



OFFICE OF THE CITY ATTORNEY

MAYOR: Lauren McLean | BOISE CITY ATTORNEY: Jayme Sullivan

October 26, 2021

Lynda Lowry
Director of Finance and Administration
Office of the Boise City Clerk
City Hall

VIA HAND DELIVERY

Re: Certificate of Review
Proposed Initiative to add new section to Title 7, Chapter 1 of Boise City Code Requiring a Vote to Sell, Trade, Gift, or Change any Park or Land

Dear Director Lowry:

On September 28, 2021, the Office of the Boise City Clerk received a proposed initiative petition from John Gannon and Boise Working Together (“Petitioners”) seeking to add a new section of Boise City Code Title 7, Chapter 1, “to require a vote by the people of Boise to approve any sale, trade, gift, or change in use of any park, or land, property or easement of any kind donated or purchased with the proceeds of the open space voter approved levies of 2001, 2015, and 2017” (“Initiative”). The Initiative petition was submitted with 28 signatures. The Ada County Election’s Office subsequently verified 24 of those signatures, satisfying the number of signatures required by Idaho Code § 34-1804(1) to transmit the Initiative to the City Attorney for review.

Pursuant to Idaho Code §§ 34-1801B(5) and 34-1809(1)(a), this Office reviewed the Initiative and prepared the following recommendations concerning the Initiative. Given the strict statutory timeframe for review, this review only identifies areas of concern and does not provide in-depth legal analysis. This Office reviewed the Initiative only for matters of form, style, and substantive import and makes recommendations for revisions or alterations as may be deemed necessary and appropriate. Idaho Code § 34-1809(1)(a). These recommendations do not offer an opinion on any policy or fiscal issues that may be raised by the Initiative. These recommendations are advisory only, and the Petitioners may accept or reject them in whole or in part. Idaho Code § 34-1809(1)(b).

I. Ballot Title

If Petitioners file the Initiative following the issuance of this Certificate of Review, this Office will prepare short and long ballot titles. Idaho Code §§ 34-1801B(5) and 34-1809(2). The short ballot title will contain a distinctive title not exceeding twenty words by which the measure is commonly referred, and the long ballot title will not exceed two hundred words and will include the purpose of the measure. Both ballot titles will be true and impartial statements of the purpose of the Initiative and will not be argumentative or create prejudice either for or against the Initiative. Idaho Code §§ 34-1809(2)(d) and (e). The Petitioners may submit proposed ballot titles to this Office for consideration, provided they are consistent with the standards set forth in Idaho Code §§ 34-1809(2)(d) and (e).

II. Matters of Form and Style

Upon reviewing the Initiative for form and style pursuant to Idaho Code § 34-1809(1), this Office recommends the following revisions:

First, the numbering and format should be consistent with other sections of Boise City Code. Currently, only two sections have headers, Statement of Purpose and Definitions, and the numbering is incorrect. Each section should have a header and should be numbered and organized as follows: 7-1-2 Disposition of Certain Interests in Real Property, 7-1-2A Statement of Purpose, 7-1-2B Definitions, 7-1-2C [Header], 7-1-2D [Header], and 7-1-2E [Header]. In addition, Boise City Code does not use parentheses and numbered subsections in its definitions sections. Instead, it lists the definitions in alphabetical order. *See, e.g.*, Boise City Code § 7-7A-1. The definitions section in the Initiative should be organized in the same manner, listing the definitions in the following order: Change in Use, Land Area, Open Space, and Park. *See* Legislative Drafting Manual, created by the Idaho Legislative Services Office, p. 15 (“Legislative Drafting Manual”) [LEGISLATION DRAFTING MANUAL \(idaho.gov\)](http://idaho.gov).

Second, nouns and other references should be used consistently throughout the Initiative. *See* Legislative Drafting Manual, p. 18. In this Initiative, the City of Boise is referenced in five different ways: (1) City of Boise City (capitalized City), (2) city of Boise City (lower case city), (3) the City, (4) the City of Boise, and (5) Boise. The Petitioner should use the term “the City” throughout the Initiative to be consistent within its own section and other sections of Boise City Code. In addition, qualified electors are referenced in two different ways: (1) qualified electors, and (2) voters. The Petitioner should use the term “qualified electors” throughout the Initiative, as that is the more accurate term. *See* Idaho Code §§ 34-104 and 50-402(c). And finally, “change in use” is sometimes referenced as “change the use.” References should be changed to “change in use” to be consistent with the proposed definition.

