

1 THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
2 THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA
3
4

5 IN THE MATTER OF:
6

7 CITY OF BOISE,
8 PETITIONER,

Case No. CVOC0202395D
DECISION DENYING PETITION
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11 On March 28, 2002, pursuant to *Idaho Code* §7-1304, the City of Boise ("Boise")
12 petitioned the Court for a judicial examination and determination of the validity and
13 authority for Boise to enter into a Lease and Trust Agreement and related financing
14 documents for the construction of and lease of a new police facility to be located on
15 Fairview Avenue. The proposed project also includes renovating the existing Barrister
16 facility. Boise resident David Frazier, *pro se*, answered in opposition on April 24, 2002,
17 and Boise resident Robert Auld (represented by counsel) answered in opposition on May
18 13, 2002. A public hearing was held on May 15, 2002. Several other Boise residents,
19 Gene Summa, Nicole Fornshell and Aimee Robbins, appeared in opposition to the
20 Petition at the hearing but filed no answer. The Court set a briefing schedule.

21 Oral argument was held on July 8, 2002, and the Court ordered the parties to file
22 proposed findings of fact and conclusions of law by August 19, 2002. Boise and
23 Respondents Frazier and Auld submitted proposed findings of fact and conclusions of
24 law on August 19, 2002, and the Court took the matter under advisement.

25 For the reasons stated below, the Court denies the Petition. The Court finds that
26 construction of the Boise Police Department Fairview facility does not constitute an
27 "ordinary and necessary" expense, and further finds that its proposed financing
28 arrangement (denominated a "lease" by Boise) would create a liability exceeding Boise's
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1 income and revenue provided for it for each year in violation of the Idaho Constitution.¹
2 Thus, this expenditure must be approved by Boise voters.

3 **BACKGROUND**

4 Among those powers most jealously guarded by the people is the power of local
5 government to incur debt and to expend money on its residents' behalf. Therefore, the
6 framers at Idaho's constitutional convention decided to severely limit local government
7 authority to incur debt in Article VIII, §3 of the Idaho Constitution. From the beginning,
8 local governments have tested its limits, developing many schemes designed to avoid
9 the consequences of this article. Historically, the appellate courts have resisted their
10 efforts, opining that the courts cannot and should not amend the clear constitutional
11 prohibitions by judicial fiat.

12 While the Boise Police Department Fairview facility may be desirable and its
13 construction in the best interests of Boise residents, the project's desirability is not
14 before the Court. By statute, the Court's role is limited to determining whether this
15 project is an "ordinary and necessary" expense. If it is, then Boise residents do not need
16 to vote on its construction. However, if the Court finds that the project is not an "ordinary
17 and necessary" expense, the Court must determine whether the proposed "lease" is a
18 multi-year debt or liability requiring voter approval. The Court finds that it does require
19 voter approval.

20 **Factual Findings**

21 Boise is a municipal corporation incorporated pursuant to *Idaho Code* §50-101 *et*
22 *sec.*, and it seeks to enter into an agreement ("Agreement") designed to allow it to
23 ultimately purchase a new police facility to be constructed at 27th and Fairview in Boise.
24 It calls this Agreement a "lease" Agreement and its semi-annual payments are called
25 "lease" payments.

26 **1. The "lease" agreement.**

27 On its face, the Agreement is a "lease" with an option to purchase, providing for
28 thirty (30) years of "lease" payments. Those "lease" payments include a "principal"
29 component and "interest" on that "principal." By paying the total "principal" owing (from
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31 ¹ Idaho Constitution art. VIII, §3.

1 \$16,680,000 to \$16,750,000) and all accrued "interest" (up to nearly \$19,000,000) plus
2 \$1.00, Boise can purchase the Fairview facility. The proposed project also includes
3 renovating the existing Barrister facility.

4 Boise currently owns the project property located at 27th and Fairview, and if the
5 Agreement is approved, Boise will transfer ownership of this property to the Agreement's
6 trustee, Bank of New York Western Trust Company ("BNY Western"). Boise will act
7 as BNY Western's agent and supervise the construction of the new facility by a private
8 contractor on the Fairview property. Certificates of Participation² will be issued by BNY
9 Western and sold to private investors to raise the costs of construction
10 (\$16,680,000.00).³ The "lease" requires Boise to make semi-annual payments for the
11 use of the new Fairview police facility, and the "lease" payments include a "principal"
12 component and "interest" on that "principal."

13 BNY Western will hold title to the Boise Police Department Fairview project
14 (defined as Boise's Fairview land, the proposed improvements, and the fixtures) on
15 behalf of the Certificate Owners, until and unless Boise exercises its purchase option.
16 The option to purchase the Fairview facility could be exercised during the thirty-year term
17 of the "lease" by payment according to an amortization schedule included in the "lease"
18 plus \$1.00. The bulk of the "principal" is due at the end of the thirty year period and the
19 purchase price includes payment of the "principal" plus \$1.00. Or, should Boise continue
20 to make the scheduled rental payments for the entire thirty-year term, Boise would
21 acquire ownership of the facility, and reacquire ownership of its land, after the final
22 payment plus \$1.00.

23 The "lease" also contains a "non-appropriation" clause which provides for
24 termination of the lease at the end of any fiscal year should a future Boise City Council
25 not appropriate sufficient funds to pay the "lease" payments. According to Boise's
26 counsel, this clause will be eliminated if the Court finds the expenditure to be "ordinary
27 and necessary."

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29 ² Certificates of Participation are designed to create a tax exempt "lease" to finance local government
30 capital improvement projects. The "lease" is structured as a series of one year renewable obligations
31 spread out over time and the principal amount (loaned) is divided and sold to multiple investors.

³ This amount could increase to \$16,750,000.00.

1 In addition, the "lease" defines a number of conditions in which Boise may be
2 declared in default, including failure to make a scheduled payment, failure to observe
3 certain covenants, or becoming insolvent. If Boise fails to appropriate funds, or if the
4 Owners of Certificates terminate the "lease" upon default by Boise, there are a number
5 of remedies available to the Owners of Certificates. While the "lease" ostensibly
6 distinguishes between a failure to appropriate funds and "default," the remedy for failing
7 to appropriate is the same as one of the remedies available upon default. Furthermore,
8 it is found in the section addressing default remedies.

9 According to the "lease" remedies for default, upon Boise's failure to appropriate
10 funds to pay the "lease," the Certificate Owners can either order the sale of the entire
11 Fairview project, including the Fairview property previously owned by Boise but
12 transferred to BNY Western as trustee, any fixtures and personal property, or they can
13 temporarily lease the project or portions of it for the benefit of the Certificate Owners.

14 If the Certificate Owners decide to sell the project, contrary to Boise's contentions,
15 Boise is not guaranteed any return for its Fairview property. Before any sale proceeds
16 would be distributed, any expenses relating to the sale, any costs for repair or
17 replacement of any project property, and expenses related to enforcing the Agreement
18 would be deducted from the proceeds. Furthermore, before any potential distribution to
19 Boise, the Certificate Owners are entitled to be repaid the total principal amount held by
20 each Certificate Owner. This means that the total principal, at least \$16,680,000.00,
21 must be repaid from the sale before any proceeds are available to Boise. In other
22 words, by signing this agreement, Boise property (the Fairview property) becomes
23 obligated for at least \$16,680,000.00. Because the majority of the principal becomes
24 due at the end of the thirty year period, Boise's property is significantly encumbered for
25 up to thirty years and may be lost as a penalty for failing to appropriate funds to pay the
26 "lease" payments in the future.

