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Use of appropriation from 470 Fund for DMVA Operations Center

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INTRODUCTION

Some time ago you alerted this office to an appropriation made by the legislature to the Department of Military and Veteran Affairs (DMVA), Division of Emergency Services (DES). The appropriation--section 17(c) and 19, chapter 79, SLA 1993--made monies available to DMVA for "emergency operation center enhancements." Because this appropriation was made from the Oil and Hazardous Substance Release Response Fund (fund), AS 46.08.010, you asked this office if the purpose of the appropriation was within the allowable purposes of the fund, and if the appropriation could be expended without violating a statutory restriction that says the fund cannot be used for capital improvements. AS 46.08.010(b).

We find that construction of the pertinent statutes turns on the facts to which they are applied. Generalizations can not be reliably drawn. Given the facts of this case as presented to us by the DMVA, we find that the proposed expenditures are within the allowable purposes of the fund and are not capital improvements.

However, this is such a close call that we can make reasoned arguments the other way.[2] Accordingly, we suggest a retroactive legislative change to AS 46.08.010(c) to expressly allow the fund to be used for enhancement of the state emergency operation center.

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[2] Indeed, legislative counsel has reached an opposing conclusion. Memorandum, FY 94 Appropriation from the Oil and Hazardous Substance Release Response Fund to the Department of Military and Veteran's Affairs, Division of Emergency Services (SB 183), G. Utermohle (Oct. 13, 1993).

PURPOSES OF THE FUND

The fund was created by statute. AS 46.08.010. Allowable uses of the fund are statutorily delineated. AS 46.08.040. No expenditure may be made from the fund unless the purpose of the expenditure is one of the statutorily acknowledged purposes.[3]

In this case, the money will be used to enhance the emergency operations center maintained by the DMVA. Dollars will be used to relocate certain Alaska State Trooper operations to the center; to furnish and equip the center with various electronic investigation, tracking, and communication devices; to purchase and hook up an emergency power generator; and generally to convert an empty suite of rooms into a command post.

Among other things, the fund may be used to "undertake activities intended to establish the preparedness of the state to act in accordance with [contingency] plan[s]." AS 46.08.040(a)(2)(C). Alaska must have both a state and regional contingency plan. AS 46.04.200; AS 46.04.210. One of the primary jobs of DES is to implement those plans in the event of a catastrophic release of oil. AS 46.04.080; see also AS 26.23.030, 26.23.040. To do so, DES needs a center from which to implement its incident command system. Id.; see also AS 46.08.100-46.08.190. Thus, equipping the command center so that DMVA can adequately respond to oil catastrophes is an activity intended to establish the preparedness of the state to act in accordance with its contingency plans.[4] Accordingly, the proposed purpose is a statutorily recognized purpose.[5]

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[3] The introductory clause of AS 46.08.040 only mentions "the commissioner of environmental conservation." However, the application of AS 46.08.040 to others is made clear by AS 46.08.010(c). Accordingly, we started with the threshold conclusion that no expenditure may be made from the fund by anyone unless for a purpose iterated in AS 46.08.040.

[4] Persons responding to an oil catastrophe must also implement the National Contingency Plan. 40 C.F.R. Part 300 (1993).

[5] Our interpretation of AS 46.08.040(a)(2)(C) is based, in part, on the historical interpretations given this language by the Department of Environmental Conservation (DEC). As the agency tasked with implementing this statute, DEC's interpretation is entitled to some weight. Peninsula Marketing Ass'n v. State, 817 P.2d 917, 922 (Alaska 1991). DEC has, in the

CAPITAL IMPROVEMENTS

A. Statutory Definitions

Activities otherwise allowable under AS 46.08.040 are expressly disallowed if they constitute "capital improvements." AS 46.08.010(c). One cannot spend monies from the fund -- even for purposes identified in AS 46.08.040 -- if the expenditure is for a capital improvement. Thus, this question arises: Are the proposed activities and expenditures at the operations center "capital improvements" within the meaning of the law?

