

MINUTES
SENATE LOCAL GOVERNMENT & TAXATION COMMITTEE

- DATE:** Tuesday, February 05, 2013
- TIME:** 3:00 P.M.
- PLACE:** Room WW53
- MEMBERS PRESENT:** Chairman Siddoway, Vice Chairman Rice, Senators Hill, McKenzie, Johnson, Vick, Bayer, Werk and Lacey
- ABSENT/ EXCUSED:**
- NOTE:** The sign-in sheet, testimonies and other related materials will be retained with the minutes in the committee's office until the end of the session and will then be located on file with the minutes in the Legislative Services Library.
- CONVENED:** **Chairman Siddoway** called the Local Government and Taxation Committee (Committee) meeting to order at 3:01 p.m.
- MINUTES:** **Senator Johnson** moved to approve the minutes from January 22, 2013 meeting. **Senator Vick** seconded the motion. The motion carried by **voice vote**.
- RS 21849** **Vice Chairman Rice** introduced **RS 21849**, a concurrent resolution stating findings of the legislature and rejecting certain rules of the Idaho Board of Tax Appeals. The proposal relates to the Pending Rules review from earlier in this session in which changes to Rule 63, Rule 65 and Rule 140.06 were rejected.
- MOTION:** **Vice Chairman Rice** moved to print **RS 21849**. **Senator Lacey** seconded the motion. The motion carried by **voice vote**.
- H 14** **Chairman Siddoway** invited Alan Dornfest of the Idaho State Tax Commission to the podium to introduce **H 14** relating to property taxation. **Mr. Dornfest** said the bill is designed to correct an ambiguity in current law that was passed in 2009. The statute prescribes the way to appraise Section 42 low income housing for property tax purposes. The ambiguous language may be misinterpreted to mean that expenses should be subtracted from net operating expenses. This would in effect double-subtract expenses, which was never intended and was not implemented in that fashion. He said instead, as called for in **H 14**, expenses are to be deducted from effective gross income to derive net operating income. This is what has been done and the law change codifies current practice and current interpretation.
- MOTION:** **Senator Johnson** moved to send **H 14** to the floor with a do pass recommendation. **Vice Chairman Rice** seconded the motion. The motion carried by **voice vote**.
- H 15** **Chairman Siddoway** invited Michael Chakarun, Tax Policy Manager of the Idaho State Tax Commission (Commission), to the podium to introduce **H 15**, relating to the sales and use tax to define the terms "primary" and "primarily" with respect to the use of tangible personal property. **Mr. Chakarun** said the word "primarily" is used about nine times in the sales tax act but is not defined. He said this causes confusion and uncertainty for taxpayers when they try to determine if tangible property is subject to sales tax when it is purchased or if it is exempt. The bill defines "primary" and "primarily" as: the predominant or greatest use of property. The goal is to develop a bright line test to determine the taxability of tangible personal property. Some taxpayers break down taxable uses into small components that are compared to one larger nontaxable use, and then conclude that primary use is nontaxable.

Mr. Chakarun gave an example: A forklift is used in a manufacturing plant. Thirty percent of the time, it is used in shipping, which is taxable. Thirty percent of the time it is used in the warehouse, which is taxable. Forty percent of the time it is used in the production area, which is 'not' taxable. Some taxpayers would conclude that since it is nontaxable forty percent of the time that the forklift would be exempt from tax. However, the bill requires the taxpayer combine all uses of the property into two categories: taxable use and nontaxable use, and the primary use is the greater of the two. In the example of the forklift, sixty percent of the use 'is' taxable, while forty percent is 'not' taxable. Therefore, the forklift is subject to sales tax. **Mr. Chakarun** added the fiscal effect is zero because the bill follows the Commission's interpretation of the statute.

MOTION: **Senator McKenzie** moved to send **H 15** to the floor with a do pass recommendation. **Vice Chairman Rice** seconded the motion. The motion carried by **voice vote**.

H 22 **Mr. Chakarun** described **H 22** as a taxpayer friendly bill. He said under current law, large employers who withhold \$240,000 per year or \$20,000 per month must remit employee withholding on a pay schedule that overlaps two calendar months. This results in a withholding fiscal year reporting year of January 16th of one year to January 15th of the following year. Because wage and withholding reporting for employees is on a calendar year basis to prepare W-2's, these employers must file a reconciliation form with the Commission to ensure proper amounts are reported on W-2's.

Mr. Chakarun said these reconciliations are difficult for taxpayers to prepare and time consuming for the Commission to review. He said those returns result in a 92 percent error rate, and discrepancies often take two years to correct and can result in the employer being subject to penalties. This proposal streamlines the process by aligning the current fiscal year system to a calendar year system. Employers would remit withholding between the first and fifteenth of the month by the twentieth of the month. Then employers would remit withholding from the sixteenth to the end of the month by the fifth of the following month. He said this change has businesses' support and there is no fiscal effect. **Mr. Chakarun** said the effective date is for withholding periods beginning after January 1, 2014 to allow the Commission and taxpayers time to develop rules prior to the effective date.