1 If the sale proceeds are insufficient to redeem all Outstanding Certificates in full,
2 each Certificate Owner is entitled to a *pro rata* share of such proceeds, based on the
3 outstanding principal amount held by each Certificate Owner, and Boise gets no return
4 for its Fairview property. Only if the sale proceeds exceed the amount required to pay all
5 the expenses and are sufficient to redeem all Outstanding Certificates in full, then the
6 balance remaining after paying any other amounts due under the Agreement will be paid
7 to Boise. Thus, the Court finds that because Boise's Fairview property is at risk for up to
8 \$16,680,000.00 plus accrued interest, there is a significant potential penalty which will be
9 imposed if a future city council fails to appropriate funds to pay the "lease" payments.

10 **2. Boise Police Department Proposal.**

11 Boise has approximately 260 police officers and 53 civilian police employees.
12 From 1977 to 2000, the Boise Police Department headquarters and certain associated
13 headquarters staff remained located in a 25-year-old law enforcement facility located at
14 7200 Barrister Drive in shared facilities with the Ada County Sheriff's Office. To meet
15 increased demands for direct law enforcement service and the increased needs for
16 public safety programs, certain Boise Police Department non-headquarters staff were re-
17 located into leased facilities throughout Boise. By 2001, Boise Police Department staff
18 occupied nearly 35,000 square feet of leased or City-owned space throughout Boise.

19 In 2000, Boise had annual rental costs for Boise Police Department leased
20 facilities of approximately \$193,985. Annual leasing costs in 2002 for Boise Police
21 Department facilities total \$230,105 for 39,491 square feet of space, which area figure
22 also includes non-leased space at the Public Safety Building.

23 Expansion of the Boise Police Department, as well as a similar expansion of the
24 Ada County Sheriff's Office and the Ada County-City Emergency Management, also
25 located in the Barrister facility, have filled the Public Safety Building far beyond its
26 capacity. Any future growth of the Boise Police Department will now have to take place
27 in leased or City-owned operations away from 7200 Barrister Drive. This project would
28 centralize Boise Police Department headquarters. Boise anticipates that the renovated
29 Boise portion of the Barrister facility will house the Bench Precinct. The proposed
30 Fairview downtown area facility will not only serve as Boise Police Department
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1 headquarters but as a Valley Precinct headquarters, as well. This location will put
2 officers much closer to the downtown, Harris Ranch, Southeast Boise, and North End
3 areas.

4 However, it would not eliminate the need for leasing additional properties to meet
5 various police needs. The Boise Police Department facilities Master Plan calls for
6 retaining the various Community Outreach Division substations and the Vice/Narcotics
7 office apart from the proposed Fairview centralized location. The Boise Police
8 Department Office of Internal Affairs will remain located temporarily in the remodeled
9 section of City Hall. It is anticipated, however, that Internal Affairs may eventually move
10 into the proposed Boise Police Department headquarters building once it is completed.

11 If the Boise Police Department cannot centralize its headquarters facility in the
12 downtown area and combine it with one of its proposed precinct facilities, Boise claims it
13 will need to lease an estimated 142,600 square feet of additional space by 2020 to
14 house various police activities and services. Boise claims that acquiring, constructing
15 and moving to a more centralized, downtown area Boise Police Department facility will
16 result in various cost savings or benefits to Boise and its taxpayers. However, in
17 response to the Court's questions, Boise's counsel, Mr. Skinner, represented that if
18 future city councils failed to appropriate funds for this "lease," the Boise Police
19 Department could easily relocate to other leased facilities throughout Boise. He
20 indicated this would not be a problem. Thus, based on Boise's representations at the
21 oral argument, sufficient leased capacity exists to house Boise Police Department's
22 expanded needs even if this Agreement is not approved and even if future Boise City
23 Councils fail to appropriate funding, thus, triggering sale of the project property.

24 The proposed Fairview facility is planned to include an indoor eight-lane handgun
25 range,⁴ a child care facility, a dedicated Training Center with office and classroom space,
26 an armory for weapons inventory and range support, a physical fitness facility, defensive
27 tactics training, building support services (e.g., break rooms, adequate storage to meet
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30 ⁴ Currently, Boise Police Department has an outdoor range, leased from the Boise Police Association and
31 located in the foothills northeast of Boise. Boise Police Department intends to stop using that outdoor
32 range on September 1, 2002, based on an increase in leasing costs to \$12,000.00 per year.

1 projected needs, locker rooms restrooms, and showers) and public meeting space for
2 officers to meet with citizen groups on such topics as crime prevention and public safety.

3 ANALYSIS

4 By filing a Petition, Boise requests the Court examine the Agreement and
5 determine whether the Agreement can be validly executed in the absence of voter
6 approval. While the judicial confirmation law has not been tested in higher courts, the
7 law clearly requires the Court to independently examine the Petition and the Petitioner's
8 claims even in the absence of property owner, taxpayer, or elector objections. The
9 Court is not allowed to simply "rubber stamp" a Petitioner's request.

10 It is the Court's responsibility to determine whether the Petitioner has legal
11 authority for its proposed actions, whether the obligation or agreement is permissible
12 under the general laws of the state and whether Idaho's Constitution requires voter
13 approval. *Idaho Code* §7-1308 provides in relevant part as follows:

14 (1) The filing of the petition and publication and posting of the notice as
15 provided in section 7-1306, *Idaho Code*, shall be sufficient to give the court
16 jurisdiction, and upon hearing the court shall examine into and determine
17 all matters and things affecting each question submitted, shall make such
18 findings with reference thereto and render such judgment and decree
19 thereon as the case warrants.

20 (2) In making the findings set forth in subsection (1) of this section, the
21 court shall find upon what legal authority the political subdivision bases the
22 petition for the proposed bond, obligation or agreement and whether such
23 bond, obligation or agreement is permissible under the general laws of the
24 state or is permissible as an ordinary and necessary expense of the
25 political subdivision authorized by the general laws of the state and shall
26 determine if the political subdivision is entitled to the relief sought. . . ⁵

27 Therefore, whether taxpayers, property owners or voters appear in the action is
28 irrelevant. The Court is required to make its own inquiry and findings. Thus,
29 Respondent Auld's suggestion that the statute calls for an unconstitutional advisory
30 opinion in violation of Article V, §1,⁶ is simply wrong.

31 ⁵ *Idaho Code* §7-1308 (emphasis added).

32 ⁶ Idaho Const., art. V, § 1 provides in relevant part as follows: " . . . Feigned issues are prohibited"

1 An advisory opinion is a “nonbinding statement by a court of its interpretation of
2 the law on a matter submitted for that purpose.”⁷ The Court finds the statute does not
3 call for a non-binding opinion and the cases cited by Respondent Auld simply do not
4 apply to this case. The statute clearly puts the matter at issue and the Court’s decision
5 is not advisory; it is binding.

