

12-8-2008

# Urban Renewal Agency of City of Rexburg v. Hart Appellant's Brief Dckt. 35435

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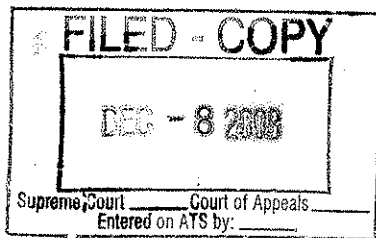
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IN THE SUPREME COURT OF THE STATE OF IDAHO

URBAN RENEWAL AGENCY OF THE )  
CITY OF REXBURG, )  
 )  
Petitioner-Respondent, )  
 )  
v. )  
 )  
KENNETH W. HART, an interested party, )  
 )  
Respondent-Appellant )  
\_\_\_\_\_ )

Docket No. 35435

**APPELLANT'S BRIEF**



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**APPELLANT'S BRIEF**

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I.

STATEMENT OF THE CASE

1. Nature of the Case.

This is an appeal from the Judgment and Decree entered on May 29, 2008, by the District Court of the Seventh Judicial District of the state of Idaho, in and for the County of Madison granting the Petition of the Urban Renewal Agency of the City of Rexburg ("Agency") for judicial confirmation of the validity of the Agency's proposed Revenue Allocation ("Tax Increment") Bonds. The Petition for Judicial Confirmation was challenged by Appellant, Kenneth W. Hart, a concerned citizen of Rexburg, Idaho, on the grounds that confirmation of the Petition would violate Article VIII, Sections 3 and 4 and Article XII, Section 4 of the Constitution of the state of Idaho. Appellant's statutory argument that the mature date of the proposed revenue bonds violated the provisions of Idaho Code § 50-2904 will not be pursued further on appeal.

2. Course of Proceedings Below.

On February 13, 2008, the Agency filed its Petition for Judicial Confirmation with supporting documents. R. Vol. I, pp. 4-26. The Agency filed a memorandum in support of its Petition for Judicial Confirmation on March 12, 2008. R. Vol. I, pp. 30-100. Hart filed his Response in Opposition to the Agency's Petition and the Agency filed a Reply which was followed by a hearing before the district court on March 31, 2008. Mr. Hart appeared *pro se* in the proceedings before the district court. The Agency in these proceedings was represented by attorney Ryan P. Armbruster. The district court's docket ("Registry of Actions") is found at R. Vol. I, p. 2. The district court filed its Memorandum Decision on May 8, 2008, rejecting Mr. Hart's constitutional challenge and

granting the Agency's Petition. R. Vol. I, p. 129. On May 29, 2008, the court entered its Findings of Fact, Conclusions of Law, Judgment and Decree in support of its decision. R. Vol. I, p. 136. On June 18, 2008, Mr. Hart filed his Notice of Appeal and an identical Amended Notice of Appeal, the latter of which changed one of the signatory attorneys within the law firm representing Mr. Hart. R. Vol. I, pp. 148, 156.

### **3. Statement of Facts.**

The Urban Renewal Agency of the City of Rexburg is an urban renewal agency created and existing under the authority of the Idaho Urban Renewal Law of 1965, Title 50, Chapter 20, Idaho Code. Asserting its alleged revenue allocation financing powers under the Local Economic Development Act, Title 50, Chapter 29, Idaho Code, the Agency filed its Petition seeking judicial confirmation of its power to enter into a bond purchase agreement with Zions Bank Public Finance. The proceeds of the bonds were intended for construction of a park in Rexburg. The agreement with Zions Bank was conditioned on the Agency obtaining judicial confirmation of the validity of the bonds as provided under Idaho Codes §§ 7-1304 et. seq.

The subject bonds, entitled "Revenue Allocation (Tax Increment) Bonds Series 2008" are to be secured by the Agency's tax increment revenues received by property taxes "allocated" to the Agency for this project by the city of Rexburg pursuant to the Local Economic Development Act. This appeal does not challenge the procedural steps taken by the city of Rexburg in establishing, amending and restating the urban renewal plan, adopting Ordinance No. 950, serving the various notices, and adopting the various resolutions recited at length in the Petition for Judicial Confirmation. R. Vol. I, pp. 5-10.

