Attachment 2

GARDEN CITY
NESTLED BY THE RIVER

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March 9, 2021

The Honorable Jim Rice, Chair
Senate Local Government and Taxation Committee Idaho State Senate
P.O. Box 83720
Boise, ID 83720-0081

RE: GARDEN CITY'S OPPOSITION TO SENATE BILL 1106
TO PROVIDE THAT PLANS AND ORDINANCES SHALL NOT APPLY TO LOCAL TRANSPORTATION SYSTEM "ESSENTIAL FACILITIES" AS DETERMINED BY LOCAL TRANSPORTATION JURISDICTION BOARDS

Chairman Rice:

On behalf of the City of Garden City (City), I am writing to register the City's opposition of Senate Bill (SB) 1106, which is sponsored by the Ada County Highway District (ACHD). This bill, in part, relates to the exemption of local highway districts from Idaho's Local Land Use Planning Act (LLUPA). The City represents the public interest in carrying out the authorities vested with local governments under LLUPA, Title 67, Chapter 65 of the Idaho Code.

All of the cities in Ada County, and the County of Ada, are uniformly against SB 1106. The Association of Idaho Cities (AIC), the Idaho Association of Counties (IAC), the Idaho Department of Water Resources (IDWR), and the American Planning Association (APA Idaho) also reportedly have concerns with the bill. In short, the only organization I am aware of in support of the bill is ACHD. ACHD's recent changes to the bill do not rectify the concern of knowing what "essential facility" or "existing" means.

INTRODUCTION

The City is concerned by this proposal and feels that the consequences of this bill are widespread, drastic, and problematic. As has previously been stated, transportation and land use planning are inseparable, as one is necessary for the other. As described below, the City agrees with the other agencies in opposition, and finds the proposal concerning because of the following considerations: (1) ACHD has pending litigation regarding the matter against the City; (2) SB 1106 complicates the ability of local jurisdictions to comply with LLUPA; (3) Idaho Code § 46-1023 is inapplicable to SB 1106; (4) the purpose of SB 1106 is troubling; (5) the terms "Essential Facilities" and "Existing" in SB 1106 are ambiguous and do not provide for public process; (6) SB 1106

compromises and is inconsistent with federal mandates; and (7) SB 1106 could have a negative impact on development. The City strongly believes that land use authority best resides with local jurisdictions under the standards, procedures, and protections set forth in LLUPA and by the federal government.

I.
ACHD HAS PENDING LITIGATION AGAINST THE CITY

The Ada County Highway District has pending litigation against the City regarding the "genesis" behind SB 1106. ACHD is the Petitioner in a Petition for Judicial Review against the Garden City Council as the Respondent, in the District Court of the Fourth Judicial District of the State of Idaho, in and for the County of Ada, in Case No. CV01-20-17508. The litigation is regarding a temporary Conditional Use Permit (CUP) for the Salt and Sand Storage Shed (CUPFY2017-10) on Adams Street, Garden City, Ada County, Idaho. ACHD is represented in the litigation by Mary V. York and Alison C. Hunter with Holland & Hart LLP.

On October 26, 2020, ACHD filed its petition for judicial review of the Garden City Council's decisions denying ACHD's request to extend the approval of its CUP for the salt and sand storage shed and ACHD's request for reconsideration of the denial of its extension request. The Garden City Council heard and denied ACHD's extension request on August 12, 2020, and heard and denied ACHD's reconsideration request on September 14, 2020.

In order to remedy a procedural defect, ACHD agreed in the litigation to submit a new application to extend the approval of its CUP to the City Council, and the City Council has agreed to review and hold applicable hearings regarding ACHD's new application. Accordingly, on December 21, 2020, ACHD and the City entered into a Stipulation to Stay Proceedings and deadlines in the litigation pending the outcome of all agency review and proceedings concerning ACHD's new application to extend the approval of its CUP. On December 22, 2020, District Judge Medema approved the Stipulation and all deadlines and proceedings in Case No. CV01-20-17508 were stayed pending resolution of all agency review and proceedings concerning ACHD's new application to extend the approval of its CUP or as otherwise determined by an Order of the Court.