6 In this case, however, various Boise property owners and taxpayers did intervene
7 and challenged Boise’s contentions.

8 Respondent Auld and Respondent Frazier allege Boise’s proposed agreement
9 violates the Idaho Constitution, Art. VIII, §3, because no election was held to obtain
10 approval of the electorate to enter into the “lease” agreement in question. Article VIII, §3
11 requires both that the expenditure be authorized by the general laws of the state and
12 that it be an “ordinary and necessary” one or that it not be a liability or debt.⁸ Art. VIII, §3
13 states in relevant part as follows:

14 No . . . city . . . shall incur any indebtedness, or liability, in any manner, or
15 for any purpose, exceeding in that year, the income and revenue provided
16 for it for such year, without the assent of two thirds (2/3) of the qualified
17 electors thereof voting at an election to be held for that purpose, nor
18 unless, before or at the time of incurring such indebtedness, provisions
19 shall be made for the collection of an annual tax sufficient to pay the
20 interest on such indebtedness as it falls due, and also to constitute a
21 sinking fund for the payment of the principal thereof, within thirty (30) years
22 from the time of contracting the same. Any indebtedness or liability
23 incurred contrary to this provision shall be void: Provided, that this section
24 shall not be construed to apply to the ordinary and necessary expenses
25 authorized by the general laws of the state⁹

29 ⁷ BLACK’S LAW DICTIONARY (7TH ED. 1999), “OPINION”.

30 ⁸ See *City of Pocatello v. Peterson*, 93 Idaho 774, 777, 473 P.2d 644, 647 (1970).

31 ⁹ Idaho Constitution, art. VIII, § 3 (emphasis added).

1 In its Petition, however, Boise contends no election is necessary because the
2 proposed expenditures are "ordinary and necessary." In addition, Boise argues that if
3 they are not "ordinary and necessary," the expenditures do not constitute a liability or
4 debt exceeding Boise's yearly income and revenue provided for it.

5 While the Court finds that Boise has the appropriate legal authority under the
6 general laws for its proposal, the Court further finds the expenditures are not "ordinary
7 and necessary" and constitute a multi-year liability exceeding Boise's yearly income and
8 revenue provided for the project. Therefore, Boise must submit this expenditure to a
9 vote of the electorate.

10 **A. Boise has legal authority for the proposed agreement.**

11 As a municipal corporation incorporated pursuant to *Idaho Code* §50-101 *et sec.*,
12 Boise's authority is limited to those authorities delegated to it by the Legislature. Boise
13 relies on *Idaho Code* §50-1403¹⁰ as authorizing it to transfer its Fairview property to a
14 trustee (BNY Western) for "security purposes, or for purposes of accommodating a
15 transaction, or for funding of construction of capital facilities on city owned property." In
16 this case, Boise contends the proposed transfer of its Fairview property to BNY Western
17 fulfills all three purposes.

18 Boise also has authority to acquire and lease property and erect buildings for its
19 use.¹¹ Therefore, the Court finds Boise has the requisite general statutory authority to
20 construct this project.

21 Having found Boise has the requisite statutory authority to construct this project,
22 the Court's inquiry does not end. The Court must next determine whether Art. VIII, §3,
23 Idaho Constitution, requires Boise to submit its proposed project for voter approval.

27 ¹⁰ *Idaho Code* §50-1403. "After a public hearing has been conducted, the city council may proceed to
28 exchange, convey or offer for sale the real property in question, subject to the restrictions of section 50-
29 1401, Idaho Code. The city council shall be governed by the following provisions: . . . (5) When it is
30 determined by the city council to be in the city's best interest, the city may transfer property to a trustee for
31 security purposes, or for purposes of accommodating a transaction, or for funding of construction of
capital facilities on city owned property."

¹¹ See *Idaho Code* §50-301.

1 **B. The Court finds the proposed expenditure must be approved by the**
2 **electorate.**

3 The Idaho Constitution was framed and adopted in 1889, and the constitutional
4 history clearly demonstrates that the framers intended to severely limit the ability of local
5 government to incur indebtedness.¹² Section 3 prohibits local governments from
6 incurring debt and the framers “employed more sweeping and prohibitive language in
7 framing section 3 of article 8, and pronounced a more positive prohibition against
8 excessive indebtedness, than is to be found in any other Constitution”¹³

9 Although the subject of frequent litigation, Article VIII, §3 survived intact for nearly
10 sixty years without amendment. During that period, the Idaho Supreme Court regularly
11 applied the limitations strictly, requiring local governments to submit various
12 expenditures to the voters.¹⁴ This section was first amended in 1950 to permit local
13 government to issue revenue bonds¹⁵ for constructing water and sewer systems,
14 treatment plants and off street parking facilities.

15 Subsequently, a number of amendments have allowed local governments to issue
16 revenue bonds for facilities like recreational or air navigation facilities.¹⁶ The vote
17 requirements for various expenditures have also been lowered for some local
18 government projects. For example, the vote requirement to approve revenue bonds for
19 water and sewer systems was lowered from two-thirds to a simple majority.¹⁷ This
20 section has been amended more than any other section in the constitution and Idaho
21 voters have also added three sections to it.¹⁸

22 Given this, some authors contend that by amendment to the constitution and by
23 adding new sections, the trend appears to be away from applying strict debt limitations.¹⁹
24 However, in each case, loosening those limitations has required an amendment to the
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26 ¹² See Proceedings Constitutional Convention, vol. 1, pp. 590, 593.

27 ¹³ *Feil v. City of Coeur d'Alene*, 23 Idaho 32, 129 P. 643, 648-649 (1912).

28 ¹⁴ See Dennis Colson, *Idaho's Constitution*, pp. 105-110, 198-202 (1991).

29 ¹⁵ Revenue bonds are repaid from rates and charges assessed against users of the facilities rather than
from taxes assessed against the taxpayer.

30 ¹⁶ Colson, *supra* note 14, at 109 and 201.

31 ¹⁷ *Id.*

32 ¹⁸ *Id.* at 110 and 202.

¹⁹ *Id.* at 110.

1 state constitution or a vote of the electorate. Significantly, on all six occasions, no one
2 chose to amend the section at issue here.

3 It is against that backdrop that the Court must analyze Boise's Petition. The
4 Court notes that the parties rely on case law from other jurisdictions. However, the
5 Court finds that the cases relied on are based upon specific statutes, constitutional
6 provisions, and legislative history unique to those jurisdictions and while it is instructive,
7 it is of limited assistance.

8 Furthermore, Idaho courts have made it clear that Idaho strictly construes this
9 provision and does not follow other jurisdictions' interpretations.²⁰ In fact, the Idaho
10 court has frequently been asked to revise its strict construction by local governments
11 advocating adoption of other states' interpretations. Each time, the Idaho court has
12 resisted their requests, and this Court believes such resistance is proper.

13 Moreover, many of those other jurisdictions are "outcome" oriented – approving
14 schemes to evade debt limitations because those courts find the outcome is in the
15 people's best interest writing things like "[i]t is never an illegal evasion to accomplish a
16 desired result, lawful in itself, by discovering a legal way to do it."²¹ States that employ
17 this circular reasoning are noted to generally approve any and all lease-purchase
18 agreements.²²

19 As the court in *Boise Development* wrote in commenting on a California²³ court's
20 circuitous reasoning based on such an outcome oriented philosophy:

21 [W]hen the court attempts by argument to escape the force and effect of
22 the constitutional provision under consideration and show that the city
23 incurred no liability under the contract, we submit that its reasoning is not
24 sound.²⁴

25 Therefore, the Court has limited its analysis to considering and applying Idaho cases.

27 ²⁰ See, e.g., *Miller v. City of Buhl*, 48 Idaho 668, 284 P. 843, 845 (1930); *Feil*, 23 Idaho 32, 129 P. 643.