Third, the definition of “Parks” in proposed section 7-1-2A of the Initiative is inconsistent with other definitions in Boise City Code. Boise City Code defines “Parks” in two locations. The Parks and Recreation Commission section of Boise City Code § 2-3-1 provides the following definition for the parks under its jurisdiction:

PARK: Any and all lands, buildings, facilities, reserves and open space, sports complexes, swimming pool grounds, golf courses, game fields, cemeteries, community forestry, playgrounds, skate board parks, BMX facilities, zoological and/or botanical gardens, trails and other general or special use outdoor places, including the Boise River Greenbelt, that are owned, operated or maintained by Boise City or specifically included in the inventory of park properties at the Office of the Director.

And the Public Ways and Property section of Boise City Code § 7-7A-1 provides the following definition for its parks:

PARK: Any and all lands, buildings, facilities, reserves and open space, sports complexes, swimming pool grounds, golf courses, game fields, cemeteries, playgrounds, skate board parks, BMX facilities, zoological and/or botanical gardens, trails and other general or special use outdoor places, including the Boise River Greenbelt, that are owned, operated or maintained by Boise City or specifically in the inventory of park properties at the Office of the Director.

The only difference between these two definitions is the addition of “community forestry” in Boise City Code § 2-3-1. The Development Code section of Boise City Code also has another definition of “Parks,



Recreation and Open Space,” Boise City Code § 11-012-02.1.O, however this section is not directly related to City-owned parks and only concerns the Development Code. The Initiative’s proposed definition of Parks is different from the definitions in the other parks-related sections of Boise City Code. The different definition may lead to confusion regarding the proposed section of Boise City Code and how it relates to the other sections. The Petitioner should use the same definition in the Initiative as set forth in Boise City Code §§ 2-3-1 or 7-7A-1 to provide for consistent and accurate application of Boise City Code.

Furthermore, the definition of “Parks” in proposed section 7-1-2A is much broader than the description of the Initiative. The Initiative states that it seeks to require a vote for the sale, trade, gift, or change in use of any park or land “purchased with the proceeds of the open space voter approved levies of 2001, 2015 and 2017.” The proposed definition of “Parks” is not limited to lands “purchased with the proceeds of the open space voter approved levies of 2001, 2015 and 2017.” The Initiative’s description is therefore misleading, as it would require a vote for the sale, trade, gift, or change in use of lands not purchased with the proceeds of those levies. The Initiative’s description should be reworded to match the language contained in the Initiative, or vice versa.

Fourth, the Initiative uses capitalized words and terms in an inconsistent manner. The Initiative capitalizes defined terms in some locations and not others. Further, the Initiative capitalizes “Primary election” but not “general election” in proposed section 7-1-2C. The Initiative should be consistent with its use of capitalized words.

III. Summary of the Initiative and Matters of Substantive Import

A. Summary of the Initiative

The Initiative is self-described as:

An Initiative Ordinance to Require a Vote by the People of Boise to Approve any Sale, Trade, Gift or Change in Use of any Park, or Land, Property or Easement of any Kind Donated or Purchased with the Proceeds of the Open Space Voter Approved Levies of 2001, 2015, and 2017[.]

The Initiative seeks to add a new section to Boise City Code that would purport to govern the “disposition of certain interests in real property” and would be designated as section 7-1-2. The proposed section sets forth a statement of purpose, definitions, voting requirements and information, and exemptions.

Proposed section 7-1-2 lists a subsection A with the header “statement of purpose.” In summary, this subsection requires a majority vote of qualified electors of the City to approve any disposition by sale, exchange, gift, or change in use of any real property held by the City and designated as a park, open space, golf course, cemetery, or recreational facility. There are no other subsections in proposed section 7-1-2.