Vice Chairman Rice asked if there has been any investigation as to what the additional cost will be to businesses doing the calculations and payments twice a month instead of once a month. **Mr. Chakarun** replied the Commission contacted some 600 employers and there was positive response and no objections. He said it will get them out of the problems with reconciliation issues.

MOTION: **Senator Vick** moved to send **H 22** to the floor with a do pass recommendation. **Senator Werk** seconded the motion. The motion carried by **voice vote**.

H 23 **Mr. Chakarun** introduced **H 23**, relating to the taxation of beer. He said current law states that the Tax Commission has the duty to prescribe rules relating to the reporting of beer shipments into Idaho by out-of-state brewers and manufacturers, and reporting deliveries of beer into Idaho by carriers for hire or carriers owned or employed by out-of-state brewers and manufacturers of beer. He said the need to require reporting by these entities is no longer necessary. The Commission no longer requires permits by out-of-state brewers and manufacturers and can cross check beer shipments using other methods. The bill strikes the words "it shall be the Commission's duty" which gives the Commission the discretion to prescribe rules as needed, but not require them to do so. This allows that if industry practices change and the need for a rule arises, the Commission will have that authority. Other minor changes include changing "act" to "chapter" and "account" to "fund."

MOTION: **Senator Werk** moved to send **H 23** to the floor with a do pass recommendation. **Senator Johnson** seconded the motion. The motion carried by **voice vote**.

Chairman Siddoway asked the Committee who would be willing to carry these bills on the floor. Senator Werk will carry **H 23**. Senator Vick will carry **H 22**. Senator Johnson will carry **H 14**. Senator McKenzie will carry **H 15**.

S 1046 **Chairman Siddoway** invited Senator Guthrie to the podium to introduce **S 1046**, relating to Eminent Domain. **Senator Guthrie** said the bill seeks to amend Idaho Code § 7-701A to provide additional restrictions on the use of eminent domain. He said there are a few exemptions in Idaho Code already, and this would add "For trails, paths, greenways or other ways for walking, running, hiking, bicycling or equestrian use, unless adjacent to a highway, road or street."

Senator Guthrie offered some history on why this section exists in the first place and why it should be strengthened. He said as early as 1795 the United States Supreme Court called eminent domain a 'despotic power' which means tyrannical, dictatorial, repressive or cruel power. He cited the Berman v. Parker case of 1954, in which the Court ruled that eliminating blight is a legitimate use of eminent domain. **Senator Guthrie** said after that, the local government would see blight every time developers wanted to see a building. He said one of the most famous cases was the Kelo Decision when property was taken from landowners for upscale shopping, and to his knowledge, nothing has been built on that property yet. **Senator Guthrie** said on the heels of that decision, the Supreme Court did rule the states can use their statutes to provide greater protection against eminent domain abuse. He said it is his understanding that Idaho Code § 7-701A was in reaction to the Kelo case.

Senator Guthrie said the Committee may hear from opponents today that takings for trails and greenways or bike paths should be a decision left to the local entities, but as with the other efforts in 7-701A, the decision about when eminent domain is appropriate is a decision left to the states. He said the Attorney General confirms that.

Senator Guthrie cited an example of why it is important to modify the bill is these kinds of takings are being seen more and more across the country. He said he understood that the Idaho Association of Counties was going to submit written testimony against the bill and he said he finds that interesting because other counties across the nation are actually opposing these takings and voicing their concerns. In 2010 a group went into the Rowan County, North Carolina Commissioners seeking support of a fifteen county Carolina Thread Trail. The Commissioners looked at that and not only rejected the request for support, but also passed a resolution to limit the power of eminent domain for takings because they had seen other counties allowing that and they didn't agree with it. **Senator Guthrie** quoted from the testimony at the Rowan County hearing, saying it mirrors his beliefs: "I don't know of anyone I have talked to that is against the greenway itself. What we are against is the methods that can be used, and have been used across the state, in order to get the property necessary for that greenway."

Senator Guthrie said that is how he feels, that he is not against greenways or those kinds of recreational opportunities; it is just the methods of property acquisition that he disagrees with. The second quote is: "I've been the victim of eminent domain twice and let me tell you, it is an unfair process. Not only do the ordinances of Rowan County need to be changed and strengthened, but the eminent domain laws of North Carolina need to be changed." **Senator Guthrie** said legislation is being considered in other states, including nearby Utah. In 2008, Utah passed a law almost identical to **S 1046**.

