STATE OF IDAHO

OFFICE OF THE ATTORNEY GENERAL

LAWRENCE G. WASDEN

March 3, 2014

Representative Mike Moyle
Majority Leader
Idaho House of Representatives

Hand Delivered

Re: Senate Bill 1277aa

Dear Representative Moyle:

You asked this office to analyze Senate Bill 1277aa, which has four objectives. First, it would remove the provision limiting exchanges to "similar lands," as well as associated language requiring exchanges to aid in the consolidation, control, management or use of state lands. Second, it would prohibit exchanges for lands that have as their primary value buildings or other structures, unless such a building is used by a public entity for public purposes. Third, it would provide that cottage sites may be exchanged for lands of equal value. Fourth, it would define the term "exchange" to include transactions in which state lands are conveyed to a party other than the party from whom lands are received, which party than may immediately sell the former state lands to other parties if such sale is "expressly provided for in the exchange agreement."

1. Removal of the "similar lands" requirement.

Senate Bill 1277aa would eliminate the statutory requirement that endowment lands can only be exchanged for "similar lands," as well as the requirement that the exchange "consolidate state lands or aid the state in the control and management or use of state lands." Idaho Code § 58-138.

The proposed elimination of the similar lands and consolidation requirements is consistent with the provisions of Article IX, § 8, which provides that the legislature may authorize the State Board of Land Commissioners (Land Board) to exchange endowment lands "on an equal value basis for other lands under agreement with the United States, local units of government, corporations, companies, individuals, or combinations thereof."

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2. Prohibiting Exchanges of Lands for Buildings.

Senate Bill 1277aa would prohibit the exchange of endowment lands for "lands that have as their primary value buildings or other structures, unless said buildings or other structures are continually used by a public entity for public purposes."

The Statement of Purpose cites as authority for such restrictions Article IX, § 7, which provides that the Land Board "shall have the direction, control and disposition of the public lands of the state, under such regulations as may be prescribed by law." Article IX, § 7 is a questionable basis for the proposed prohibition on the exchange of state lands for buildings; by its plain terms the Legislature may regulate the Land Board's direction, control, and disposition of endowment lands, but such regulations cannot direct, control, or dispose of endowment lands—those powers are reserved to the Land Board. This principle was recognized in *Rogers v. Hawley*, 19 Idaho 751, 760, 115 P. 687, 690 (1911), in which the Court, in reviewing § 7, stated: "Now, it must be at once apparent that if [legislation] is a 'regulation' of the powers and duties of the board, it is valid and constitutional, but if it goes beyond the scope of regulating the action of the board in the discharge of its constitutional duties, it is void."

While the *Hawley* decision did not define the limits of legislative authority to regulate the activities of the Land Board, the Court has addressed similar language in Article IX, § 10, providing the regents of the University of Idaho with "control and direction of all the funds of, and appropriations to, the university, under such regulations as may be prescribed by law." The Court concluded that:

> "Regulate" does not mean to prohibit, or destroy or change, but rather signifies "to adjust by rule, method or established mode; to direct by rule or restriction"; "to reduce to order, method or uniformity". It is the antonym of "disorder, upset, disarrange".
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> The foregoing definitions all carry the implication that the word "regulations" used in this section of the constitution refers more to the manner, method, procedural and orderly conduct of business than to mandatory or prohibitive legislation.

Dreps v. Board of Regents of University of Idaho, 65 Idaho 88, 96, 39 P.2d 467, 471 (1943) (citations omitted). The Court went on to hold that "[s]uch regulations must not be of a character to interfere essentially with the constitutional discretion of the board, under the authority granted by the Constitution." *Id.*

The principles established in the *Dreps* decision apply with equal force to the Land Board. While the Legislature may prescribe "methods and rules for the conduct of [Board] business," 65 Idaho at 96, 39 P.2d at 471, it can neither require the Board to take certain management actions, prohibit the Board from taking certain management actions, or otherwise interfere with the discretion vested in the Land Board. Put another way, if a statute undertakes to make a land management decision that is reserved to the Land Board's discretion, it is void.