To answer this question we first conducted an analysis of pertinent statutes and cases. Because the appropriation had been made part of the 1994 capital budget, ch. 79, SLA 1993, we had to ascertain whether an item could be a capital item for budget purposes but not for purposes of the fund. We find that it can be. The pertinent definition for budget purposes is AS 37.07.120(4):

> "capital projects" and "capital improvements" mean an allocation or appropriation item for an asset with an anticipated life exceeding one year and a cost exceeding $25,000 and include land acquisition, construction, structural improvement, engineering and design for the project, and equipment and repair costs.

(..continued)
past, relied upon this language to expend, or to permit DMVA to expend, money from the fund on an emergency broadcasting satellite uplink, an electronic map, general communications equipment, and emergency response personnel. The expenses under consideration in this memorandum are not substantially different in form.

Furthermore, these previous expenditures have been brought to the attention of the legislature. AS 46.08.060; e.g., 1992 ADEC, Oil and Hazardous Substance Release Response Fund Annual Report at 25, 27-28. At no time has the legislature negatively responded to these reported expenses. Personal communication with Barbara Frank, DEC, November 29, 1993. On the contrary, AS 46.08.040(a)(2)(C) is an expansion of sections previously dealing with preparedness. Cf. sec. 28, ch. 191, SLA 1990, with sec. 3, ch. 90, SLA 1989. This particular subsection was not revised when recent amendments were made to other subsections. See sec. 15, ch. 83, SLA 1991. This acquiescence constitutes a form of ratification. Hafling v. Inlandboatmen's Union, 585 P.2d 870, 876 (Alaska 1978) (the "operational history" of a statute is a factor in its construction).

On the other hand, the pertinent definition for purposes of the fund is AS 46.08.900(1):

> "capital improvement" includes construction, renovation, repair of, and improvement to, a building, but does not include other improvements to real property, such as construction of a dike or retaining wall.

Obviously the former definition is more inclusive than the latter. While the telecommunications, investigation, and tracking "equipment" that make up the bulk of this appropriation would clearly be "capital improvements" for purposes of Title 37, they may not affect the "building" and, therefore, may not be "capital improvements" for purposes of Title 46. The "to a building" phrase of AS 46.08.900(1) makes that provision quite narrow, and clearly distinct from AS 37.07.120(4).[6] We conclude that an item can be "capital" for budget purposes but not "capital" for purposes of the fund.

B. Developing a Test

To determine whether the expenditures proposed by DMVA

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[6] Legislative counsel noted that AS 46.08.900(1) begins with the word "includes" rather than "means." From this, legislative counsel argued that AS 46.08.900(1) is really quite broad; that improvements "to a building" are just one example of the types of improvements excluded by AS 46.08.010(c). We believe the more natural reading is one in which "to a building" is operative; one in which "to a building" is expressly stated as a form of limitation. Any illustrative list established by the word "includes" is a listing of those activities to which a building might be subjected: construction, renovation, repair, and other improvements.

We find that the commas in the definition support this interpretation. Also, the second use of the word "includes" tends to show that the word is used to differentiate rather than illustrate. It differentiates those types of improvements normally thought of as capital--improvements to buildings and improvements to realty--into two legal categories. The first, improvements to a building, are capital, while the second, improvements to land, are not capital for purpose of this law. Furthermore, we deem it unlikely that the legislature would make equipment and other assets a part of the definition simply by using the word "includes" when the legislators had an explicit model available in AS 37.07.120(4).

were, in fact, "improvements to a building," we turned our attention to the laws of fixtures, real property tax laws, and other cases involving buildings. From these cases we were able to establish a legal test, which we applied to determine whether the proposed actions were "capital improvements" within the meaning of AS 46.08.900(1).

From *Hikita v. Nichiro Gyogyo Kaisha Ltd.*, 713 P.2d 1197, 1198 (Alaska 1986), we learned that in ordinary custom and usage "improvements" and "equipment" are differentiated.[7] From *Hydaburg Co-op v. Hydaburg Fisheries,* 826 P.2d 751, 752 (Alaska 1992), we learned that two trademarks of a "capital improvement" to a building are that the improvement makes the building functional and that it contributes substantial value to the building. *See also id. at* 757 n.11. From *Wright v. City of Palmer*, 468 P.2d 326 (Alaska 1970), we learned that a capital improvement must be a tangible asset; that capital improvements are associated with value represented by real or personal property in some form and with relative permanency.

