

1981 WL 38582 (Alaska A.G.)

Office of the Attorney General

State of Alaska  
File No. J-66-300-81  
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**Village Safe Water Act, Bond Proceeds**

\*1 Ernst W. Mueller  
Commissioner  
Department of Environmental Conservation

You have asked whether the proceeds of bonds authorized by chapter 97, SLA 1980, for village safe water facilities may be used to construct individual sanitation improvements, including rain catchment systems or wells, that will service only a single home. The short answer is no, as explained below.

**BACKGROUND**

Chapter 97, SLA 1980, provides for the issuance of general obligation bonds in the amount of \$33,000,000 ‘for the purpose of paying the cost of capital improvements for water and sewer systems, solid waste facilities, and village safe water facilities. . . .’ 1980 Alaska Sess. L., ch. 97, § 1. Issuance of these bonds was authorized by the qualified voters of the state on November 4, 1980, resulting in the creation of a special state fund known as the ‘1980 Water Supply and Sewer Systems, Solid Waste Facilities, and Village Safe Water Construction Fund’. *Id.*, § 2. The sum of \$10,000,000 of this fund is appropriated to the Department of Environmental Conservation for village safe water and solid waste construction projects under the Village Safe Water Act (AS 46.07) in each of 20 named communities. *Id.*, § 3(a)(1). It is this money that DEC proposes to use to finance improvements which will be located on private property.

There are three considerations which will determine whether the bond proceeds can be used in the manner which you have proposed. First, the bond proceeds must be used for a public purpose. [Alaska Const., art. IX, § 6](#). Second, the bond proceeds must be used for capital improvements. *Id.*, § 8. Third, expenditure of the bond proceeds must comply with the terms established by the voters of the state when they authorized issuance of the bonds. 1974 Op. Att’y. Gen. No. 11.

**THE PUBLIC PURPOSE LIMITATION**

With respect to the first factor, our supreme court has found the phrase ‘public purpose’ to be a concept which cannot, indeed should not, be precisely defined, but ‘which will change as changing conditions create changing public needs.’ [DeArmond v. Alaska State Dev. Corp.](#), 376 P.2d 717, 721 (Alaska 1962), cited with approval in [Walker v. Alaska State Mortgage Association](#), 416 P.2d 245, 251 (Alaska 1966). The court went on to state that the determination of whether a public purpose is being served will be decided on a case by case basis in light of the facts and circumstances of the particular case. *Id.*

A review of some of the other cases interpreting [section 6](#) helps this otherwise amorphous concept of public purpose to take shape. In [Wright v. City of Palmer](#), 468 P.2d 326 (Alaska 1970), the court upheld an industrial development bond, finding that the proposed expenditure was not ‘so unreasonable as to transgress the limitations of the constitution.’ *Id.* at 330-331. To arrive at this conclusion, the court relied in part on the finding that industrial development would offer collective advantages to the community. *Id.*

\*2 The supreme court also has determined that the fact that the benefits accruing from expenditure of bond proceeds will extend to only a relatively small and restrictive class of persons will not necessarily lead to the conclusion that no public purpose will be achieved. The most significant case on this point is [Suber v. Alaska State Bond Committee](#), 414 P.2d 546 (Alaska 1966). In that case, public money was slated to be used to adjust or retire mortgage obligations on one-to-four-family dwellings which were damaged by the 1966 earthquake. The number of dwellings qualifying for relief under the program represented only about \$1.5 million in mortgage obligations compared with a total mortgage investment in Alaska of over \$100 million.

In upholding the constitutionality of the state's relief program, the court determined that it is not essential that an entire community or even a particular number of persons benefit from remedial legislation to effect a public purpose, and that the purpose of a program may be public even though its benefits are limited by circumstances to a comparatively small part of the public. Rather, the court found that any private advantage resulting from expenditures made under the program was merely 'incidental and subordinate' to the overall public purpose. [Id.](#) at 552.