Senator Guthrie said there are those who favor the ability to take property and they say the landowners are fairly compensated, as they will receive market value. He said he guesses that is how some rationalize that it is fair to take someone else's property. He said, "Let's talk about market value. Imagine you bought your property in 2004-2005 and paid plenty for it so you could have privacy. The market tanks in 2006, 2007, and 2008. Your property is taken and you get the market value in a down market, and now you have untold numbers of people with access through your property." **Senator Guthrie** said the playing field needs to be leveled. He said his message is, "Negotiate, not take." He said if people know they have to negotiate, when subdivisions are planned and city planning is done, they will incorporate those walking paths and greenways in subdivisions and they will require the developer to recognize the need for those kinds of things and it will be from a non-takings kind of atmosphere. He said this is 'not' an anti-greenway issue, it is a private property rights issue, which he cares deeply about.

In closing, **Senator Guthrie** quoted from the Idaho Constitution Article 1 Section 1, which reads: "All men are by nature free and equal, and have certain unalienable rights, among which are enjoying and defending life and liberty; acquiring, possessing and protecting property; pursuing happiness and securing safety." **Senator Guthrie** said **S 1046** aims to protect those private property rights as guaranteed in the Constitution, and he asked the Committee to send the bill to the floor with a do pass recommendation.

Senator Hill asked Senator Guthrie if there have been any specific instances in Idaho where eminent domain has been a problem or could be a problem. **Senator Guthrie** described a situation in Bannock County where there has been an effort to build a greenway along the Portsmouth River where they have talked openly about using eminent domain. He said there are about 28 property owners who don't want to sell and there has been significant pressure placed on those owners with eminent domain being considered as a tool. As for specific cases of where it 'has' been used, **Senator Guthrie** said he thinks it is rare to see documentation of these efforts, but the fact of the matter is, it is used as a threat, so people tend to yield before the process actually occurs. So, he said, the threat is very real.

Senator Hill commented that the Bannock County situation has been going on for 15 years or more without any eminent domain powers being used, and asked if threats have affected landowners' negotiations. **Senator Guthrie** replied yes, that is correct. He said this bill is really looking to the future where there is likely to be issues with takings and loss of private property rights. He said rather than wait until there are many takings happening, it is appropriate to look at what is going on now. He said the Utah legislation was prompted by takings that occurred for a trail. There is also a South Carolina case where some government entities and people started to rise up and say this is not appropriate. **Senator Guthrie** said this bill tries to preempt the issue before it gets out of hand. If it is a level playing field, it will be willing buyer, willing seller, and developers will have to plan trails and paths in their subdivision plans.

Senator Werk asked Senator Guthrie to describe what the issues have been over the past fifteen years for the 28 property owners in Pocatello. **Senator Guthrie** said the greenway was built over a number of years and they began in areas where they could get property more easily, whether purchased or donated. Their ambitions were focused on the areas where they could build. Then they started in places where they could not build and got to the end of the line, and now they are seeking to connect those ends through the middle. He said the reason eminent domain has not been used before now is because they were busy building where they could build.

Senator Guthrie said now they have hit a road block and they need these properties to complete it. Landowners have said they just don't want to sell. The properties lay in five, ten and twenty acre tracts where the property goes into the river. If that property along the river is taken from the landowners, their quiet enjoyment or their opportunity to privately enjoy the river, will be gone. Senator Guthrie said the reason eminent domain has entered the discussion the past few years is the developers have hit that road block.

Senator Werk asked how long the stalemate has existed. **Senator Guthrie** answered at least six or eight years, as it was an issue for discussion when Senator Guthrie was a county commissioner. He said he does not want to pin this legislation solely on the situation in Bannock County, because this is really about private property rights. He said the Bannock County trail developers have had ample time to exercise eminent domain, so whether they actually will or intend to, he doesn't know. **Senator Guthrie** said this is about seeing a need for something to protect private property rights in the future.

Senator Werk said when he sees this body trying to protect private property rights associated with specific elements, such as trails, paths, greenways and such, that as a cyclist, he starts to feel picked on. He said it seems Senator Guthrie is valuing a road more than a pathway for pedestrian use, because this legislation concentrates on that. **Senator Werk** asked why he should feel more peaceful about why Senator Guthrie objects to bicycle use of a pathway as opposed to building a road along the Portsmouth River and using eminent domain to put a road in there instead of just a path.

Senator Guthrie answered the reason the language was left in the legislation about being adjacent to a roadway is that it is sometimes necessary to yield for key infrastructure. He said when building gas lines or power lines along a road, they try to do their best to avoid takings, and when takings have to occur, he said he thinks "we all recognize it's for the greater good of public infrastructure." **Senator Guthrie** said if Idaho Transportation Department (ITD) comes in and says they need to take this land for a roadway, it didn't make sense to him to say they couldn't also have an extra five or ten feet for bike paths, because it would be in conjunction with a project that is appropriate for takings if necessary.

