

The Honorable Lee E. Fisher
The Honorable Glenn A. Olds
The Honorable Millett Keller

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Use of municipal bond
proceeds to repair
existing facilities
and maintain roads

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You have asked for an opinion as to whether a municipality may issue bonds for the purpose of repairing existing facilities and maintaining roads. In short, it is our opinion that the Alaska Constitution, article IX, section 9, probably prohibits use of municipal bond proceeds for these purposes as it is doubtful they constitute "capital improvements."

The controlling provision in the state constitution regarding your question is article XI, section 9, which reads:

No debt shall be contracted by any political subdivision of the State, unless authorized for capital improvements by its governing body and ratified by a majority vote of those qualified to vote and voting on the question.

This provision was considered by the Alaska Supreme Court in City of Juneau v. Hixson, 373 P.2d 743 (Alaska 1962), 1/ in which the court construed the intent of the constitutional framers in limiting municipalities' power to incur bonded indebtedness to capital improvements.

In construing the framers' intent, it was necessary for the court to give meaning to the term "capital improvement." However, the court refused to provide an abstract definition of the term "capital improvement." Instead, the court recognized the framers' use of this term as a concept, one that did not require illustration "by actually listing the type projects that

1/ This case concerned the City of Juneau's attempt to issue general obligation bonds to buy raw land within the city that would be given to the state as a site for a new capitol. The Alaska Supreme Court held that it did not constitute a capital improvement as required by article IX, section 9 because the city would be left with no tangible asset in place of the indebtedness.

were considered to be included within its meaning." The refusal of the court to provide a detailed definition of "capital improvement" was based upon the reasoning that it was "beyond human ability to permanently circumscribe with mere words at a given point in time, a concept which, though limiting in one aspect, is otherwise intended to provide a broad, permanent and continuing authority for municipalities to finance present as well as unforeseeable future needs." Id. at 747.

While the court refused to define the term "capital improvement," it did attempt to give meaning to the concept. Citing from a New Hampshire case, our court noted:

In the absence of any definition of a capital improvement as used in the act the term 'capital improvement' must be taken in its ordinary sense of a permanent improvement or betterment as distinguished from ordinary repair or current maintenance. 2/

And, the court took into account various dictionary definitions and use of the term "capital." 3/ It found "capital" to be generally associated with value represented by real or personal property in some form and with relative permanency. "Improvement" was determined by the court to mean, in its broad sense, betterment. Id. at 746.

The Alaska Supreme Court concluded that "capital" was used by the framers of the constitution as it is associated with assets in the form of real or personal property and that it was intended to connote a degree of permanency. Combined with the term "improvement," the court concluded that the framers intended to place a limitation on the purposes for which a municipality

2/ City of Juneau v. Hixson, 373 P.2d at 746 (citing Leavitt v. Town of North Hampton, 96 A.2d 554 (N. H. 1953)). We note that neither case discusses whether "extraordinary" repairs or maintenance constitute a "capital improvement."

3/ The court took note that the term "capital" has many meanings. The economic definition is, "A stock of accumulated wealth." "Capital asset" is defined as being synonymous with "permanent assets" in its general accounting use. "Permanent assets" are defined as, "A resource, such as land, buildings or machinery, or capital stock of another company held for purposes of control." City of Juneau v. Hixson, 373 P.2d at 747 (citations omitted).

could incur indebtedness:

This limitation was not intended to accomplish all desirable improvements sponsored by the governing body and approved by the electorate. If this had been the intent, it would have been clearly stated by simply omitting the word 'capital'.

Id. (emphasis in original).

Other states with similar constitutional or statutory provisions as the State of Alaska's have held, for example, that the power to issue bonds for construction of buildings did not authorize issuance of bonds for repair of the building. School District No. 6 v. Robb, 93 P.2d 905, cited in 15 E. McQuillin, Municipal Corporations • 43.22, at 611 (3d rev ed. 1985) (hereafter McQuillin). But it has also been held that repairs are authorized if they are necessary to preserve the property. McQuillin, • 43.22 at 612. We note, however, that authority to "repair" existing structures must be express. For example, authority to issue bonds for the "construction and maintenance of waterworks" is authority to repair, since repairing is maintenance. Id. In contrast, article IX, section 9, of the Alaska Constitution does not expressly authorize issuance of bonds for repairs or maintenance, we find no discussion in the minutes of the constitution that is enlightening as to this issue.

In sum, it is our opinion that, based upon the analysis of the Alaska Supreme Court in City of Juneau v. Hixson, especially the court's citation and apparent acceptance of the reasoning of the New Hampshire court that "[t]he term "capital improvement" must be taken in its ordinary sense of a permanent improvement or betterment as distinguished from ordinary repair or current maintenance," the Alaska Supreme Court would find the issuance of general obligation bonds by a municipality for the purpose of ordinary repair of existing facilities or ordinary road maintenance be in violation of article IX, section 9, of the Alaska Constitution. The question of whether "extraordinary" repairs or maintenance constitutes a "capital improvement" is not as readily answered, and the Alaska Supreme Court has not had an opportunity to confront it.

MLO:ck

cc: The Honorable Edgar Blatchford, Commissioner

Commissioner Fisher, et al
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July 25, 1991
Page 4

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