If a reviewing court were to apply the *Dreps* principles to Senate Bill 1277aa, the prohibition on acquiring lands whose primary value lies in buildings may not stand, since such a prohibition does not control the manner, method, or procedure of the Board, but rather appears to embody the Legislature's business judgment as to acceptable investments for the endowment trust. As such, it delves into areas that the Constitution reserves to the Board's business judgment: "The land business of the state placed in the hands of the State Board of Land Commissioners ought to be conducted on business principles so as to subserve the best interests of the people of the state." *Barber Lumber Co. v. Gifford*, 25 Idaho 654, 669, 139 P. 557, 562 (1914).

A reviewing court, however, may not apply the *Dreps* principles to Senate Bill 1277aa if it concludes that it does not affect the Board's self-executing constitutional powers. Article IX, § 8 does not authorize the Land Board to exchange endowment lands; rather, it provides that the "legislature shall have power to authorize the state board of land commissioners to exchange granted or acquired lands of the state . . . ." Nothing in Article IX, § 8 requires the Legislature to authorize exchanges: it is left to legislative discretion whether to grant or withhold such authority. As such, the Board's power to exchange endowment lands is derived entirely from Idaho Code § 58-138. Because the Legislature is empowered by Article IX, § 8 to grant or withhold the power to exchange, a reviewing court could conclude that Senate Bill 1277aa is not an impermissible intrusion upon the Land Board's discretionary powers, but instead implements the Legislature's authority to withhold from its grant of exchange authority the power to exchange endowment lands for lands whose primary value is derived from buildings or other structures.

In short, the issue of legislative authority to enact Senate Bill 1277aa may come down to the question of whether the reviewing court concludes that it is a proper exercise of the Legislature's authority to partially authorize exchanges or whether it is an unconstitutional attempt to exceed the Legislature's regulatory authority and interfere with the Board's discretion to determine the types of property that, in the Board's business judgment, best serve the interests of the beneficiaries.

Even if a reviewing court were to conclude that Senate Bill 1277aa can be upheld as an exercise of the Legislature's authority to only partially authorize exchanges, the court would still review the provision to determine if it otherwise complies with Article IX, § 8's mandate to manage state lands as a trust whose sole aim is to maximize long term financial returns for beneficiaries. Facially, an intent to maximize financial returns for beneficiaries is not apparent, since the legislation does not prohibit exchanges for buildings generally, only for those buildings not "continually used by a public entity for a public purpose." In other words, on its face, the prohibition applies only to buildings held for the purpose of leasing space to private entities. Nothing in the bill or the statement of purpose explains how financial returns to beneficiaries will be maximized by prohibiting acquisition of buildings leased to private entities while allowing acquisition of buildings leased to public entities. Absent clarification, the most likely reason for such a prohibition is to prevent competition with private commercial leasing

businesses. If a reviewing court were to reach such a conclusion, it may result in a finding that the legislation is unconstitutional, for the Legislature is prohibited from directing management of endowment lands to benefit private business. *See Idaho Watersheds Project v. State Bd. of Land Comm'rs*, 133 Idaho 64, 67, 982 P.2d 367, 370 (1999) (examining committee minutes to determine that Legislature impermissibly took into consideration the stability of the livestock industry in enacting bill that discouraged leasing to non-grazing interests).

3. Cottage Site Exchanges

Senate Bill 1277aa, after prohibiting the exchange of endowment lands for buildings leased to private entities, goes on to provide: "Land that the state owns known as 'cottage sites' can be exchanged for lands of equal value, public or private."

