

STATE OF IDAHO,
COUNTY OF KOOTENAI
FILED: 1/28/13

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DEPUTY

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE

STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

IN THE MATTER OF
CITY OF COEUR D'ALENE,
KOOTENAI COUNTY, IDAHO

Petitioner,

CASE NO. CV-13-338

MEMORANDUM DECISION AND
ORDER REGARDING PETITION
FOR JUDICIAL CONFIRMATION

S.C. Danielle Quade, Attorney for Petitioner

Coeur d'Alene councilman Steve Adams, appearing individually and on his own behalf

INTRODUCTION

The City of Coeur d'Alene has submitted a petition for judicial review and has requested this Court to declare that the City has authority to enter into an agreement to fund improvements to the City's wastewater treatment facility. There are two issues raised: first, whether the City has statutory authority to enter into a funding agreement for such a purpose; and second, whether the City may incur indebtedness for the funding under the "ordinary and necessary" exception of article VIII, section 3 of the Idaho Constitution, which does not require an approval of the expense by public vote. This Court holds that there is statutory and constitutional authority to enter into an agreement to fund improvements to the wastewater treatment facility. The Idaho Revenue Bond Act permits the City to pledge revenue from the wastewater treatment

facility to fund the improvements to the wastewater treatment facility. This Court also holds that improvements to the City's wastewater treatment facility are ordinary and necessary under article VIII, section 3 of the Idaho Constitution. The maintenance of public works, legal obligations, and the preservation of public health and safety are all expenses that Idaho courts have held constitute ordinary and necessary expenses. Additionally, "necessary" expenses are expenses that must be made within the year. Because expenditures on improvements to the wastewater treatment system must be made within the year to meet federal permit requirements and to preserve the public safety, this Court holds that the expense is ordinary and necessary under the Idaho Constitution, and the City may enter into a funding agreement without a public vote.

Facts for this memorandum opinion are from various affidavits submitted to the Court by the following individuals: Renata McLeod, Clerk of the City of Coeur d'Alene; Katy R. Baker-Casile, Regional State Revolving Fund Engineer for the Idaho Department of Environmental Quality; John Tindall, Engineering Manager for the Idaho Department of Environmental Quality; David L. Clark, Professional Engineer for HDR Engineering, Inc.; H. Sid Frederickson, Superintendent of the Coeur d'Alene Wastewater Treatment Plant; and Coeur d'Alene councilman Steve Adams.

FACTS

The City of Coeur d'Alene's wastewater treatment facility discharges a portion of its treated effluent into the Spokane River. (Affidavit of H. Sid

Frederickson, ¶ 4.) This discharge has operated under a National Pollution Discharge Elimination System (NPDES) permit issued by the Environmental Protection Agency (EPA) in 1999. (Aff. Frederickson, ¶ 5.) Although the 1999 permit expired in 2004, the EPA has extended the permit until a new NPDES permit is issued. (Aff. Frederickson, ¶5.) In 2004 the City applied for a new permit to continue discharging effluent into the Spokane River. (Aff.

Frederickson, ¶6.) An NPDES permit is currently in draft form, and engineers who represent the Idaho Department of Environmental Quality (DEQ) and also the City expect the final NPDES permit to be issued in 2013. (Affidavit of John Tindall, ¶4; First Affidavit of David L. Clark, ¶ 3.) The City has no alternative system for the disposal of the effluent that is currently discharged into the Spokane River. (First Aff. Clark, ¶ 16)

The NPDES permit draft reduces permissible levels of various pollutants and imposes new restrictions on additional pollutants. The final draft of the NPDES permit is expected to impose pollutant discharge restrictions similar to the limits outlined in the latest draft. (First Aff. Clark, ¶ 5; Aff. Tindall, ¶ 4.) The latest draft imposes restrictions on the discharge of oxygen-demanding pollutants, such as ammonia, phosphorus, and five-day carbonaceous biochemical demand (CBOD₅) (First Aff. Clark, ¶ 9; Second Affidavit of David L. Clark, ¶ 5.)

In 2009 the City hired an engineer to prepare a plan for improving the wastewater treatment facility. (First Aff. Clark, ¶ 3.) The plan assessed improvements necessary for discharge requirements expected in the new

NPDES permit. (First Aff. Clark, ¶ 3.) The wastewater treatment system is currently struggling to comply with discharge limits for ammonia; more ammonia must be removed for effluent to achieve the current permit levels as well as meet the expected new permit levels. (First Aff. Clark, ¶ 10; Aff. Frederickson, ¶ 9.) The plan identified improvements that would enable the facility to meet phosphorous and CBOD₅ limits in the draft permit and limits expected in the final permit. (First Aff. Clark, ¶ 9.)

