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February 22, 2011

Chairman Mike Kennedy
General Services Committee
City Hall
Coeur d'Alene, Idaho 83814

Re: Public Vote on McEuen Park Plan

Dear Mike:

Last week you called me seeking legal advice upon the question of public vote. (1) You informed me that Julie Clark and Rita Sims-Snyder, representing "Friends of McEuen Field" had come before the City Council to ask for a public vote upon the McEuen Park Plan. They were advised by Mayor Bloem to come before the General Services Committee today.

Friends of McEuen Field had placed a full page advertisement captioned "Public Vote" in the Coeur d'Alene Press on February 10, 2011. In that advertisement, Ms. Clark and Ms. Sims-Snyder, in a careful and respectful manner, recited a number of the projects proposed in the initial published draft of the McEuen design team and its related observations, to each of which they stated, "We do not agree."

The McEuen Park Concept Plan public questionnaire for the January 6, 2011 public meeting showed 24 separate proposals with the persons responding to indicate by check mark degrees of agreeing or disagreeing.

Friends of McEuen Field in this advertisement and in coming before the City Council and today before your committee is asking for the City Council to conduct an election upon the McEuen Park Plan, either in its present draft form or as may be revised and presented to the City Council. The election sought is to take place before the City Council formally accepts the plan as stated in the advertisement.

Please support us in asking for a Public Vote on the McEuen Field Project.

The public vote, as sought in the advertisement and as thoroughly vetted in letters and opinions printed in the Coeur d'Alene Press, pro and con, is intended

to be a definitive up or down final determination which would be binding upon the City Council.

There is no provision in the Coeur d'Alene city ordinances nor in Idaho Code Title 34 "Elections" nor in the Municipal Code Title 50, Chapter 4 "Municipal Elections" for a public vote.

It is my conclusion for reasons set forth hereafter at considerable length that the City Council does not have the authority under applicable statutes, ordinances and Idaho Supreme Court decisions to authorize an election for a public vote upon the McEuen Park Plan in either the present concept or in any final form which may be presented to the City Council or subsequently adopted.

The McEuen Park Plan is an administrative action, not legislative, and cannot be under any circumstance or future revision be the subject of a city election for a public vote. (2)

Municipal elections are strictly regulated by state statutes. Candidates for public office are voted in and out. Bond elections are voted up or down. That is all. The election system is similar to the judicial system. Courts cannot give advisory opinions. Neither the city nor county may ask in an election for the opinion of the citizens upon any issue.

The city, county or state may refer to their respective citizens for vote of approval or disapproval a legislative issue. In *Anderson v. Boise City,* 91 Idaho 527 (1967), a city charter change was voted upon. The Legislature may refer a proposed law for statewide vote. Acting in response to then acting Governor Jim Risch, the Idaho Legislature put to a state-wide vote upon legislation to eliminate state taxation of real property for educational support.

The Legislature must refer to a vote amendments to the Idaho Constitution. In every instance, the legislation referred to vote must be a law, act or measure, not a policy or a proposed plan which would be administrative, not legislative.

Based upon decisions by the Idaho Supreme Court spanning almost a century, it is very clear law that the City of Coeur d'Alene does not have jurisdiction to authorize and conduct an election upon the McEuen Park Plan in the manner sought before this committee.

The authority for this conclusion is found in three Idaho Supreme Court cases. *Perrault v. Robinson*, 29 Idaho 266 (1916). *Gumprecht v. City of Coeur d'Alene,* 104 Idaho 615 (1983). *Weldon v. Bonner County Tax Coalition,* 124 Idaho 31 (1993).