Similarly, in [Lien v. City of Ketchikan](#), 383 P.2d 721 (Alaska 1963), the contention was made that when a hospital constructed with public funds is leased to a non-profit corporation managed by a sectarian religious order, there is a violation of the public purpose section of the state constitution. The court rejected this contention, however, finding that the money used to construct the Ketchikan hospital was spent for a public purpose because a community hospital serves the general welfare. The court concluded that the purpose remains public even though the hospital is turned over to a charitable, non-profit corporation for operation rather than being operated by the city itself. [Id.](#) at 722. Thus, the test of whether a public purpose is being served was found to depend upon the character of the use to which the property which is purchased or constructed with public funds will be put.

Based on the applicable case law, it is our conclusion that expenditure of public funds for the construction of individual sanitation improvements can reasonably be viewed as fulfilling a public purpose if constructed as part of an overall project which has benefits throughout the community and the state. See [Wright v. City of Palmer](#), 468 P.2d at 330-331; [Suber v. Alaska State Bond Committee](#), 414 P.2d at 551-552.

#### THE CAPITAL IMPROVEMENTS LIMITATION

The second constitutional hurdle standing in the way of your proposed expenditure of public funds is as follows:

No state debt shall be contracted unless authorized by law for capital improvements and ratified by a majority of the qualified voters of the state who vote on the question.

\*3 [Alaska Const., art. IX, § 8](#) (emphasis added).

Although the Alaska Supreme Court has not specifically defined what is meant by a capital improvement, it has given examples: We believe 'capital' was used in the sense in which it is associated with assets in the form of real or personal property and that it was intended to connote a degree of permanency. We believe that it includes the 'public works of a permanent character' such as 'streets, bridges, wharves, and harbor facilities, sewers and sewerage disposal plants, municipal buildings, schools, libraries, gymnasias and athletic fields, fire houses, and public utilities' as mentioned in the original Act of Congress.

[City of Juneau v. Hixson](#), 373 P.2d at 747. As may be inferred from the [Hixson](#) case, the closer village safe water projects are to those types of capital improvements described by the court, the less likelihood there is of challenge. Nevertheless, in [Wright](#), the court made it clear that capital improvements include more than traditional public works, there, an industrial development project. [468 P.2d at 329.](#)

It is our conclusion that durability is one element which will determine whether the projects which you propose to construct are capital improvements within the meaning of [article IX, section 8, of the Alaska Constitution](#). As guidance in this matter, our office has previously advised you by memorandum dated July 16, 1979 that holding tanks built to last for a long period of time fall within the concept of a capital improvement when they are integral parts of the overall water and sewage system.

It is also our opinion that the capital improvements clause requires that the public own the improvement to assure that the public has a tangible asset which offsets, as it were, the public debt. See [Wright v. City of Palmer](#), 468 P.2d 326, 329-330 (Alaska 1970), and [City of Juneau v. Hixson](#), 373 P.2d 743, 748 (Alaska 1962). The need for public ownership does not require that ownership be in the state. For example, the state does not own any part of the Fairbanks Flood Control Project into which it has funnelled millions of dollars in general obligation bond proceeds. Similarly, the state transfers boat harbors and other improvements to cities without retaining an ownership interest. Nevertheless, ownership remains 'public' in both cases.

The public ownership requirement can be met by following an approach similar to the one taken in the State of Wisconsin. In Wisconsin, subdividers commonly deed a portion of the land in the subdivision to the local government for sewage treatment or water supply purposes. A similar approach should be taken in locating public improvements on private property. A portion of the landowner's property could be conveyed to the village (if the village is an unincorporated community) for purposes of constructing a well, for example. Even under this approach, however, the bond proceeds could not be used to plumb the inside of a house, as some community leaders reportedly have suggested, or to construct any other individual sanitation improvement which can service only a single home, because the public ownership would then be a fiction at best.