Proposed section 7-1-2A has the header “definitions” and includes definitions of the following terms: change in use, park, open space, and land area. “Change in use” is defined, in part, in an ambiguous manner as any change in use of any park or open space “to a use that does not fit within the definition of a Park or Open Space except in the case of a cemetery or golf courses which shall not be within this definition.” “Park” is defined, in part, to include open space and “property operated or maintained by the city of Boise City or in the inventory of park properties maintained in the Office of the Director of the Department of Parks & Recreation or at any other location under the control of the City of Boise” and specifically includes golf courses and cemeteries. With regard to cemeteries and golf courses, it is unclear what the Petitioners intended by these two definitions when read together. “Open Space” is defined, in part, as lands “purchased



in whole or in part with proceeds from the 2001 Foothills levy or the 2015 and 2017 Open Space and Clean Water levy.” And finally, “Land Area” is defined as “the area of land of a specific property at the time it was acquired by the city of Boise City.”

Proposed section 7-1-2B does not have a header and purports to restrict the City from selling, trading, gifting, or changing the use of “any Park or Open Space in excess of 5 per cent[sic] of the land area as it exists on August 1, 2021 of the specific Park or Open Space unless City Council determines it is in the public interest by submitting any such proposal to voters. . . .” The section states that a majority of votes must be received to approve a sale, trade, gift or change in use, and that approval by the voters is a “prerequisite to a determination that such action is in the public interest.” As stated above, the use of the defined term “Park” broadens the voting requirement beyond what is set forth in the Initiative’s description.

Proposed section 7-1-2C does not have a header, and states that approval of a majority of qualified electors is required for this vote, and that the vote may be held in a general election in November or primary election in May of either an even or odd numbered year.

Proposed section 7-1-2D does not have a header, and states that “this subsection shall not apply to any successful eminent domain proceedings” or other final orders from a court, provided that the City “participates in good faith to protect the park or open space in such proceeding.” This section also states that “this subsection” does not “apply to city contracts entered into prior to enactment of this initiative.” If Petitioners intended for these exceptions to apply to the entire new section and not just proposed section 7-1-2D, it should refer to “section” and not “subsection.” As written, these exceptions are not applicable to the other portions of the Initiative. Further, if this Initiative becomes part of Boise City Code, the date reference to the “enactment of this initiative” will be nonsensical. Finally, it is unclear what Petitioners intend by requiring the City to “participate in good faith to protect the park or open space,” as this is undefined and thus leaves open the possibility of future controversy and challenges regarding the City’s actions.

B. Matters of Substantive Import

Upon reviewing the Initiative for matters of substantive import pursuant to Idaho Code § 34-1809(1)(a), this Office finds that the Initiative is likely unconstitutional, preempted by State law, and conflicts with other sections of Boise City Code.

1. The Initiative May Be Considered Administrative in Nature, And Likely Unconstitutional

Article III, section 1 of the Idaho Constitution governs the right of citizens to enact laws via initiative:

The people reserve to themselves the power to propose laws, and enact the same at the polls independent of the legislature. This power is known as the initiative, and legal voters may, under such conditions and in such manner as may be provided by acts of the legislature, initiate any desired legislation and cause the same to be submitted to the vote of the people at a general election for their approval or rejection.

Initiatives can only seek to implement an act or measure, and only subjects that are legislative in nature are appropriate for action by initiative. *See City of Boise City v. Keep the Commandments Coalition*, 143 Idaho 254, 256, 141 P.3d 1123, 1125 (2006); *Weldon v. Bonner County Tax Coalition*, 124 Idaho 31, 38, 855 P.2d 868, 875 (1993)(overruled on other grounds by *Keep the Commandments Coalition*). Subjects that are



administrative in nature are not appropriate for action by initiative. *Keep the Commandments Coalition*, 143 Idaho at 256, 141 P.3d at 1126.

To say that administrative determinations are subject to referendum could defeat the very purpose of local government. To give a small group of the electorate the right to demand a vote of the people upon every administrative act of the governing body would place municipal governments in a straightjacket and make it impossible for the city's officers to carry out the public's business.

Idaho Att'y Gen. Op. No. 7614 (1987) (quoting *Cuprowski v. City of Jersey City*, 242 A.2d 873, 878 (N.J. 1968)(holding that approval and adoption of a municipal budget is administrative in character)).