In *Perrault v. Robinson,* a resident and taxpayer filed suit for a writ of prohibition against the Boise mayor and city council seeking to prohibit the city from conducting a referendum election allowing a vote on a city ordinance that permitted the operation of theaters and moving picture shows on Sunday. The city had passed the ordinance and then received a petition containing 1,786 names, more than 25% of those voting in the past election, seeking an election up or down upon the ordinance. The Supreme Court described the issue thusly:

> **The question here is not, as in most of the cases cited, may an election which is provided for by law be restrained, but is, have the mayor and council of Boise jurisdiction to call an election which is unauthorized by law and thereby involve the taxpayers of that city in a useless expense of approximately $1,000?**
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> 29 Idaho at 272.

The District Court had dismissed Perrault's lawsuit. On appeal, the Idaho Supreme Court reversed and granted the writ to prohibit conduct of the election.

In 1982, Dr. Don Gumprecht filed suit directly in the Idaho Supreme Court seeking a writ of prohibition to prevent the City of Coeur d'Alene from conducting an election upon an initiative that would have adopted the shoreline ordinance (subsequently adopted by a successor city council.) The Idaho Supreme Court issued the writ stopping the election. The opinion commences with the identical wording from the *Perrault* case (29 Idaho at 272) cited above. 104 Idaho at 617. Following the quote is this wording:

> **The question presented in this case, whether the election itself is proper, is similar to the question presented in *Perrault.* If an initiative election is an improper means of adopting or amending zoning ordinances in Idaho, then the city council of Coeur d'Alene would be acting in excess of its jurisdiction in holding the election. We hold that review of a petition for writ of prohibition is proper where, as in this case, the resolution of an important undecided question of law will necessarily decide the propriety of the election.**
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> 104 Idaho at 617.

The writ was made permanent the Court deciding that the Local Land Use Planning Act did not provide for citizen initiatives that created zoning regulations.

In *Weldon v. Bonner County Tax Coalition,* the parties were reversed. The county had set the ad valorem tax; the Tax Coalition in opposition collected signatures for both a referendum and initiative to be set for a county-wide election. Bonner County and its elected officials filed suit represented by attorney Jerry Mason

seeking a writ of prohibition to prevent the election. District Judge Michaud granted the writ to stop the election and the Tax Coalition appealed.

There were numerous side issues. The opinion again quoted from *Perrault,* 29 Idaho at 272 as repeated in *Gumprecht* and then went on:

> **We hold that *Gumprecht* controls this case. We note that *Gumprecht* was not a declaratory judgment action, instead involving an application for a writ of prohibition. However, we deem this distinction to be unimportant. Like *Gumprecht,* this case involves a proposed election. In this case, both the referendum and initiative are set for election, and the critical issue is whether Idaho law providing for referenda and initiative encompasses county budget decisions. The only thing that is uncertain is whether the voters of Bonner County will approve or disapprove the measures, which has no effect on the issue before this Court.**
>
> 124 Idaho at 37.

The granting of the writ of prohibition was affirmed. The Supreme Court described the referendum as being directed at the "process" by which the county commissioners were acting rather then an "act" or "measure." The referendum can only be directed against acts, measures, or ordinances as indicated in both *Perrault* and *Gumprecht.* The McEuen Park Plan is not an act or measure or ordinance. There is no statutory procedure for approving or disapproving of McEuen Park Plan. (3)

The three Supreme Court opinions stand for the proposition that neither a city nor a county has jurisdiction to conduct an election upon any issue unless there is a specific state statute that authorizes a public vote upon that issue. There is no state statute granting to a city the authority to allow an election as a vote on park improvements.

Boise City v. Keep the Ten Commandments Coalition, 143 Idaho 254 (2006) put a twist upon the three decisions. However, as shown in the dissent by Justice Linda Trout, the end result is even more negative to those seeking a vote on the McEuen Park Plan.

The City of Boise had moved the ten commandments plaque (similar to the plaque on the courthouse lawn here) from Julia Davis City Park to another site. The Coalition circulated an initiative petition to restore the plaque to the city park and obtained 10,721 signatures, enough to qualify as an initiative under by the city ordinance.