However, ACHD has not submitted a new application to extend the approval of its CUP even though the City has agreed to review the application. Rather than submitting a new application to extend the approval of the CUP, ACHD has proposed SB 1106. Accordingly, even though ACHD has a potential judicial remedy that is pending in its court case, it has opted to turn to the legislature instead.

These occasional disputes about facilities and local governments can be reasonable and perhaps the highway district just does not like the results, which means the system is working. The highway districts can dispute LLUPA decisions (just like any other adversely affected party), which is what is currently happening with the City, as the ACHD has filed a petition for judicial review regarding the salt shed. Turning to the

legislature on pending litigation is problematic.

II.
PLANNING AND THE LOCAL LAND USE PLANNING ACT

Senate Bill 1106 further separates and confuses land use planning and transportation planning, and complicates the ability of local jurisdictions to comply with planning mandates set forth in LLUPA. Most jurisdictions throughout the United States are responsible for their own transportation planning, infrastructure improvements, and maintenance. As we know, in Ada County, this responsibility has been jointly delegated by the county and all cities to the ACHD as authorized by Idaho Code. The proposed language of SB 1106 undermines the ability of cities and counties to fulfill their mandate to exercise the powers conferred under the LLUPA.

Senate Bill 1106 exempts local transportation systems in their entirety from local land use plans and ordinances. This is concerning because it makes it unclear if the City will be able to apply duly enacted ordinances for 5G antennas, signs, and other uses that have and could occur within an ACHD right-of-way. If such ordinances were no longer applicable, the ACHD would make the final decision on the appropriateness of such uses outside of the processes and standards set forth in the LLUPA. This is concerning because it raises due process issues.

The Ada County Highway District claims that SB 1106 does not impact LLUPA responsibilities and authority because LLUPA does not apply to local highway districts. While there are some distinctions regarding "transportation systems," and a prohibition against contravening the grant of exclusive authority under state law to local highway jurisdictions concerning the highways and rights-of-way, it is incorrect to simply indicate that LLUPA does not apply to local highway districts. A municipality can pass an ordinance under LLUPA which is of general applicability. I.C. § 67-6528.

The Ada County Highway District also claims that LLUPA does not govern flood plain compliance or telecommunications. It is true that it is the federal government and not the states or local jurisdictions ultimately govern flood plain compliance and telecommunications, but SB 1106 is also in conflict with those federal laws. While highway districts may have exclusive general supervisory authority over all public streets and public rights of way under their jurisdiction within their district, they do not have exclusive general supervisory authority over all of its facilities in violation of federal, state (including LLUPA), and local regulations. *See City of Sandpoint v. Sandpoint Indep. Highway Dist.*, 126 Idaho 145, 879 P.2d 1078 (1994).

It is disingenuous when ACHD indicates that LLUPA does not apply to highway districts because ACHD's pending petition for judicial review against the City over denial of a CUP was filed pursuant to the judicial jurisdiction granted by LLUPA. LLUPA clearly applies to CUPs. If LLUPA does not apply to highway district CUPs, then the pending litigation against the City should be dismissed on that basis for lack of jurisdiction. Simply put, ACHD does not get to have it both ways. It does not take much "intellectual

integrity," as claimed by ACHD attorney Steve Price, to understand the interplay with SB 1106. And if SB 1106 requires a high level of "intellectual integrity" to interpret, that means it is confusing and subject to interpretation, which is what leads to litigation.

III.
IDAHO CODE § 46-1023 IS INAPPLICABLE TO SENATE BILL 1106

The ACHD has submitted on the record that I.C. § 46-1023 would prohibit essential facilities from remaining pursuant to SB 1106 if remaining would violate a local floodplain management ordinance. However, that distinction is not listed in SB 1106, and there is no legal authority or interpretation regarding I.C. § 46-1023. Additionally, this position is inconsistent with what ACHD has told the County of Ada and other local agencies.

