MINUTES

SENATE LOCAL GOVERNMENT & TAXATION COMMITTEE

DATE: Wednesday, March 06, 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 meeting of the Local Government and Taxation Committee (Committee) meeting to order at 3:00 p.m.

H 184

Chairman Siddoway invited Ken McClure, Attorney with Givens Pursley, to the podium to present **H 184**, relating to income tax and net operating losses (NOLs, NOL). **Mr. McClure** said there is a problem with Idaho law in the way it deals with NOLs. He said there have been more businesses that have had the privilege of having net operating losses, which is when a for-profit company did not turn a profit, allowing the business to deduct the amount of the loss against income in other years. It can be carried back or carried forward, but only if a specific box is checked on the tax return. If the box is not checked to carry the NOL 'forward', it must be carried 'back'; it can only be carried back two years. **Mr. McClure** said unfortunately, many people, or their tax preparer, forget to check that box and will lose the deduction if they did not have enough income to cover it in the previous two years.

Mr. McClure said taxpayers should be able to use the NOL however they are entitled to use it, and that is what this bill provides, without any need to check any box. He said this simplifies the tax code. **Mr. McClure** said he brought two practicing accountants with him to testify if the Committee has specific technical questions.

Senator Hill asked about why a section is being stricken in the first part of the bill and then reinserted later. **Mr. McClure** said this bill was drafted in conjunction with the Idaho State Tax Commission (Commission), and that is the way the Commission wanted it. He said it is their language and is easier for them to administer that way.

Chairman Siddoway asked if someone misses that one small box on the five page form, does that mean they are not eligible. **Mr. McClure** said under current law, if someone didn't check the box, they may not 'ever' fix it. It is an 'incurable' choice. It may never be fixed to be carried forward for the next twenty years, as they would be entitled to otherwise. If the box is checked, they 'must' carry it 'forward' and it may not be carried back. He said the choice the Committee could make, as Idaho's tax lawmakers, would be to check the box to carry it forward, but **Mr. McClure** said that doesn't seem to make sense either. He said this bill provides that when someone has an NOL and did not take advantage of an amended return, it can be carried forward or back in a future year. It gives the taxpayer flexibility to do whatever is in the taxpayer's best interest without creating an artificial requirement that many have stumbled on in the past.

Vice Chairman Rice asked if the "'check-the-box-thing" was part of a rule rather than statute. **Mr. McClure** said it is actually 'in' statute on line 35, "at the election of the taxpayer," and the election is made by checking the box. If an election is not made at that time, under current law, taxpayers are constrained to carry it 'back' only. **Mr. McClure** called it an "odd requirement." He said in speaking with accountant Matthew Grow, he asked, "I want to make it clear. Can I amend my return and go back and check the box," and Mr. Grow said, "No, you can't do that. Once your return is filed, it's an irrevocable election." **Mr. McClure** said that is why they are trying to remove the irrevocable election.

Senator Hill said besides the point of that 'one box' being irrevocable, a taxpayer can amend almost anything else, and that makes it a practical problem for practitioners and taxpayers, especially for businesses posting a loss. Often they will wait until the last minute to get that filed, and then they say, "Well, after tax season is over, come in and let's talk about if we want to carry this back or let's sit down and see what the options are for carrying this forward." **Senator Hill** said the current law forces taxpayers to make that decision at that moment in time when that tax return is filed, and sometimes they don't have the time or resources to take everything into consideration. **Senator Hill** said he thinks this is a really good idea. **Mr. McClure** said thank you.

Mr. McClure added that if a taxpayer is forced to carry the NOL 'back' because they didn't check the box, it can only be carried back for the prior 'two' years, and they may not have enough income in those prior two years to absorb the deduction. If it is allowed to be carried forward, hopefully there will be a time in the coming twenty years that the NOL can be used. He said, "When it bites you, it bites in a bad way and it's unnecessary."

MOTION: **Vice Chairman Rice** moved to send **H 184** to the floor with a **do pass** recommendation. **Senator Werk** seconded the motion. Motion carried by **voice vote**.

