Boise River. The Act defines the term "vessel" to exclude "nonmotorized devices not designed or modified to be used as a means of transportation on the water, such as inflatable air mattresses, single inner tubes, and beach and water toys." Idaho Code § 67-7003(22). As a result, much of the recreational use typical of the Boise River does not fall within the scope of the Safe Boating Act. For those recreational users not utilizing "vessels," there is, by definition, no conflict between the Safe Boating Act and municipal ordinances governing recreational use of the River.

For those watercraft qualifying as "vessels," such as canoes, kayaks and rafts, the analysis is necessarily more complex. Some may assert that a municipal ban on alcohol consumption would conflict with the provisions of Idaho Code § 67-7034, which explicitly allows operation of vessels while having "an alcohol concentration of less than 0.08," unless under the additional influence of drugs or other intoxicants. *See* Idaho Code § 67-7034(2). While it is possible to read the cited subsection as impliedly allowing some level of imbibition while boating, it is more precise to state that it does not prohibit operation of vessels when blood alcohol levels are below the specified threshold. In short, the only alcohol regulated by the Safe Boating Act is the operator's blood alcohol level, not the presence or consumption of alcoholic beverages on the vessel itself. For purposes of the Safe Boating Act, it is irrelevant whether the alcohol is consumed while on shore or on the water. As such, the Safe Boating Act is silent on the issue of the place and manner in which alcohol may be consumed while boating. In such circumstances, additional regulation by municipal ordinance is permissible, so long as it does not "prohibit that which the legislature has expressly sanctioned." Gartland v. Talbott, 72 Idaho 125, 129, 237 P.2d 1067, 1069 (1951). If the ordinance "merely goes further and adds limitations to those contained in the statute, [it] is not necessarily in conflict with the statute." Id. at 129-30, 237 P.2d at 1069; *see also* Benewah County

Cattlemen's Ass'n v. Bd. Of County Comm'rs, 105 Idaho 209, 214, 668 P.2d 85, 90 (1983) ("local enactments which merely extend the state law by way of additional restrictions or limitations are not invalid").

Given the lack of actual conflict between the Safe Boating Act and ordinances banning possession and consumption of alcoholic beverages on navigable streams, the remaining question is whether the Safe Boating Act occupies the field of permissible regulation. The fact that the Legislature has banned actual operation of watercraft while under the influence of alcohol does not imply an intent to occupy the entire field of regulation or preempt local ordinances addressing the use of alcohol while upon navigable waters. In order to infer intent to preempt local ordinances, the state regulatory scheme must be "pervasive," Envirosafe, 112 Idaho at 689, 735 P.2d at 1000, or must "completely cover[]" the subject matter. Caesar, 101 Idaho at 161, 610 P.2d at 520. Implied preemption has been rarely found by the Idaho courts, even where the local ordinance covers the same subject matter as a general statute. A case in point with obvious analogies to the question at hand is State v. Poynter, 70 Idaho 438, 220 P.2d 386 (1950), where the Court was asked to determine whether the City of Pocatello was preempted from enacting an ordinance prohibiting the driving of an automobile while under the influence of alcohol, given that the identical conduct was an offense under state law. The Court held that the "mere fact that the state has legislated on a subject does not necessarily deprive a city of the power to deal with the subject by ordinance." Id. at 441, 220 P. 2d at 389. Upon petition for rehearing, the Court reiterated that cities may enact and enforce police regulations "that do not contravene any general law of the state," so that "the fact that an ordinance covers the same offense as the state law does not make it inconsistent or in conflict therewith, or invalid for that reason." Id. at 444, 446, 220 P.2d at 391-92 (quoting, in part, State v. Quong, 8 Idaho 191, 194, 67 P. 491, 492 (1902)).

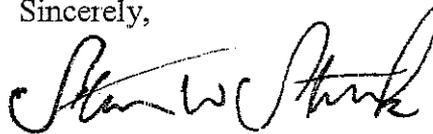
Legislative intent to occupy a field of regulation is also rarely implied when the Legislature has explicitly made provision for additional municipal regulations. The Court has often cited statutes allowing cities and counties to enact additional rules and regulations in finding a lack of preemptive intent. *See, e.g.*, Gartland, 72 Idaho at 129, 237 P.2d at 1069; Poynter, 70 Idaho at 441, 220 P.2d at 389; Clyde Hess, 69 Idaho at 510, 210 P.2d at 800. Here, the Safe Boating Act provides that:

Any political subdivision of the state of Idaho may at any time, but only after sufficient public notice is given, adopt local ordinances with reference to the operation of vessels on any waters within its territorial limits or with reference to swimming within areas of intense or hazardous vessel traffic, provided the ordinances are intended to promote or protect the health, safety and general welfare of its citizenry.

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Given the limited scope of conduct regulated by Idaho Code § 67-7034 and the explicit authorization for municipal governments to adopt local ordinances addressing the subject of boating safety, the most logical inference is that the Legislature did not intend to preempt the field of potential regulation relating to possession and consumption of alcohol while upon navigable waters. This leaves municipal governments free to regulate the use of alcohol by recreational users of navigable streams when such streams are within the limits of the municipality.

Sincerely,

A handwritten signature in black ink, appearing to read "Steven W. Strack". The signature is fluid and cursive, with a large initial "S" and "W".

STEVEN W. STRACK
Deputy Attorney General

SWS/pb