



STATE OF IDAHO  
OFFICE OF THE ATTORNEY GENERAL  
LAWRENCE G. WASDEN

**ATTORNEY GENERAL OPINION NO. 07-2**

To: Mr. Ned C. Williamson  
Hailey City Attorney  
115 Second Avenue S.  
Hailey, ID 83333

Per Request for Attorney General's Opinion

You have requested an Attorney General's Opinion regarding three initiatives recently passed by Hailey voters concerning the possession and use of marijuana. This opinion addresses the question you have presented.

**QUESTION PRESENTED**

Are any of the provisions of the three "marijuana" initiatives recently passed by Hailey voters clearly illegal under Idaho law?

**CONCLUSION**

The major provisions of Initiative 1 (medical marijuana) and Initiative 2 (hemp) conflict with state law and are invalid. The major provision of Initiative 3 (law enforcement priorities) is administrative rather than legislative in nature and is likely not an allowable subject for an initiative and therefore invalid. The observations contained in this letter identify the *clearly* unlawful provisions of these initiatives and do not include all of their problematic consequences.

**ANALYSIS**

**A. Summary of the Initiatives**

Initiative 1 is entitled "The Hailey Medical Marijuana Act." It allows persons described as "seriously ill citizens" to use up to 35 grams of marijuana for medicinal purposes upon the "recommendation" of a physician. It immunizes persons who possess

and use marijuana and marijuana paraphernalia from arrest and prosecution and restricts the discretion of municipal law enforcement to enforce state drug laws. Additionally, it instructs city officers to advocate, by official public declaration and through lobbyists, for changes to state law and establishes a Community Oversight Committee, whose membership includes a representative of the Liberty Lobby of Idaho.

Initiative 2 is entitled “The Hailey Industrial Hemp Act.” It declares that the growth and cultivation of industrial hemp is a positive and beneficial farming activity and that the legalization of such activity by the state and the federal government is favored. It contains provisions for advocacy and establishment of the Community Oversight Committee similar to Initiative 1.

Initiative 3 is entitled “The Hailey Lowest Police Priority Act.” It directs that Hailey law enforcement officers make enforcement of marijuana laws, where the drug is intended for adult personal use, the city’s lowest law enforcement priority, with some exceptions. It prohibits Hailey law enforcement officers from accepting or renewing formal deputizing or commissioning by federal law enforcement agencies if the deputizing or commissioning will include investigating, citing, arresting, or seizing property from adult marijuana users. As in Initiatives 1 and 2, it contains provisions for advocacy and establishment of the Community Oversight Committee.

## **B. Issues**

### 1. Conflict With State Law

Cities are municipal corporations that are subdivisions of the State. “A municipal corporation possesses only such powers as the state confers upon it, subject to addition or diminution at its discretion.” State v. Frederic, 28 Idaho 709, 711, 155 P. 977, 979 (1916). Article XII, § 2 of the Idaho Constitution states that:

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.) A local regulation may conflict with a state law in two ways:

1. The local regulation may be in direct conflict by “expressly allowing what the state disallows, and vice versa.” Envirosafe Services of Idaho v. Owyhee County, 112 Idaho 687, 689, 735 P.2d 998, 1000 (1987); *see also* State v. Barsness, 102 Idaho 210, 628 P.2d 1044 (1981).

2. A conflict may be inferred where the state has intended to fully occupy or preempt a particular area of regulation to the exclusion of local governmental entities. See Envirosafe, 112 Idaho at 689, 735 P.2d at 1000. The doctrine of implied preemption typically applies “where, despite the lack of specific language preempting regulation by local governmental entities, 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.” *Id.*; see, e.g., Caesar v. State, 101 Idaho 158, 610 P.2d 517 (1980) (state’s comprehensive safety regulations pertaining to state-owned buildings preempted application of the Boise City Building Code to Bronco Stadium).