Rather, this appeal is limited to Mr. Hart's constitutional challenges under Article VIII, Sections 3 and 4 and Article XII, Section 4 of the Idaho Constitution as set forth below.

Relevant to the constitutional issues is the fact that on December 21, 2005, the City Council of the city of Rexburg adopted Ordinance No. 950, which approved the Second Amended and Restated Urban Renewal Plan, North Highway Urban Renewal Project, including South Addition ("Second Amended and Restated Urban Renewal Plan") which contained revenue allocation financing provisions pursuant to Idaho Code § 50-2902 of the Local Economic Development Act. R. Vol. I, p. 7. Ordinance No. 950 became effective upon publication on December 23, 2005. R. Vol. I, pp. 7-8. On December 4, 2007, the Agency adopted Resolution No. 2007-4 approving a bond purchase agreement with Zions Bank Public Finance to fund the subject recreational project. Said Resolution authorized the issuance of the Revenue Allocation (Tax Increment) Bonds Series 2008 which would be secured by the deposit of funds from the proceeds of the revenue allocation by the City to the "Revenue Allocation Fund." The revenue allocation proceeds deposited in the fund would be used for the following purposes and in the following order of priority:

First, to pay the interest accruing on the Series 2008 Bonds and any additional bonds by required deposits into the bond fund;

Second, to pay the principal of the Series 2008 Bonds and any additional bonds payable within the next bond year by required deposits into the bond fund;

Third, to fund the debt service reserve fund by required deposit thereto, if any;

Fourth, to fund the administration fund;

Fifth, for any other lawful purpose of Petitioner. R. Vol. I, pp. 8-9.



On May 29, 2008, the court entered its Judgment and Decree granting the Agency's Petition and concluding that the Agency was not required by the Constitution of the state of Idaho to submit the issuance of its revenue notes or bonds to a vote of the electorate and that the Agency is not the "*alter ego*" of the city of Rexburg. R. Vol. I, p. 145.

## II.

### ISSUES ON APPEAL

Appellant raises these issues on appeal:

1. Whether the revenue allocation scheme pursuant to Chapter 29, Title 50, Idaho Code, the Local Economic Development Act violates the provision of the Idaho Constitution prohibiting municipalities from:
  - (a) Incurring an indebtedness or liability exceeding income and revenues for a specific year without the assent of a super majority of qualified electors, as provided in the Idaho Constitution, Article VIII, Section 3;
  - (b) Lending or pledging credit, directly or indirectly, in any manner to or in the aid of any association or corporation for any amount or for any purpose whatsoever or become responsible for any debt, contract or liability or any association or corporation as set forth in Article VIII, Section 4 and Article XII, Section 4 of the Idaho Constitution.

2. Whether the Agency is an *alter ego* of the city of Rexburg and therefore violates Article VIII, Section 3, Article VIII, Section 4 and Article XII, Section 4 of the Idaho Constitution.

### III.

#### STANDARD OF REVIEW

On appeal, the Court defers to the factual findings of the district court unless those findings are clearly erroneous. *Bouten Const. Co. v. H.F. Magnuson Co.*, 133 Idaho 756, 760, 992 P.2d 751, 755 (1999). The Appellate Court exercises free review of the district courts application of the relevant law to the facts. *City of Boise v. Frazier*, 143 Idaho 1, 2, 137 P.3d 388, 389 (2006); *Roberts v. State*, 132 Idaho 494, 496, 975 P.2d 782, 784 (1999). Constitutional issues are questions of law over which we also exercise free review. *City of Boise v. Frazier*, 143 Idaho 1, 2, 137 P.3d 388, 389 (2006); *State v. Weber*, 140 Idaho 89, 91, 90 P.3d 314, 316 (2004).