Senator Werk said what he just heard is that Senator Guthrie believes that roadways are key infrastructure, so the ability to drive is key infrastructure and serves the greater good, but is Senator Guthrie indicating in the entire state of Idaho, that having a walking path or a biking path or other trail does not serve the greater good, as it is not a key piece of infrastructure. **Senator Guthrie** said he believes trails as described in this legislation do not rise to the level of public infrastructure importance as do roads. He said, "With that said, that doesn't mean I don't think they aren't important, and the question is, do you believe that private property rights are more important than property being taken so someone can do recreation activities?" He said those are important but can be incorporated in other areas where consent is given.

Senator Werk said he assumed if he was inclined to send this legislation to the amending order to include roads in the same category of non-key infrastructure and not allow eminent domain for a road, that Senator Guthrie would not be amenable to that kind of motion. **Senator Guthrie** replied that assumption is a fair one, and he wouldn't take the Committee's time to read Article 1 Section 14 about right of eminent domain for public infrastructure, and no, it is not an amendment he could support.

Senator Lacey said he had been involved in the Pocatello issue for about 25 years, and they have used the 'threat' of eminent domain, but haven't used the process yet because they don't have the support of local authorities. He commented there may be times when a trail or walking path would be beneficial to the whole, such as a pathway to a school for children. He asked if it would be possible to put the term "recreational" or "for the safety of children" in this bill to make an amendment acceptable. **Senator Guthrie** said he would consider any amendments that the majority wanted to look at, but he said this might be getting down to over-thinking it a little bit. He said he appreciates the thought as he hadn't thought of it that way.

Senator Lacey commented that in his community, kids walk along the greenway to their charter school to avoid the main street, so he would like to include an exception in this bill for these circumstances. **Senator Guthrie** said he doesn't want to go down too many tangents, but it makes sense to him. He said it also would make sense that a private property owner would yield to that for that use. He said, "It still gets down to taking something from somebody, and that's a pretty big issue for me."

Chairman Siddoway noted many people were present to testify with about half an hour left in the Committee meeting and he would call on each person in order of sign-in. He asked guests to please keep their comments short and concise.

TESTIMONY:

Speaking in opposition to **S 1046** were **Heather Wheeler**, Executive Director of Community Transportation Association of Idaho (CTAI) (See Attachment 1); **Rodney Ashby**, City Planner with City of Nampa (See Attachment 2); **Lynda Clark**, Grant Writer with City of Nampa (See Attachment 3), **Elaine Clegg** of Idaho Smart Growth/City of Boise (See Attachment 4); **Cynthia Gibson**, Executive Director of Idaho Pedestrian and Bicycle Alliance (Alliance); **Jay Gibbons** of City of Meridian (See Attachment 6); **John Reuter** of Conservation Voters for Idaho; **John Evans**, President of Association of Idaho Cities/Garden City; **Jonathan Parker** of City of Caldwell; **Justin Ruen** of Association of Idaho Cities; and, **Jim Pace** representing himself. Unable to attend the meeting but submitting written testimony in opposition were Ken Harward of Association of Idaho Cities (See Attachment 7); Kerry Ellis with Idaho Association of Counties (See Attachment 8); and, William F Gigray, III with City of Caldwell Pathways and Bike Routes Committee (See Attachment 9.)

Speaking in favor of **S 1046** were **Dennis Tanikuni** of the Idaho Farm Bureau (See Attachment 5); and, **John Eaton** of the Idaho Association of Commerce and Industry (IACI).

First to the podium was Ms. Wheeler of CTAI. **Ms. Wheeler** said the mission of the CTAI is to advocate for and empower individuals and communities to develop transportation systems needed for economic vitality and quality of life. She said although rare, in some instances the use of eminent domain assists a community in that mission, and communities should have eminent domain available as a tool to develop the transportation infrastructure their community leaders and citizens desire. **Ms. Wheeler** said the CTAI opposes **S 1046** because paths are essential for the quality of life, they attract new business and tourists, and they help people get from point A to point B. She said there are safety reasons for having such facilities away from roads and highways. **Ms. Wheeler** said the eminent domain process exists to fulfill a mandate under the state and federal constitutions and property owners receive just compensation, as well as severance damages compensation for impacts on their ability to use the remainder of the property. She said this strikes the right balance by protecting the rights of property owners while ensuring that taxpayers are not cheated in the process. **Ms. Wheeler** said local officials should be trusted to make the right decisions for their communities, adding that local elected officials are reluctant to use eminent domain as they prefer to reach negotiated agreement.

Vice Chairman Rice asked to understand where Ms. Wheeler draws the line on eminent domain. He asked if the appropriate limit on people's property rights is "whatever the community wants as long as they compensate for the value of the property they take." **Ms. Wheeler** answered eminent domain is there for the greater good of the community, and if that community feels that is an infrastructure need they would like to have, then she believes that's why it is in the law.

Mr. Ashby said the City of Nampa has developed a master plan for the city with significant public input. He said the steering committee identified gaps in the pathway network. He said it is difficult to determine whether a greenway is for recreational purposes or transportation purposes. He said the federal agency from which the city receives funding has directed the city to develop more "multi-modal transportation options." **Mr. Ashby** said the city needs to consider the needs of all people, including under-served populations, including children under fifteen who do not drive but use pathways to get where they need to go. He said the existing legislation does quite a bit to protect private property rights. He said the City of Nampa has not used eminent domain for pathway condemnation, although it has used it for roadways.