The wastewater treatment plant is on the cusp of a third phase in a series of improvements. This third phase involves constructing advanced filtration and chemical feed systems to restrict ammonia, phosphorus, and CBOD₅ levels anticipated in the 2013 NPDES permit. (First Aff. Clark, ¶¶ 5, 11.) Drafts of the 2013 NPDES permit from the EPA and accompanying state certification from the Idaho Department of Environmental Quality establish a mandatory timeline to comply with permit requirements. (First Aff. Clark ¶ 13; *see* Second Aff. Clark, Ex. A, p. 2.) For example, CBOD₅ limits in the draft permit would be effective immediately. (*See* Second Aff. Clark, Ex. A, p. 12.) Without improvements, the wastewater treatment facility risks violating the new permit when it becomes effective. (Second Aff. Clark, ¶ 5.) Improvements to the system are recommended to start immediately in order to comply with the mandatory schedules and pollutant limits in 2013 NPDES permit. (First Aff. Clark, ¶ 18.)

Wastewater treatment system improvements for the new NPDES permit will cost an estimated \$33,590,000. (Aff. Frederickson, ¶ 9.) The City applied

for special funding from DEQ, but as part of its application, the City must submit evidence of its authority to enter into a loan agreement. (Affidavit of Katy R. Baker-Casile, ¶¶ 3, 6.) The City has petitioned this Court for a declaration of that authority and a declaration that incurring the debt to fund improvements to the wastewater treatment facility would be permissible under the Idaho Constitution. This issue came before the Court on February 27, 2013, and the Court took the matter under advisement.

JURISDICTION

This Court has jurisdiction over the City's petition under the Judicial Confirmation Law. See IDAHO CODE § 7-1301 *et seq.* (2012). Under this title, a court may determine the authority of a political subdivision to issue bonds, incur obligations, or execute agreements that promote the public welfare. *Id.* §§ 7-1301, -1302 (2012).

A governing body, such as a city, must follow a statutorily-mandated procedure in order to properly bring a petition for judicial review. These procedures involve notifying the public and conducting a hearing on whether to file a petition with the court, adopting a resolution to file the petition, filing the petition, and notifying the public of the judicial hearing. See *id.* § 7-1304. Additionally, providing notice of the public hearing on the resolution and notice of the judicial hearing must be completed within certain timeframes. See *id.* §§ 7-1304; -1306. A court will only have jurisdiction when the City has completed these requirements. *Id.* §7-1306(3). Based on the City's petition and the affidavits of Renata McLeod, this Court determines that the procedural

requirements for a petition for judicial review have been satisfied. This Court has jurisdiction over the matters before it.

DISCUSSION

In the petition, the City has requested that the Court make two rulings. First, the City requests a declaratory ruling that the City has the power to enter into a loan agreement to fund improvements to the wastewater treatment system. Second, the City requests this Court to declare the expense of improving the wastewater treatment system as an ordinary and necessary expense under the Idaho Constitution, which exempts the requirement that the expense be approved by a public vote. The Court takes up these issues here.

A. Declaration of the City's Power and Authority to Enter into Debt

The City has asked this Court for a determination that the City has authority to incur debt for the purpose of improving the City's wastewater treatment system. Cities have the power to borrow money as provided by the Idaho Code. IDAHO CODE § 50-237 (2012). The City has cited the Idaho Revenue Bond Act for support that it may finance improvements to the wastewater treatment system. *See id.* § 50-1027. The finance of public works is permitted under the Revenue Bond Act:

In addition to the powers which it may now have, any city shall have power under and subject to the following provisions: ... (e) To issue its revenue bonds hereunder to finance, in whole or in part, the cost of the acquisition, construction, reconstruction, improvement, betterment or extension of any works....

Id. § 50-1030. In addition to the authority to issue revenue bonds for financing, a city can also pledge revenue from public works that were improved

by the financing. *Id.* § 50-1030(g). Finally, a city issuing revenue bonds to improve public works may use the revenue generated to pay the financial obligations incurred for those improvements. *Id.* § 50-1033. Under the Revenue Bond Act, the City has the power to enter into a loan agreement, such as the one with the DEQ, so long as the City finances its obligation by using revenues from the current wastewater treatment system and revenues from the improved wastewater treatment system, and so long as incurring this obligation is permitted under the Idaho Constitution.