### IV.

#### ARGUMENT

##### 1. Confirmation of Legal Issues on Appeal.

In finding No. 19 in the Judgment and Decree, the district court stated as follows:

The Response to Petition for Judicial Confirmation (“Response”) filed on or about March 24, 2008, by Mr. Kenneth Hart, a resident of the city of Rexburg, raised three issues challenging the validity of the purchase agreement and the Series 2008 Bonds as follows:

- a. The Revenue Allocation Scheme violates the provisions of the Idaho Constitution prohibiting the city of Rexburg incurring

indebtedness or lending its credit without confirmation by a super majority of the city's citizens;

- b. The Agency is the "alter ego" of the city of Rexburg, therefore violating provision of the Idaho Constitution prohibiting the city of Rexburg from incurring indebtedness or lending its credit without confirmation by a super majority of the city's citizens; and,
- c. The purchase agreement allows the Series 2008 Bonds to mature beyond the life of the Urban Renewal Plan in violation of I.C. § 50-2904.

As stated above, Appellant has abandoned the statutory claims set forth in "c" above. The claim that the Revenue Allocation Scheme violates the Idaho Constitution and that the Agency is the *alter ego* of the city of Rexburg, the Idaho Constitutional provisions invoked thereby are Article VIII, Sections 3 and 4 and Article XII, Section 4.

Article VIII, Section 3 of the Idaho Constitution generally bars municipalities from incurring debts or liabilities without first conducting an election to secure voter approval for the proposed expenditure. This Section however contains the major exception to the effect that no public vote is required if the expenditure is for an "ordinary and necessary" expense authorized by the general laws of the state. This exception is referred to as the "proviso clause." *City of Pocatello v. Peterson*, 93 Idaho 774, 778, 473 P.2d 644, 648 (1970). There is no proviso issue in this case. The district court below made no finding or conclusion regarding whether the subject Revenue Allocation Bonds were, or were the financing for, ordinary and necessary expenses. Moreover, on p. 45 of its Memorandum in Support of Judicial Confirmation, the Agency expressly stated that it was not seeking authorization for issuance of the bonds as ordinary and necessary expenses:

In this case the Agency is not petitioning for judicial confirmation based upon the "ordinary and necessary" clause of Article VIII, Section 3. In fact, the "ordinary and necessary" clause is not applicable to the Agency. R. Vol. I, p. 77.

Therefore, the Idaho constitutional provisions at issue are Article VIII, Section 3 requiring an election of the city's voters with no consideration given to the "proviso clause" and Article VIII, Section 4 in conjunction with Article XII, Section 4, often referred to as the "credit clauses" proscribing the loaning or pledging of public credit. *Utah Power & Light Co. v. Campbell*, 108 Idaho 950, 703 P.2d 714 (1985).

**2. The Revenue Allocation Scheme Provided Under Chapter 29, Title 50, Idaho Code, The Local Development Act Is Unconstitutional *Per Se*, And As Applied In This Case Under Article VIII, Section 3 Of The Idaho Constitution.**

Appellant Hart alleges that the district court erred in authorizing the Agency to issue the subject Revenue Allocation Bonds for the reason that such issuance violates the Idaho Constitution, Article VIII, Section 3, because no election was held to obtain approval of the electorate for the purpose of approving said indebtedness or liability of the city of Rexburg in funding – pledging its credit – to the Agency for issuance of the bonds. Article VIII, Section 3 states in relevant part as follows:

No.....city..... shall incur any indebtedness or liability in any manner, or for any purpose exceeding in that year, the income and revenue provided for it for such year without the assent of two-thirds (2/3) of the qualified electors thereof voting at an election to be held for that purpose, nor unless, before or at the time of incurring such indebtedness, provisions shall be made for the collection of an annual tax sufficient to pay the interest on such indebtedness as it falls due, and also to constitute a sinking fund for the payment of the principal thereof, within thirty (30) years from the time of contracting the same. Any indebtedness or liability incurred contrary to this provision shall be void: provided that this Section shall not be construed to apply to the ordinary and necessary expenses authorized by the general laws of the state.....

The constitutional history of Idaho clearly demonstrates that the framers intended to severely limit the ability of local government to incur indebtedness. See, Proceeding of the Constitutional Convention, Vol. 1, pp. 590-593. As stated in *Feil v. City of Coeur d'Alene*, 23 Idaho 32, 129 P. 643, 648-649 (1912), the court noted that the framers "employed more sweeping and prohibitive language in the framing of Section 3 of Article VIII, and pronounce a more positive prohibition against excessive indebtedness, than is to be found in any other constitution....." For sixty years, despite being the subject of frequent litigation, Article VIII, Section 3 remains substantially unaltered with its limitations being strictly applied by the Idaho Supreme Court. See, Dennis Colson, Idaho's Constitution, pp. 105-110; 198-202 (1991).

