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Municipal Grants Administrator
Department of Administration

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663-92-0379

465-3600

North Slope Borough
municipal grant;
ch. 96, SLA 1991

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At your request, we have reviewed a \$1.2 million municipal grant that was appropriated to the North Slope Borough (borough) in 1991 for a "coal project - mine site development/power plant design" study.¹ Ch. 96, SLA 1991, page 119, line 12. You ask us to determine the following: (1) whether the appropriation is consistent with the public purpose clause of the Alaska Constitution; and, if so, (2) whether the appropriation is consistent with AS 37.05.315(a).

BACKGROUND

The mine site to be studied for potential development is commonly called the "Northwest Alaska Coal Project" (Project).

The Project is located near Point Lay, Alaska, on the Arctic Slope within the borough. The Project site is owned by the Arctic Slope Regional Corporation (corporation). Over the past several years, the Alaska Native Foundation has worked with the corporation in the marketing and development of the Project. According to information supplied us from Senator Adams's office, one of the sponsors of the appropriation, previous funding for the Project has been provided by the corporation, the borough and the state.²

As we understand the facts, the Project is now in Phase II and the 1991 appropriation to the borough will be used to pay for an in-depth study of the feasibility of developing a local

¹ While the appropriation fails to state that the purpose is for a "study," legislative materials explaining the appropriation in greater detail make clear that the appropriation was intended to be used for a study; not for actual mine site development.

² Previous appropriations by the legislature to assist in the development of the Project are: \$2 million to the Alaska Native Foundation for coal (Cape Beaufort area), sec. 2, ch. 24, SLA 1984, p. 16, l. 13; and \$200,000 to the borough for the NW Alaska Deadfall Syncline Coal Project, sec. 139, ch. 208, p. 99, l. 14.

coal industry to serve the domestic energy needs of several borough villages, Kotzebue and Nome. Apparently, the in-depth study will be performed by the Arctic Slope Consulting Group.³

COMPLIANCE WITH PUBLIC PURPOSE CLAUSE

Article IX, section 6, of the Alaska Constitution requires that all appropriations of state money be for a "public purpose." While the term "public purpose" has not explicitly been defined by the Alaska courts,⁴ it has been broadly interpreted to encompass any expenditure of public money that serves a governmental interest. See, e.g., 71 Am. Jur. 2d State and Local Taxation • 42 (1973).

To satisfy the public purpose clause, the benefit to the public generally must be the direct and primary purpose of an expenditure. It is, however, permissible if the expenditure also has an indirect private benefit. 1991 Inf. Op. Att'y Gen. (Apr. 1; 883-91-0002). Also, payments of public money may be made to private individuals, if the direct benefit of the payment inures to the public rather than to private individuals. The Alaska Supreme Court has found such a public purpose in a variety of situations.⁵

³ The Arctic Slope Consulting Group is not directly named in the appropriation. The doctrine of separation of powers prohibits the legislative branch of government from designating the contractor in an appropriation. 1982 Inf. Op. Att'y Gen. (Mar. 8 J66-463-82).

⁴ DeArmond v. Alaska State Dev. Corp., 376 P.2d 717, 721 (Alaska 1962) ("public purpose represents a concept which is not capable of precise definition. . . . It is a concept which will change as changing conditions create public needs."); 1991 Inf. Op. Att'y Gen. (May 7; 661-91-0503).

⁵ Comtec, Inc. v. Mun. of Anchorage, 710 P.2d 1004 (Alaska 1985) (marketing of customer premises telephone equipment through Anchorage Telephone provides a public benefit); Lake Otis Clinic v. State, 650 P.2d 388 (Alaska 1982) (state aid to private hospitals fulfills a public purpose); Wright v. City of Palmer, 468 P.2d 326 (Alaska 1970) (bonds issued to encourage industrial development fulfill a public purpose); Walker v. Alaska State Mktg. Ass'n, 416 P.2d 245 (Alaska 1966) (Alaska State Mortgage Association, which promotes housing, fulfills a public purpose by promoting the general welfare); Suber v. Alaska State Bonding Comm., 414 P.2d 546 (Alaska 1966) (plan to provide mortgage

An informal opinion of the attorney general found a public purpose in a proposed appropriation to expand a private recreational ski area. 1982 Inf. Op. Att'y Gen. (Mar. 8; J66-82-463). Another opinion dealt with a proposed grant by the City of Juneau of approximately \$3.2 million and a piece of property to a private corporation for construction of a seven-story parking garage. 1983 Inf. Op. Att'y Gen. (Jul. 27; 366-84-036). The primary concern raised in the attorney general's opinion was that the corporation could earn a substantial profit on the public investment by charging prevailing commercial rates for parking. The opinion pointed out that the Alaska Supreme Court in Lien v. City of Ketchikan⁶ upheld a long-term lease of a public hospital to a nonprofit corporation in part because the lease required the corporation to establish fair and equitable rates "sufficient only to pay the costs of operation." The opinion also focused on the fact that the City of Juneau did not propose to retain ownership in the property or have control over operation of the parking garage or the rates to be charged.