B. The expense incurred by improvements to the City's wastewater treatment system is an ordinary and necessary expense under Idaho's Constitution

The discussion of whether it is permissible for the City to enter into a loan agreement and incur this debt is based on article VIII, section 3 of Idaho's Constitution. The Idaho Constitution limits the amount of debt that municipalities may incur without assent from a supermajority of voters. "No...city...shall incur any indebtedness, or liability, in any manner, or for any purpose, exceeding in that year, the income and revenue provided for it for such year, without the assent of two-thirds of the qualified electors...." IDAHO CONST. art. VIII, § 3. The section then provides for various exceptions. Ordinary and necessary expenses do not require a public vote: "[T]his section shall not be construed to apply to the ordinary and necessary expenses authorized by the general laws of the state...." *Id.* Incurring debt to finance public works purchases, maintenance, or construction requires only a majority vote, not a supermajority: "[P]rovided further, that any city or other political

subdivision of the state may own, purchase, construct, extend or equip...water systems, sewage collection systems, water treatment plants, [and] sewage treatment plants...with the assent of a majority of the qualified electors....” *Id.*

At the judicial hearing, Coeur d’Alene councilman Steve Adams, in his individual capacity as a private citizen, opposed the constitutionality of the petition. Councilman Adams argued that, because section 3 specifically identified public works, these types of expenses were not intended to be included under the “ordinary and necessary” clause. Instead, public works expenses require approval by a majority vote. This Court does not agree with the argument that ordinary and necessary expenses and public works expenses are mutually exclusive categories of article VIII, section 3. Additionally, precedent from the Supreme Court of Idaho does not support Councilman Adams’s interpretation.

The Supreme Court of Idaho has held water-system expenses to be “ordinary and necessary” expenses under the Idaho Constitution and exempt from requiring voter approval. Water systems and wastewater treatment plants are both enumerated in the clause cited by Councilman Adams. But, the Idaho Supreme Court has not ruled that all water system projects fall under the clause of section 3 that requires a majority vote. For example, in *Hickey v. City of Nampa*, the Supreme Court held the repair of the city’s water system to be an ordinary and necessary expense. 22 Idaho 41, 45-46, 124 P. 280, 281 (1912).

We take it that it was within the power of the Legislature, under this constitutional provision, to say that an expenditure, though out of the ordinary, which is incurred for the purpose of repairing some damage done to city property, or improving it in such manner as to render it serviceable to the city, falls within this proviso to the Constitution. The repair and improvement of the property may be "ordinary and necessary," and yet not occur frequently. It is one of the incidents of the ownership of property that it must be kept in repair; and any casualty that may happen must be repaired, if the property is to be useful and serve its purpose.

Id. Because the Supreme Court has considered some water system expenses to be ordinary and necessary expenses, public works expenses and ordinary and necessary expenses cannot be mutually exclusive categories of section 3, as Councilman Adams has suggested. Instead, a cost that might be categorized as a water system, and require merely a majority vote under the public works exception, may occasionally be supported by facts that would render the expense ordinary and necessary, which requires no public vote. Therefore, the Court must consider the specific facts in this case to determine whether an improvement to the wastewater treatment facility is an ordinary and necessary expense.

For an expense that creates indebtedness to be exempt from a public vote, the expense must be "ordinary," but it also must be "necessary." *City of Boise v. Frazier*, 143 Idaho 1, 4, 137 P.3d 388, 391 (2006). Expenses that are ordinary are incurred in the normal course of municipal administration. The Idaho Supreme Court considers an expense to be ordinary "if in the ordinary course of municipal business, or the maintenance of municipal property, it may be and is likely to become necessary." *Frazier*, 143 Idaho at 4, 137 P.3d at

391 (quoting *Hanson v. City of Idaho Falls*, 92 Idaho 512, 514, 446 P.2d 634, 636 (1968)). Here, the maintenance and improvement of the City's wastewater treatment system is an expense well within the ordinary course of municipal administration. The issue is whether the expense to improve the wastewater treatment system is currently necessary.

An expense that is necessary carries an element of urgency. "In order for an expenditure to qualify as 'necessary' as the word is used in the proviso clause to Article VIII, § 3 of the Idaho Constitution, there must exist a necessity for making the expenditure at or during such year." *Frazier*, 143 Idaho at 6, 137 P.3d at 393 (With this definition, the Idaho Supreme Court returned to the test for necessary first articulated by the Court in *Dunbar v. Board of Commissioners of Canyon County*, 5 Idaho 407, 412, 49 P. 409, 411 (1897). This initial test renders Idaho cases from the early 20th Century to be instructive guidelines.) The Court in *Frazier* continued by noting that the urgency could be the result of the following factual circumstances: 1. repairs or maintenance of property, as illustrated by *Asson v. City of Burley*, 105 Idaho 432, 441, 670 P.2d 839, 848 (1983); 2. a legal obligation that would prevent delaying the expenditure, as illustrated by *Butler v. City of Lewiston*, 11 Idaho 393, 404, 83 P. 234, 238 (1905); or 3. threats to public safety, as illustrated by *Board of County Comm'rs of Twin Falls County v. Idaho Health Facilities Authority*, 96 Idaho 498, 510, 531 P.2d 588, 600 (1974). *Frazier*, 143 Idaho at 7, 137 P.3d at 394. This Court finds the type of maintenance, the legal obligation, and the preservation of public safety all support the conclusion that