Senator Werk asked Mr. Ashby if he would say pathways are critical infrastructure in certain circumstances. **Mr. Ashby** answered absolutely. He said their surveys show one of the gaps Nampa citizens would like to see filled is the "Stoddard Corridor" which would be a major connection to the downtown area where people could benefit with access to jobs and education.

Ms. Clark said it is important to look at trails and pathways as an essential part of a broader transportation network and not just recreational areas. She said the current practice in transportation development is multi-modal transportation, including biking, walking, transit and vehicular transportation. She said the city has been awarded through grant funding more than \$1.2 million for this purpose. There are almost 13 miles of multi-use public pathways in Nampa, and she said they keep seeking funding to fill gaps in the trail system, including connecting them to transit stops and retail centers, schools or community events. **Ms. Clark** said it makes no sense to single out pathways from being exempt from eminent domain procedures. She said unless there is an obvious abuse of power, why should states limit the tools available to local government to respond to the people of the community.

Vice Chairman Rice asked Ms. Clark to describe where she thinks the line is that an individual's private property rights are more important than the majority in their neighborhood, or vice versa. **Ms. Clark** replied that can only be answered in a specific situation. She believes in private property rights and has the experience of protecting those as a member of city council, but she said they also have to serve the greater good. She said eminent domain is a tool in the toolbox and should remain available.

Ms. Clegg said she contracts with the Idaho Transportation Department (ITD) to provide technical assistance on planning infrastructure and developing local policy for safe walking and biking routes for school children in Idaho. She is also a Boise City Council member. She pointed out that it has been a user group in Pocatello who advocated for the use of eminent domain on the greenway, but the local government has consistently refused to use it. **Ms. Clegg** said in her estimation, the legislation in **S 1046** is preemptive and sometimes it is wise to be preemptive, but she said not in this case. She said there is no evidence across the state of Idaho that local governments have misused eminent domain, and if there was evidence of misuse, she thinks the resolution would be to fix the process, not prohibit the use.

Ms. Clegg listed the communities she has worked in where they are looking for a safe and efficient way for kids to walk to school, which would not be recreational paths, but rather transportation facilities. She said the benefits include saving taxpayers' money by reducing bussing costs and gas emissions, promoting air quality and better health for students by reducing childhood early-onset obesity, all of which have a "public purpose." She said the state of Idaho's constitution makes clear that the preservation of the health of the citizens is one of the primary purposes for which eminent domain can be used. She said in many of the areas she has worked, paths have been developed that do not follow a roadway, and they often are a safer, more direct route. **Ms. Clegg** said it is a local and case-specific decision. She said Senator Hill had asked where is the line, and she said it is not only public purpose with support, but all other alternatives must be exhausted, then there is appropriate use of eminent domain.

Ms. Clegg said the Boise Greenbelt was created fifty years ago to increase property values, and the image of the river changed dramatically from unsightly and unpleasant with trash and animal waste to now being one of the premier locations in the city. Eminent domain was used only once in the history of the Greenbelt. Only one property owner refused to negotiate and she said he was fairly compensated. She said that eminent domain is to prevent one property owner from unjustly holding up a whole project. **Ms. Clegg** said the Greenbelt was envisioned as a recreational facility, but a report due out next week will show one location on the Greenbelt was used for transportation purposes 91,000 times. She asked the Committee to hold the bill.

Mr. Tanikuni came to the podium to share his support of **S 1046**. He said the Idaho Farm Bureau Federation (IFBF) is Idaho's largest general agriculture organization, with approximately 68,500 member families. He said of those, 14,500 are agricultural producers, so the IFBF represents about 58 percent of Idaho's farms in some way. He said private property rights, and possessing and utilizing private property, both real and personal, are very important to IFBF members. Their Policy 186 says, "...we oppose the use of eminent domain for recreational purposes, for private economic development or to expand the land holding of wildlife agencies..." He said the properties in question are either productive lands or lands enjoyed by the owner. He said an important point is that lands to be utilized for the trail system are not economically distressed nor are they a threat to human safety. **Mr. Tanakuni** said he thinks it is interesting that there is a stringent standard applied to cities that are going to provide a basic human need of shelter, but there is no standard for a recreational site.

Mr. Tanakuni said IFBF has nothing against bike or walking paths, and in fact has cyclists and triathletes among their members. He said he does acknowledge that eminent domain is a powerful government tool and he thinks it should be limited to purposes essential to the greater good of the general public. Therefore, he said, IFBF does not think the taking of an individual's private property for a bike path or hiking trail through eminent domain meets that objective. He said often the 'threat' of eminent domain is used to bring people to the bargaining table, and that is why this bill should become law. He asked the Committee to support **S 1046** and send it to the floor with a do pass recommendation.