City of Juneau v. Hixson, 373 P.2d 743 (Alaska 1962), construes the term "capital improvement" as used in article IX, section 9, of the Alaska Constitution. From that case we learned that a capital improvement is characterized by permanency. *Hixson* alerts us to the fact that the term "capital improvement" cannot be applied in any generic sense. Each activity, transaction, or undertaking must be examined on its own facts in light of the unique statutory or constitutional definition of "capital improvement" that is being employed.

In *Hixson* our supreme court cited a New Hampshire case for the proposition that a capital improvement is something that betters the building or premises and is distinguishable from ordinary repair or current maintenance. Because our supreme court felt comfortable looking to other jurisdictions, we did too. We learned that if it is physically and commercially unfeasible to separate an improvement from a building, the improvement is more likely than not a capital improvement to that building. *Honeoye Storage Corp. v. Bd. of Assessors,* 433 N.Y.S.2d 943 (N.Y.A.D. 1980).

In general, our review of case law showed us that courts apply a two-part test to determine whether an improvement that involves a building is a capital improvement. First, the questioner must ask: Is the questioned activity designed and

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[7] See also *Crown CoCo, Inc. v. Comm'r of Revenue*, 336 N.W.2d 272 (Minn. 1983).

implemented for the purpose of making the building fundamentally functional? If the answer is "yes," the activity is more likely than not a capital improvement and the questioner need look no further. If, however, the answer is "no," the questioner analyzes five factors: the nature of the activity, the extent of the activity, the cost of the activity relative to the cost of the building, the benefit to the building occasioned by the activity, and the degree of permanence of the results of the activity. Such scrutiny reveals characteristics that tend to define the project. *Georgian Gardens Tenants Ass'n v. Georgian Gardens,* 592 A.2d 641 (N.J. 1991).[8]

By nature, the courts seem to be asking for a common-sense analysis of the activity. Is the item in question structural? Is it an integral component of the building? Is it an undertaking without which the building would be noticeably lacking? Will the building be harmed by removal of the item resulting from the activity? If so, the item is of the nature of a capital improvement. If not, the item is less likely to be a capital improvement.

By extent of the activity, courts are asking what the extent is relative to the whole building. Does it involve all the square footage of the building, or just a part? Does it go on for an extended duration or is the activity resulting in the asset reasonably short in duration?

By cost, the courts are most often speaking of cost of the questioned activity relative to the cost of the building. Looked at another way, this question is whether the activity adds substantial value to the building.

The benefit to the building factor involves functionality. Can the building function without this item or is the benefit of the undertaking needed to make the building functional? Does the activity result in something that the building must have or something that would merely be helpful? Also, this factor addresses the question of whether the building will be substantially more valuable after the activity than

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[8] See also *Cafritz Co. v. Dist. of Columbia Rental Housing Comm'n*, 615 A.2d 222 (D.C. App. 1992); *Norene v. Municipality of Anchorage*, 704 P.2d 199 (Alaska 1985); *In re Marriage of Aird*, 530 N.E.2d 556 (Ill. App. 1988); *Finn v. McNeil*, 502 N.E.2d 557 (Mass. App. 1987); *Glenville Cablesystem Corp. v. State Tax Comm'n*, 531 N.Y.S.2d 137 (N.Y.A.D. 1988); *Honeoye Storage Corp. v. Bd. of Assessors of Town of Bristol*, 433 N.Y.S.2d 943 (N.Y.A.D. 1988).

before.

The degree of permanence is probably the quintessential factor. Will the item last as long as the building or must it be replaced regularly? Long lasting items tend to be capital improvements while items with a relatively short life are not. Permanence is viewed in light of permanence relative to the life of the building.

C. Applying the Test to These Specific Undertakings

After extracting this test from the case law, we conferred with you and DMVA. Together, we applied this test to the undertakings at issue. DMVA produced explicit information outlining the nature, extent, cost, etc. of several items. We have concluded that the activities occurring at DMVA's operations center are not "capital improvements" to the building within the meaning of AS 46.08.900(1).

