

Steve Pavish
Statewide Leasing Coordinator
Department of Transportation
and Public Facilities

October 7, 1991

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Dedicated aviation fund--
clarification of 8-22-91
Memorandum of Advice

Carolyn E. Jones
Assistant Attorney General
Transportation, Anchorage

On August 20, 1991, you asked several questions about article IX, section 7, of the Alaska Constitution, the dedicated fund prohibition. I answered those questions in a memorandum dated August 22, 1991. This memorandum clarifies and expands on my opinion of August 22. 1/

1. What is a dedicated fund?

A dedicated fund is defined as the dedication of any source of public revenue: tax, license, rental, sale, bonus, royalty, or whatever. State v. Alex, 646 P.2d 203, 210 (Alaska 1982); 1982 Op. Att'y Gen. No. 13, at 8.

2. Is the International Airports Revenue Fund a dedicated fund?

Article IX, section 7, of the Alaska Constitution prohibits the establishment of dedicated funds. Notwithstanding this sweeping language, there are certain implied and explicit exceptions to the constitutional prohibition. These exceptions were discussed in a 31-page memorandum issued by Attorney General Wilson Condon in 1982. 1982 Op. Att'y Gen. No. 13. Implied exceptions include, among others, a fund to retain the proceeds from bond issues. 1982 Op. Att'y Gen. No. 13, at 11.

The International Airports Revenue Fund ("the Fund"), AS 37.15.430, provides for a dedication of state revenue. The Fund, however, is permissible as an implied exception to the constitutional prohibition to the extent that the moneys deposited in the fund were derived from facilities constructed with bond proceeds and were spent to satisfy the debt obligation

1/ This memorandum incorporates the information contained in the August 22nd memorandum so that it will not be necessary to refer to both memoranda in order to understand my opinion.

Steve Pavish
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- 2 -

October 7, 1991
AG# 661-92-0124

or to maintain the facility so that it continues to generate revenues for that purpose. 1982 Op. Att'y Gen No. 13, at 24-26. Once all the bonds are retired, however, the reasoning in Attorney General Condon's memorandum suggests that the Fund would not be able to retain dedicated revenues pursuant to the implied exception that I just described.

Notwithstanding the above, the dedication of revenues in the Fund would still be permissible under article IX, section 7, of the Alaska Constitution on a separate basis. Article IX, section 7, explicitly provides:

The proceeds of any state tax or license shall not be dedicated to any special purpose, except as provided in section 15 of this article [establishing the Permanent Fund] or when required by the federal government for state participation in federal programs. This provision shall not prohibit the continuance of any dedication for special purposes existing upon the date of ratification of this section by the people of Alaska.

(Emphasis added.) This explicit exception to the dedicated fund prohibition permits the establishment of a dedicated fund when the fund is "absolutely required for participation in Federal programs" 1959 Op. Att'y Gen. No. 7, at 3.

Congress adopted the Airports and Airway Improvement Act of 1982 ("the Act") within the same time frame that Attorney General Condon issued his definitive opinion on the dedicated funds prohibition. Consequently, his opinion does not discuss whether the Act provides an explicit exemption from the dedicated funds prohibition. I believe it does.

49 U.S.C. • 2210 specifically requires the establishment of a dedicated fund and provides, in part:

(a) Sponsorship

As a condition precedent to approval of an airport development project contained in a project grant application submitted under this chapter, the Secretary shall receive assurances, in writing, satisfactory to the Secretary that --

. . . .

(12) all revenues generated by the airport, if it is a public airport, and any local taxes on aviation fuel (other than taxes in effect on December 30, 1987,) will be expended for the capital or operating costs of the airport, the local airport system, or other local facilities which are owned or operated by the owner or operator of the airport and directly and substantially related to the actual air transportation of passengers or property; except that if covenants or assurances in debt obligations issued before September 3, 1982, by the owner or operator of the airport, or provisions enacted before September 3, 1982, in the governing statutes controlling the owner or operator's financing, provide for the use of the revenues from any of the airport owner or operator's facilities, including the airport, to support not only the airport but also the airport owner or operator's general debt obligations or other facilities, then this limitation on the use of all revenues generated by the airport, if it is a public airport, and any local taxes . . . shall not apply[.]

49 U.S.C.A. • 2210 (1987) (emphasis added).

Since the passage of the Act, the Federal Aviation Administration ("the FAA") has routinely required applicants for grants under the Act to assure FAA that the airport-applicant would establish a dedicated fund to set aside airport revenues for the capital or operating costs of the airport. See, e.g., FAA Advisory Circular No. 150/5100-16 Part V, at 1 and Appendix 1 at 5 (July 22, 1985) (assurances required by the Act must be submitted as part of the grant application and become a part of the grant agreement); *id.* at 11 (airport-applicant must comply with the requirements of the Act regarding assurances); FAA advisory circular No. 150/5100-16, Part V, Appendix 1, Assurance No. 25 at 6 (July 22, 1985). While I could find no case law on this issue, the court in United States v. County of Westchester, 571 F. Supp. 768 (D.C.N.Y. 1983), did discuss the consequences where an airport failed to comply with an assurance required under the Act and contained in its grant agreement to permit evening flight operations. The court held that failure to comply with the grant conditions and assurances authorized the FAA to suspend the grant and withhold further payments until the airport took corrective action. 571 F. Supp. at 798. If the airport

Steve Pavish
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- 4 -

October 7, 1991
AG# 661-92-0124

failed to take corrective action, the FAA could terminate the grant.

Given the statutory requirements, the case law, and the FAA administrative policy and practices, I conclude that the establishment of the International Airports Revenue Fund to retain the revenues generated by the airport and to spend those revenues only on permitted airport activities is absolutely required as a condition of receiving federal grants under the Act. In the absence of this dedicated fund, the airport would not qualify for planning and development grants under the Act. Therefore, the establishment and maintenance of the International Airports Revenue Fund would come within the explicit exception of the dedicated funds prohibition.

3. Do the requirements of AIP regulations and sponsor assurances permit the establishment of a rural airport dedicated fund by statute?

You have correctly noted that the dedicated funds prohibition does not extend to a fund "required by the federal government for state participation in federal programs." See Alaska Const. art. IX, • 7. For the reasons stated in my earlier discussion about the International Airports Revenue Fund, I believe that the establishment by statute of a rural airport dedicated fund falls within the explicit exception to the dedicated funds prohibition.

I hope I have satisfactorily answered your questions. Please call me if you would like to discuss this memorandum.

CEJ\chb

cc: Randy Simmons, Deputy Commissioner, Finance & Management