28 ²¹ See *Bulman v. McCrane*, 312 A.2d 857, 861 (N.J. 1973) quoting *Kelley v. Earle*, 190 A. 140, 147 (Pa.
29 Sup.Ct. 1937).

30 ²² See Rueven Mark Bisk, *State and Municipal Lease-Purchase Agreements: A Reassessment*, 7
31 Harvard J.L.Pub.Pol'y 521,540 (1984).

32 ²³ *McBean v. City of Fresno*, 44 P. 358 (Cal. 1896).

²⁴ *Boise Development Co. v. City of Boise*, 26 Idaho 347, 143 P. 531, 535, (1914).

1 **1. The proposed project is not an “ordinary and necessary”**
2 **expenditure.**

3 Article VIII, §3 of the Idaho Constitution prohibits municipalities from incurring any
4 indebtedness or liability exceeding the income or revenue of that year unless the
5 indebtedness or liability is approved by two-thirds of the qualified electors. “Ordinary and
6 necessary” expenses are, however, expressly excepted from this provision.²⁵

7 The two terms, “ordinary and necessary,” are used conjunctively; “hence, to come
8 within the constitutional proviso or exception, expenditures made in excess of the
9 revenues of any current year must not only be for ordinary expenses, such as are usual
10 to the maintenance of the county government, the conduct of its necessary business,
11 and the protection of its property, but there must exist a necessity for making the
12 expenditure at or during such year.”²⁶ Thus, the issue presented in this case is whether
13 construction of an entirely a new Boise Police Department facility at a new location,
14 Fairview and 27th, is both “ordinary and necessary.”

15 Boise claims this project is “ordinary and necessary” and, thus, expressly
16 excepted. It also claims that all expenditures made for police protection are inherently
17 “ordinary and necessary.” The Court rejects these claims and, without reaching whether
18 it is a necessary expense, the Court finds that it is clearly not an “ordinary” expense.

19 **a. An expenditure for constructing entirely new municipal**
20 **facilities is not normally an “ordinary and necessary” expense.**

21 Early Idaho cases interpreted the “ordinary and necessary” language very
22 narrowly, often comparing the proposed expense amount to the city or county’s revenue
23 for that year.²⁷ In *County of Ada v. Bullen Bridge Co.*, the court wrote:

24 If it is claimed that this expenditure comes within the proviso of section 3,
25 article 8, of the constitution, we answer that a construction of that proviso,
26 as well as of the entire section, was given by this court in *Bannock Co. v.*
27 *Bunting*, 4 Idaho 156, 37 Pac. 277, and we would suggest that an
28 improvement involving an expenditure of nearly \$40,000, where the
revenue of the county for the year was only about \$70,000, would not
readily be classed as an ‘ordinary and necessary expense.’ It would be
difficult, we apprehend, to name an expense under such a construction that

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30 ²⁵ *Loomis v. City of Hailey*, 119 Idaho 434, 440, 807 P.2d 1272, 1278 (1991).

31 ²⁶ *Dunbar v. Board of Com’rs of Canyon County*, 5 Idaho 407, 49 P. 409, 411 (1897).

32 ²⁷ *Asson v. City of Burley*, 105 Idaho 432, 441, 670 P.2d 839, 848 (1983).

would not be 'ordinary and necessary.' If a necessity existed for the bridge, there was no conceivable excuse for not complying with the plainly expressed provisions of the constitution and the statutes. If these provisions of law are to be ignored or defeated upon flimsy technicalities, it is difficult to see what protection the people will have.²⁸

In other words, necessity does not drive the analysis, because, as the court in *Bullen* noted, the need for a facility can almost always be established; it is extremely subjective. Thus, to qualify for an exemption, the expenditure must be both ordinary and necessary.

Idaho Courts have held the following expenditures are not "ordinary and necessary": the construction of bridges;²⁹ construction of a wagon road;³⁰ purchase of a water system;³¹ construction of a schoolhouse addition;³² and purchase of a street sprinkler.³³

Expenditures held to be "ordinary and necessary" within the exception include: paying city officer and employee salaries;³⁴ repairing existing city waterworks;³⁵ constructing a jail in a newly created county;³⁶ street maintenance;³⁷ and the cost of employing school teachers.³⁸ These cases fit into three distinct categories. Some concerned the repair of existing facilities. Others involved performing ordinary maintenance on existing facilities. Still others involved the "ordinary and necessary" construction of new facilities to meet the requirements for essential services of newly created local governments. The *Jones* case is instructive. In *Jones*, the court said:

The ordinary and necessary expenses of a new county include the expenditures [like transcription of certain records, furniture, fixtures, record books, and constructing county jails]. To hold otherwise would prevent the

²⁸ *County of Ada v. Bullen Bridge Co.*, 5 Idaho 79, 90, 47 P. 818, 822 (1896) (emphasis added), quoted with approval in *Asson*, 105 Idaho at 441, 670 P.2d at 848; See also, *Ball v. Bannock Co.*, 5 Idaho 602, 51 P. 454 (1897).

²⁹ See generally, *Bullen Bridge Co.*, 5 Idaho 79, 47 P. 818.

³⁰ *McNutt v. Lemhi Co.*, 12 Idaho 63, 84 P. 1054 (1906).

³¹ *Woodward v. City of Grangeville*, 13 Idaho 652, 92 P. 840 (1907).

³² *Petrie v. Common School Dist.*, 44 Idaho 92, 255 P. 318 (1927).

³³ *Williams v. City of Emmett*, 51 Idaho 500, 6 P.2d 475 (1931).

³⁴ *Butler v. Lewiston*, 11 Idaho 393, 83 P. 234 (1905).

³⁵ *Hickey v. City of Nampa*, 22 Idaho 41, 124 P. 280 (1912).

³⁶ *Jones v. Power Co.*, 27 Idaho 656, 150 P. 35 (1915).

³⁷ *Thomas v. Glindeman*, 33 Idaho 394, 195 P. 92 (1921).

³⁸ *Corum v. Common School Dist.*, 55 Idaho 725, 47 P.2d 889 (1935).

1 new county government from going into operation until the question of the
2 expense of procuring copies of the records, erecting a jail, and procuring
3 offices, furniture, and equipment necessary for the conduct of the business
4 of the county was submitted to a vote. Neither the framers of the
5 Constitution nor the Legislature intended that it should be necessary to
6 submit such a question to the electors.³⁹

7 However, the *Jones* court went on to say “[w]hen a county organization is
8 complete, and the county government is in running operation, expenditures over and
9 above those mentioned in section 2, art. 8, of the Constitution must be submitted to the
10 voters.”⁴⁰ The court’s emphasis on the fact that once the local government is organized,
11 the debt limitations apply is significant. This means that once the initial organization is
12 complete, new expenditures must obtain voter approval.