According to Ada County, "...ACHD representatives have indicated that the sole purpose of the proposed legislation is to avoid the application of Garden City's land use authority over the Adams Yard Salt/Sand Shed." It has been clarified that the referenced ACHD representative is attorney Steve Price. Reportedly, Mr. Price told an Ada County Deputy Director and others in a Zoom meeting that the reason for the bill is because the City was requiring the Adams Salt Shed to comply with EPA regulations, but it was too expensive to move the facility. To date, ACHD has not verified on the record whether SB 1106 would prevent the removal of the ACHD salt shed within the limits of the City.

If ACHD truly believes that the SB 1106 exemption would not apply to ordinances pursuant to I.C. § 46-1023, it would or should have included that exemption, specifically in the bill. Assuming *arguendo*, whether the SB 1106 exemption would not apply to ordinances pursuant to I.C. § 46-1023 may be decided or controlled by the location of the floodplain ordinance in municipal code. Because the floodplain enabling power is not part of LLUPA, it may be important to know where the floodplain management ordinance is located in the local code, and whether there is a separate Floodplain Title in the code.

The City's floodplain ordinance is in the Development Code in the Design and Development Regulations Chapter (G.C.C. § 8-4H). It is the intent of the Development Code (Title 8) to, in part, carry out the purposes of the "'local land use planning act', I.C. § 67-6501 *et seq.*" G.C.C. § 8-1A-2. Similarly, Ada County's floodplain standards are part of its zoning ordinance, which ACHD is proposing an exemption from. If the zoning ordinance does not apply, ACHD could not be in violation of the zoning ordinance.

In practice, the way I.C. § 46-1023 is currently drafted, ACHD may not be required to remove a facility if it was in violation of a floodplain management ordinance. However, ACHD could still be enjoined in court from maintaining the facility. In addition, the facility would not be covered under any state or federal disaster relief if there was a flood. If SB 1106 were to pass, then the zoning ordinances would not apply to ACHD's essential facilities, and there would no longer be a violation of state or local ordinances.

However, if there is a federal overlay, such as with EPA requirements or FEMA, there could be wider-reaching consequences.

Interestingly, I.C. § 46-1023, which ACHD points to, is in the "Militia and Military Affairs" Title of the Idaho Code, in the "State Disaster Preparedness Act" Chapter. The stated policy and purpose of the State Disaster Preparedness Act Chapter is planning and preparing for disasters and emergencies, and it has been found necessary because of disasters and emergencies to: create and authorize an Idaho office of emergency management and local organizations for disaster preparedness, and prevent and reduce damage resulting from disasters; prepare for search and rescue, care and treatment; provide for restoration and rehabilitation; prescribe the roles of the various governmental entities (highway districts not listed); encourage cooperation and coordination between the governmental entities; provide a disaster management system; and to provide for payment of expenses. I.C. § 46-1003. The stated purpose of the State Disaster Preparedness Act is to: protect human life, health, and property; preserve floodplains for the purpose of carrying and storing flood waters; reduce public cost of providing emergency services, flood control structures and rebuilding public works damaged by floods; protect the tax base and jobs; reduce the threat of increased damage; encourage orderly development and wise use of floodplains; minimize business interruptions; and prevent increased flooding and erosion caused by improper development. I.C. § 46-1020. Idaho Code § 46-1023 is regarding the State Disaster Preparedness Act and not highway districts, salt sheds, or LLUPA.

Essentially, the State Disaster Preparedness Act Chapter in the Idaho Code, wherein I.C. § 46-1023 lies, is regarding disaster emergency plans and not highway districts. The Sections within the State Disaster Preparedness Act Chapter are: short title, definitions, and policy and purpose; Idaho office of emergency management created; coordinating officer – selection; disaster emergency account; powers and duties of chief and office; limitations; the governor and disasters emergencies; local and intergovernmental disaster agencies and services; intergovernmental arrangements; local disaster emergencies; compensation; communication; mutual aid; weather modifications; liability for property damage, bodily injury or death; immunity; interstate mutual aid compact; emergency management assistance compact; emergency responses [repealed]; purpose and findings; definitions; local governments may adopt flood-plain zoning ordinances; enforcement and sanctions; severability; federal funds to political subdivisions; definitions; and military division – Idaho office of emergency management – additional powers and duties. Accordingly, I.C. § 46-1023 is intended to address militia and military affairs, and governmental responsibilities, when preparing for emergencies and disasters. Perhaps this is the reason why there is no legal authority or interpretation that indicates I.C. § 46-1023 would prohibit the proposed highway district exception to local regulation in SB 1106, if there is a local floodplain ordinance within the zoning code, even though I.C. § 46-1023 has been around since 1998. As SB 1106 is currently written, I.C. § 46-1023 likely would not prohibit facilities from remaining, and at a minimum, would create a variance, discrepancy, ambiguity, and confusion, which is what often triggers litigation.