Idaho courts have not adopted a bright line rule distinguishing legislative acts from administrative acts. *Keep the Commandments Coalition*, 143 Idaho at 256, 141 P.3d at 1126. In *Weldon*, the court held that an initiative to reject a county budget decision and implement a new county budget process did not seek to reject or propose a law, but instead sought to propose a process. "The county budgeting process, which results in *ad valorem* levy, is not an 'act' or 'measure,' but instead it is merely the *result* of the statutory process set forth in the County Budget Law, title 31, chapter 16, Idaho Code." *Weldon*, 124 Idaho at 38, 855 P.2d at 875 (emphasis in original). The court rejected the petitioners' argument that the budget process is a law. *Id.* at 39, 855 P.2d at 876. Similarly, the Initiative at issue here also proposes a process – a process on how the City should approve the sale, trade, gift, or change in use of certain lands. The purchase and sale of lands for the purposes of parks is firmly within the jurisdiction of the City under Idaho law, Idaho Code §§ 50-303, 50-1401 *et seq.*, and the City's procedures for determining the sale, trade, transfer, lease, and use of the property is indeed a *process* and in compliance with Title 50, chapter 14, Idaho Code. Therefore, the Initiative is administrative in nature and not legislative, making it inappropriate for action by initiative.

When making the determination of whether an act is legislative or administrative, courts in other jurisdictions have looked at a variety of factors. Cases with similar facts are discussed below, but these are not Idaho cases and therefore will not be binding on an Idaho court. Idaho courts may look to such cases for guidance but are not required to adhere to their rulings.

In *City of Idaho Springs*, the Colorado Supreme Court reviewed two petitions for initiated ordinances: the first repealing any city council measures that approved the purchase of certain land as a site for a new city hall and relocation of an historical building to be renovated for use as a new city hall, and the second prohibiting the appropriation of funds for the relocation of the historical building or purchase of land for the relocation. *City of Idaho Springs v. Blackwell*, 731 P.2d 1250, 1251-52 (Colo. 1987). The court was tasked with determining whether the initiated ordinances were administrative or legislative and stated that "[t]he central inquiry is whether the proposed legislation announces a new public policy or is simply the implementation of a previously declared policy." *Id.* at 1254. The court concluded that the selection of a site and structure for a city hall was not a permanent or general act and thus administrative in nature. *Id.* at 1254. The court also looked at whether an initiated action is necessary to carry out existing legislative policies and purposes or whether it constitutes a declaration of public policy. *Id.* The court held that the proposed initiatives were administrative under this test as well, stating that the choice of location and structure for the new city hall is "necessary to carry out" the existing legislative policy to build a new city hall. *Id.* at 1255.

In *Vagneur*, the Colorado Supreme Court reviewed two petitions for initiated ordinances regarding the design and construction of a state highway entrance, requiring a vote on a change in use of open space, a



mandate regarding the specifics of the design and location, and a mandate to amend or rescind documents that conflict with the elements of the proposed roadway. *Vagneur v. City of Aspen*, 295 P.3d 493 (Colo. 2013). The court held that the proposed initiatives were administrative in nature, as they sought to circumvent the administrative process for the approval of the location and design of the state highway. *Id.* at 496. In making its decision, the court stated that “the powers of initiative and referendum do not encompass the right to petition for an election on administrative matters . . . In short, a voter initiative must be a valid exercise of legislative power, rather than executive or judicial power.” *Id.* at 504. *Vagneur* clarified that the “permanent or general” test set forth in *City of Idaho Springs* focused on “whether the act represented a ‘declaration of public policy of general applicability’” and not the “‘duration of legislation or the anticipated useful life of a municipal improvement.’” *Id.* at 507 (quoting *City of Idaho Springs*, 731 P.2d at 1254). The court further explained that executive acts are based on individualized, case-specific considerations rather than broad policy grounds. *Id.*

In *Sevier Power*, the Utah Supreme Court reviewed an initiative that sought to amend a county’s zoning ordinance in two ways: (1) requiring voter approval on conditional use permits, and (2) requiring the revocation of already-issued conditional use permits for certain facilities if issued after the initiative had been filed and before any vote required in section (1). *Sevier Power Co., LLC v. Board of Sevier County Com’rs*, 196 P.3d 583, 587 (Utah 2008). In reviewing whether the initiative was legislative or administrative in substance, the court stated it:

depends upon the precise language of the initiative proposed and on the action of government it intends to modify or require. When an initiative seeks to undo an accomplished action taken pursuant to existing law, it most likely falls within the administrative action category. . . . When, on the other hand, an initiative seeks to enact or modify a statute or ordinance of broad application, it most likely falls within the legislative sphere.

