



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

November 3, 2011

The Honorable Shawn Keough  
Idaho State Senator  
P.O. Box 101  
Sandpoint, ID 83864

Re: Property Rights Council – Our File No. 11-38589

Dear Senator Keough:

This letter is in response to your recent inquiry regarding Bonner County's Property Rights Council ("PRC") and the training requirements volunteers must undertake to become volunteers for the PRC. In addition to reviewing the documents you provided, as well as the web based materials related to this committee, we also discussed the PRC with Bonner County Deputy Prosecutor Scott Bauer. Although Bonner County adopted an ordinance creating the PRC, it appears that the details of that committee are still being worked out. Mr. Bauer informed us that several of the documents were first drafts, or works in progress. With this in mind, this analysis will also provide recommendations where appropriate. An analysis of a developing organization poses challenges; however, it appears that Bonner County has the authority to both create the PRC and enact certain requirements for volunteer participation.

With the above as a backdrop, this analysis, as explained in greater detail below, concludes:

1. The PRC appears to be a valid exercise of County's authority;
2. As a purely advisory body, the question as to formation of the PRC is one of policy, not law;
3. Care should be exercised to ensure that the free-market of ideas is not corrupted by requirements to adhere to a single source of information; and
4. As an entity formed by County Ordinance, the PRC must ensure that it strictly follows the Idaho Open Meeting Law and Public Records Law.

**Bonner County has the Authority to create Advisory Councils like the PRC.**

From our discussion with Mr. Bauer, we understand that the purpose of the PRC is to provide information to county commissioners, county departments and the public regarding the impact certain proposals have on private property rights as well as to provide a forum and process for review and discussion of those impacts. The creation of such an advisory council appears to be in accordance with I.C. § 31-604 which empowers counties with “other and further authority as may be necessary to effectively carry out the duties imposed on it by the provisions of the Idaho Code and constitution.”

More specifically, Idaho Code § 31-828 provides the county commissioners with the ability to “do and perform all other acts and things required by law which may be necessary to the full discharge of the duties of the chief executive authority of the county government.” I.C. § 31-828. These powers generally include the creation of advisory councils and committees such as the PRC in order to aid the county commissioners with the county’s governance. Similarly, the County Commission appears to have sought to balance the governmental interests in uses of property with the private interests of the County’s citizens in those same properties. This appears to be an innovative solution to an ever present tension, and likely consistent with the overarching theory that “local government is the laboratory of democracy.”<sup>1</sup> Therefore, the creation of the PRC appears consistent with the county’s implied powers.

**The PRC can impose requirements and a general philosophy upon its members and volunteers.**

There is no legal authority suggesting that Bonner County cannot require certain training for the volunteers of the PRC. Further, Bonner County’s decision that this training should consist solely of the volunteer’s review of what the county terms “free market” literature is most likely protected government speech. *See Pleasant Grove City, Utah v. Summum*, 129 S. Ct. 1125, 1139 (2009). In *Summum*, the United States Supreme Court upheld the principle that a governmental entity has the right to speak for itself and to select the views it wants to express. *Id. citing Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 833 (1995).<sup>2</sup> Here, Bonner County chooses to endorse a “free market” ideology. Because Bonner County has the right to speak for itself there is probably no viable legal challenge to the content of Bonner County’s volunteer training requirements.

The limitations on the PRC’s power and responsibilities support this conclusion. Specifically, the PRC is a purely advisory body whose members receive no

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<sup>1</sup> *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., *dissenting*).

<sup>2</sup> The United States Supreme Court went on to state: “Indeed, it is not easy to imagine how government could function if it lacked this freedom. ‘If every citizen were to have a right to insist that no one paid by public funds express a view with which he disagreed, debate over issues of great concern to the public would be limited to those in the private sector, and the process of government as we know it radically transformed.’” *Id. quoting Keller v. State Bar of Cal.*, 496 U.S. 1, 12–13, (1990).

compensation. Further, the PRC has no final authority to approve any county decisions. Therefore, the impact of the “free market” ideology advanced by Bonner County is somewhat limited.