Starting in 1950, Article VIII, Section 3 was amended to allow local government to issue revenue bonds for the construction of certain infrastructure, such as sewer systems, treatment plants and off-street parking facilities. Thereafter a number of amendments have allowed local governments to issue revenue bonds for certain purposes, where the bonds are repaid from rates and charges assessed against the users of the facilities as distinguished from taxes assessed against taxpayers. In more recent times other amendments of Article VIII have been promulgated, i.e. creating "independent public bodies corporate and politic" (Article VIII, Section 1 amended in 1998). For example, the vote requirement to approve revenue bonds for sewer systems in Article VIII, Section 3 was lowered from two-thirds to a simple majority. Nevertheless, none of the six amendments of Article VIII, Section 3 to date have elected to amend this Section at issue here.

It is in this context, then, it is submitted that the Court should analyze the Agency's Petition to issue revenue allocation bonds specifically authorized under the Local Economic Development Act I.C. § 50-2001, et seq. The Idaho Supreme Court has been frequently requested to revise its strict construction of Article VIII, Section 3 by local government which advocated adoption of other states' interpretations. To the contrary, the Idaho Appellate Courts have made it clear that Idaho strictly construes this provision and does not follow other jurisdictions' interpretations. *Miller v. City of Buhl*, 48 Idaho 668, 284 P. 843, 845 (1930); *Feil*, 23 Idaho 32, 129 P. 643, *supra*. Idaho has resisted the "outcome oriented" philosophy of other jurisdictions and has strictly adhered to the historical construction of this constitutional provision. The Court in *Boise Development Co. v. City of Boise*, 26 Idaho 347, 143 P. 531, 535 (1914) stated in commenting on a California court's outcome oriented philosophy:

[W]hen the court attempts by argument to escape the force and effect of the constitutional provision under consideration and show that the city incurred no liability under the contract, we submit that its reasoning is not sound.

Consequently, the Idaho Supreme Court has limited its analysis of this constitutional provision to considering and applying only Idaho cases. It is now settled law in Idaho that voters must approve both general obligation bonds, which are secured by full faith and credit of the issuer, and revenue bonds, which are secured solely by a pledge of a special fund. *Asson v. City of Burley*, 105 Idaho 432, 670 P.2d 839 (1983), cert. denied, *Chemical Bank v. Asson*, 469 U.S. 870, (1984); *Feil v. City of Coeur d'Alene*, *supra*; *Boise v. Frazier*, *supra*. Despite other jurisdictions to the contrary, the Idaho Supreme Court has uniformly rejected the "special fund" doctrine, which provides that a municipality does not contract indebtedness or incur liability in violation of the

constitutional limitation by undertaking an obligation which is to be paid out of a special fund consisting entirely of revenue or income from the property purchased or constructed. *Asson, supra* 105 Idaho at 438. In the present case the Agency's Revenue Allocation Bonds will be funded solely out of a "special fund" from incremental tax revenues derived from the appreciation in tax evaluation of the improvements financed by the bond proceeds pursuant to the Local Economic Development Act, I.C. § 50-2901 et. seq.

In its Memorandum in Support of its Petition, the Agency suggests that Revenue Allocation Bonds do not fall within the constitutional terms of "indebtedness" or "liability." R. Vol. I, pp. 67-69. In light of the amendment to Article VIII, Section 1, urban renewal agencies are exempt from the operation of the vote requirements of Article VIII, Section 3. This amendment ratified the finding of the Idaho Supreme Court in *Boise Redevelopment Agency v. Yick Kong Corp.*, 94 Idaho 876, 881-882, 499 P.2d 575 (1972). Appellant's focus in this appeal is on the constitutional effect which the application of the provisions of the Local Economic Development Act in conjunction with the Urban Renewal Law has on the municipalities with respect to their use and pledge of *ad valorem* tax generated funds to raise money to finance the subject projects without voter approval. Indeed, if the municipalities are constitutionally prohibited from participating in "revenue allocation financing" then the scheme falls apart.