H 187 **Chairman Siddoway** invited Roger Batt, Executive Director of the Idaho Heartland Coalition, to the podium to present **H 187**, relating to use tax exemptions on free food samples. **Mr. Batt** said the Idaho Heartland Coalition has a strong membership base from several sectors of agriculture across the state. He said they focus on working for regulatory reform issues as they pertain to the agricultural industry.

Mr. Batt said last year, the industry presented legislation H 489 to exempt free samples of beverages, which included wine and beer, from the payment of use tax. He said the legislation was in response to a 2011 letter from the Idaho State Tax Commission. The letter mandated Idaho businesses to go back three years into their records and pay use tax of six percent on all free samples that were given to potential customers. Both the House and Senate passed H 489 and it became law in 2012.

Mr. Batt said during the presentation of that bill last year, the same question was asked several times, about why free food samples were not also included in that bill. He said their response was they tried, but the Tax Commission would not allow it because it was uncertain what the fiscal impact might be.

Mr. Batt said **H 187** is the legislation that the Tax Commission and the industry drafted together and are in agreement upon. It amends Idaho Code § 63-3621 to do the following: 1) It quantifies a tasting of wine or beer as a maximum serving allowed by state or federal law, which was forgotten in last year's legislation. He said current Idaho statute allows a maximum of two ounces of wine and federal law allows a maximum of eight ounces of beer to be served as a tasting. 2) It exempts tastings of food from the payment of use taxes.

He gave some examples of situations that would now become exempt from paying use tax: a vendor at a farmer's market selling a product and giving visitors a taste; Chobani Yogurt handing out samples; Costco providing tastings of food to shoppers on a Saturday afternoon shopping trip; the local fruit ranch operator cutting slices of apples and sharing with visitors to eat. 3) It defines a tasting of a non-alcoholic beverage or food as a "sample from a unit available for sale at the tasting location."

Mr. Batt said the fiscal impact from this legislation is unknown. He said he asked the Tax Commission if it could be quantified and was told it could not be. He said that is why the fiscal impact is listed as "de minimus" which is the same fiscal impact placed on the beverage bill last year. **Mr. Batt** explained there is also an emergency clause in the legislation to allow the exemption to apply upon the signature of the Governor, as retailers will continue to hand out tastings of food to consumers before July 1.

Mr. Batt pointed out it is also believed that the collection of use tax from tastings of food is difficult to administrate and can be very onerous on business owners who may, at some point, be asked to go back years into their records and pay use taxes on free samples given to potential customers. He said he believes **H 187** sets good tax policy for the state of Idaho and business owners.

MOTION: **Senator Hill** moved to send **H 187** to the floor with a **do pass** recommendation. **Senator Bayer** seconded the motion. Motion carried by **voice vote**. Senator Bayer will carry the bill on the floor.

S 1138 **Chairman Siddoway** invited Senator Tippets to the podium to introduce **S 1138**, relating to the Local Planning Act to provide clear decision-making criteria and a process of review to ensure protection of private property rights and due process. **Senator Tippets** said he was approached several months ago by a group of residents in Teton County. They expressed to him their frustrations with the local land use planning process in their county. He said one of their primary concerns was that in some areas of the county, it is already very difficult to get approval for building or development, and multiple new overlay zones have been proposed that would add to the problem. He gave some examples of the overlay zones: big game migration corridors and seasonal range; water bird migration, foraging habitat; water bird breeding, migration, foraging, wintering habitat; songbird/raptor breeding and wintering habitat; sharp-tailed grouse breeding and wintering habitat; priority wetland habitat; and, perennial and seasonal trout habitat.

Senator Tippets said landowners and developers expressed they weren't sure what they needed to do to comply with zoning requirements. He said some had gone to great expense over an extended period of time only to find they were denied permits to build, and they were left wondering exactly what they would have to do to be allowed to build – if that were even possible. **Senator Tippets** said some suggested changes to the zoning laws were considered by some to go too far, limiting the ability of cities and counties to enact appropriate zoning measures.