Ms. Gibson stood next to express her opposition to **S 1046**. She said her organization represents those who have the right to choose, and also those who are not able to choose, alternative transportation. She said 29.8 percent of the American population is a non driver, by choice or not by choice, and she wants them to be safe. Non drivers are either too old or too young, disabled, have lost their right to drive, or perhaps choose not to drive.

Ms. Gibson said this includes Idahoans who walk or bike on trails, paths and greenways. She said the Alliance supports family values for those who choose to walk or bike their children to school safely, and this is often done by paths, greenways and trails. She said 83 percent of Americans want to maintain or increase funding to build sidewalks, bike lanes and bike paths.

Ms. Gibson said Idaho communities must have the tools they need to get the land they need, including the use of eminent domain. She said walking and biking are legitimate forms of transportation and infrastructure is needed for this type of mobility. She said maybe people don't want to walk or bike every day and maybe not for every trip, but they do want that option. She said this bill specifically addresses recreational use of trails, but she also sees community members using these trails for transportation not just for recreation. She said wouldn't it make more sense to keep cyclists and walkers away from busy roadways by maximizing the tools communities can use to acquire this land to build pathways on areas not close to motorized vehicles. She said that as a motorist, she would prefer to not have cyclists and walkers close to her motor vehicle, and as a cyclist, she would prefer to have distance between herself and motor vehicles.

Vice Chairman Rice asked what percentage of the population she thinks it takes before someone has the right to decide to walk across their neighbor's property.

Ms. Gibson said that is a really good question. She said she's a property owner here in Idaho and she doesn't mind people walking across her property, but she knows there are those who do. She added she believes that local governments should be able to make that decision as far as taking her private property to use it for the common good of society. **Ms. Gibson** said she cannot answer Vice Chairman's Rice question specifically with a percentage, but what she does know is that as a society they should be encouraging community members to be able to use whatever form of transportation they choose to use, and she believes local government should have all the tools to be able to do that. She said her understanding is eminent domain is not used a lot but it's a tool local governments should have and should continue to have.

Mr. Gibbons approached the podium. He said as the pathways project manager for the City of Meridian, he is here to speak against **S 1046**. He noted he is a member of the IBBF, and he opposes this bill. He said they have a pathways master plan adopted since 2007 that is a network of connected pathways throughout the city. **Mr. Gibbons** said the City of Meridian has not used eminent domain to this date, and if he does his job right, he won't have to. The pathway network uses easements instead of property ownership. He said his answer to Vice Chairman Rice's question to Ms. Gibson is that it requires the property owners' permission. **Mr. Gibbons** said alternative transportation is huge these days, especially with gas prices. He said eminent domain should be used as a last resort, but it is a tool that should be in the tool box to be used only if absolutely necessary.

Vice Chairman Rice asked at what point would Mr. Gibbons consider it absolutely necessary to take someone's property to use for a walking path. **Mr. Gibbons** replied with an example. He said the pathway master plan has a Rails Trail that follows the existing rail corridor through the city from Nampa to Boise. He said they have discussed the option of partnering with other cities and the rail entities to pursue that. The issue is if they cannot work out a solution incorporating the pathway inside the existing rail corridor right of way, they would have to go across the property just north of the right of way, which would require permission and easements from upwards of one hundred landowners, some of which are residential lots and others are undeveloped parcels.

Mr. Gibbons said if he has a six-mile pathway with 92 pieces of property whose owners are on board, and have only one or two who absolutely won't agree despite negotiations, eventually it would lead them down the road to the use of eminent domain. He said his job is to sit at the table and negotiate and so far he has been successful.

Mr. Reuter said he was on the Sandpoint City Council where he had to vehemently argue against the use of eminent domain for a greenway project along their lake. He said instead they entered negotiations and made fair deals with the property owners. He said he still opposes this bill. He said eminent domain should be a last resort after they've tried everything else, and there still has to be a 'high enough public good' to justify the use of eminent domain. He said Idahoans have been careful with this power and have not used it in an abusive way. He said he wanted to tackle the idea of a road versus a pedestrian connection. He said he personally believes a pedestrian connection that allows kids to get to school safely is just as important and a public good as the road he drives to work.

Mr. Evans, Mayor of Garden City, approached the podium. He posed the question: around the whole state, are greenbelts the same or the uses or definitions of how these facilities are used the same, and he answered no. The Boise Greenbelt has striped lines and speed limit signs, because it is a transportation corridor. He said he wanted to emphasize the hesitance to use eminent domain for this purpose. He said he consulted with Ken Harward of Association of Idaho Cities, and they concluded there have been only two uses of eminent domain in Idaho for a pathway or greenway purpose. **Mr. Evans** cited the most recent use in which private property was needed as a landing point of a pedestrian bridge to connect the north and south side of the Boise River. The property was held in a homeowners association and the president of the association, who happened to be an attorney, recommended that the city condemn the property, and it was stipulated by both sides and is closed, recorded and done. He said the considerations are different in rural and urban areas. **Mr. Evans** said his final comment is that he is a member if the IFBF and he opposes this bill.