The Agency claims the municipalities can engage in this use and pledge of tax generated revenues for tax increment financing of urban renewal projects. The argument is that since the incremental tax revenues that fund the bonds are attributable to increases in the assessed value of the taxable property in the revenue allocation area, it is somehow

no longer a debt or liability of the municipality. In other words, the argument goes that since the original base value of the property is not encumbered, the city has suffered no indebtedness or liability. This is sleight of hand in the extreme. The mere fact that the property is tied up for the bond period is cost to the municipality. The generation of a cost automatically creates a debt or liability. Moreover, Article VIII, Section 3 of the Idaho Constitution not only prohibits incurring of such indebtedness, it prohibits incurring such liability in any manner or for any purpose. “Liability” has been interpreted by the Idaho Courts to be much more sweeping and comprehensive than the term “indebtedness.” *Feil, supra* 23 Idaho at 50, 129 P. at 649; *see also, Boise Development Co., supra* 26 Idaho 347, 143 P. 531; *Straughan v. City of Coeur d’Alene*, 53 Idaho 494, 24 P.2d 321 (1932). The Court noted in *Feil* that the Idaho Constitution “not only prohibits incurring any indebtedness, but it also prohibits incurring any liability in any manner or for any purpose, exceeding the yearly income and revenue. *Feil, supra* 23 Idaho at 50, 129 P. at 649 (emphasis added). Furthermore, the *Feil* Court recognized that local governments were precluded from trying to circumvent the constitutional limitations. In that regard, the Court stated:

The framers of our Constitution were not content to say that no city shall incur any indebtedness “in any manner or for any purpose,” but they rather preferred to say that no city shall incur any indebtedness or liability in any manner, or for any purpose. It must be clear to the ordinary mind, on reading this language that the framers of the Constitution meant to cover all kinds and character of debts and obligations for which a city may become bound, and to preclude circuitous and evasive methods of incurring debts and obligations to be met by the city or its inhabitants. *Id.*

After stressing that the framers of the Idaho Constitution intended the term “liability” to be more expansive than the term “debt”, the Court in *Feil* included in the



definition of liability "the state of being bound or obligated in law or justice to do, pay, or make good something; legal responsibility...." *Id.* Hence, the legal responsibilities of the entities engaged in an urban renewal plan and project involving revenue allocation financing results in said parties incurring respective liabilities. Further, despite all applicable attempts to distinguish incremental revenues in this instance, they are still proceeds from property taxes and therefore cannot be removed from the category of obligations which must be approved by the voters under the provisions of Article VIII, Section 3. Other jurisdictions have sided with Idaho on this issue. In *State ex. rel. Washington State Finance Committee v. Martin*, 384 P.2d 833 (Wash. 1963) the court held:

If the revenues in it derive exclusively from the operation of the device or organ of government financed by the fund, as in the case of a toll bridge, or the operation of the State Liquor Control Board, or from sales or leases of publicly owned lands, any securities issued solely upon the credit of the fund are not debts of the state, but debts of the fund only. But if the state undertakes or agrees to provide any part of the fund from any general tax, be it excise or ad valorem, then securities issued upon the credit of the fund are likewise issued upon the credit of the state and are in truth debts of the state. *Id.* at 842.

Finally, the agency seeks to avoid the application of Article VIII, Section 3 to prohibit revenue allocation financing by asserting it is not one of the governmental entities enumerated in that constitutional provision. That argument is inapposite. There are two responses to this assertion. First, the issuance of revenue allocation bonds is a two way street involving in this instance both the agency and the city of Rexburg. The city of Rexburg is without a doubt an entity within the meaning of Article VIII, Section 3. As such, Rexburg cannot do indirectly what it cannot do directly. Hence, it cannot incur and indebtedness or liability in any manner, which under the Local Economic

Development Act would result in such a debt or liability. Under Article XII, Section 4, a municipality cannot loan its credit "or raise money for" any "corporation or association whatever." Clearly under the scheme of the Local Economic Development Act, the generation of the revenue bonds is derived directly from the city's pledge of its credit and the raising of money for the bonds. As stated in paragraph 19 of the Findings of Fact, the district court's Judgment and Decree, "Rexburg will collect the property taxes that will pay off the bonds." R. Vol. I, p. 144. They began directing and financing the entire projects but "indirectly" through statutory and regulatory artifice. Therefore, from the standpoint of the city's participation alone, the mechanism of providing for the revenue allocation bonds violates the provisions of Article VIII, Section 4 of the Idaho Constitution.