13 As the *Asson* court explained in reviewing the earlier Idaho cases, “[c]omparison
14 of these earlier cases reveals one clear distinction between those expenses held to be
15 ordinary and necessary and those held not to be: new construction or the purchase of
16 new equipment or facilities as opposed to repair, partial replacement or reconditioning of
17 existing facilities,” with new construction being found to be not an “ordinary and
18 necessary” expenditure.⁴¹ The court in *Asson* further opined that while recent cases
19 applying Idaho Constitution, art. VIII, §3, have interpreted the “ordinary and necessary”
20 language more broadly, those decisions are not inconsistent with earlier case authority.

21 For example, in *Hanson v. City of Idaho Falls*,⁴² the Supreme Court held that
22 establishing a policeman's retirement fund was within the “ordinary and necessary”
23 proviso, reasoning that it was merely an extension of the city's salary compensation and
24 support of its municipal law enforcement staff.

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29 ³⁹ *Jones*, 33 Idaho at 663, 150 P. at 36-37.

30 ⁴⁰ *Id.* (emphasis added).

31 ⁴¹ *Asson*, 105 Idaho at 442, 670 P.2d at 949.

32 ⁴² *Hanson v. City of Idaho Falls*, 92 Idaho 512, 446 P.2d 634 (1968).

1 Thus, the *Asson* court found that the Supreme Court's most recent decisions
2 could be reconciled with earlier cases. It noted that the following local government
3 expenditures involving new construction or purchase of new facilities were required to
4 comply with the requirements of Art. VIII, § 3: purchase of an existing water system from
5 the estate of a deceased city resident in the *Woodward*⁴³ case; purchase of electric
6 generating system, to be paid for from receipts from sale of power and light;⁴⁴ entering
7 into agreement with natural gas distribution system to provide gas for city residents and
8 vicinity;⁴⁵ purchase by city of municipal lighting plant, and of waterworks system;⁴⁶
9 construction of courthouse annex.⁴⁷ These were all expenditures for new facilities and
10 did not involve repair or renovation of existing facilities.

11 Furthermore, contrary to Boise's argument, the *Pocatello* decision cannot be
12 argued to condone construction of entirely new facilities as "ordinary and necessary."
13 While the project may have entailed new construction, the Supreme Court clearly
14 articulated the issue before it as:

15 The principal issue presented by this appeal is whether the repair and
16 improvement of the municipal airport by the City of Pocatello is an ordinary
17 and necessary expense falling within the pertinent constitutional
provision.⁴⁸

18 While Boise suggests that the Pocatello airport facility's inadequacy was a
19 significant factor in the Supreme Court's decision, the Court finds that it was only one
20 factor and was not determinative. Instead, the Supreme Court focused on the need to
21 repair an aging, unsafe and unsound structure. It does not appear that if the only basis
22 for constructing a new structure in *Pocatello* was its present inadequacy, that the
23 Supreme Court would have arrived at the same decision. (In the case before this Court,
24 Boise presented no facts that its current leased or owned structures are "unsound" and
25 its safety claims are not of the same caliber as those in *Pocatello*.)
26
27

28 ⁴³ *Woodward*, 13 Idaho 652, 92 P. 840.

29 ⁴⁴ *Miller*, 48 Idaho 668, 284 P. 843.

30 ⁴⁵ *O'Bryant v. City of Idaho Falls*, 78 Idaho 313, 303 P.2d 672 (1956).

31 ⁴⁶ *Straughan v. City of Coeur d'Alene*, 53 Idaho 494, 24 P.2d 321 (1932).

32 ⁴⁷ *Reynolds Construction Co. v. County of Twin Falls*, 92 Idaho 61, 437 P.2d 14 (1968).

⁴⁸ *Pocatello*, 93 Idaho at 776, 473 P.2d at 646.

1 In addition, the court in *Asson* considered this very contention that inadequacy
2 alone may justify an expense as "ordinary and necessary" and rejected it. The local
3 government in *Asson* argued that future power needs could not be met by the present
4 power supplies, and they were inadequate for future needs. The Supreme Court
5 addressed this concern as follows:

6 The question is whether the cities' belief that there would be inadequate
7 power supplies several years in the future is sufficiently analogous to the
8 cases which hold that repair or reconditioning of existing facilities is an
9 ordinary and necessary expense. . . . One cannot stretch the meaning of
"ordinary" to include an expense for which there could not be, until years
later, certainty of limits.⁴⁹

10 Therefore, the Court finds that the determinative factor is whether the proposed
11 expenditure contemplates construction of a new facility, as opposed to repairing,
12 renovating or reconditioning an existing facility.

13 **b. Construction of the Boise Police Department Fairview facility**
14 **expenditure is not an ordinary expense.**

15 Against that legal authority, Boise contends that its proposed Boise Police
16 Department Fairview facility is an "ordinary and necessary" expense and, thus, outside
17 the Art. VIII, §3 debt limitation. The Court disagrees.

18 First, Boise contends that all expenditures for police protection are *inherently*
19 "ordinary and necessary" expenses and, thus, always escape the application of the debt
20 limitations of Art. VIII, §3. It relies on the following quotation found in *Hanson*: "One of
21 the most fundamental and necessary expenses of municipal government is that which is
22 incurred in the provision of adequate police protection for persons and property."⁵⁰

23 However, in *Hanson*, the Supreme Court did not rule that because an expenditure
24 was for police protection it escaped constitutional debt limitations; it merely applied the
25 early Idaho rulings that municipal employee salaries and related expenses are "ordinary
26 and necessary" which they clearly are. To adopt Boise's view of the law would
27 perpetually exempt all police protection expenditures from voter scrutiny – even where
28 the expenditure is clearly not "ordinary and necessary," is only marginally related to

30 ⁴⁹ *Asson*, 105 Idaho at 442-43, 670 P.2d at 849-50.

31 ⁵⁰ *Hanson*, 92 Idaho at 514, 446 P.2d 636.

1 police protection or even grossly improper. Thus, taxpayers could find themselves
2 saddled with huge debts and liabilities without ever having approved those expenditures.
3 That is clearly not what the constitution intends. Therefore, the Court rejects this
4 argument and finds that while some level of police protection is fundamentally
5 necessary, this does not mean that all expenditures for police protection are "ordinary
6 and necessary" within the exception found in Art. VIII, §3.

7 Second, Boise contends that if the expenditure is not *inherently* "ordinary and
8 necessary," then the Court should find it is "ordinary and necessary" based on Boise's
9 justification for the project. In support of its contention, it asserts the project will allow
10 Boise Police Department to centralize its operations and to have adequate space to
11 house its law enforcement operations and activities for future population growth. Boise
12 further asserts the project will enhance the Boise Police Department's public safety and
13 protection services, administration and communication effectiveness and efficiency, and
14 community-based policing programs. Boise also asserts the project will maintain or
15 improve Boise Police Department emergency response by reducing police and
16 emergency response times to Boise residents throughout all Boise Police Department
17 public service areas. Without finding these facts established, the Court finds that these
18 contentions, even if true, would not support a finding that this project is "ordinary and
19 necessary." If the Court were to adopt such reasoning then every time a local
20 government wanted more room or wanted to improve service, such expenditures would
21 escape the debt limitations.