IV.
SENATE BILL 1106 NEGATIVELY DIMINISHES COUNTY AND CITY AUTHORITY

The Statement of Purpose for Senate Bill 1106 indicates that:

1. The current requirement for land use agencies to "take into account the plans and needs" of the Idaho Transportation Department (ITD) is inadequate; and
2. The exceptions for ITD transportation facilities from local land use plans and ordinances should be extended to local highway jurisdictions because they have the same needs as ITD.

While it is unclear if ITD indeed finds the present law inadequate, as stated above, ACHD representative Steve Price has indicated that the sole purpose of the proposed legislation is to avoid the application of Garden City's land use authority over the Adams Yard Salt/Sand Shed. It is concerning that ACHD is pursuing SB 1106 without collaborating with the cities of and counties, rather than focusing on alternate options that satisfy land use plans, ordinances, and standards. One of the main tenets of LLUPA is public participation, but public participation would not be required in determining what is an "essential facility." The purpose of LLUPA and the Comprehensive Plan cannot be accomplished without consideration of local transportation networks.

Regardless of ACHD's claims, SB 1106 would change state law, allowing highway districts to avoid the land-use authority of local jurisdictions. The actual purpose of the bill is to remove city and county authority regarding local land use planning. The way SB 1106 is written, it can apply to many things, such as subdivision standards. As to standalone small cell poles if an essential facility, for example, cities and counties would not have the ability to regulate the location, zone preference, spacing of poles, height, and aesthetics. City and county authority regarding local land use planning should not be removed by the passage of SB 1106.

V.
THE TERMS "ESSENTIAL FACILITIES" AND "EXISTING" ARE AMBIGUOUS

The proposal leads to *de facto* land use authority for the establishment of "essential facilities" and what is "existing" by the ACHD, without due process and public involvement. Arguably, this will give highway districts the ability to approve private uses in their rights-of-way, without approval from the local communities.

If the proposed bill becomes law, any facility ACHD deems "essential" and "existing" will no longer be subject to the land use plans, ordinances, and standards adopted by any of the local jurisdictions. ACHD could construct any "essential" facility regardless of location without any land use consideration by the applicable jurisdiction. For example, the ACHD could put a gravel pit in the middle of a subdivision if it were deemed "essential" and "existing."

Although current iterations of the proposed bill indicate that ACHD would be required to "collaborate" with local jurisdictions when it comes to "essential" facilities, ACHD would make the final decision on whether something was an "essential" facility. Such a land-use decisions should be carried out by the appropriate local jurisdiction in compliance with LLUPA. Moving the land use decision outside of the processes and standards set forth in LLUPA means public involvement and public processes could be lacking. The public and surrounding property owners will also not be able to rely on the afforded protections in LLUPA, following a land-use decision by the ACHD on an "essential" facility.

The term "essential facility" is ambiguous without a definition. The term is not defined in LLUPA or in Title 40. Idaho Code § 40-107(1) defines "facilities" as "tracks, pipes, mains, conduits, cables, wires, towers, poles, equipment, and appliances." Are some facilities "essential" and some are not? Or are essential facilities something completely different (everything that is not a road)? Under SB 1106, "essential facilities" are whatever the ITD board or local highway agency board determine they are. Additionally, the term "existing" does not clearly indicate that a future property cannot later become "existing." Clearly, there is a need for a definition of "essential facilities" and "existing." Terms without definitions are problematic.

