



STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL
LAWRENCE G. WASDEN

March 17, 2014

The Honorable Steve Vick
Idaho Senate
STATEHOUSE MAIL

Dear Senator Vick:

This letter is in response to your recent inquiry regarding the legislature's grant of discretionary authority to an executive agency. In more specific terms, you have asked whether H. 546 presents a constitutional issue due to its delegation of legislative authority to the Executive. As outlined below, it appears that H. 546 is constitutionally vulnerable for two reasons: (1) H. 546 lacks sufficient precision with regard to the Director's and Department's discretion over the award of tax credits; and (2) H. 546 fails to properly provide for review of the decision of the director, which implicates due process concerns.

H. 546's Delegation of Legislative Authority to the Executive Is Constitutionally Vulnerable.

Instead of requiring standards to control discretion, the current view of the non-delegation doctrine is that the legislation itself or the agency's internal guidelines should provide meaningful safeguards against arbitrary decision making; for example, a right to a hearing or judicial review of agency decision making. *Sun Valley Co. v. City of Sun Valley*, 109 Idaho 424, 151 (1985), citing *Warren v. Marion County*, 222 Or. 307, 353 P.2d 257 (1960). In this regard, H.546 fails to provide a boundary or precise guideline for the Director when determining and setting the amount of tax credit given to a successful applicant. Indeed, H.546 appears to be purposefully vague as to how the amount is determined in order to afford the Director and Council (through its approval authority) broad discretion that is limited only by the 30 percent tax credit limit. Within this broad grant of discretion, it is foreseeable that two identical applicants would receive different rates depending on each applicant's ability to negotiate with the Director and secure subsequent Council approval.¹ The inclusion of specific criteria to structure the amount of the tax credit and thereby limit the Director's and the Council's currently

¹ This discretion and "tax based on the ability to negotiate" could also implicate Article VII, § 5, which requires that all taxes be uniform. The creation of a discretionary tax as opposed to a regulated tax likely fails the requirement for a "just valuation" under the provision because one claimant could present the same set of facts as another but the two would be taxed differently based upon the discretion of the director.

unfettered discretion would likely overcome the delegation vulnerability in the current version of H. 546.

H. 546 Should Include Some Measure of Review of the Council's or the Director's Determinations.

H.546 also creates constitutional vulnerability because it denies unsuccessful applicants any judicial review of the agency's determination. See Proposed Idaho Code § 67-4739(2). The determination of the council "will be final and conclusive and shall not constitute an appealable agency action or order under chapter 52, title 67, Idaho Code."² This lack of review could be remedied by providing an appeal to either the director (as to the denial of a tax credit application) or to the Council (as to the amount or other terms of an agreement with a successful applicant). We do not believe that a requirement for *judicial* review is necessary.

I hope that you find this analysis helpful.

Sincerely,



Chelsea E. Kidney
Deputy Attorney General
(208) 334-7542

ck/ljd

cc: Brian Kane
William von Tagen
Steve Olsen

² Although beyond the scope of this inquiry, this restriction of an appealable right could implicate due process issues as well.