22 While it also argued there were safety concerns, the Court finds there is no
23 evidence of any true safety problems similar to those found in *Pocatello*. Instead, the
24 Court agrees that expanding services and a growing population may support the
25 desirability for a new facility, and it may be in the public's best interests. However, that
26 does not make the expense "ordinary." "Ordinary" means "regular; usual; normal;
27 common; often recurring . . . not characterized by peculiar or unusual circumstances."⁵¹
28 This is clearly an extraordinary, planned expenditure for an expensive capital
29 improvement – a new stand alone centralized police department. It is precisely these
30
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1 kinds of capital improvement projects that the Constitution requires be approved by the
2 voters who ultimately pay for these projects.

3 While some Idaho cases have approved non-recurring expenses as "ordinary,"
4 those cases can be distinguished from Boise's proposal. Boise's project is not driven by
5 emergency like *Hickey* where the city owned waterworks system was so damaged,
6 impaired or destroyed as to render it of no practical value or use, requiring immediate
7 action by the city council.⁵² The *Hickey* court rightly concluded that it was an ordinary
8 expense to rebuild a clearly necessary system in that case where it had been utterly
9 destroyed.

10 Likewise, the situation is unlike the situation in *Jones*,⁵³ Boise has long been
11 incorporated. It is not a newly created local government in need of establishing certain
12 essential services in order to function and serve the public.

13 Furthermore, the Court notes that Boise's counsel stated that if future city
14 councils failed to appropriate funds for this project and the Boise Police Department was
15 evicted from the new Fairview facility, Boise could easily re-locate the Boise Police
16 Department to other leased property. As Respondent Auld argued, this undercuts
17 Boise's contention that this project is even necessary.

18 While making significant repairs to an existing structure can be an "ordinary and
19 necessary" expense even if such extensive repairs occur only at infrequent intervals, this is
20 not such a case.⁵⁴ By building (on behalf of BNY Western) this nearly \$17 million⁵⁵ facility
21 which may ultimately cost Boise residents up to \$35 million Boise is not proposing to
22 renovate or repair an existing structure; it is constructing a new building unrelated to existing
23 facilities.⁵⁶

26 ⁵¹ *Pocatello*, 93 Idaho at 778, 473 P.2d at 648, quoted in *Asson*, 105 Idaho at 443, 670 P.2d at 850.

27 ⁵² *Hickey*, 22 Idaho 41, 124 P. 280.

28 ⁵³ *Jones*, 27 Idaho 656, 150 P. 35.

29 ⁵⁴ *Hickey*, 22 Idaho 41, 124 P. 280.

30 ⁵⁵ If Boise pays the full "lease" principal plus interest over the entire 30 year period, the total cost for the
Boise Police Department project is approximately \$35 million.

31 ⁵⁶ To the extent the project only includes the renovation and repair of the Barrister facility, this would be
an "ordinary and necessary" expense. At this time, however, the projects have not be presented as
separate projects.

Furthermore, while repairing or replacing an "an unsound structure" which is "unsafe for the citizens of the area" may constitute an "ordinary and necessary" expense, the Court finds that Boise has not established such a public safety necessity exists for this project.

While Respondent Auld argues that this Agreement creates a liability because it potentially could affect Boise's credit rating, the Court rejects this argument. The Idaho Supreme Court has ruled that this section requires the imposition of some monetary liability in favor of the non-public entity.⁵⁷ While, It may be true that a failure to appropriate funds in the future will adversely impact Boise's credit rating,⁵⁸ it does not create a debt or liability within the meaning of this section. However, a potential adverse impact on Boise's credit rating may provide yet another incentive for future city councils to continue funding the "lease,"⁵⁹ contrary to Boise's contention.

Based on the above, the Court finds this proposed expense is not an "ordinary and necessary" expense. Therefore, the Court must consider whether the proposed Agreement creates a liability or debt in excess of Boise's current year budget for it requiring Boise to submit the proposed expenditure to the voters.

2. The proposed Agreement constitutes a "liability" in violation of Article VIII, §3 of the Idaho Constitution.

a. Article VIII, §3 of the Idaho Constitution not only prohibits incurring indebtedness, it prohibits incurring *liability in any manner or for any purpose*.

"Liability" is a much more sweeping and comprehensive term than 'indebtedness.'⁶⁰ As the *Feil* court noted, 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."⁶¹ Furthermore, the *Feil* court recognized that local governments were precluded from trying to circumvent the constitutional limitations.

⁵⁷ *Hanson*, 92 Idaho at 516, 446 P.2d at 638.

⁵⁸ Jon Magnusson, *Lease-Financing by Municipal Corporations as a Way Around Debt Limitations*, 25 GEO. WASH. L. REV. 377, 393 (1957).

⁵⁹ See *State ex rel. Anzai*, 936 P.2d 637 (Haw. 1997); *State ex rel. Kane v. Goldschmidt*, 783 P.2d 988 (Ore. 1989).

⁶⁰ *Feil*, 23 Idaho at 50, 129 P. at 649; See also *Boise Development Co.*, 26 Idaho 347, 143 P. 531; *Straughan*, 53 Idaho 494, 24 P.2d 321.

1 The framers of our Constitution were not content to say that no city shall
2 incur any indebtedness "in any manner or for any purpose," but they rather
3 preferred to say that no city shall incur any indebtedness or liability in any
4 manner, or for any purpose. It must be clear to the ordinary mind, on
5 reading this language, that the framers of the Constitution meant to cover
6 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.⁶²

7 After pointing out that the framers intended for liability to be more expansive than
8 a debt, the *Feil* court defined liability as "[t]he state of being bound or obliged in law or
9 justice to do, pay, or make good something; legal responsibility" and as "the condition of
10 being responsible for a possible or actual loss, penalty, evil, expense or burden."⁶³

11 It is noteworthy that in spite of Justice Stewart's dissent in *Feil* arguing that the
12 terms "indebtedness" and "liability" are essentially synonymous, several subsequent
13 Idaho courts have accepted and followed the majority's view of liability being a much
14 broader term with larger implications.⁶⁴ For example, in *Boise Development*, the court
15 used a hypothetical to illustrate the difference between the term "debt" and "liability."⁶⁵
16 The hypothetical case the court put forth was:

17 If A. by a valid contract employs B. to work for him for one year at \$50 per
18 month, payable at the end of each and every month, would this contract
19 not be a liability on A. as soon as executed? A *debt* of \$50 would accrue
20 thereon at the end of each month, but the *liability* would be incurred at the
time the contract was entered into.⁶⁶

21 This hypothetical illustrates the difference between the two terms and squarely rejects
22 Justice Stewart's contention that the terms are synonymous.

23 Thus, Idaho cases have repeatedly held that it is improper to attempt to evade or
24 circumvent the force and effect of Art. VIII, §3 or attempt to do what it cannot do
25 directly.⁶⁷

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27 ⁶¹ *Feil*, 23 Idaho at 50, 129 P. at 649 (emphasis added).

28 ⁶² *Id.* (emphasis added).

⁶³ *Id.*

29 ⁶⁴ See *Hanson*, 92 Idaho 514, 446 P.2d at 636; *O'Bryant*, 78 Idaho at 326, 303 P.2d at 678; *Straughan*, 53
Idaho 501-501, 24 P.2d at 322; *Boise Development Co.*, 26 Idaho at 361-362, 143 P.2d at 535.