Senator Tippets said interested parties joined together to find a solution, noting that he doesn't take credit for the work they did, but he thinks it is a great resolution. He said with input from cities, counties and landowner representatives, the group reached consensus on the legislation in **S 1138**. The bill does not seek to strip local government of its planning authority; rather, it codifies some best practices related to local land use planning, which will be described by Jerry Mason momentarily.

Senator Tippets noted the bill doesn't include everything some county residents had wanted, but he said they believe it will still be a significant help to them. He said city and county representatives support the legislation because it makes some important improvements to the language in the code dealing with zoning ordinances.

He said he is not aware of any opposition to this bill. He noted that Dennis Tanikuni is home sick but specifically asked him to mention that the Idaho Farm Bureau supports this bill. **Senator Tippets** deferred to Jerry Mason to continue the presentation.

Jerry Mason with the Association of Idaho Cities approached the podium. **Mr. Mason** said the group he represents believes this bill is an opportunity to add some best practices to the Local Land Use Planning Act in a way that benefits property owners, permit applicants, and neighbors, making the process more functional for everyone. He said he would walk the Committee through the bill, **S 1138**.

Mr. Mason said the first section is in response to concerns that overlay zoning districts were being applied in some instances without clear enough standards. This bill adds language that requires the zoning ordinance contain "clear and objective standards" for evaluating applications. He said that is a basic principle for any regulation. He said when establishing requirements for a permit, it should be clear what an applicant needs to do to obtain it. **Mr. Mason** said the second part of the amendment to in Idaho Code § 67-6511 emphasizes that overlay district standards must "not constitute a regulatory taking" pursuant to Idaho or federal law.

Mr. Mason said the next section of the bill, an amendment to Idaho Code § 67-6522, is in response to property owners' concerns that some jurisdictions established rules that covered the same subject matter as the existing state or federal rules or health districts that applied state adopted rules. He said local jurisdictions would have another set of ordinance requirements that, once the permit is obtained from a state agency or the health district, the builder still would 'not' necessarily be good to go, because they may face 'different' requirements that may conflict with those state requirements. He said the bill adds the language that says, "in no event shall the governing board by local ordinance enact provisions that abrogate the statutory authority of a public health district, state and/or federal agency." He said obviously federal and state law is superior to local law.

Mr. Mason said section three is about a clear statement of approval standards and the criteria for approving or rejecting a permit application. It requires that the approval standards need to be set forth in express terms in the ordinance. He said it cannot be "I like it or I don't like it." The question must be if it complies with the objective ordinance requirements. He said in some instances, they cannot be objective, as when a decision is based on accordance with a comprehensive plan, which is sometimes a judgment call. **Mr. Mason** said the compliance needs and statutory requirements that the permit issuer requires must be addressed in the written decision. If they are not addressed in writing, the decision is subject to being overturned.

Mr. Mason said one subject that has been repeatedly addressed by permit applicants is that once a permit is approved in final decision, any affected person claiming they are aggrieved can file an appeal. The appeal can go to the district court and potentially the supreme court, which can take 18 to 30 months. While that appeal is proceeding, the property owner is in limbo. The reconsideration provision in this bill is designed to say if someone has a concern about the decision made in a certain matter, it should be addressed to the local decision makers who are closest to the matter and made the decision regarding it. He said now, in order to bring an appeal to the courts, one must first point out the alleged error to the people who first made the decision.

Mr. Mason said some people fear this could make the process take longer, but he said his experience in speaking with attorneys on both sides is they would like to see the issues clarified and decided "as quickly and locally as possible." He said **S 1138** provides that within 14 days of the final decision, they have to specifically identify the basis for claiming the decision is improper and the decision makers have a maximum of 60 days from the date of the request for reconsideration to evaluate the grounds stated and either affirm, modify or reverse their decision. He said if the decision makers affirm their decision, that can be done in as few as three to five days.