VI.
SENATE BILL 1106 COMPROMISES AND IS INCONSISTENT WITH FEDERAL MANDATES

First, SB 1106 is inconsistent with federal mandates. The National Flood Insurance Program (NFIP) does not have "essential facilities" – it has "critical facilities":

> **Critical Facilities**: facilities that are vital to flood response activities or critical to the health and safety of the public before, during, and after a flood, such as a hospital, emergency operations center, electric substation, police station, fire station, nursing home, school, vehicle, and equipment storage facility, or shelter; and facilities that, if flooded, would make the flood problem and its impacts much worse, such as a hazardous materials facility, power generation facility, water utility, or wastewater treatment plant.

Second, transportation agencies are not exempt from compliance with floodplain regulations. However, as a local jurisdiction's floodplain regulations are typically part of the adopted ordinances that SB 1106 would exempt transportation agencies from, it remains unclear how said regulations could be administered. This leads to the concern of the potential that a transportation agency would proceed with or retain improvements that violate floodplain standards, thus adversely affecting surrounding property owners or the jurisdiction in general.

If the law is passed, ACHD could determine that a facility is an "essential" and retain it in its current location and configuration. The local agency would then no longer be able to

apply adopted land use and floodplain regulations (and other federal regulations) leaving the City with a use/structure that does not comply with the higher level of flood protection required for critical facilities. With no way to remedy the deficiency, the local agency may be forced to accept a non-compliant use/structure that could affect its Community Rating System Classification and Flood Insurance Rates resulting in an adverse impact to the City and its residents.

Additionally, the federal government requires all flood ordinances to have the clause below:

> Article III. **Section E. Abrogation and Greater Restrictions**
> This ordinance shall not in any way repeal, abrogate, impair, or remove the necessity of compliance with any other laws, ordinances, regulations, easements, covenants, or deed restrictions, etcetera. However, where this ordinance and another conflict or overlap, whichever imposes more stringent or greater restrictions shall control.

Senate Bill 1106 would create a variance on its face with these federal requirements.

The proposal makes it unclear how floodplain regulations can be applied to transportation agencies jeopardizing the ability of local jurisdictions to comply with local and federal standards. Pursuant to SB 1106, local communities could not ensure transportation systems and "essential facilities" (as determined by the highway district) meet floodplain regulations without jeopardizing the eligibility of the community in the National Flood Hazard Insurance Program. SB 1106 would restrict the eligibility of the community to apply for FEMA disaster funds and property owners to obtain flood insurance. Therefore, SB 1106 is inconsistent with federal mandates.

VII.
NEGATIVE IMPACT ON DEVELOPMENT

Finally, there can be unintended consequences when highway districts shortcut the normal process for floodplain development. Some of the consequences happen when a bridge or culvert is constructed in a regulatory floodway and no Letter of Map Revision (LOMR) or Conditional Letter of Map Revision (CLOMR) is prepared. Any landowner is required to conduct normal floodplain development procedures. If a landowner is near a bridge that has no LOMR or CLOMR, the landowner may have to include the bridge or culvert in their application. Reportedly, in a number of cases, FEMA has reviewed the situation and did not process the LOMR/CLOMR application until an apparent violation (a bridge in the floodway for example) is cleared. This can cause delays, sometimes significant, to new development.

Recently, a project allegedly resulted in the landowner upstream having their project delayed for more than a year, and it will likely be two years until they obtain approval from FEMA, to construct their development. These examples are unfortunate and in the current housing market, can significantly damage a developer. The solution is simple:

the highway districts should remain required to follow the same rules the public is required to follow.

VIII.
CONCLUSION

The City is concerned that the proposed language in SB 1106 may increase the separation of transportation and land use planning efforts, making it more difficult for local jurisdictions to have any significant voice in the planning of transportation facilities within their boundaries. This will also make it difficult to meet the mandates and maintain the rights and protections set forth by the federal government and LLUPA. To illustrate this point, a special public meeting was noticed and conducted by ACHD on March 8, 2021. At this special meeting, it was clear that the five ACHD Commissioners were not unified, but rather divided, on whether SB 1106 should proceed to hearing as it is currently written. Even ACHD elected officials have questions and doubts. Accordingly and respectfully, the City submits that SB 1106 should not pass.

Sincerely,

Charles I. Wadams
City Attorney