The "cottage sites" provision creates ambiguity, because it is unclear whether the provision is intended to be an exception to the prohibition on exchanges for lands whose primary value is derived from buildings. The cottage sites provision is mere surplusage unless it functions as an exception to the prohibition, because the exchange of cottage sites is already authorized under the preceding general exchange provision, which applies to "any of the state lands" held by the state. "It is well established that we are required to give effect to every word, clause and sentence of a statute . . . and the construction of a statute should be adopted which does not deprive provisions of the statute of their meaning." *George W. Watkins Family v. Messenger*, 118 Idaho 537, 540, 797 P.2d 1385, 1388 (1990); *Bradbury v. Idaho Judicial Council*, 149 Idaho 107, 116, 233 P.2d 38, 47 (2009) ("[T]his Court "will not construe a statute in a way which makes mere surplusage of provisions included therein") (quoting *Sweitzer v. Dean*, 118 Idaho 568, 57172, 798 P.2d 27, 3031 (1990)). Further confusing the issue is the Statement of Purpose, which provides:

> The legislation also seeks to clarify that lands known as 'cottage sites' can be exchanged for land of equal value regardless of whether the land exchanged for is used for cottage sites, ranching, forestry, or other permitted uses of state lands. In other words the mandate of the Constitution is exchange for equal value, period.

Statement of Purpose, Senate Bill 1277aa. The Statement of Purpose suggests that for cottage site exchanges, the only restriction is that the lands be of equal value, which would allow the exchange of cottage sites for commercial buildings. If so, then Senate Bill 1277aa embodies the Legislature's determination that certain endowment assets only be exchanged for lands or buildings occupied by public tenants, while other endowment assets can be exchanged for buildings occupied by private tenants. Such detailed land management directives may increase the risk of a court finding Senate Bill 1277aa to be an unconstitutional intrusion into the Board's discretionary business judgment regarding the types of assets that should be obtained in an exchange, rather than a mere withholding of a portion of the exchange authority granted by the Legislature.

4. Defining "exchange."

Senate Bill 1277aa would define the term "exchange," as used in § 58-138, to mean:

> [A] transaction in which the state conveys the land to another party or parties pursuant to an agreement that predates the exchange, in which transaction a party conveying land to the state may be different from a party to whom the state conveyed land. The parties dealing with the state in such an exchange transaction shall not be prohibited from purchasing or selling assets related to accomplishing the transaction before, simultaneously or after said transaction, provided that all such prior and simultaneous purchases and sales are expressly provided for in the exchange agreement.

The legislature's authority to define the terms used in a specific statute is well-recognized. *State v. Hartzell*, 305 P.3d 551, 554 (Idaho App. 2013). Such definitions "do not apply for all purposes and in all contexts but generally only establish what they mean where they appear in that same act." *Id.* Thus, as a general principle the legislature can define the meaning of "exchange" as used in the context of § 58-138.

That conclusion does not, however, end the inquiry, because Article IX, § 8 of the Idaho Constitutions cabins the otherwise plenary power of the Legislature as applied to the management of state endowment lands. In relevant part, Article IX, § 8 provides:

> The legislature shall, at the earliest practicable period, provide by law that the general grants of land made by congress to the state shall be judiciously located and carefully preserved and held in trust, subject to disposal at public auction for the use and benefit of the respective object for which said grants of land were made, and the legislature . . . shall have power to authorize the state board of land commissioners to exchange granted or acquired lands of the state on an equal value basis for other lands under agreement with the United States, local units of government, corporations, companies, individuals, or combinations thereof.

Under the terms of Article IX, § 8, an "exchange" is the only transaction that the Legislature can authorize aside from dispositions at public auction. The meaning of "exchange" as used in Article IX, § 8 cannot be altered legislatively: the Idaho Supreme Court has held that the interpretation of constitutional terms is a power reserved solely to the judiciary. *Idaho Schools for Equal Educational Opportunity v. Evans*, 123 Idaho 573, 583, 850 P.2d 724, 734 (1993). The Court has rejected past legislative attempts to circumvent constitutional limitations through statutory re-interpretation of constitutional terms. For example, in *State v. Village of Garden City*, 74 Idaho 513, 521-22, 265 P.2d 328, 331-32 (1953), the Court reviewed a legislative attempt to avoid the then-existing constitutional prohibitions on lotteries by defining slot machines as "gaming but not lottery." The Court held that the definitions, while "adroitly and cleverly drawn," did not alter the scope of the constitutional prohibition, because the "Legislature cannot amend or repeal the constitution, or any part of it, by legislative act, nor interpret it." *Id.*