If they decide that the request has merit, the local government can reopen the matter and have another hearing and make a final determination within a maximum of 60 days. **Mr. Mason** said that is an effort to try to keep the decision making local and prompt, and within the jurisdiction in which the issues arise, rather than in the supreme court hundreds of miles away.

Mr. Mason said there still may be other issues that have not been fixed in this bill, but the goal of this legislation is to address the need for clear decision making points in ordinances; written decisions; and effective, time-efficient, cost-efficient resolution of problems at the 'local' level.

Vice Chairman Rice asked if the judicial review is de novo or appellate. **Mr. Mason** answered that it is appellate. The record is compiled and forwarded to the district court. **Vice Chairman Rice** asked if this poses a burden for unsophisticated landowners who represent themselves and don't initially identify a problem with the decision and raise a different issue than they should have. That landowner then contacts an attorney to appeal to district court. He asked in a case like this, would their right to appeal be waived in this language.

Mr. Mason said yes, as with anyone who does not raise a valid objection in the appropriate time, that would be the case. He said the current statute only provides 28 days, and all it takes is the cost of a complaint to be filed and a matter is locked into the courts until the matter is settled. **Mr. Mason** said the intent of the bill is to require that if errors are made, they need to be identified promptly.

TESTIMONY: **Chairman Siddoway** invited Roy Molton, attorney from Driggs, to the podium. **Mr. Molton** said he has been practicing law in land use planning for 30 years. He said what initiated the attempt to amend the Local Land Use Planning Act was a redraft of the comprehensive plan that created overlay districts for wildlife management. He said given his experience with the administration of conditional use permits, he was extremely worried the process would be hopelessly subjective.

Mr. Molton said this bill didn't end up being what he would like to see, but it is helpful, because it requires local governments, whether city or county, to come up with a list of do's and don'ts so applicants can objectively determine what will need to be done to file the application before they file it. He said he served a term on the Fish and Game Commission, and it disturbs him that local government has been allowed to get into resource and wildlife management. He suggested, based on his experience, a committee should be assigned to come up with criteria for the overlay districts, which can be onerous. He said it is better to be affirmed and known than subject to an arbitrary process of applying, "only to have every Tom, Dick and Harry say what they think should be restricting that application." **Mr. Molton** said even though this bill is not everything he'd like, he still highly encourages a do pass recommendation.

Vice Chairman Rice asked Mr. Molton to share the top two or three specific weaknesses he sees in this bill. **Mr. Molton** said the Local Planning Act grants all the authority to local government to impose regulations that manage property owners' property so long as there is any economic value left, even if it is not profitable. He said there may be dry grazing ground that is essentially worthless and isn't profitable, and the owner may wonder why paying taxes on it even justifies owning it, but it still meets the regulations for management.

He said the better answer is yes, he would fundamentally alter the Local Planning Act itself so it allows local government to regulate in the areas of health, safety and nuisance. He said when local government gets into the business of "the common good," there is no end to it. He said they are only protected by the elected officials in place at that time. **Mr. Molton** said, "Let me suggest to you that a person living on a postage stamp in his house has a very different view than if he's a significant landowner." He said the legislature has responded to the Local Planning Act with the Right to Farm Bill that protects farming, but there are other areas that aren't protected in the business of land ownership.

Senator McKenzie asked if this bill is creating a standing for an organization or person who wanted to oppose the use of a piece of land. He said the bill provides that an "affected" person has the right to appeal the process. He gave an example, suggesting if he gets a permit to use his land in a certain way, and some organization wants to prevent that type of use, or any use on that particular land, and that organization considers itself "affected" persons, does this bill change whether or not they have standing to appeal the decision and make him go through the process.

Mr. Molton answered he does not think it changes the group who has standing to appeal. He said it might reiterate it, but doesn't create a new category. He said it is plenty broad in the planning act who is an interested party and has sufficient interest to appeal.