improvements to Coeur d'Alene's wastewater treatment facility constitute an ordinary and necessary expense under the Idaho Constitution.

While this Court may consider urgency for maintenance issues, legal obligations, and public safety in its determination, this Court cannot consider the economic-based arguments before it. At the hearing, in briefing, and in affidavits, the City has informed the Court of a low-interest loan opportunity from Idaho's DEQ, and the City noted the "utmost importance" for immediate action to secure the funding opportunity. (See Aff. Frederickson ¶ 15.) Additionally, city council meeting minutes suggested that the city council discussed prompt action to secure the low-interest loan opportunity. (Affidavit of Steve Adams, Ex. A) Weighing economic considerations is an appropriate legislative function, but it has no place in a judicial analysis and will not be considered. No court can release a city from the public vote requirement of the Idaho Constitution because the debt incurred happened to be a loan with a great interest rate. The City also noted that pollutant levels that exceeded the NDPES permit could render the City liable to fines of approximately \$37,500 per day. Again, the potential economic cost to taxpayers cannot be considered by the Court. However, the legal obligations that underlie and give rise to the possible fines have been considered in the Court's decision.

The Court's decision today is based on analysis that aligns with Idaho Supreme Court precedent for "ordinary and necessary" expenses. Specifically, the type of improvement to the wastewater treatment system is similar to maintenance expenses for public works that the Idaho Supreme Court has

recognized under the “ordinary and necessary” clause. Also, the Idaho Supreme Court recognizes legal obligations and public safety expenses to be under the purview of “ordinary and necessary,” and maintenance of the wastewater treatment system is directly related to federal legal obligations under the Clean Water Act as well as public safety issues of pollutants in the region’s surface water resources.

1. An expense to improve the wastewater treatment system is a type of expense recognized as “ordinary and necessary” by Idaho courts

The financial obligation that would be incurred to fund improvements to the wastewater treatment system is the type of expense that Idaho courts have held to be “ordinary and necessary” under article VIII, section 3. The Idaho Supreme Court has considered the following expenses on repairs and maintenance to be necessary: constructing a new airport terminal to replace a structurally unsound one, *City of Pocatello v. Peterson*, 93 Idaho 774, 473 P.2d 644 (1970); restoring a badly damaged city water system, *Hickey v. City of Nampa*, 22 Idaho 41, 124 P. 280 (1920); building a water storage tank and improving the city waterworks system to provide a “more adequate water supply” to city residents, *Durand v. Cline*, 63 Idaho 304, 119 P.2d 891 (1941). In this case, the City seeks to enter into a loan agreement to fund improvements to the wastewater treatment system, thereby limiting pollutants discharged into the Spokane River. This expense is similar to other expenses for other “ordinary and necessary” public works improvements. Additionally, improving the facility should be started within the year.

2. The City has impending legal obligations under the Clean Water Act to improve the wastewater treatment system

Legal obligations that cannot be delayed are considered “ordinary and necessary” expenses. *Butler v. City of Lewiston*, 11 Idaho 393, 404, 83 P. 234, 238 (1905). The City of Coeur d’Alene has a federal legal obligation under the Clean Water Act. *See* 33 U.S.C. § 1251 *et seq.* The Clean Water Act (CWA) generally prohibits the discharge of pollutants into waters of the United States: “Except as in compliance with [the Act], the discharge of any pollutant by any person shall be unlawful.” 33 U.S.C. § 1311(a) (2012); *see also* § 1362(7). “Person” includes municipalities such as Coeur d’Alene. *See id.* § 1362(5). One section of the CWA allows discharge provides under special federal permits issued by the EPA; these permits are the NPDES permits. 33 U.S.C. § 1342 (2012). It is because of this permit that Coeur d’Alene’s wastewater treatment plant may discharge any effluent into the Spokane River. Without this permit, the discharge of any pollutant is prohibited by federal law, which means that discharging effluent in compliance with the ND PES is a federal legal obligation. Any doubt as to the gravity of this federal legal obligation may be cleared up by article VI, clause 2 of the United States Constitution:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof...shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any state to the Contrary notwithstanding.