30 ⁶⁵ *Boise Development Co.*, 26 Idaho at 361-362, 143 P.2d at 535.

31 ⁶⁶ *Id.* (Emphasis added.)

32 ⁶⁷ See *O'Bryant*, 78 Idaho at 325-326, 303 P.2d at 674; *Dunbar*, 5 Idaho at 415, 49 P. at 412.

1 In *O'Bryant*, for example, the court denounced efforts to evade constitutional
2 limitations,⁶⁸ quoting a Colorado case holding: "Contrary to popular opinion, mere
3 schemes to evade law, once their true character is established, are impotent for the
4 purpose intended. Courts sweep them aside as so much rubbish."⁶⁹ The *Dunbar* court
5 also warned that:

6 If boards of county commissioners are permitted to violate, disregard, and
7 set at naught one plain provision of the constitution, then they may violate
8 any and all provisions of that instrument, and the people who pay taxes are
9 bear the burdens of government are without protection, and at the mercy
and whims of county commissioners.⁷⁰

10 The Idaho Supreme Court's history demonstrates its real concern about local
11 governments trying to circumvent the state constitution and the ramifications for allowing
12 such evasion.

13 Thus, the Constitution clearly requires that, before an indebtedness or liability is
14 incurred which exceeds the income and revenue provided for it in the current year, it
15 must be submitted to a vote of the people and be authorized by two-thirds of the
16 qualified electors.

17 **b. Boise's proposed expenditure creates a liability as**
18 **contemplated by Article VIII, §3 of the Idaho Constitution.**

19 "What cannot be done directly (pursuant to our constitution) cannot be
20 accomplished indirectly. That which the constitution directly prohibits may not be done
21 by indirection through a plan or instrumentality attempting to evade the constitutional
22 prohibition."⁷¹ Article VIII, §3 was adopted precisely "to preclude circuitous and evasive
23 methods of incurring debts and obligations to be met by the city."⁷² The Court finds that
24 the clear purpose of this Agreement is to allow Boise to do indirectly what it cannot do
directly.

25 In this case, Boise would acquire ownership of the Boise Police Department
26 Fairview facility simply by making the agreed "lease" payments over the thirty-year term
27

28 ⁶⁸ *O'Bryant*, 78 Idaho at 325, 303 P.2d at 678.

29 ⁶⁹ See *Id.* quoting *Davis v. People*, 247 P. 801, 802 (Colo. Sup. Ct. 1926).

30 ⁷⁰ *Dunbar*, 5 Idaho at 414, 49 P. at 411.

31 ⁷¹ *O'Bryant*, 78 Idaho 313, 303 P.2d 672.

32 ⁷² *Feil*, 23 Idaho at 50, 129 P. at 649.

1 plus \$1.00 for a total of approximately \$35 million. Each semi-annual "lease" payment
2 represents more than just a present debt for the use of the facility for a six month period.
3 The arrangement is in essence an installment-purchase agreement or loan for the
4 acquisition of a public building, with outside financing and payments spread over thirty
5 years, and as such it requires voter approval. Furthermore, to secure this Agreement,
6 Boise transfers title to municipal property, the real property located at Fairview, and can
7 only guarantee redemption of that property upon full payment of the "lease." The only
8 way to avoid incurring a penalty for either a traditional default or a "default created by
9 non-appropriation" is for Boise to fully repay the entire \$16.7 million plus accrued interest
10 up to a total of \$35 million.

11 Although the parties labeled this agreement a lease, this alone does not establish
12 the existence of one. As the Supreme Court of the United States opined:

13 What then is the true construction of the contract? The answer to this
14 question is not to be found in any name which the parties may have given
15 to the instrument, not alone in any particular provisions it contains
16 disconnected from all others, but in the ruling intention of the parties
17 gathered from all of the language they have used. It is the legal effect of
the whole which is to be sought for. The form of the instrument is of little
account.⁷³

18 Since, clearly, an agreement's substance must prevail over its form, a careful
19 study of the language of this Agreement demonstrates the parties intended to create an
20 installment purchase agreement of the premises and loan secured by municipal
21 property, even though they titled it a lease.⁷⁴

22 While Boise's financing plan is creative, regardless of how this Agreement is
23 characterized, it contemplates a purchase of property by using an installment plan and
24 directly obligates Boise to pay up to \$16,680,000.00 plus accrued interest up to a total of
25 approximately \$35 million. By subjecting the Fairview property to potential loss, the
26 Agreement creates a contingent liability – a liability that may well be substantial. To the
27 extent Boise stands to lose its property, property it presently owns, as future re-payment
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30 ⁷³ *Heryford v. Davis*, 102 U.S. 235, 243-244 (1880).

31 ⁷⁴ See *Williams*, 51 Idaho at 506, 6 P.2d at 476.

1 for the principal amount of \$16,680,000.00 plus accrued interest, the Agreement violates
2 Art. VIII, §3 of the Idaho Constitution.

3 The Court finds the Agreement to be a "lease" in form only; Boise is clearly
4 borrowing money upon the security of its Fairview property, to finance the construction of
5 a new stand alone Boise Police Department facility. The Court finds that Boise, albeit in
6 reliance on previous district court cases, is attempting to evade the application of Art.
7 VIII, §3 requiring approval by the electorate before entering into this Agreement. This is
8 not new.

9 Local governments throughout the United States have been devising such
10 schemes for quite some time and commentators clearly recognize these schemes are
11 specifically designed to avoid constitutional debt limitations.⁷⁵ The National Association
12 of Counties even has a website containing advise on how to avoid such limitations.⁷⁶ In
13 fact, a cursory review of several district court cases in the Fourth Judicial District
14 confirms that this scheme is not new to Idaho.⁷⁷

15 Although the scheme varies, at its heart, property is "leased" to the municipality
16 for a certain period, in consideration of a "lease" payment which purportedly does not
17 exceed the debt limit, with an option to purchase the property at a certain price. Clearly,
18 where the lease is truly a lease, the plan is proper. However, where the "lease"
19 payments are in fact installment payments on the purchase price and repayment of a
20 loan, the transaction should be treated as a purchase and loan, rather than a "lease,"
21 and the court should recognize that the municipality is indebted on the aggregate
22 amount rather than on individual "lease" payments as they accrue.⁷⁸ In particular, where
23 municipal property is transferred as security for the transaction, the scheme is
24 transparent.

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26 ⁷⁵ See 56 Am.Jur.2d MUNICIPAL CORPORATIONS, ETC., §614; Bisk, *supra* note at 22; Magnusson, *supra* note
at 58.

27 ⁷⁶ Jim Culotta, *Certificates of Participation: An Innovative Financing Alternative for Counties*, (1999), at
28 <http://www.naco.org/pubs/research/briefs/cops.cfm>.