## SUBSTANTIAL COMPLIANCE WITH THE

### TERMS OF THE PROPOSITION

\*4 The third hurdle which must be overcome before the bond proceeds may be used for the purposes you have proposed stems from the terms of the original proposition. Since the issuance of the bonds was submitted to referendum, DEC must, in expending the bond proceeds, substantially comply with the terms of the proposition submitted to the voters. That is, if practical implementation of the bond act increases the financial burden which the taxpayers agreed to bear or varies so greatly from the original proposition that the voters may be said to have been misled or to have not intended that the funds be spent as proposed by DEC, then the practical implementation is invalid. 1961 Op. Att'y. Gen. No. 6. The general rule restricts expenditure of the proceeds of publicly-approved bonds to those projects approved by the voters.

The bonding proposition submitted to the voters provided as follows:

### BALLOT QUESTION:

Shall the State of Alaska issue its general obligation bonds in the principal amount of not more than \$33,000,000 for the purpose of paying the cost of capital improvements for water and sewer systems, solid waste facilities, and village safe water facilities?

Bonds Yes

Bonds No

The Legislative Affairs Agency summary provided in the voters pamphlet along with that proposition stated:

LEGISLATIVE AFFAIRS AGENCY SUMMARY This proposal, if approved, would provide for the issuance of general obligation bonds of the State in the amount of \$33,000,000 for the purposes of paying the cost of capital improvements for water and sewer systems, solid waste facilities and village safe water facilities. Bond proceeds would be appropriated among the following projects:

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The significant difference between these two statements and the act itself is that the act made clear that the village safe water and solid waste construction projects portion of the bond proposal would be used to fund projects under the provisions of the Village Safe Water Act (AS 46.07). 1980 Alaska Sess. L. § 3(a)(1). Therefore, assuming that the voters intended that the bonds proceeds would be used for village safe water and solid waste construction projects as delimited by the terms of the Village Safe Water Act, then expenditure of the bond proceeds must substantially comply with the terms of that Act.

Relevant portions of the Village Safe Water Act provide as follows:

1. DEC shall provide for the installation of safe water and hygienic sewage disposal facilities in villages of the state as are necessary to assure that there will be at least one facility for safe water and hygienic sewage disposal in each village. [AS 46.07.020](#).

**\*5** 2. A facility shall be available for year-round public use. A facility shall include a source of clean water, shower bath facilities, a means of hygienic sewage disposal, and facilities for the washing of clothes. AS-46.07.030(a).

3. DEC may provide for the construction of facilities through grants to public agencies or private non-profit organizations or otherwise. [AS 46.07.040\(a\)](#).

4. The village governing body is responsible for maintaining and operating the safe water and hygienic disposal facility. Upon completion of the facility, DEC shall transfer title vesting complete ownership of the facility in the governing body. DEC may not construct a facility unless it receives satisfactory assurances that the village governing body will accept ownership and responsibility for the operation and maintenance of the facility. [AS 46.07.050\(a\)](#).

The key limitations on facilities funded under the Village Safe Water Act are readily apparent. The facility must be available for year round public use. [AS 46.07.030\(a\)](#). This limitation appears to preclude the construction of improvements intended for single family use, such as individual wells or catchment systems. While the installation of single-family water and sanitation facilities could well meet any public-purpose requirements, it will not meet public-use requirements.

The act also requires that complete ownership of the facility be transferred to the village governing body upon completion of the facility. This requirement satisfies the constitutional requirement for public ownership of capital improvements financed by general obligation bonds, if the village is a second class city. However, if the village is an unincorporated community, then the constitution requires that ownership of the facility be retained in state ownership or transferred to a public association or corporation open to all residents of the community until the village incorporates as a municipality to which title may be transferred.

Summarizing, it is our conclusion that bond proceeds authorized by chapter 97, SLA 1980, for village safe water facilities may not be used to construct individual sanitation improvements because of the public ownership requirement inherent in the capital improvements clause of our constitution.

We hope that this opinion offers sufficient guidance to you in implementing chapter 97, SLA 1980. However, if you have additional specific proposals which you feel are not adequately addressed by this memorandum, please do not hesitate to refer them to us.

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