



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

February 16, 2010

The Honorable Ben Ysursa
Idaho Secretary of State
STATEHOUSE MAIL

Re: Certificate of Review
Proposed Initiative Relating to the Protection of Property Rights

Dear Secretary of State Ysursa:

An initiative petition was filed with your office on January 19, 2010. Pursuant to Idaho Code § 34-1809, this office has reviewed the petition and has prepared the following advisory comments. Given the strict statutory timeframe within which this office must review the petition, our review can only isolate areas of concern and cannot provide in-depth analysis of each issue that may present problems. Further, under the review statute, the Attorney General's recommendations are "advisory only." The petitioners are free to "accept or reject them in whole or in part." The opinions expressed in this review are only those that may affect the legality of the initiative. This office offers no opinion with regard to the policy issues raised by the proposed initiative.

BALLOT TITLES

Following the filing of the proposed initiative, this office will prepare short and long ballot titles. The ballot titles must impartially and succinctly state the purpose of the measure without being argumentative and without creating prejudice for or against the measure. While our office prepares titles for the initiative, petitioners may submit proposed titles for consideration. Any proposed titles should be consistent with the standard set forth above.

MATTERS OF SUBSTANTIVE IMPORT

The Initiative Raises Significant Policy Issues

At the outset, it should be noted that several concepts have been included within this initiative, which may be more appropriately formatted through a series of statutes. Instead of

combining all of these items into a single statute, proposed section 67-6539, it would be more effective to set out the many provisions of this proposed single act as discrete statutory sections. Along those same lines, it would likely be more beneficial and clear if the initiative were re-drafted to reflect changes throughout the Local Land Use Planning Act (the Chapter into which the proposed amendment is to be inserted). The initiative purports to significantly impact a number of provisions throughout the Local Land Use Planning Act, and would thus be clearer if the existing Act were amended to reflect these changes, as opposed to tacking an additional conflicting provision on to the end of the Chapter.

The proposed initiative seeks to limit a number of the powers of entities with regard to planning and zoning decisions. Most significantly, the proposed initiative could not impair the ability of local government to enact zoning ordinances in such a way as to reduce or eliminate their police powers as outlined by the Idaho Constitution. *E.g.*, Idaho Const. art. XII, § 2 and art. XI, § 8. Similarly, the initiative seeks to require a governmental entity to pay the landowner 120% plus the costs incurred by the landowner in the change of use. Although permissible, this provision would likely significantly increase the costs to government with regard to enacting planning and zoning decisions as virtually any decision would become the object of a claim.

Similarly, based upon the proposed addition to the Land Use Planning Act, this would likely create a series of conflicts, which would likely be resolved through litigation. If enacted, this measure would likely result in significant litigation with regard to the scope of the addition to the Code, its effect on existing land use systems, and most future land use decisions.

This initiative also attempts to limit the authority of the federal government with regard to federal environmental regulations and other similar decisions affecting uses of land. The Supremacy Clause of the United States Constitution provides that federal laws and treaties are "the supreme Law of the Land." U.S. Const. art. VI, cl. 2. Accordingly, when Congress acts within the scope of its constitutional authority, the laws it enacts may preempt state or local action within that field. Based upon the significant federal laws and regulatory systems in existence, it appears likely that portions of this initiative would likely be struck down as preempted.

CONCLUSION

Based upon the analysis above, it appears that portions of this initiative will likely be preempted where the restrictions on government action conflict with federal law. Stylistic changes should be made to more appropriately make this initiative consistent with the existing Idaho Code. Adoption of this initiative would also increase the likelihood and quantity of litigation within this area.

The Honorable Ben Ysursa

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CERTIFICATION

I HEREBY CERTIFY that the enclosed measure has been reviewed for form, style, and matters of substantive import. The recommendations set forth above have been communicated to the Petitioner via a copy of this Certificate of Review, deposited in the U.S. Mail to Alana Grimm, 2817 E. St. James Ave., Hayden, Idaho 83835-7544.

Sincerely,

A handwritten signature in black ink, appearing to read "L. Wasden", written over a faint circular stamp.

LAWRENCE G. WASDEN
Attorney General

Analysis by:

BRIAN P. KANE

Deputy Attorney General