Senator McKenzie said the bill says if one wants a decision on a request for reconsideration, a written response shall be provided to the applicant or affected persons within 60 days of receipt of the request for reconsideration. He said it says a decision shall not be deemed final for purposes of judicial review until the process required has been followed. **Senator McKenzie** said in other statutes he has seen the language, "either upon completion of the process or the expiration of the 60 days." He asked what happens if there is not a written response within 60 days, if the intent is that they would then have a chance to appeal, or must they wait until a decision comes back in order to start the appeal time frame.

Mr. Molton said he believes the way it is written, one has 28 days in which to appeal the final decision of the board. He said it is possibly a 60 day period, but as Mr. Mason said, it doesn't have to take that long. **Mr. Molton** said Senator McKenzie's concern is legitimate, because one of his concerns in representing applicants is that the process can drag on for a long time, and this potentially adds another 60 days to the process. He said it does not add meaningfully to the overall time it takes to process an application and deal with whatever appeals may come from that.

Senator McKenzie asked if the 60 days have passed, and there is no written response, does the affected party have the right to appeal at that time, or do they still have to wait for the written decision on the reconsideration. **Mr. Molton** said an applicant has 28 days after a final decision, so it presumes a final decision already. It just gives them an additional process in which they can ask them to reconsider.

Senator McKenzie restated his question again. He said when a motion for reconsideration is presented, it sets a time frame to get back a response, which is within 60 days, and the bill says a decision is not final for purposes for judicial review until the process required in this bill has been followed. **Senator McKenzie** said his question is: if those 60 days have passed and the written decision response to the request for reconsideration is not issued within that timeframe, does the party then have the right to seek judicial review or do they have to 'wait' for the written response. **Mr. Molton** said there may be others with a different opinion, but he thinks they can file the appeal immediately after the passage of the 60 days, but at least within 28 days.

Senator McKenzie said typically if one has to exhaust their administrative appeals, this bill is saying a decision is not final for purposes of judicial review until the process required in the subsection has been followed. He said it suggests to him that one has to get the 'written response' before they can go to the court for judicial review. He said he is not certain if he is reading that correctly and invites anyone who might know to help clarify.

Vice Chairman Rice said he has seen a number of these and they would 'not' be able to appeal until they have a written decision, and they would have to bring a writ to 'force' them to issue a written decision. He said that is a flaw in the language.

Chairman Siddoway invited Meagan Leatherman, Ada County Director of Development Services, to the podium. **Ms. Leatherman** said the Ada County Board of Commissioners is in favor of **S 1138**, as is the Idaho Association of Counties. She said they appreciate law that clarifies expectations and sets a level playing field for everyone. She said land use planning gets blamed for inhibiting business and slowing down growth and some say it is useless, but she said when it is used appropriately and consistently, it is a key component in communities that flourish. She said when it comes to overlay districts, in Ada County, there are overlays for airport influence areas and flood plains, and planners find the overlays to be beneficial.

Chairman Siddoway said many people do have concerns about overlays, in that, for example, Teton County has different overlays than Ada County. He asked in planning Ada County overlay maps, if the reasons and goals of the overlays are well-defined, so a resolution can be reached if there is a conflict; or, does someone just arbitrarily draw a line and say that's the overlay. **Ms. Leatherman** answered, no, every overlay district has a purpose statement and associative statements with it. She said they would not make any changes to ordinances to comply with this bill, and they already have reconsideration in another section of their ordinance, as well.

Chairman Siddoway asked if a project were denied in Ada County because it conflicts with something in an overlay, is there specific detail included in the notice as to why the project was rejected, so that the applicant may come in and offer mitigation in order for the project to move forward. **Ms. Leatherman** said yes, they are very detailed in their responses and findings in a denial. She said they try to work in advance to go through codes and standards with an applicant so they don't have a denial, but if there is a denial, they have details that tie back to the standards and purpose.

