

Hon. John A. Sandor
Commissioner
Department of Environmental
Conservation

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Ranking criteria under
AS 46.07 (Village Safe
Water Act)

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I. ISSUE

May a village's willingness or lack of willingness to contribute to construction and maintenance costs of a water project be considered when prioritizing requests for Village Safe Water Act funds?

II. INTRODUCTION

Alaska's Village Safe Water Act (Act), AS 46.07, requires the Department of Environmental Conservation (DEC) to provide for the construction of safe water and hygienic sewage disposal facilities. Each year, Alaska's villages submit numerous capital project funding requests in which the villages seek money to construct or improve such facilities. DEC ranks these requests in order of priority. Ranking has traditionally been based upon public health, environmental, and project-status criteria. 1/ Another criterion sometimes applied is the relationship of the proposed project to other projects. 2/ This year, DEC proposes to add a "local project commitment" criterion.

The commitment criterion would favor those projects which are partially subsidized by users. 3/ The proposed

1/ Public health criteria look to the existence of, or threat of, a "disease event" that could be corrected or avoided. Environmental criteria look to "pollution events" and are designed to give priority to facilities that will correct or avoid pollution. Project status criteria look to the feasibility of the proposed project and the stage to which it has already progressed.

2/ This is a consideration of such things as whether this is an initial project or an accessory to some other project.

3/ As currently crafted, the maximum ranking points a project could accumulate total 800 (300 each for health and environmental factors, 100 each for project development and project

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criterion is divided into Part A and Part B. Part A prioritizes projects where construction costs are subsidized. Part B prioritizes projects where operating costs are subsidized. If facility users promised to subsidize either construction or operating costs (or both), the funding request submitted by those users would be given additional ranking points. The project with the most ranking points is the first project funded. Thus, if all other factors were equal, a locally subsidized project would be given priority over an equivalent project that was not locally subsidized. 4/

Your question is whether such a scheme violates the letter and intent of AS 46.07.040(a). That law instructs DEC to build safe water and hygienic sewage disposal facilities, but warns DEC that "a contribution toward the cost of the construction of a facility may not be required from its users." We conclude that it is possible (although not facile) to take local contributions into account without violating the law. However, we also conclude that facility users may renege on their construction "commitments" (Part A commitments) with impunity. Therefore, rankings based on local commitments will be inherently unreliable.

III. ANALYSIS

A misprint in Alaska's codified statutes caused DEC to misinterpret legislative intent with respect to this law. As printed in the September 1987 codification, AS 46.07.040(a) reads:

A contribution toward the cost of the construction of a facility may be required from its users."

(Emphasis added.) This has never been the law in Alaska.

(..continued)
relationship factors). The "local project commitment" criterion would make possible the accumulation of 200 more points.

4/ Lower ranking project requests would not necessarily go unfinanced; however, first dollars would go to higher priority projects.

As written in 1970, the operative language read:

No contribution toward the cost of the construction of a facility may be required from its users." 5/

In 1978 other portions of AS 46.07.040 were amended, but subsection (a) -- including the operative language -- remained unchanged. 6/ Michie Company, printer of Alaska's statutes, continued to correctly print subsection (a) until 1986. 7/

During the 1986 legislative session, AS 46.07.040(a) was amended. The operative language was changed to read:

A contribution toward the cost of the construction of a facility may not be required from its users." 8/

This was correctly printed in the 1986 statutory supplement, 9/ but was misprinted in the 1987 codification. 10/ In that printing Michie left out the word "not." Of course, this led DEC to mistakenly assume that a "local commitment" criterion was expressly permitted.

5/ AS 46.07.040(a), as originally enacted in HB 505 (1970); sec. 1, ch. 186, SLA 1970.

6/ The legislature added a new subsection (c) -- which defined the phrase "cost of the construction of a facility" -- but it made no other changes to the section. See sec. 32, ch. 168, SLA 1978. The printed supplement and codification remained correct. See Alaska Stat. Tit. 45 -- Tit. 47, at 146-147 (Supp. 1978).

7/ See Alaska Stat. Tit. 46, at 61 (Sept. 1982).

8/ Sec. 55, ch. 106, SLA 1986.

9/ Alaska Stat. Tit. 45 -- Tit. 47, at 34 (Supp. 1986).

10/ Alaska Stat. Tit. 46, at 68 (Sept. 1987).

Michie caught its mistake in 1989 11/ and has printed the correct wording in the supplements since that time. 12/ However, the 1987 codification is still the primary codification.

The net result of Michie's error was to affirmatively misrepresent legislative intent with respect to this proscription. Anyone reading the statutes would be led to believe that legislators had been inconsistent; at times prohibiting contribution requirements, at other times allowing them. In truth, the proscription against requisite contributions has been in continuous effect for 21 years. There is legal significance in the fact that legislators have had 21 years to reconsider their position, but have not done so. *Matanuska-Susitna Borough v. Hammond*, 726 P.2d 166, 176 (Alaska 1986). There is legal significance in the fact that when legislators did amend the operative language they changed syntax, but not meaning. *Id.* Both of these circumstances evidence legislative intent. 13/ Contributions may not be required. 14/

Legislative intent is not dispositive. One must still ask whether the proposed ranking violates the letter of the law.