Here, the borough does not own nor have control over the Project or the mine site; and the expenditure of the appropriation will indirectly extend a substantial benefit to two private entities, namely, the corporation that owns the mine site and the consulting group performing the study. However, whether private entities receive a benefit from an expenditure of public money is not, in our view, the dispositive factor. See 1984 Inf. Op. Att'y Gen. (Sept. 13; 366-127-85). The test instead is whether the expenditure will directly enhance the general welfare of the community. E.g., Wright v. City of Palmer, 468 P.2d 326 (Alaska 1970); Suber v. Alaska State Bond Committee, 414 P.2d 546 (Alaska 1966). According to documents accompanying the appropriation, the goal of the Project is to resolve energy problems that persist throughout rural Alaska by providing an abundant, stable-priced energy source, as well as providing long-

(..continued)

relief to owners of homes destroyed by earthquake satisfied a public purpose); Lien v. City of Ketchikan, 383 P.2d 721 (Alaska 1963) (purpose of hospital did not become nonpublic just because the city turned it over to a private corporation); DeArmond v. Alaska State Dev. Corp., 376 P.2d 717 (Alaska 1962) (creation of development corporation to promote business growth fulfills a public purpose).

⁶ 383 P.2d 721 (Alaska 1963).

term, permanent employment opportunities, development of an infrastructure in the region, and potential tax revenues. Finally, substantial deference must be extended to the legislature's finding -- as evidenced by the adoption of the appropriation -- that the expenditure of public funds to assist in the development of the Project serves a valid public purpose. 1984 Inf. Op. Att'y Gen. (Sept 13; 366-127-85).

In light of the stated public purpose of the Project, it is our view that the legislature's decision to assist in development of the Project through appropriations of public money, even in the Project's embryonic stages, satisfies the public-purpose limitation of the Alaska Constitution.

COMPLIANCE WITH AS 37.05.315

The North Slope Borough's attorney has expressed concern as to the proper administration of this appropriation under AS 37.05.315 because the borough does not own nor have any control over the Project. Additionally, you request assistance in amending page 1 of the standard grant agreement in light of the borough's lack of ownership and control of the Project.

Having been designated by the legislature as a municipal grant, the \$1.2 million appropriation to the borough must conform to the applicable requirements of AS 37.05.315 before the Department of Administration may pay the grant money to the borough. AS 37.05.315(a) reads in relevant part:

(a) When an amount is appropriated or allocated as a grant to a municipality, the Department of Administration shall promptly notify the municipality of the availability of the grant. When the Department of Administration receives an agreement executed by the municipality which provides that the municipality (1) will spend the grant for the purposes specified in the appropriation or allocation; (2) will allow, on request, an audit by the state of the uses made of the grant; and (3) assures that to the extent consistent with the purpose of the appropriation or allocation, the facilities and services provided with the grant will be available for the use of the general public, the Department of Administration shall pay the grant directly to the municipality. The agreement shall be executed by the municipality on a form furnished by the

Department of Administration.

Here, the intended purpose of the appropriation is for the conduct of a study for mine-site/power plant design. The appropriation is not for construction of a public facility or for actual development of a mine or power plant (which would usually require that a municipality have an ownership or possessory interest in the land or project in order to qualify for the grant money under AS 37.05.315). Therefore, ownership of the mine site is not at issue here. The borough is not required to assure public access to any facility or to the mine. So long as the expenditure of the money is for a public purpose (which, as stated above, we believe it is) and the money is spent for the intended purpose, then it is our opinion that the borough's duty under AS 37.05.315(a) will be met.⁷

With respect to the grant agreement with the borough, we suggest the following introductory language:

This agreement is executed between the State of Alaska, Department of Administration ("State"), and the North Slope Borough ("Grantee");

WITNESSETH that:

Whereas, the Grantee is willing to undertake this grant under the terms of this agreement;

Whereas, the Grantee has the authority under State law or local charter to spend the appropriation for the purposes noted in the appropriation;

Whereas, the Grantee has the authority to enter into this agreement under AS 37.05.315(a);

Whereas, the grant number is: 9/92-061

Whereas, the grant amount is: \$1,200,000.00

Whereas, the grant purpose is: a study of "Coal Project-Mine Site Development/Power Plant Design"

Whereas, the Grantee intends to oversee the expenditure of these funds as explained below:

⁷ We do not imply that the borough is required to accept the money under this appropriation. Borough retains the option to refuse the money under AS 37.05.315 pending an agreement.

Grantee will pass-through the funds to the Arctic Slope Consulting Group (ASCG), which will perform an in-depth study of developing the Northwest Alaska Coal Project, Phase II, in compliance with the stated purpose of the appropriation. It is acknowledged that the Northwest Alaska Coal Project site is owned by the Arctic Slope Regional Corporation and that the Grantee does not have site control of the project. However, Grantee shall contract with ASCG for performance of the study, such contract providing that the funding be used as: \$1,000,000 for baseline data gathering, port and mine development, and resource evaluation; and \$200,000 toward power plant and transmission facilities design.

We think the remaining portions of the standard grant agreement are sufficient.

Finally, we recommend that agreements the borough makes with the Arctic Slope Consulting Group for performance of the mine-site development/power plant design studies incorporate the requirements of AS 37.05.315 as appropriate.

We hope this addresses the borough's and your concerns. Please do not hesitate to call me if you have further questions.

MLO:ck

cc: Kent Grinage, Vice President
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Governor Bill Sheffield

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