Mr. Parker spoke next in opposition to **S 1046**. He said specific to the City of Caldwell, many of the city safe routes to school and pedestrian bicycle safety planning involve detached pathways away from traffic influences. He said the City of Caldwell believes it is critical to prevent this exemption. The Indian Creek project did not use eminent domain in the development process. He said this is a local issue and this legislation sets policy for the entire state, so this one-size-fits-all approach is not appropriate, and it is a solution in search of a problem.

Mr. Ruen approached the podium and said he believes the other speakers have covered the main points, which are also summarized in the letter from the Association of Idaho Cities. (See Attachment 7.)

Next to the podium is **Mr. Pace**, who said he is a citizen who believes bicycle pathways 'are' just as important as roads, and they 'are' key infrastructure. He said just as eminent domain is used to support other key infrastructure projects that give water, power, natural gas and a way to get a vehicle there. He said the bike path he uses to get to work every day is a key piece of public infrastructure. They're not just recreation.

Mr. Eaton approached the podium. He said he represented the Idaho Association of Realtors (Association). He said this issue came up with basically the exact language and passed in the House of Representatives in 2011. He said the Association did support it then. He said they will be reviewing it at their meeting tomorrow and he expects they will support it again. He said eminent domain is a very important property rights issue, and first and foremost they care about property rights.

Mr. Eaton said the one thing they see most often is "this is not something we use very often, it is our last resort." He said it's not that they 'use' it, but rather the 'threat' that they 'can' use it that gets the action done. He said he asks for a do pass recommendation.

Vice Chairman Rice asked if property values could be affected for an area in the city that had long-standing discussions of eminent domain hanging over it. **Mr. Eaton** said yes, that would affect values in a negative way.

Senator Werk asked if Mr. Eaton was offering his do pass recommendation as himself or as representing his organization. **Mr. Eaton** said his organization has not taken a position yet, but it did take a position last time on the same language, as far as he could remember, and he presumed it would again. **Senator Werk** asked if the organization's legislative committee composed of the same people as last time. **Mr. Eaton** said no, it is not.

Senator Guthrie returned to the podium for final comments. He said he bought some land a few years ago and paid more for it than it was worth for what he's doing with it. Part of the reason is so he can have a guarantee of privacy, so in his opinion, there is no amount of money that is just compensation. This bill helps protect the property owner. **Senator Guthrie** said a common theme throughout the testimony is that local governments need this tool, and he said something needs to be done to set the tone differently about how property is acquired in the future for these kinds of activities.

Senator Guthrie shared some ideas on what other communities do instead of concentrating on eminent domain. He cited 'Access Yes' which is a program facilitated by Idaho Fish and Game, in which a property owner gives permission for hunters to go through their land to reach government land; Landowner Appreciation Program through Fish and Game, where landowners are willing to let people hunt on certain acres of land, and they get to put in for a controlled hunt tag; conservancy groups are purchasing land all around the United States so they can do with that land what they want; hunting groups buy up tracts of land and charge membership so they can go hunt and have access to the land. He said these are all examples of a level playing field with a willing seller and willing buyer.

Senator Guthrie next addressed the issues of safety. He said he wants to go on a trip and the brakes on his car are not very good, so "would you lend me your new Mercedes so I can feel safer on my trip." He said in regards to recreation, "would you lend me your Harley for the weekend so I can go have a good time on the weekend." He said that is what is being asked of private property owners, to let others go through their land for recreation and activities. He said it's going from pristine property where one has access to their streams and rivers and quiet enjoyment, and now 91,000 people might be travelling through their property.

Senator Guthrie commented that much has been said about eminent domain not being used that much. He said eleven years ago, a young man came in to his store and robbed them by putting a gun in his sister's face. He didn't fire the gun, so technically he didn't use it, but he 'threatened' to use it, and because he did, they gave him what he wanted and he went on his way. **Senator Guthrie** said one doesn't have to actually 'use' eminent domain to use it. He said the 'threat' is there, and when that card is in the deck, there cannot be a level playing field or fair negotiations. **Senator Guthrie** said he appreciated the Committee's favorable consideration of a do pass recommendation for **S 1046**.

MOTION:

Senator Bayer moved to send **S 1046** to the floor with a do pass recommendation. **Vice Chairman Rice** seconded the motion.