The petition was presented to the city council which rejected the same as improperly seeking ". . . to implement an administrative act, rather than a legislative act, through an initiative election." 143 Idaho at 255.

The city attorney then filed a petition for declaratory judgment and the district court upheld the rejection by the city council.

The Coalition appealed. The majority of the Supreme Court reversed citing *Noh v. Cenarrusa,* 137 Idaho 795 (2002) which held that the initiative was not ripe for judicial review and such judicial decision should be deferred to let the citizens vote. If the vote was favorable, it could then be challenged.
In so doing, the majority opinion overruled *Weldon, Gumprecht and Perrault*, ". . . to the extent the conclusion in this case is inconsistent. . ." 143 Idaho at 257. That extent is the holding in *Noh* that these three cases held the proposed initiatives invalid instead of allowing each to proceed and, if passed, then determines whether the initiative was invalid.

If each of the three cases had allowed the initiative to go to vote and each passed, the in all three cases a reviewing court would have reached the same conclusion as initially: the initiatives would have been invalid for the reasons stated in each on the reported opinions. (4)

In *Keep the Commandments Coalition*, the majority opinion stated:

> **If a subject is legislative in nature, it is appropriate for action by initiative. On the other hand, if the proposed initiative is administrative in nature, it falls outside the scope of action allowable by initiative.**
>
> 143 Idaho at 256.

The 1911 amendment to the Idaho Constitution that added the initiative power is crystal clear that initiatives are only allowable for legislation.

> **The people reserve to the themselves the power <u>to propose laws</u>, and enact the same at the polls independent of the legislature. This power is known as the initiative. . . (Emphasis supplied.) Article III, §1, Idaho Constitution.**

In dissent, Justice Trout distinguished *Noh v. Cenarrusa* arguing that the validity of a initiative was ripe for decision before going to vote. Of importance here is Justice Trout's clarity in distinguishing between "legislative" and "administrative."

Justice Trout wrote that the management of real property owned by the city rests in the judgment on the city council under Idaho Code §50-1401, equally applicable to Coeur d'Alene. The creation of Julia Davis Park was a previously

adopted policy or plan just as has been the creation of McEuen Field and the surrounding areas covered by the McEuen Park Plan. Justice Trout wrote that the plaque change initiative was therefore "administrative" and not allowable:

> **Because the Coalition seeks to place a monument in the park, an act that falls within the purview of an already adopted plan, the petition is an administrative act beyond the reach of the initiative process.**
>
> 143 Idaho at 259.

Justice Trout then looked at another line of cases which distinguished "Legislative" and "Administrative."

> **Another consideration is that decisions requiring specialized knowledge and experience in municipal government may be characterized as administrative, even though they may also be said to involve the establishment of a policy. *City of Wichita,* 874 P.2d at 672. Under this framework, the project-specific petition that involves specialized knowledge and experience in park layout is clearly administrative in nature. Also, many have noted the initiative power is "restricted to measures which are quite clearly and fully legislative." 62 C.J.S. *Municipal Corporations* §318; *City of Wichita,* 874 P.2d at 672, *Town of Whitehall,* 956 P.2d at 749.**
>
> 143 Idaho at 259.

The colored survey sheets handed out by City Park Director Doug Eastwood identify 24 separate proposals each seeking separate acceptance or rejection. Eastwood's slide presentation and explanation plus questions takes 30 to 45 minutes. The McEuen team has spent months putting the plan together. The McEuen Park Plan is totally based upon "specialized knowledge and experience in park layout. . . clearly Administrative in nature. Justice Trout concluded:

> **In sum, under any of these analyses, the subject of the Coalition's petition is administrative, so it does not fall within the scope of the people's power to enact legislation.**
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> 143 Idaho at 260.

If the plaque relocation had subsequently come to a vote and been approved, it would be judicially struck down as "Administrative."