Id. The court determined that the initiative was legislative in nature because it addressed the overall conditional use permit issuance and revocation ordinance. *Id.*

In *Friends of Congress Square Park*, the Maine Supreme Court reviewed an initiative that amended the city’s land bank ordinance. *Friends of Congress Square Park v. City of Portland*, 91 A.3d 601 (Maine 2014). Specifically, the amendments would create a new category of land bank property and require the approval of eight out of nine city councilpersons—or in the alternative, six of the nine city councilpersons, a favorable recommendation from the land bank commission and a majority vote in a municipal election—to dispose of property in the land bank. *Id.* at 602-603. The city conceded that setting up the new category of land bank property was legislative but asserted that the remainder of the initiative was administrative. *Id.* at 605. In reviewing whether the initiative was legislative or administrative, the court looked at the effects of the exercise of the initiative power and stated, “an act exceeds the scope of the initiative power if it compels or bars action by elected officials that would seriously hamper governmental functions.” *Id.* at 607. The court determined that the amendments in the initiative would not “seriously impede the day-to-day operations” of the city, city council, or land bank commission. *Id.* The court specifically mentioned that the voting requirement would only be triggered if the city attempted to dispose of the land without garnering eight votes, “a scenario not likely to occur so regularly that it would destroy or disrupt the City’s efficient functioning.” *Id.*

These out-of-state cases, when reviewed in the context of the Initiative, raise concerns that the Initiative will likely be considered administrative in nature if challenged in court. The Initiative at issue here is not a permanent or general matter but seeks to place restrictions on the sale, trade, gift, or change of use of certain



property. It also seeks to determine how to carry out existing legislative policies (when and how to sell certain lands) rather than declaring public policy. Further, the Initiative would require a vote for all sales, trades, gifts, or changes in use of certain property. This is a much broader voting requirement than those addressed in the above cases, and a vote on all such matters would seriously hamper government functions and impede the day-to-day functions of the City. If deemed to be administrative in nature, it will be an unconstitutional use of the initiative process.

2. The Initiative is Preempted by Idaho Code

Article 12, section 2 of the Idaho Constitution provides that a city ordinance may not conflict with “the general laws.” A conflict between a municipal ordinance and a state statute can be found if preempted by the state, either expressly or impliedly. *Idaho Dairymen’s Ass’n, Inc. v. Gooding County*, 148 Idaho 653, 658-659, 227 P.3d 907, 912-913 (2010) (citing *Envirosafe Serv. Of Idaho v. County of Owyhee*, 112 Idaho 687, 689, 735 P.2d 998, 1000 (1987)). See also *Heck v. Commissioners of Canyon County*, 123 Idaho 826, 827, 853 P.2d 571, 572 (1993)(“Because the legislature did not state any role for local governmental units in regulating the retail sale of safe and sane fireworks, we conclude that the legislature intended to preempt the regulation of retail sales of safe and sane fireworks.”). Implied preemption “typically applies in instances where, despite the lack of specific language preempting regulation by local governmental entities, the state has acted in an area in such a pervasive manner that it must be assumed that it intended to occupy the entire field of regulation.” *Envirosafe*, 112 Idaho at 689, 735 P.3d at 1000. Implied preemption also applies “where uniform statewide regulation is called for due to the particular nature of the subject matter to be regulated.” *Id.* In short, city ordinances cannot conflict with state laws.

In this case, the scope of Title 50, chapter 14, Idaho Code, makes clear that the legislature intended to fully occupy the area of city property regulation. This chapter sets forth the laws regulating the conveyance of property owned by cities, and a city ordinance is preempted by these laws. The law clearly states:

It is the intent of this chapter that cities of the state of Idaho shall have general authority to manage real property owned by the city in ways which the judgment of the city council of each city deems to be in the public interest. The *city council shall have the power to sell, exchange or convey*, by good and sufficient deed or other appropriate instrument in writing, any real property owned by the city which is underutilized or which is not used for public purposes.