The Agency notes that the Idaho Supreme Court has held that the urban renewal agencies are not one of the governmental entities enumerated in Article VIII, Section 3 of the Idaho Constitution. *See, Boise Redevelopment Association v. Yick Kong Corp., supra.* At the time of the *Yick Kong* decision, the current Local Economic Development Act providing for revenue allocation bonds did not exist. The Act was promulgated in 1988 for the purpose of encouraging private development in blighted areas of Idaho communities. I.C. § 50-2901 (purpose). *See, Statement of Purpose H.B. 497, 49<sup>th</sup> Legislature, 2d. Reg. Sess. (Idaho, 1988).* As a result municipalities became much more directly involved in the Urban Renewal process, in fact, this intimate involvement of the city in the process is a far, far cry from the federally funded project in *Yick Kong*. At the time of the *Yick Kong* decision, the source of funding for urban renewal agencies was largely derived from federal grants. With the advent of revenue allocation bonds under

the Local Economic Development Act, the funding source shifted to municipalities within the state of Idaho, thereby adding another Idaho entity into the constitutional equation regarding issues of liability, debt and credit. Idaho cases have repeatedly held that it is improper to attempt to evade or circumvent the force and effect of Article VIII, Section 3 or to attempt to do what it cannot do directly. *See, O'Bryant v. City of Idaho Falls*, 78 Idaho 313, 325-326, 303 P.2d 672, 674 (1956). In *O'Bryant*, the Court denounced efforts to evade constitutional limitations, quoting a Colorado case which held:

Contrary to popular opinion, mere schemes to evade law, once their true character is established are impotent for the purpose intended. Courts sweep them aside as so much rubbish. *O'Bryant*, 78 Idaho at 325, 303 P.2d at 678.

In *Dunbar v. Board of Com'rs of Canyon County*, 5 Idaho 407, 414, 49 P. 409, 411 (1897), the Court uttered the following *caveat*:

If boards of county commissioners are permitted to violate, disregard, and set at naught one plain provision of the constitution, then they may violate any and all provisions of that instrument, and the people who pay the taxes and bear the burdens of government are without protection, and at the mercy and whims of county commissioners.

The Idaho Supreme Court has manifested a long and consistent history of thwarting attempts by local governments to circumvent the provisions of Article VIII, Section 3 of the Idaho Constitution. The Constitution clearly requires that before and indebtedness or liability is incurred by any municipality which exceeds the income and revenue provided for it in the current year, it must be submitted to a vote of the people and be authorized by two-thirds of the qualified electors. If this requirement were

followed, the scheme to generate revenue allocation bonds under the Local Economic Development Act would not get off the ground.

**3. The Revenue Allocation Scheme Under The Economic Development Act Violates Article VIII, Section 4 And Article XII, Section 4 Of The Idaho State Constitution Prohibiting Municipalities From Loaning Or Pledging Their Credit, Or The Faith Thereof, Or Raising Money, Directly Or Indirectly, In Any Manner, To Or For Any Corporation Or Association Whatever.**

Article VIII, Section 4 and Article XII, Section 4 are the “credit clauses” under the Idaho Constitution and prohibit governmental entities from loaning or pledging their credit for the benefit of any corporation for any amount or for any purpose whatsoever.

Article VIII, Section 4 provides:

No county, city, town, township, board of education, or school district, or other subdivision, shall lend, or pledge the credit or faith thereof directly or indirectly, in any manner, to, or in aid of any individual, association, or corporation, for any amount or for any purpose whatever, or become responsible for any debt, contract or liability of any individual, association or corporation in or out of this state.

Article XII, Section 4 provides:

No county, town, city, or other municipal corporation by vote of its citizens or otherwise, shall ever become a stockholder in any joint stock company, corporation or association whatever, or raise money for, or make donation or loan of its credit to, or in the aid of any such company or association...

