

MEMORANDUM

State of Alaska Department of Law

TO: The Honorable Joseph Perkins, P.E.
Commissioner
Department of Transportation and
Public Facilities

DATE: January 14, 1997

FILE NO: 661-97-0382

TELEPHONE NO: 269-5161

SUBJECT: Dedicated Whittier
Project Fund

FROM: Carolyn E. Jones
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You have asked whether the Department of Transportation and Public Facilities (DOT&PF) may establish a fund to finance the costs of constructing, operating, and maintaining the Whittier toll road. The short answer is yes. For the reasons explained in the remainder of this memorandum, the Whittier Project Fund will not violate the dedicated fund prohibition in article IX, section 7 of the Alaska Constitution.

FACTS

As we understand the facts, DOT&PF plans to construct a road, tunnels, and bridges to improve access to Whittier. The entire cost of constructing the project will be \$50,000,000. The Federal Highway Administration (FHWA) would provide up to 90.3 percent of the construction costs. The Alaska Legislature has previously provided \$27,000,000 in preconstruction costs for this project, and no additional funding from the legislature can be expected. You have determined that the only way that DOT&PF can provide the state share of the construction costs as well as the operating and maintenance costs is by selling bonds to finance the remaining construction costs and by designating this project as a toll facility.

The estimated life of the project is 20 years. The bonds sold to finance the state's share of the construction costs would be retired in 20 years. The tolls collected would be at a level estimated to meet the bond requirements and the estimated operating and maintenance costs.

FHWA is willing to participate in the construction of a toll facility if DOT&PF will use all toll revenues received from operation of the facility for debt service and for the costs necessary for the proper operation and maintenance of the toll facility. If FHWA does not participate in the construction costs, the entire financing burden would fall to the state. You have previously determined that, under those circumstances, the project would not be financially feasible, and would not be built.

LEGAL ANALYSIS

Setting aside state revenues for a specific long-term use is generally considered to create a dedicated fund. Article IX, section 7 of the Alaska Constitution prohibits the establishment of dedicated funds.¹ 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 and a fund for revenue derived from facilities constructed with bond proceeds -- at least to the extent necessary to satisfy the debt obligation or maintain the facility so that it continues to generate revenues for that purpose. 1982 Op. Att'y Gen. No. 13, at 11, 24-26. Explicit exceptions include, among others, a fund required by the federal government for state participation in federal programs. Alaska Const. art. IX, § 7. Both exceptions apply under the facts you have presented.

Explicit Exception

DOT&PF may make all contracts and do all things necessary to cooperate with the federal government in the construction of highways. AS 19.15.020. In previous memoranda of advice, we have concluded that where the federal government specifically requires that, as a condition precedent to the receipt of federal funding, the income stream from a state project must be specifically dedicated to certain uses, then the dedication can be construed as a condition precedent or condition subsequent to participation in the federal program. Under those conditions, the income may be deposited in a dedicated fund without violating the prohibition in article IX, section 7 of the Alaska Constitution. 1991 Inf. Op. Att'y Gen. (Oct. 7; 661-92-0124)(Federal Aviation Administration requirement that state establish a fund to account for income and expenses related to airport capital and operating expenses as a condition of receiving federal grants comes within explicit exception of article IX, section 7); 1987 Inf. Op. Att'y Gen (Jan. 23; 663-87-0319) (Federal requirement that income and proceeds from federal land grant

¹ Article IX, section 7 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 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.

first be applied to meet necessary expenses of Alaska's mental health program falls within exception for dedications required for participation in federal programs); 1984 Inf. Op. Att'y Gen. (May 23; 663-84-0565) (Alaska Railroad Transfer Act requirement that revenues generated by railroad be retained and managed by railroad for railroad and related purposes is condition subsequent to railroad transfer and falls within exception for dedications required for participation in federal programs); 1982 Inf. Op. Att'y Gen. (April 26; 663-82-0619) (Federal requirement that revenues from federal oil and gas leasing be dedicated to planning, construction, maintenance and operation of essential public facilities comes within explicit exception of article IX, section 7).

In your case, the FHWA will contribute up to 90.3 percent of the \$50,000,000 required to construct this toll facility, i.e., \$45,150,000. Before FHWA will commit to this financing, however, DOT&PF *must* enter into an agreement with the Secretary of the U.S. Department of Transportation that all toll revenues received from operation of the toll facility will be used first for debt service, and for the costs necessary for the proper operation and maintenance of the toll facility, including reconstruction, resurfacing, restoration, and rehabilitation. 23 U.S.C. § 129(a)(3). This fund is absolutely required for participation in the federal highway program and in order to receive federal grant moneys for 90.3 percent of the construction costs for this facility. In the absence of this dedicated fund, DOT&PF would not qualify for the 90.3 percent of the funding, and the toll facility could not be built. Therefore, the establishment and maintenance of a fund to retire the construction debt and to operate and maintain this toll facility would come within the explicit exception of article IX, section 7 of the Alaska Constitution.

Implied Exception

DOT&PF is authorized to construct and operate a toll facility. AS 37.15.720. Construction, operation, and maintenance costs may be financed through the sale of revenue bonds. AS 37.15.610; 37.15.730.

AS 37.15.630(a) establishes a toll facilities revenue fund as a trust fund for the deposit of, amongst others, tolls derived by the state from the ownership, use, and operation of toll bridges, tunnels, highways, roads, crossings, and causeways. Money in the revenue fund is restricted to certain specific uses:

(1) to pay or secure payment of the principal and interest on revenue bonds issued to provide money to construct and equip the toll facility;

(2) to pay the normal and necessary costs of maintaining and operating said facilities;

(3) to pay the costs of renewals, replacements, and extraordinary repairs to said facilities;

...

(6) to provide money to pay any and all other costs relating to the ownership, use and operation of the facilities.

Id. This dedicated fund is permissible as an implied exception to the constitutional prohibition in article IX, section 7 to the extent that the moneys deposited in the fund were for revenues derived from bond issues and revenue derived from facilities constructed with bond proceeds, and were spent to satisfy the debt obligation 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 the debt obligation is satisfied, however, the fund would not be able to retain dedicated revenues under this implied exception. Since you plan to retire the bonds in 20 years, and the facility has an estimated life of 20 years, this should not present a problem.

CONCLUSION

The establishment of a dedicated fund to pay the principal and debt service on revenue bonds sold to finance a toll facility and to pay the costs of operating and maintaining the toll facility during the life of the facility while the bonds remain unpaid is permitted under article IX, section 7 of the Alaska Constitution. The fund is required in order to participate in the FHWA program providing 90.3 percent of the total construction costs for the project. Therefore, it comes within an explicit exception of article IX, section 7. The income deposited in the fund will be used to retire the revenue bonds sold to finance construction of the toll facility, and to pay the facility's operation and maintenance costs while the bonds remain unpaid. Therefore, the fund comes within an implied exception to article IX, section 7 of the Alaska Constitution.

CEJ:sb