More concerning are the references in the PRC’s documentation to “oaths” that PRC members and volunteers must take or sign. These oaths could be comparable to “loyalty oaths” which have been the subject of frequent legal challenges. However, based upon this office’s limited research, none of the challenges have addressed this specific context. We did discuss this issue with Mr. Bauer and he indicated that these references and requirements were intended as placeholders, and that these requirements would be amended to reflect a more robust market of ideas.

Similarly, we understand that the directives within the documents to use certain sources for property rights training were intended as recommendations as opposed to a sole source. As the PRC matures, a more complete list of resources for this subject matter should be developed and advanced for training.

#### **Potential conflicts with other state and federal laws.**

Due to the relatively undefined nature of the PRC’s activities, there are concerns regarding the PRC’s interaction with other county departments and commissions. Mr. Bauer indicated that the PRC has already confronted some of these issues including ensuring that the PRC functions in a manner consistent with the requirements of the Local Land Use Planning Act (“LLUPA”). As the PRC’s scope is further defined, care must be taken to ensure that the PRC’s authority remains consistent with state and federal laws.

#### **The PRC is Subject to the Open Meetings Law**

As an advisory council created to make recommendations to a public agency regarding private property rights, the PRC is subject to the Open Meetings Law. *See* I.C. §§ 67-2341(4), 67-2341(5). Therefore, the PRC must comply with all of the Open Meeting Law requirements. These requirements are explained in more detail in the Idaho Open Meeting Law Manual, which can be found online at:  
<http://www.ag.idaho.gov/publications/legalManuals/OpenMeeting.pdf>.

The Open Meeting Law does not expressly require the opportunity for public comment at meetings of the PRC. This gives further support to the conclusion that Bonner County’s limitation on the type of advice it is seeking from PRC volunteers is viable. It is recommended that the PRC encourage public comment from members not certified as PRC volunteers in order to remain consistent with the goals of the PRC, namely to inject citizen participation into property rights decisions.

### **The PRC is Subject to the Idaho Public Records Law**

As an advisory body created to advise Bonner County and its departments, the PRC is also subject to the requirements of the Idaho Public Records Law. *See* I.C. §§ 9-337(11) and 9-337(8). These requirements are explained in more detail in the Idaho Public Records Law Manual, which is available online at: <http://www.ag.idaho.gov/publications/legalManuals/PublicRecordsLaw.pdf>.

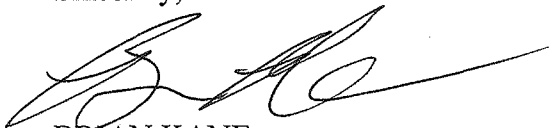
In visiting the PRC's website, it has been observed that not all of the documents or links are open or available to the public. This is a significant concern. Mr. Bauer indicated that they have been providing the password protected areas of the website in response to public records requests; however, we believe the issue needs to be addressed by the PRC and that the public should be allowed access to all of the information on the website. Notably, there should be no members only section of the website, nor should there be any mechanism preventing unfettered access by the public to any documents created or used by the PRC. Importantly, there is no exemption within the Public Records Law for "draft" documents at the local government level.

### **Conclusion**

As reflected above, it appears that the PRC was legally created and its volunteer requirements are legally defensible. But it appears that there are some steps that the PRC may need to take in order to ensure full and ongoing compliance with the Open Meeting Law and the Public Records Law. Finally, it appears that some minor adjustments need to be made to the governing document drafts to ensure a free flow exchange of ideas related to private property rights consistent with the goals of the PRC.

I hope that you find this analysis helpful. If you would like to discuss the content of this letter more fully, or any other issue, please contact me.

Sincerely,



BRIAN KANE  
Assistant Chief Deputy

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