The issue of whether the municipality was unconstitutionally lending or pledging its credit was address in *Boise Redevelopment Agency v. Yick Kong Corp.*, *Supra*. In that case the Court held that those sections relating to “association”, “corporation”, etc. were intended to refer only to “private interests.” *Id.* Idaho at 884, P.2d at 583. This

conclusion was based on the Court's finding in *Engelking v. Investment Board*, 93 Idaho 217, 458 P.2d 213 (1969), where the historical purpose of the constitutional prohibitions was explained as preventing favorite status from being given to any private enterprise or individual in the application of public funds. It was feared that private interests would gain advantages at the expense of the taxpayers. Even though the Court noted that it was "at least arguable that the above provisions do indeed constitute a "donation or loan of credit" and that the City of Boise is "raising money for" the plaintiff," the Court held that the urban renewal agency was not a private entity of the sort intended by the subject constitutional provision.

However, the advent of the Local Economic Development Act in 1988 allowing for the use of revenue allocation financing brings private interests back into the picture. The very purpose of the Local Economic Development Act is to utilize the agency as a development conduit with the objective being to turn the development property over to private interests. (*See*, Legislative history – statement of purpose of act, *supra*). The purpose of the Act is stated in pertinent part "to encourage taxing district to cooperate in the allocation of future tax revenues arising in urban areas.... In order to facilitate long term growth of their common tax base, and to encourage private investment within urban areas...." I.C. § 50-2901. Hence, the lending and pledging of credit and the raising of money is "indirectly" to the benefit of private corporations, associations and interest, with the agency being the conduit. The Local Economic Development Act and the use of revenue allocation financing did not exist when *Yick Kong* was decided in 1972. Now with revenue allocation of the municipal tax base to the purpose of revenue bonds for the ultimate purpose of private development, the entire factual matrix has significantly

changed. For that reason alone, *Yick Kong* is no longer applicable with reference to the purpose and the mechanism of revenue allocation financing. The fact that the urban renewal agency under *Yick Kong* had no ability to impose taxes on the residence of the city of Boise nor encumber any public assets to the advantage of private enterprise is inapposite in the situation of the revenue allocation financing mechanism, where the assets of the municipality are encumbered and pledged for an extended period to raise money for the agency to eventually attract and benefit private interests and where the municipality forms the Agency and designates the projects.

The attempt to relegate the older case and previous strictness in the application of the provisions of Article VIII and Article XII to the dustbin of history on the grounds that the founders feared large private interests fails because concerns regarding large private interest abuse still exists. The Wal-Mart or Microsoft of today can be as imposing and grasping at tax benefits as was the railroad of yesterday. The fundamental fact situation has changed from *Yick Kong* with the advent of the Local Economic Development Act rendering it inapplicable. To say that the development under urban renewal pays for itself whereas the railroads of old were subsidized is not a fair comparison. Today, the private enterprises that follow urban renewal take advantage of a subsidized situation the same as the railroads of old took advantage of the right of way grants and created far more development than their land grants were worth – whole cities sprang up along the railroad routes. In both cases the public subsidy helped bring about development. And in both cases the constitutional restrictions of Article VIII, Section 3 and Article XII, Section 4 should apply. A city cannot pledge revenues “from any source” whatever without creating an “indebtedness” within the constitutional provision limiting

indebtedness. *Williams v. City of Emmett*, 51 Idaho 500, 6 P.2d 475 (1931). As discussed above, the concept of "liability" is even broader than that of indebtedness in Idaho and is relevant to Mr. Hart's claim that, especially now with the advent of revenue allocation financing, the constitutional requirement that, before an indebtedness or liability is incurred which exceeds the income and revenue provided for it in the current year, it must be submitted to a vote of the people and be authorized by two-thirds of the qualified electors.

**4. The Rexburg Urban Renewal Agency is an *alter ego* of the city of Rexburg.**

In *Yick Kong*, the Court concluded that the statutory provisions allowing a municipality to be involved in a creation of an urban renewal agency and providing for close association between the two entities did not make the agency the *alter ego* of the city of Boise. *Yick Kong*, Idaho at 882, P.2d at 581. The Court found the following elements to be significant in determining that the agency was not an *alter ego* of the city.

