

LEGAL SERVICES

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MEMORANDUM

January 23, 2017

SUBJECT: Public Purpose (Work Order No. 30-LS0353\A)

TO: Representative Jonathan Kreiss-Tomkins
Attn: Berett Wilber

FROM: Emily Nauman 
Legislative Counsel

Attached please find a bill allowing an entity designated for federal tax purposes as a 501(c)(3) non-profit corporation or a federally recognized tribe to obtain a loan from the Alaska energy efficiency revolving loan fund. At the outset, I should note that this memo is largely a duplication of the memo sent to your office with the original version of this bill drafted last year.

The extension of the loan program to 501(c)(3) non-profit corporations or federally recognized tribes, either through the state or a municipality, may be subject to challenge under the public purpose clause of the Constitution of the State of Alaska and the establishment clauses of the Constitution of the United States and the Constitution of the State of Alaska. However, a challenge under these provisions is not likely to be successful, as discussed below.

Public Purpose

The Alaska constitution requires that public funds be used only for a public purpose.¹ In general, where the legislature has found that a public purpose will be served by the expenditure of public funds,² the court will not set aside that finding unless it is clearly arbitrary and without any reasonable basis in fact. When the bill is heard in committee you may wish to consider addressing the public purpose and policy reasons for extending the loan program to 501(c)(3) non-profit corporations and federally recognized tribes.

¹ The public purpose clause is set out in art. IX, sec. 6, Constitution of the State of Alaska:

Public Purpose. No tax shall be levied, or appropriation of public money made, or public property transferred, nor shall the public credit be used, except for a public purpose.

² It could be argued that a loan does not constitute an expenditure of public funds.

Preparing an adequate record in this matter will help defend the program against a potential public purpose challenge.

Religious Purpose

An issue may arise if a religious group that is also a 501(c)(3) non-profit corporation applies for an Alaska energy efficiency loan. Article I, sec. 4 of the Constitution of the State of Alaska provides, "no law shall be made respecting an establishment of religion, or prohibiting the free exercise thereof." The establishment clause in the state constitution is almost identical in wording to the federal establishment clause.

The United States Supreme Court has established a three-part test (the *Lemon* test) to determine whether a benefit received by a religious group is constitutionally permitted. First, the statute must have a secular legislative purpose; second, its principle or primary effect must be one that neither advances nor inhibits religion; and, finally, the statute must not foster an excessive government entanglement with religion.³

The Alaska Supreme Court has construed the state establishment clause the same way the federal courts have construed the federal establishment clause.⁴ The Alaska Supreme Court has applied the *Lemon* test, saying:

A legislative enactment will not be invalidated under the "effect" prong merely because it may incidentally benefit religion or religious institutions. Rather, the constitutional inquiry focuses on whether the law's "principal or primary effect advances religion."⁵

In another Alaska case (that predates the *Lemon* case), the City of Ketchikan provided for the construction of a hospital with a combination of federal, state and local funds. The city executed an agreement to lease the hospital to the Sisters of St. Joseph of Newark, a charitable, non-profit corporation, for a nominal rental amount.⁶ The lease required that the Sisters could not deny admission or care of patients on account of race, color or creed. The Alaska Supreme Court held that the city action did not violate the establishment clause because (1) the hospital served a public purpose, (2) the Sisters are a non-profit

³ *Lemon v. Kurtzman*, 403 U.S. 602, 612 - 613 (1971); *See also, Felman v. Simmons-Harris*, 536 U.S. 639 (2002) and *Lynch v. Donnelly*, 45 U.S. 668, 681 at n.6 (1984) (establishment clause does not require an "exclusively secular" objective).

⁴ *See, Bonjour v. Bonjour*, 592 P.2d 1233, 1236, n. 3 (Alaska 1979) (statute allowing consideration of religious factors in child custody suits facially valid but unconstitutional as applied).

⁵ *Bonjour v. Bonjour*, at 1243 (note 21), citing *Tilton v. Richardson*, 403 U.S. 672 (1971).

⁶ *Lien v. Ketchikan*, 383 P.2d 721, 722 (Alaska 1963).

corporation, organized for charitable purposes, and (3) the city's action did not have the effect of promoting or giving a preferred position to the religious beliefs of the individual members of the corporation.⁷

An energy efficiency program seems likely to pass the *Lemon* test as it appears to have a secular purpose, saving energy. Although one might argue that some benefit flows to a religious group because of receiving a loan, the primary effect is to save energy, not to advance or inhibit a religion. While some administrative costs will be incurred, the administration of an energy efficiency program does not appear to excessively entangle government with religion. Rather than being considered a program that promotes religion, the energy efficiency program would probably be interpreted as incidental to religion or promoting religious beliefs.

There is a small possibility that a loan granted a place of worship may be considered unconstitutional. One could argue that because a religious organization receives money from the energy efficiency program it would have additional money available for promoting its religious beliefs. Again, many of these arguments may be negated because the benefit is a loan, subject to repayment.

In my opinion, it seems more likely that a court addressing a legislative program that allows an energy efficiency loan to be used by a religious organization for creating energy efficiencies in houses of worship would not violate the establishment clause of either the Alaska or U.S. constitutions.

If I may be of further assistance, please advise.

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Attachment

⁷ *Id.* at 724.