U.S. CONST. art. VI, § 2.

The municipality is operating under a 1999 NPDES permit that has been extended until a new one is issued. Although the NPDES permit is currently in draft form, the drafts give the City notice of what to expect when the final permit is issued. The requisite conditions are expected to be no less stringent than the drafts, but these conditions are, for some pollutants, significantly more stringent than the current permit. The City must meet these conditions to continue to lawfully discharge pollutants into the Spokane River. The new permit is expected within the year, causing the start of improvements required to satisfy permit conditions also necessary within the year. The urgency requirement is therefore satisfied, and the expense is "necessary" under article VIII, section 3 of the Idaho Constitution.

3. Improving the City's wastewater treatment system is a matter of public safety

Threats to the public safety can make an expense urgent and therefore "necessary" under article VIII, section 3 of the Idaho Constitution. *Frazier*, 143 Idaho at 7, 137 P.3d at 394. Expenditures necessary for public safety have included improvements to a hospital building to achieve state safety standards, *Board of County Comm'rs of Twin Falls County v. Idaho Health Facilities Authority*, 96 Idaho 498, 500, 531, P.2d 588, 591 (1974), and the construction of a new airport terminal where the current one was structurally unsound and therefore unsafe, *City of Pocatello v. Peterson*, 93 Idaho 774, 778, 473 P.2d 644, 648 (1970). The relationship between the improvement and public safety is

such that the urgency requirement is satisfied. *City of Boise v. Frazier*, 143 Idaho 1, 6, 137 P.3d 388, 393 (2006).

Here, the effluent discharged into the Spokane River is directly related to public health and safety. Pollutant limits are imposed for the integrity of water resources. See 33 U.S.C. § 1251 (2012). The surface waters of this region, Lake Coeur d'Alene and the Spokane River, are used for public recreation. If the system is currently struggling to meet legal limits for pollutants such as ammonia levels, rectifying this issue is urgent. The failure to properly treat wastewater could generate public health risks in the regional surface water. Although this expenditure is proactive in preventing pollutant levels from exceeding permit limits and not reactive in mitigating levels that have already exceeded permit limits, this Court considers proactivity concerning water resources and related public safety to be the more appropriate way forward.

The City's failure to meet its federal legal obligation under the NPDES permit could result in other public safety issues as well. Noncompliance with the permit's conditions may result in revocation of the NPDES permit, which would force the City to dispose of effluent in another manner. Because the City currently has no other alternative system in place for this effluent disposal, a revocation of the NPDES permit would immediately diminish the City's capacity to treat its citizens' wastewater, thus potentially creating unexpected public health issues. In order to address a wastewater treatment system that is currently struggling with pollutant limits, improving the system must be undertaken within the year. Thus, the expense is necessary.

CONCLUSION

For these reasons, the Court holds the following:

1. The City has authority to enter into a loan agreement for the purpose of improving the City's wastewater treatment facility.
2. The expenditure to improve the City's wastewater treatment facility is "ordinary and necessary" under Idaho's Constitution, and incurring the indebtedness for this expense is exempt from a public vote.

DATED this 2nd day of April, 2013.

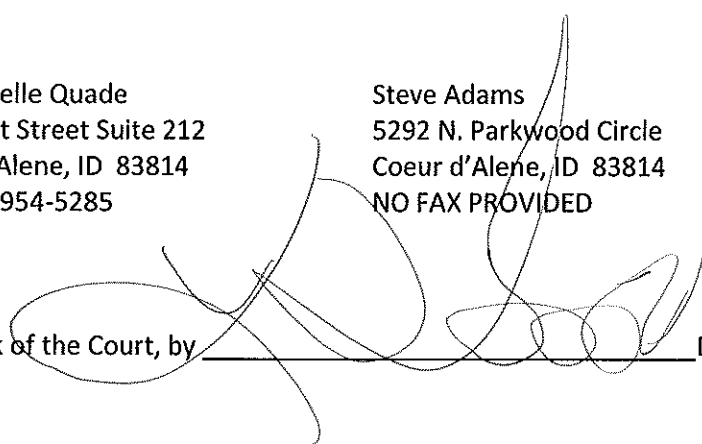


John Patrick Luster
District Judge

I hereby certify that on the ^{2nd} day of April, 2012, a true and correct copy of the foregoing MEMORANDUM DECISION AND ORDER REGARDING PETITION FOR JUDICIAL CONFIRMATION was sent as indicated below:

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CLIFFORD T. HAYES, Clerk of the Court, by  Deputy Clerk

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