

1981 WL 38607 (Alaska A.G.)

Office of the Attorney General

State of Alaska

File No. J99-078-81

April 2, 1981

Water & Sewerage Construction Grants

*1 Ernst W. Mueller
Commissioner
Department of Environmental Conservation

This memorandum is in response to your department's request of March 31, 1981 for clarification of this department's position on the use of bond proceeds for the initial purchase of water delivery and sewerage collection vehicles.

Your department's proposed regulation [18 AAC 73.010\(g\)\(3\)](#) reads as follows:
the costs of water delivery and honey bucket collection vehicles are grant eligible, on an initial purchase basis, when determined by the department to be cost effective as compared with conventional water supply and sewage collection systems.

The question which has arisen involves whether it is proper to purchase water and sewerage trucks with funds obtained by the sale of general obligation bonds under chapter 97, SLA 1980, where those trucks will be used to service the storage and holding tanks belonging to individual dwellings.

This department has recently issued a memorandum dated March 16, 1981, to your department which explains in some detail why Village Safe Water Act bond proceeds may not be used to construct individual sanitation improvements. In the interest of time and brevity, I direct your attention to the discussion of public purpose, capital improvement, and substantial compliance with the terms of the bond proposition which is contained in that memorandum, as that discussion is applicable to the present question as well. A copy of the March 16, memorandum is attached.

The use of trucks for water distribution and sewage collection would clearly meet the public purpose requirement of the Alaska Constitution. Art. IX, § 6. See Att'y. Gen. Memorandum of March 16, 1981; and Att'y. Gen. Memorandum of March 19, 1981 (service connection eligibility).

However, a problem arises when the department attempts to use bond proceeds to fund such purchases, as § 8 of art. IX imposes additional limitations on what are permissible objects of expenditure of bond proceeds. Section 8 says that:
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.

[Alaska Const., art. IX, § 8](#). It is apparent that [section 8](#) restricts the items which may be purchased with bond proceeds to Capital improvements. Moreover, 1961 Op. Att'y. Gen. No. 6 discussed an additional implied requirement. If the practical implementation of the bond act varies so greatly from the original proposition that the voters may be said to have been misled or to have not intended that funds be spent as proposed by DEC, then the practical implementation is invalid. Id. It is against this backdrop of the 'capital improvement' and 'substantial compliance with the bond proposal' requirements that the use of bond proceeds to purchase water distribution or sewage collection trucks must be reviewed.

*2 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. The court, in its description did not mention fire trucks, school buses, street maintenance vehicles, or any other types of vehicles, and it is probable that the court, like a voter, would think of capital improvements as relatively permanent structures and fixtures necessary for the operation of those structures, such as furnaces, rather than vehicles.^{a1} In Wright v. City of Palmer, 468 P.2d 326, 329 (Alaska 1970), the Alaska Supreme Court stated the term ‘capital improvement’ was broader than traditional public works and applied to an industrial development project sponsored by the City of Palmer. But again, the court was dealing with a building and paved lot, items which are clearly improvements of a relatively permanent nature and the court has yet to include a vehicle within the definition of a ‘capital improvement’. It may be inferred that the farther a project strays from the type of project described as a capital improvement in City of Juneau v. Hixson, 373 P.2d 747, the more it is subject to attack as an improper expenditure.

It is possible, at least in theory, for a truck to be included as an integral part of an overall capital improvement as the counterpart, say, of the baggage carts on a ferry. As long as the project definitely qualifies as a capital improvement, it should not matter that some of its smaller, integral parts are—if examined separately from the project—not capital improvements. But where the project consists of several more or less co-equal parts, only one or two of which qualify as capital improvements, then it is not so easy to bring the others within the ambit of the term ‘capital improvements.’ That appears to be the case where the project parts are private homes with individual sewage storage tanks and trucks to service them.