Does the "local commitment" criterion amount to a required contribution? That depends upon how the criterion is implemented. DEC may employ the criterion in a way that does not violate the statute. It could, for instance, employ the "local commitment" criterion only when ranking requests for repair monies. The Act prevents DEC from requiring contributions toward "construction" costs, not repair costs. 15/ Similarly, DEC

11/ Alaska Stat. Tit. 45 -- Tit. 47, at 68-9 (Supp. 1989). An "editor's note" explains: "This section [AS 46.07.040] is set out above to correct a minor error in the next-to-last sentence of subsection (a) in the main pamphlet."

12/ *E.g.*, Alaska Stat. Tit. 45 -- Tit. 47, at 165 (Supp. 1990).

13/ This is a case of statutory interpretation. In every case of statutory interpretation the aim is to discover legislative intent. *Femmer v. City of Juneau*, 9 Alaska 315; 97 F.2d 649, 656 (9th Cir. 1938).

14/ Legislative intent may be gleaned from the legislature's consistent, unwavering iteration of the proscription. *Femmer*, 9 Alaska at 331; *Claus v. City of Fairbanks*, 13 Alaska 201, 207, 95 F. Supp. 923 (1951). In fact, consistent application is the only guide to legislative intent because our review of materials at the legislative library failed to uncover any legislative history on this proscription.

15/ Although "cost of the construction of a facility" is broadly defined, AS 46.07.040(c), it does not include repairs.

could adopt only the Part B criterion -- which looks at the facility user's willingness to pay operating costs -- and delete the Part A criterion -- which looks at the user's willingness to pay construction costs. 16/ Villages must "accept ownership and responsibility for the operation and maintenance of the facility." 17/ Part B of the local commitment criterion is one legitimate means for assuring that villages do so. DEC could give highest priority -- irrespective of any criterion -- to villages that do not now have at least one facility for safe water and hygienic sewage disposal. This would satisfy the Act's goal of providing at least one facility per village, 18/ and would demonstrate that contributions are not requisite. Another option is to use the list only as a guideline. Assuming that all requests for funding appear on the priorities list when it is given to legislators, lawmakers would be free to reprioritize projects irrespective of the presence or absence of local contributions. 19/ These, and similar steps, allow DEC to employ the "local commitment" criterion without violating AS 46.07.040.

Several caveats must be kept in mind. First, legislators clearly intended to provide villages with safe water systems irrespective of the villages' ability to pay for construction of those systems. 20/ DEC must endeavor not to

16/ This would mean that DEC would only employ on Part B criterion, not Part A of the "local commitment" criterion.

17/ AS 46.07.050(a)

18/ AS 46.07.020.

19/ Legislators have done their own prioritizing in the past. For instance, when implementing the municipal safe water program (AS 46.03.030) -- which is a companion to this program -- legislators expressly instructed DEC to give the Girdwood sewer system highest priority. See Statement of Committee Intent, Free Conference Committee Report to the legislature accompanying the 1975 budget, as quoted in 1974 Inf. Op. Att'y Gen. (Jun. 11; Pegues) "Legislative intent [is] that the installation and completion of the [Girdwood] sewer system be considered by the Department of Environmental Conservation to be a project of the highest priority."

20/ Reading the Act in its entirety emphasizes this point. Construction burdens are not placed on the villagers. Rather, all obligations for constructing facilities are imposed upon DEC. *E.g.*, DEC must choose the funding mechanism, AS 46.07.040(a); DEC must coordinate with other ongoing projects, AS 46.07.070; DEC must ensure that the facility is designed for year-round use.

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thwart that intent, even indirectly. *U.S. v. Hardcastle*, 10 Alaska 254, 266 (1942) (the intent of the legislature must be kept in mind, and such construction placed upon a statute as will effect its purpose). Second, because contributions may not be required, a "commitment" by a village is unenforceable. A village can pledge money or services in order to attain high priority for its proposal, then renege when asked to make good on that commitment. DEC cannot force the village to honor the commitment because that would make the contribution requisite, thereby violating AS 46.07.040. Consequently, rankings based on Part A of the "local commitment criterion" are inherently unreliable.

III. CONCLUSION

In the Village Safe Water Act, program users cannot be forced to contribute to the cost of constructing a safe water or hygienic sewage disposal facility. A ranking system that prioritizes requests for construction monies according to a user's commitment to contribute to construction cost violates the intent of the Act. Whether such a system violates the letter of the law depends upon how it is implemented. Irrespective of how it is implemented, such a ranking system is inherently unreliable because the user's "commitment" cannot be enforced.

I hope this answers your questions.

RKR:lmk

cc: Keith Kelton, Director
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AS 46.07.030(a). Those provisions stand in sharp contrast to provisions which discuss operation and maintenance of facilities. When it comes time to operate and maintain the facility, a village governing body must "accept ownership and responsibility." AS 46.07.050(a). Financial responsibility is part of that acceptance. AS 46.07.050(b).