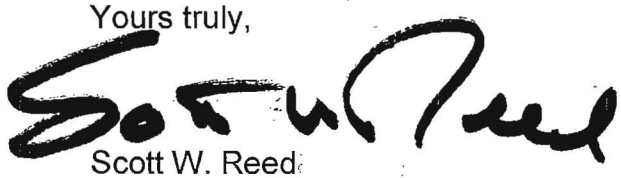
In *Keep the Commandments Coalition,* the Idaho Supreme Court did not overrule the merit of decisions in *Perrault, Gumprecht and Weldon* which held that the city and county did not have jurisdiction to allow a vote upon the proposed initiative. The decision in *Keep the Commandments Coalition* simply

held that the initiatives should proceed to vote and then, if approved, a subsequent or continuing court would necessarily hold that each of these initiatives would be invalid as a matter of law.

CONCLUSION

The City Council does not have jurisdiction nor legal authority to allow an election and public vote upon the McEuen Park Plan in any form.

Yours truly,



Scott W. Reed

SWR:kgb

Footnotes

(1) Because I represented you in the 12 month election contest, *Brannon v. City* you logically contacted me. I hasten to assure you and the city that my opinion is voluntary pro bono as a favor to you without any obligation by your or the city to me for time spent.

We do not live in the city. The only opinion I have publicly disclosed to others about the McEuen Park Plan is opposition to those parts of the plan that would touch Tubbs Hill.

(2) Mayor Bloem proposed a vote upon the Hagadone Memorial Garden plan several years back. Mr. Hagadone withdrew his plan before the mayor or city council sought any advice from the city attorney as to whether such vote could be held. As an administrative subject relating to McEuen Field, the public vote could not have occurred legally.

(3) What later became McEuen Field was saved from development by a public vote of "No" in 1959. The development proposal for a shopping mall in that area was dependent upon purchase of that land from the city. An Idaho statute at that time (since repealed) required a vote of approval by citizens for sale of city property at least of that size. There is no comparable law in effect today.

(4) Many years back before *Weldon*, I represented an Idaho Audubon Chapter suing to stop construction of a new county airport on prime bird habitat in Jerome County. In that case, the District Judge held that the county could not hold an advisory election allowing the citizens to vote for or against the airport. His decision was based on *Perrault and Gumprecht.*

(5) The decisions of the Idaho Supreme Court have become is that courts may not entertain challenge to the legality or constitutionality of proposed initiative but must let these initiatives go to vote. The result is "Penny Wise and Pound Foolish."

Penny wise, the district courts need not hear challenges thereby saving small amounts of time and some attorney's fees. Pound foolish, the campaign for and against the initiative goes on and the state, county or city bears the cost of the election. Then if the initiative passes there may be a challenge which may be successful.

Evidence of much greater costs in deferring decisions upon the legality of an initiative can be clearly seen in the two lottery cases. In the first, *Associated Taxpayers of Idaho, Inc. v. Cannarusa,* 111 Idaho 502 (1986), the Court by a three to two vote dismissed the challenge that an initiative

allowing lotteries violated Article III, §20 of the Constitution. Justice Huntley and Justice Bakes dissented.

According, it is unequivocally clear that if the initiative authorizing a lottery enterprise and licensing it by the State of Idaho is approved by the voters at the general election this November, it will be unconstitutional and void. Because of the extreme importance of this issue to the citizens of the State of Idaho, we should rule upon the merits of this case now. *Gumprecht v. City of Coeur d'Alene, supra; In re Petition of Idaho State Federation of Labor, supra.* Both the public treasury and public expectations deserve our immediate action on this important issue.

111 Idaho at 510.

Interested groups for and against the lottery spent very large amounts of money in campaigning. The lottery initiative received 60% approval.

The initiative was then challenged again in *Westernberg v. Andrus,* 114 Idaho 401 (1988). In an opinion written by Justice Bakes the Idaho Supreme Court by four to one vote held the initiative was unconstitutional for the exact reasons set forth in 1986.