As in integral part of an overall capital improvement, the truck also qualifies under the second limitation on the use of bond proceeds. That is, the implied restriction on the proceeds of publicly approved bonds to projects which substantially comply with the bond proposal. See 1961 Op. Att’y. Gen. No. 6. The bonding proposition submitted to the voters for approval 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?

*3 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:

TABULAR OR GRAPHIC MATERIAL SET FORTH AT THIS POINT IS NOT DISPLAYABLE

This bonding proposal and legislative summary are relatively abstract, and the statute provides further understanding of what would be substantially within the terms of the bond proposition.

AS 46.03.900(19) defines a sewer or sewerage system as ‘pipelines or conduits, pumping stations and force mains, and all other appurtenant constructions, devices, and appliances used for conducting sewage, industrial waste, or other wastes to a point of ultimate disposal.’ AS 46.03.030(d) states:

Eligible costs include the costs established in a construction contract which are necessary for construction of a project . . .

The reasonable understanding conveyed by the bond proposition, voter pamphlet language, and statute suggest a sewer system is to be built in the customary piped sewer form. It is doubtful that either the average voter or a court, when reviewing a proposed grant for collection or distribution trucks would perceive this expenditure as falling within the capital improvement language of the bond proposal of the statute.

Accordingly, as a general rule your department cannot fund trucks for water distribution to, and sewage collection from, private dwellings with bond proceeds.

The question you are concerned with at this time has come up in a different context under the Village Safe Water Act bond issue. To clarify our position in the present matter and to avoid misunderstanding of our earlier memoranda and analyses, those earlier memoranda will be reviewed in answering the present question.

In our memorandum of April 17, 1979, we advised your department bond proceeds could not be used to construct a ‘washeteria’, or to provide a loan fund for ‘sewer holding tanks’ or to purchase ‘special high powered pumper, trucks’.

We noted the washeteria was outside the scope of the bond issue, the trucks would not qualify as a capital improvement unless they fell within an exception to the general rule, and that the establishment of a loan program with bond proceeds for construction of private holding tanks would also be improper.

In a subsequent memorandum dated July 16, 1979, we modified our earlier memorandum noting the statutory framework of the Village Safe Water Act was sufficiently broad to allow the use of grant funds for both the construction of the washeteria and the purchase of sewage pumper trucks as ‘a capital improvement when they are integral parts of the overall water and sewage system.’ Id.

*4 The Village Safe Water Act expressly allows for ‘facilities for the washing of clothes’ AS 46.07.030(a) and AS 46.07.040(c) contains an extremely broad description of allowable costs. This description includes ‘the acquisition of machinery and equipment as may be necessary in connection with the project’. Id.

Based upon the above statutory language, this office stated the purchase of sewage pumper trucks was permissible. However, the language of AS 46.03.030(d) is much narrower in scope, stating that ‘Eligible costs include the costs established in a construction contract which are necessary for construction of a project . . .’ (Emphasis added). We do not feel the language of AS 46.03.030(d) is sufficiently broad so as to include the purchase of sewage or water trucks.

Regarding the use of bond proceeds for the construction of private dwelling sewage holding tanks, our July 16, 1979, memorandum suggested they could fall within the Village Safe Water Act. Further analysis, and a more in-depth review of that Act now requires us to overrule our earlier opinion, since the Act clearly contemplates facilities which will serve the public, precluding private improvements.

In our March 16, 1981 memorandum, we noted, at page 7:

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.

We have determined our earlier advice to you in our July 16, 1979, memorandum was wrong. Bond proceeds under the Village Safe Water Act may not be used to fund single family waste holding tanks.

In summary, we are standing by our earlier advice given by telephone to your department that proceeds from the urban water and sewer construction bonds may not be used for even the initial purchase of water distribution or sewage collection vehicles when that equipment will be used to service single family dwellings.

Should you have any further questions please get in touch with me.

Wilson L. Condon
Attorney General
James H. Isherwood
Assistant Attorney General

Footnotes

[a1](#) A long-lived vessel would probably be approved by the court.

1981 WL 38607 (Alaska A.G.)