29 ⁷⁷ While some of the parties suggest that this Court is "bound" by other district court decisions, that is not
30 the case. This Court must only follow appellate court decisions. Moreover, counsel failed to explain that
31 many of those decisions were in uncontested cases. In addition, they failed to disclose Justice Eismann's
32 decision denying Ada County Highway District's Petition to construct the West Park Center Bridge and
Curtis/Ustick roads relying on many of the same principles relied on here. See Case No. CV-OC-96-05299D

1 In this case, the Agreement's sale and loan nature and Boise's potential liability
2 for the whole principal is clear. There are several reasons for this. Boise's proposed
3 annual "lease" payments are indistinguishable from annual debt service; the "principal"
4 portion increases over the thirty year period and the "interest" portion fluctuates. The
5 majority of the "principal" is payable in the final years of the "lease." Furthermore, it does
6 not appear that the so-called "lease" payments are in any way related to the fair market
7 value of the property but are directly tied to the amount needed to repay the costs of
8 construction plus interest – similar to debt service payments.

9 Moreover, Boise's real property at Fairview is used as security for the "lease."⁷⁹
10 Unless a future Boise City Council fails to appropriate funding, Boise is clearly liable for
11 the aggregate principal and accrued interest over the entire thirty year period.
12 Furthermore, Boise's counsel told this Court in response to questioning that Boise
13 intended to eliminate the non-appropriation clause if the Court finds the expenditures to
14 be "ordinary and necessary." This is further evidence the parties recognized they were
15 attempting to circumvent the clear application of Idaho's constitutional debt limitations
16 and that this is not a "lease." It is borrowing by another name.

17 Unlike an ordinary lease, this is in practice non-terminable and clearly the parties
18 do not intend to ever terminate this "lease."

19 Significantly, the Court finds the Agreement's default remedies do not differ in
20 character from those available in any traditional conditional sale contract. Further, if a
21 future Boise City Council fails to appropriate funding and the Certificate Owners decide
22 to sell the Fairview project, including what was originally municipal property pledged as
23 security for the Agreement, Boise may lose its Fairview property, the newly constructed
24 Boise Police Department facility and any equity it has accrued by having made payments
25 on the "principal."

26 At the moment Boise signs this Agreement, its Fairview property is obligated up to
27 the full amount of the principal plus whatever "interest" has accrued – at least
28 \$16,680,000.00 – regardless of which default remedy applies. Moreover, the Certificate
29

30 ⁷⁸ 56 Am.Jur.2d MUNICIPAL CORPORATIONS, ETC., §614.

31 ⁷⁹ In support of its Petition, Boise relies on *Idaho Code* §§50-1403(5), 50-301.

1 Owners are not required to sell the property upon non-appropriation. They could decide
2 to simply re-lease the property to someone else and, thus, there would be no opportunity
3 for Boise to recoup any of its property or the value of its equity payments.

4 The only way for Boise to redeem its investment, including its property, is to
5 tender the full principal, accrued interest and \$1.00. This Agreement is essentially an
6 installment purchase agreement secured by Boise's property for the acquisition of a
7 public building, with financing and payments spread over thirty years. As such, it
8 requires voter approval.

9 Furthermore, the tax exempt status of the Agreement's "interest" payments
10 pursuant to section 103 of the Internal Revenue Code further proves that this is a
11 contract for sale or a loan and an exercise of Boise's borrowing power as opposed to a
12 "lease." In order to qualify for this tax exempt status, both the statute and case law
13 clearly require the lease contract "constitute an obligation of the governmental unit's
14 borrowing power under federal tax law. . . ."⁸⁰

15 Unless an agreement is a conditional sale with periodic purchase payments on a
16 contract of sale, payments by local governments cannot properly be construed as tax
17 exempt interest on local government obligations.⁸¹ The provision of Revenue Acts,
18 1934, 1936, §22(b), which exempts interest on state and local government obligations
19 from income taxes, does not exempt interest paid on every type of contract or legal
20 liability incurred by a municipal corporation, but only such interest as accrued on debts
21 incurred under the borrowing power of the governmental unit.⁸² "[A]lthough the
22 agreement may take the form of a lease, the contract must contemplate a sale."⁸³

23 Finally, although not determinative, it is noteworthy that some authors write that
24 typically agreements like this one are treated as a debt equal to the asset's total
25 purchase price by both accountants and by public officials.⁸⁴

27 ⁸⁰ *Consolidated Edison Co. v. U.S.*, 10 F.3d 68 (2nd Cir. 1993) (emphasis added).

28 ⁸¹ *Fox v. U.S.*, 551 F.2d 85 (7th Cir. 1977); *Cubic Corp. v. U.S.*, 541 F.2d 829 (9th Cir. 1976).

29 ⁸² *Holley v. U.S.*, 124 F.2d 909 (6th Cir. 1942) *cert. denied*, 62 S.Ct. 1276, 316 U.S. 685; *see also, Marsh*
Monument Co. v. U.S., 301 F.Supp. 1316 (E.D.Mich.1969); *State Bank of Albany v. U.S.*, 276 F.Supp.
744, *affirmed* 389 F.2d 85 (N.D.N.Y.1967).

30 ⁸³ *Brown v. City of Stuttgart*, 847 S.W.2d 710, 713 (Ark. 1993), n. 74.

31 ⁸⁴ Bisk, *supra* note at 22, p. 540-542; Magnusson, *supra* note at 58, p 393-394.

1 Therefore, while these financing arrangements may be in the taxpayers' best
2 interest and less costly to them in the long run, these financing arrangements run afoul
3 of the state constitution. In addition, there is no evidence that voter approval would
4 preclude Boise from using a similar financing method, thus taking advantage of these
5 alleged savings. Furthermore, by ruling against Boise, the Court is not suggesting that
6 the Boise Police Department facility is not desirable or proper. The Court's role is not to
7 determine the desirability of the project. The Court, however, is required to
8 independently determine whether the proposal complies with constitutional and statutory
9 limits.

10 It is not appropriate for the Court to amend the State constitution by judicial fiat
11 simply because it finds the proposal in the taxpayers' best interests. That is not, and
12 should not be, the Court's role. "The fundamental power still remains in the people
13 controllingly expressed by them in the Constitution, binding alike on all."⁸⁵

14 If courts do not fulfill their responsibility to disapprove such subterfuges, there is
15 literally no local capital project which will be subject to the constitutional debt limitations.
16 Taxpayers will have no recourse against increased tax burdens associated with
17 municipal capital projects financed by such schemes. If the electorate wishes to amend
18 the Idaho Constitution to allow local governments to make such expenditures without the
19 people's express approval, it can do so. Until that time, however, it is the Court's
20 responsibility to strictly enforce the limitations. The Court should not be a party to
21 schemes designed to circumvent the constitutional debt limit.

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29 ⁸⁵ *Straughan*, 53 Idaho at 501, 24 P.2d at 323 (citing in support *Golden Gate Highway Dist. v. Canyon*
30 *County*, 45 Idaho 406, 262 P. 1048 (1928); *Boise-Payette Lumber Co. v. Challis Ind. School Dist.*, 46
31 Idaho, 403, 268 P. 26 (1928)).

Thus, the Court finds this Agreement creates a liability for which Boise's current budget does not provide. Therefore, this expenditure must receive voter approval and the Court denies Boise's Petition.

IT IS SO ORDERED.

Dated this 26th day of August, 2002.

Cheri C. Copsey
District Judge

CERTIFICATE OF MAILING

I hereby certify that on this _____ day of August, 2002, I mailed (served) a true and correct copy of the within instrument to:

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