Chairman Siddoway asked if someone came in to the planning and zoning department with a proposed project, would the department have an initial response to say this won't work in this area so don't even try; or, would they be given tentative go-ahead, only to start the process and keep building to where there is so much money in the project that they can't stop, but they can't afford to go ahead either, as has been the concern in Mr. Molton's area. **Ms. Leatherman** said that is why it is important to have clear standards up front and stay consistent throughout the process, so the project developer knows what the rules and process will be.

Ms. Leatherman addressed Chairman Siddoway's question about the planning and zoning commission, saying that if someone was doing work in an overlay district, they would know in advance and the standards would be described before a project even got to planning and zoning. She said that is beneficial for builders and developers so they can plan time frames and budgets. She said when people don't know, it gets foggy and that's what causes problems.

Senator Johnson asked the sponsor for a definition of "regulatory taking." **Mr. Mason** said it is a phrase introduced into judicial language in the 1920s by a case called *Pennsylvania Coal Co. v Mahon*. He said it was a suit brought by an owner of mineral rights. The state of Pennsylvania had imposed requirements that when anthracite is mined under a surface in Pennsylvania, one needs to periodically leave a pillar of coal to support the surface.

He said the owner of those mineral rights sued Pennsylvania saying the state had taken the value of the coal in that pillar, meaning that the owner's property rights were absolute and should be allowed to let the house or business above sink in if it collapsed. He said the language in that decision noted that a regulation becomes a "taking" when it goes "too far." "Too far" has been the subject of debate for decades since the ruling. **Mr. Mason** said the United States Supreme Court ruled several times that matter becomes a "taking" when it removes all economic value from land, as Mr. Molton described earlier. **Mr. Mason** cited another example of property owners in the Tahoe Basin who were denied development rights for 27 years. He said they thought that would be the case to change the law, but the Supreme Court still upheld it as a balancing of public interest and private interest, saying if there was a reason for the regulation, they would uphold it. **Mr. Mason** said "too far" is specific to each individual case.

Senator Johnson asked if it is possible that a standard in one part of the state would differ from standards in another part of the state, meaning is it possible to have a "taking" in one part and not the other. **Mr. Mason** said it is a 'legal' standard, respecting a viable use, and even then there are circumstances when no use is allowed. He said one place is in a flood plain, not in the fringe, but a place where a stream floods with velocity. Someone may own part of that streamside area, but the government can prohibit them from building there because of damage that could happen if the structure gets washed downstream or for putting emergency rescue workers at risk for having to come there. **Mr. Mason** said as far as state or regional differences, the standard will be established by the Idaho Supreme Court, and he doesn't see it having any great differences in different parts of the state.

Senator McKenzie said he has been thinking over the appeal provision and it looks like the language says the decision-making body can foreclose someone's rights to judicial appeal simply by taking no action on a request for reconsideration. He asked if the sponsor would comment on the idea of having the language say "a decision shall be deemed final for purposes of judicial review on the date of the written decision regarding reconsideration 'or' the expiration of sixty days, whichever occurs first." He said then it would go on to say, "The twenty-eight day time frame for seeking judicial review is tolled until the date of the written decision regarding reconsideration 'or' the expiration of sixty days, whichever occurs first." He said that way, if the deciding body just doesn't act on the motion for reconsideration, one doesn't have to wait on their right for judicial appeal. It would start on the expiration of those sixty days when they were supposed to have responded.

Senator Tippets said he thinks that seems to be a reasonable, and frankly positive, change. He said he would be happy to see that change. **Senator McKenzie** said he prefers not to send things to the amending order, but he feels this would be a positive change and in line with the intent of this bill to provide clarity and protection for property owners and affected persons.

MOTION: **Senator McKenzie** moved to send **S 1138** to the amending order with the intent to make the change to include additional language of "or the expiration of sixty days, whichever comes first." **Vice Chairman Rice** seconded the motion. Motion carried by **voice vote**.

ADJOURNED: There being no further business, **Chairman Siddoway** adjourned the meeting at 4:03 p.m.

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Senator Siddoway
Chairman

_____
Christy Stansell
Secretary