In this memorandum, we will not again review every item involved in the questioned appropriation.[9] Some costs are clearly not questionable, such as the purchase and installation of computers.[10] Other costs might be questionable if standing alone, but are not so when considered incidental ancillaries to an allowable undertaking. Running a wire from the existing electrical service to a stove falls into this category. Wiring would normally be considered "capital," but when it is ancillary to installation of a stove, the wiring is considered part of that stove and not capital. *Allen v. Allen*, 554 P.2d 303 (Alaska 1976).

We chose two examples of the items scrutinized for the purpose of showing how we applied the test and reached our conclusion:

1. Emergency Generator

In materials presented to the legislature, DMVA sought $165,000 for an "auxiliary power generator." Because large pieces of equipment such as furnaces and generators are often

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[9] Extensive review of each item did occur during discussions and development of this memorandum.

[10] Minutes, H. Res. Comm. at 7 (May 3, 1989), confirms that the legislature contemplated use of 470 Funds to purchase equipment. Additionally, the word "equipment" is conspicuously present in AS 37.07.120(4) and absent from AS 46.08.900(1).

affixed in such a way as to become a permanent part of the building, we initially presumed that this item would be disallowed as a capital improvement. However, DMVA explained that the building was already wired for the generator and that "installation" of the generator consisted of pulling a transportable generator up to the building and connecting it to the existing wiring. The generator will not even be housed directly within the operations center.

Obviously, the building functions at this time despite the absence of a generator. The building draws power from the grid. Equally obvious is the fact that a transportable generator has no permanence in the building. It can readily be transferred to some other location. By its nature, a generator stored in a portable, stand-alone building appears to be equipment, not an improvement.

The extent of the generator, relative to the building, is nothing. The cost of the generator is minimal relative to the cost and value of the building. In the balance, the generator is not a capital improvement.

2. Upgrade of Air Handling System

The documentation submitted by DMVA to the legislature includes a reference to "upgrade of air conditioning system/air handling." This appeared to be capital. However, upon further inquiry, responses from DMVA revealed that the agency already possesses three "stand-alone" air conditioning units. The "upgrade" consists of moving a unit from the second floor of the Armory and relocating it in the basement of the operations center. Such an activity clearly does not result in a capital improvement.

Moving a unit from one place to another adds no value to the building, and the cost is infinitesimal. The fact that the unit is being moved from one location to another shows that it has no permanence in any particular location. Further, the building already has a functioning air handling system. This unit is not needed to make the building functional; it makes the computer equipment functional by keeping it cool enough to operate. Connecting water lines and power lines to a piece of equipment is simply ancillary to that equipment and does not convert that equipment into an improvement. Thus, after applying the test, we found that the proposed upgrades of the air system did not constitute capital improvements.

CONCLUSION

The purpose of sections 17(c) and 19, chapter 79,

SLA 1993, is to upgrade a facility into an operations center. This is an allowable purpose under AS 46.08.040 and, therefore, monies from the Oil and Hazardous Substance Response Fund may be used for that purpose.[11]

This outcome is not changed by the statute that prohibits use of fund monies for capital improvements. When the pertinent statute is reviewed, one finds that the key characteristic of a capital improvement for purposes of Title 46, article 8, is the effect the undertaking has on a building. Through a review of pertinent case law, we found that this effect is judged through five characteristics. To determine whether an improvement is capital--to determine whether an improvement that involves a building is "to a building"--a reviewer must ask whether the improvement is necessary to make the building functional. He or she must scrutinize the nature, extent, cost, and degree of permanence of the improvement. He or she must ask how the improvement benefits the building, if at all.

Having applied that test to the undertakings of concern, we reached the conclusion that the undertakings proposed by DMVA are not capital improvements. The preponderance of the evidence suggests that they do not fall into that category. Fund monies may be used to finance those undertakings. However, because our finding is based on a preponderance of the evidence and not a totality thereof, we agree with legislative counsel that a prudent and indisputably dispositive solution would be retroactive amendment of AS 46.08.010(c) to allow the fund to be used for enhancements of the state emergency operation center.

RKR:cr

cc: George Utermohle, Attorney
Legislative Affairs Agency

[11] Having reached the conclusion that this appropriation falls within the statutorily recognized purposes of the fund, we do not reach the "confinement requirement" discussion raised by legislative counsel.