In discussion, **Senator Bayer** said he thinks there has been much valuable dialog in this debate and he respects the positions expressed. He said he had deliberations on this same issue in the House Local Government Committee in the past. He said the key points were negotiations in good faith mean parties have balanced understanding and as Senator Guthrie mentioned, it is not pushing a nuclear button, but having 'access' to eminent domain that changes the dynamics of that transaction between that power and property rights. **Senator Bayer** said having that tool in the tool box leads to justification, which in this case is metrics, and the way the language is phrased for the metrics, they don't rise to the unilateral power of eminent domain. He said Senator Guthrie has in good faith tried to accommodate the practicalities with the language in the legislation. **Senator Bayer** said he appreciates the communities and their efforts in their infrastructure, and it seems like communities are giving great case examples of collaboration on a voluntary basis. He said he thinks having that tool requires a very measured approach in metrics and he sees where they apply in infrastructure. He said he doesn't question a project's merits, just that it doesn't rise to the occasion of eminent domain.

Vice Chairman Rice said he thinks that sometimes the needs of the communities or a neighbor are important. He said he had a situation where the city needed to put in new storm drain and their easement was across a neighbor's property, directly under his new shed. He said he gave the city an easement for free so they could avoid needing to move or rebuild the shed. He said he did that because he thought it was the right thing to do for his neighbor. It was his property so he could do with it what he wanted. **Vice Chairman Rice** said it is inappropriate to say just because the neighbors would really enjoy someone's property for their recreation that they have a right to take it. It is an inappropriate use of the power of government. It distorts the relationship of the citizen to their government. He said in our nation, that relationship is not supposed to work that way. If there is a 'real serious' need, that is when there is a proper use of a power like eminent domain, where the individual's private property rights are trumped. Trails and bike paths and horseback riding paths are just not at that level. **Vice Chairman Rice** said he thinks putting a limit on and limiting the ability to even 'threaten' under these circumstances is an appropriate limitation to place.

Senator Hill said he will be opposing the motion. He said over the years a lot of people have come to him saying they're not happy with their city council or county commissioner, so they come find a legislator and ask them to pass a law to what they can or cannot do. He said that's how local officials' authority is chipped away. He said he trusts local officials to make decisions and do their jobs. He said he believes in property rights, but he also believes in local control. **Senator Hill** said there may be an unintended consequence to this legislation, as he has had clients over the years who have requested that the city or county 'condemn' their property and take it by eminent domain because there is preferential tax treatment for that. When one sells a piece of property, they pay taxes on the gain. If it is condemned, it becomes voluntary conversion under Section 1033 of the Internal Revenue Code and they have two to three years to replace that property with similar property and avoid paying tax on that. That option to taxpayers would be completely taken away with this pathway circumstance.

Senator Lacey said he would confess he is a cyclist and uses pathways and roadways, but he also believes in personal property rights. He said he agrees that possibly the use of trails for recreation may not be a proper use of eminent domain. He said the pathway or byway may be beneficial to the community as a whole, whether it be safety of children or as a main corridor for travelling back and forth to work. He asked if **S 1046** could be sent to the amending order to insert the word "recreation" into the legislation. Upon clarification of the process, **Senator Lacey** made a substitute motion.

SUBSTITUTE MOTION: **Senator Lacey** moved that **S 1046** be sent to the amending order to insert the word "recreation" or phrase "recreational use." **Senator Werk** seconded the motion.

Senator Vick asked for clarification that if the substitute motion fails, the Committee returns to the original motion. **Chairman Siddoway** said that is correct.

ROLL CALL VOTE: **Chairman Siddoway** called for a roll call vote on **S 1046**. On the substitute motion, **Chairman Siddoway, Vice Chairman Rice, and Senators Hill, McKenzie, Vick and Bayer** voted nay. **Senators Werk and Lacey** voted aye. Senator Johnson was absent excused. The vote was 6 nay, 2 aye, and the substitute motion failed.

ORIGINAL MOTION: **Chairman Siddoway** returned the Committee to the original motion, in which Senator Bayer moved to send **S 1046** to the floor with a do pass recommendation. The motion was seconded by Vice Chairman Rice.

In discussion, **Senator Vick** commented on how the argument for trusting local government was made over and over again. He said this hasn't happened in here in Idaho, but in the Kelo decision, the local governments did not protect the homeowners. Those homeowners were kicked out of their houses, businesses were moved and the development never took place and now that property is a dump. He said their city council didn't protect them, neither did their state legislature, nor the Supreme Court. **Senator Vick** said he believes that when there is an opportunity to protect private property rights, they need to use that opportunity, and that is why he will support this motion.

Chairman Siddoway welcomed back Senator Johnson, who was excused temporarily to attend another meeting, and informed him of the status of the vote.

ROLL CALL VOTE: **Chairman Siddoway** called for a roll call vote on **S 1046**. On the original motion, **Chairman Siddoway, Vice Chairman Rice, and Senators Vick and Bayer** voted aye. **Senators Hill, McKenzie, Johnson, Werk and Lacey** voted nay. The vote was 5 nay, 4 aye, and the motion failed.

ADJOURNED: There being no further business, **Chairman Siddoway** adjourned the meeting at 4:52 p.m.

Senator Siddoway
Chairman

Christy Stansell
Secretary