We note, however, that plaintiff is an entity of legislative creation and it is the legislature that establishes powers, duties and authorities. The legislature in what we may assume to be an effort to maintain some local voice in the question of whether a particular municipality had a need for urban renewal, required a finding of need by a municipality prior to the time that an urban renewal agency could come into existence. While the particular city may trigger the existence of the plaintiff, it cannot control its powers or operations. Again, while the legislature may have sought to allow a local voice in the selection of the commissioners of the plaintiff, there is no attack upon the integrity or independence of the commissioners of the plaintiff and we cannot say that such appointment procedures cause inherent control in the city. Neither does the provision for removal of commissioner necessary show any control by the city. The removal procedures are not arbitrary, nor are they solely in the discretion of the city. Removal can result only after a hearing in consistent with the exact standard set forth in I.C. § 50-1006(d). *Yick Kong*, Idaho at 881-882, P.2d at 580-581.

The underlying fact situation upon which the Court based its opinion has substantially changed with the advent of revenue allocation financing, as discussed above. Whereas the urban renewal projects were formerly for most part financed by federal funds, they are now funded primarily by local entities. This change in source of financing must be given great weight. As a result of the Local Economic Development Act, the municipalities now provide tax based funding through the agencies for the projects which the municipalities wish to develop. Further, the independence of the urban renewal boards has been severely eroded. Under the 1986 statute no elected officials were to be on the board. Under current law, I.C. § 50-2006, membership of the agencies may include members of the city councils, and the amount and source of tax revenues is calculated by the county treasurer and paid directly to the urban renewal agency by the county auditor. Under these circumstances, the creation, organization, appointments, designation of projects, and funding are totally controlled by the municipality. As a result, by using revenue allocation financing, the municipalities have been able to successfully create a real "*alter ego*" and circumvent the constitutional provisions of Article VIII, Sections 3 and 4 and Article XII, Section 4. Mr. Hart respectfully submits that this circumvention violates those constitutional provisions.

## V.

### CONCLUSION

The evolution of the Urban Renewal Law in allowing more direct control and involvement of municipalities in that process in conjunction with the development of tax revenue allocation financing under the Local Economic Development Act has gradually,



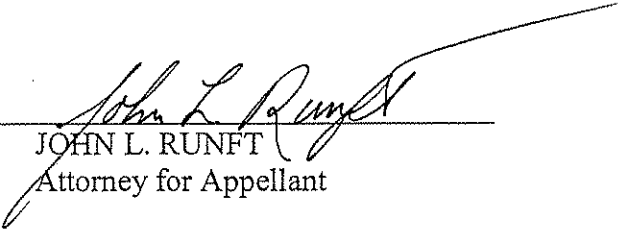
by unnoticed inches, resulted in a statutory scheme to circumvent the force and effect of Article VIII, Sections 3 and 4 and Article XII, Section 4 of the Idaho Constitution. The combined statutory scheme allows municipalities to indirectly do what they cannot do directly. If not as a "facial" violation, then, in this case, at least as "an applied" violation, the city of Rexburg has created its own "exempt" *alter ego*, which it created, appointed directors, selected the projects, pledged and allocated *ad valorem* tax revenues to finance the project to attract private investors. When we see through the "Emperor's clothes" in this case, the naked truth is that the city of Rexburg designed, controlled and funded the entire proposed project with the people's money without getting the approval of the voters as required by the Constitution of the state of Idaho. Whether the purpose is to attract a railroad or a Wal-Mart, the process has gone too far. The statement of the Court in *Feil* is as apropos today as then:

The framers of our Constitution were not content to say that no city shall incur any indebtedness "in any manner or for any purpose," but they rather preferred to say that no city shall incur any indebtedness or liability in any manner, or for any purpose. It must be clear to the ordinary mind, on reading this language, that the framers of the Constitution meant to cover all kinds and character of debts and obligations for which a city may become bound, and to preclude circuitous and evasive methods of incurring debts and obligations to be met by the city or its inhabitants. *Feil*, 23 Idaho at 50, 129 P. at 649 (emphasis added).

DATED this 8th day of November 2008.

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By: \_\_\_\_\_

  
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CERTIFICATE OF SERVICE

The undersigned hereby certified that on this 8<sup>th</sup> day of November 2008, a true and correct copy of the APPELLANT'S BRIEF was served upon opposing counsel as follows:

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