Here, we need not examine the question of implied preemption, since conflict with state law is apparent. It is a criminal act to possess or use marijuana, hemp, or drug paraphernalia. Idaho Code §§ 37-2705, 37-2732 and 37-2734A. Therefore, the provisions of Initiatives 1 and 2, which immunize persons from prosecution for any of these acts, thus allowing what the state disallows, are in conflict with state law and outside of the constitutional powers of the City of Hailey to enact. See Davidson v. Wright, 143 Idaho 616, 151 P.3d 812 (2006), holding that the Sun Valley City Clerk could review an initiative for proper form but not for constitutionality. Chief Justice Schroeder wrote, in a special concurrence that “[i]f enough signatures are gathered to qualify the initiative for the ballot, and if the initiative then passes, *significant portions of it will clearly contravene state law and be invalid.*” 143 Idaho at 622, 151 P.3d at 818 (emphasis added). See also Gonzales v. Raich, 545 U.S. 1, 125 S. Ct. 2195, 162 L. Ed. 2d 1 (2005), wherein the United State Supreme Court held that the Supremacy Clause of the United States Constitution meant that California’s medical marijuana law (the Compassionate Use Act) could not limit federal law which, like Idaho, also prohibits the use of marijuana and hemp. U.S. Const. art. VI, cl. 2. Additionally, Idaho Code § 50-209 empowers the police of every city to “arrest all offenders against the law of the state . . . .” The provision of Initiative 1 that restricts enforcement of state law by summons only is in direct conflict with this statute and therefore invalid. Further, Idaho Code § 50-208A requires city attorneys to prosecute state misdemeanors committed within the municipal limits. Consequently, the provision of Initiative 1 that directs the municipal prosecuting attorney to dismiss certain misdemeanor drug charges is also in direct conflict with state law and invalid.

## 2. Free Speech

The Idaho Constitution guarantees that “[e]very person may freely speak, write and publish on all subjects, being responsible for the abuse of that liberty.” Idaho Const. art. I, § 9. The right to free speech includes the right not to speak. In Simpson v. Cenarrusa, 130 Idaho 609, 944 P.2d 1372 (1997), the Idaho Supreme Court declared that a proposition that required candidates for elective office to take a stand on the issue of

term limits was an unconstitutional infringement of free speech. Absent a flagrant abuse of the right, the government cannot control speech. *Id.* All three of Hailey's initiatives instruct city officers to advocate for changes to state law to support the goals and implementation of each ordinance. Compelling this advocacy is clearly an infringement upon the free speech rights of city officers, rendering these provisions unconstitutional.

3. Legislation and Administration

In the case City of Boise City v. Keep the Commandments Coalition, 143 Idaho 254, 141 P.3d 1123 (2006), the Idaho Supreme Court stated that, while subjects of a legislative nature were allowable for local initiatives, subjects of an administrative nature were not. While it noted that there was "no bright line rule" to distinguish between legislative and administrative subjects, it did cite one of its prior opinions: Weldon v. Bonner County Tax Coalition, 124 Idaho 31, 855 P.2d 868 (1993). In Weldon, a coalition of citizens sought, through referendum and initiative, to reject a Bonner County budget decision and implement a new county budget process. The court held that the coalition did not seek to reject or propose a *law* (e.g., a measure passed by the Board of County Commissioners) but rather a *process*. *Id.* It stated that "[t]he county budgeting process, which results in an *ad valorem* levy, is not an 'act' or 'measure,' but instead it is merely the *result* of the statutory process set forth in the County Budget Law . . . ." 124 Idaho at 38, 855 P.2d at 875. Applying the precedent of Keep the Commandments and Weldon to Initiative 3, it is likely that a court would find "enforcement priorities" a matter of administration rather than legislation and therefore not an allowable subject for an initiative.

**AUTHORITIES CONSIDERED**

**1. United States Constitution:**

Art. VI, cl. 2.

**2. Idaho Constitution:**

Art. I, § 9.

Art. XII, § 2.

**3. Idaho Code:**

§ 37-2705.

§ 37-2732.

§ 37-2734A.

§ 50-208A.

§ 50-209.

**4. U.S. Supreme Court Cases:**

Gonzales v. Raich, 545 U.S. 1, 125 S. Ct. 2195, 162 L. Ed. 2d 1 (2005).

**5. Idaho Cases:**

Caesar v. State, 101 Idaho 158, 610 P.2d 517 (1980).

City of Boise City v. Keep the Commandments Coalition, 143 Idaho 254, 141 P.3d 1123 (2006).

Davidson v. Wright, 143 Idaho 616, 151 P.3d 812 (2006).

Envirosafe Services of Idaho v. Owyhee County, 112 Idaho 687, 735 P.2d 998 (1987).

Simpson v. Cenarrusa, 130 Idaho 609, 944 P.2d 1372 (1997).

State v. Barsness, 102 Idaho 210, 628 P.2d 1044 (1981).

State v. Frederic, 28 Idaho 709, 155 P. 977 (1916).

Weldon v. Bonner County Tax Coalition, 124 Idaho 31, 855 P.2d 868 (1993).

DATED this 20<sup>th</sup> day December, 2007.



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**Analysis by:**

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