In short, the breadth of the definition of "exchange" in Senate Bill 1127 does not override any limitations implicit in the term "exchange" as used in Article IX, § 8. A reviewing court

would interpret the meaning of "exchange" in Article IX by "ascertain[ing] the intent of the drafters by reading the words as written, employing their natural and ordinary meaning, and construing them to fulfill the intent of the drafters." *Sweeney v. Otter*, 119 Idaho 135, 139, 804 P.2d 308, 312 (1990). "In construing the constitution, the primary object is to determine the intent of the framers." Such intent "comes from the words approved by the drafters and later adopted by the people. The presumption is that words used in a constitution are to be given the natural and popular meaning in which they are usually understood by the people who adopted them." *Taylor v. State*, 62 Idaho 212, 217, 109 P.2d 879, 880 (1941).

A detailed analysis has not been performed to determine the popular meaning of "exchange" at the time that the exchange authorization was added to Article IX, § 8 in 1935, but a preliminary analysis suggests that it would not have been understood to include three-party exchanges with the middle-man holding the property only for immediate resale at a previously-fixed price. In 1935, most courts held that an "exchange" occurred "where property is transferred for property [with] no price being set upon either piece," but a sale occurred where the value of the exchanged properties was primarily "measured in money terms." *Herring Motor Co. v. Aetna Trust & Savings Co.*, 154 N.E. 29, 31-32 (Ind. App. 1926); *see also Postal Tel. Cable Co. v. Tonopah & T.R.R. Co.*, 248 U.S. 471, 474 (1919) (the term exchange "carries with it no implication of reduction to money as a common denominator"); *Ross v. Kenwood Inv. Co.*, 131 P. 649, 653 (Wash. 1913) (where exchanged property "was dealt with therein as having a fixed and agreed value [the transaction] has generally been regarded in law as a sale rather than a mere exchange"); *Grace v. McDowell*, 120 P. 413, 415 (Or. 1912) (if "there is a fixed price at which the things are to be exchanged . . . then the transaction is a sale"). A number of courts still hold to this restrictive view of "exchange." *See State ex rel. King v. Lyons*, 248 P.3d 878, 893-95 (N.M. 2011) ("[e]xchanges of land based on the monetary value of each parcel may be considered equivalent to a sale where the appraised consideration is not cash, but land"). When an exchange is transacted solely for the purpose of immediate resale, a court may conclude that the monetary value of the land is the primary determinant of the viability of the transaction. In short, the case law suggests that in 1935, a transaction is which a third party acquires the land for the sole purpose of immediate resale at a set price would not have been viewed as an exchange.

An additional factor suggesting that the proposed definition of "exchange" includes transactions not understood to be exchanges in 1935 is presented by the fact that in facilitated exchanges the third party merely acts as a middle-man for immediate resale to a pre-determined party at a pre-determined price. Such a transaction, absent the middleman, would clearly violate the public auction requirement of Article IX, § 8. While the Department would only participate in the first transaction by acquiring land for land, and would not participate in the subsequent sale of the exchanged lands, a reviewing court may not turn a blind eye to the fact that the exchange is structured to facilitate the purchase of the endowment lands cottage sites at a set price, rather than by public auction. If a court concludes that the exchange would not occur "but for" the subsequent or simultaneous sale to the lessees, then the court may conclude that the primary reason for the exchange is to facilitate such sale. If the primary purpose of the transaction, viewed as a whole, is to sell the endowment lands, then a court may conclude that it

is subject to the "disposal at public auction" requirement of Article IX, § 8. In short, a court may conclude that the Land Board cannot accomplish through a third party what it is prohibited from doing directly.

Sincerely,

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