Idaho Code § 50-1401(emphasis added). The remainder of the chapter outlines the process by which city councils convey property, including declaring the value of the property, public hearing, disposition after hearing, terms of sale, and leases. Idaho Code §§ 50-1401 *et seq.* Throughout this chapter, numerous references make it clear that the *city council* determines what is in the city’s best interest regarding real property:

- Cities can manage real property in ways in which “the judgment of *city council* of each city deems to be in the public interest.” Idaho Code § 50-1401 (emphasis added).
- City council can contract for or provide that real property be appraised under such conditions “as may be deemed appropriate by the *city council*.” Idaho Code § 50-1402(a)(emphasis added).
- *City council* has the authority to sell property “as it deems in the best interest of the city” if no bids are received. Idaho Code § 50-1403(1).
- “When it is determined by the *city council* to be in the city’s best interest” that property be exchanged, the city council may do all things necessary. Idaho Code § 50-1403(2)(emphasis added).



- City council may transfer property to a trustee when “it is determined by the *city council* to be in the city’s best interest.” Idaho Code § 50-1403(5)(emphasis added).
- Mayor and council may authorize the lease of property “upon such terms as the *city council* determines may be just and equitable.” Idaho Code § 50-1407(emphasis added).
- Mayor and *council* may authorize leases “upon such terms as may be just and equitable.” Idaho Code § 50-1409.

Idaho Code § 50-301 also makes clear that cities can acquire, lease, and convey real property. Further, Idaho Code § 50-320 provides that cities can convey cemetery lots. Nowhere in these provisions of Idaho Code does it mention the ability of citizens to vote on a conveyance of property, let alone a change in use. The Initiative’s voting requirements for the sale, trade, gift, or change in use of city property conflicts with Idaho law, and is thus preempted.

The Initiative also conflicts with Idaho law regarding elections. Proposed Section 7-1-2C states that the vote will be held in a general election in November or the primary election in May of either an even or odd numbered year. Elections may only be conducted at those times prescribed by Idaho Code. Idaho Code states:

A city initiative or referendum election shall be held on the Tuesday following the first Monday in November of odd-numbered years. A county initiative or referendum election or a bond, levy and any other ballot question elections conducted by any political subdivision shall be held on the nearest date authorized in subsection (1) of this section which falls more than sixty (60) days after the clerk of the political subdivision orders that such election shall be held in May or November of even-numbered years or more than fifty (50) days after the order for all other elections, unless otherwise provided by law.

Idaho Code § 34-106(8). The Initiative’s section on the election date is therefore also preempted by Idaho Code.

3. The Initiative Conflicts with Boise City Code

Boise City Code includes specific requirements for selling, exchanging, or conveying real property acquired by the Idaho Department of Parks and Recreation, or which has received land and water conservation funds from the Idaho Department of Parks and Recreation. Boise City Code § 7-1-1C. These requirements include seeking written approval for the sale, exchange, or conveyance from the Idaho Department of Parks and Recreation, holding a public hearing, and a city council vote. *Id.* These requirements do not include a vote by the public to approve a sale, exchange, or conveyance. To the extent the Initiative restricts the City’s actions with regard to these properties, the Initiative conflicts with existing Boise City Code.

In addition, Boise City Code authorizes the City to convey the right to be buried in a lot within a municipal cemetery. Boise City Code § 7-6-1. Boise City Code sets forth the requirements for such conveyance, none of which include a public vote. To the extent the Initiative seeks to restrict the City’s actions with regard to cemeteries, the Initiative conflicts with existing Boise City Code.

IV. Certification

I hereby certify that the enclosed Initiative has been reviewed for form, style, and matters of substantive import. The recommendations set forth above have been communicated to the Petitioners via a copy of this Certificate of Review, deposited in the U.S. Mail to John Gannon and Boise Working Together at 1104 Johnson Street, Boise, ID 83705.



Sincerely,



Jayme B. Sullivan
City Attorney

Analysis by:
Jane Hochberg
Deputy City Attorney
Municipal Division Senior Manager

