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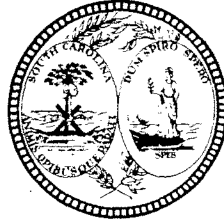

The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

CHARLES MOLONY CONDON
ATTORNEY GENERAL

January 8, 1997

The Honorable T. Edward Kyzer
Mayor, City of Newberry
Post Office Box 538
Newberry, South Carolina 29108

Re: Informal Opinion

Dear Mayor Kyzer:

Attorney General Condon has referred your recent opinion request to me for reply. You ask whether the City of Newberry may contract with the Newberry Family YMCA to provide recreation programs for city residents.

First, in regards to whether the City of Newberry may expend public funds on recreation, it is well-settled that the expenditure of state funds must be for a public, not a private purpose. Elliot v. McNair, 250 S.C. 75, 156 S.E.2d 421 (1967); Haesloop v. Charleston, 123 S.C. 272, 115 S.E. 596 (1923). This limitation applies not only to the state but to its political subdivisions as well. Elliot v. McNair, supra.

Article X, Section 5 of the South Carolina Constitution requires that taxes (public funds) be spent for public purposes. While each case must be decided on its own merits, the notion of what constitutes a public purpose has been described in Anderson v. Baehr, 265 S.C. 153, 217 S.E.2d 43 (1975):

> As a general rule a public purpose has for its objective the promotion of the public health, safety, morals, general welfare, security, prosperity, and contentment of all the inhabitants or residents, or at least a substantial part thereof. Legislation [i.e., relative to expenditure of funds] does not have to benefit all of the people in order to serve a public purpose.

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In conformity with Article X, Section 11 of the South Carolina Constitution (1895 as amended), the State's credit may not be used for the benefit of any individual, company, association, corporation, or any religious or other private education institution. See, Op.Atty.Gen., March 19, 1985 (citing cases regarding a "pledge" of credit for private entity). This provision has been construed to prohibit the expenditure of public funds "for the primary benefit of private parties." State ex rel. McLeod v. Riley, 276 S.C. 323, 278 S.E.2d 612 (1981). Courts in other jurisdictions have permitted appropriations to private entities which use funds to perform a proper "function for the state." Dickman v. Defenbacher, 128 N.E.2d 59 (Ohio 1955); Bedford County Hospital v. Browning, 225 S.W.2d 41 (Tenn. 1949); People v. Green, 47 N.E.2d 465 (Ill. 1943); Hager v. Kentucky Children's Home Society, 83 S.W.2d 605 (Ky. 1904). In such cases, the direct appropriation of public funds to these private entities is, in effect, an exchange of value which results in the performance by those entities of a public function for the State.

In light of the foregoing constitutional provisions, we note that recreation is an appropriate function of the state or a political subdivision. See, S.C. Code Ann. § 5-7-30 (Supp. 1995) and § 4-9-30(5) (Supp. 1995); Ops.Atty.Gen. dated October 16, 1989; March 16, 1988; April 2, 1987; and January 21, 1985. Thus, public funds may ordinarily be expended for recreation.

Second, in regards to whether the City of Newberry may contract with a sectarian organization, it is recognized that the mere contracting for goods or services for a public purpose with a sectarian institution is appropriate state action. State ex rel. Warren v. Nusbaum, 219 N.W.2d 577 (Wisc. 1974); See, Op.Atty.Gen. dated August 1, 1974. It is only when such a contract has a primary effect of advancing religion that the constitutional prohibitions come into effect. Id. In identifying the primary effect, the court in Hunt v. McNair, 413 U.S. 734 (1973), stated: " ... whatever may be its initial appeal, the proposition that the Establishment Clause prohibits any program which in some manner aids an institution with a religious affiliation has consistently been rejected." Stated another way, the Court has not accepted the recurrent argument that all aid is forbidden because aid to one aspect of an institution frees it to spend its other resources on religious ends. Id.

As previously stated, recreation is an appropriate function for the expenditure of public funds. In my opinion, if the proposed contract between the City of Newberry and the YMCA limits the YMCA to providing recreation programs and activities in its proprietary capacity, the agreement would not violate the Establishment Clause.

This letter is an informal opinion only. It has been written by a designated assistant attorney general and represents the position of the undersigned attorney as to the

specific questions asked. It has not, however, been personally scrutinized by the Attorney General nor officially published in the manner of a formal opinion.

With kindest regards, I remain

Very truly yours,

Paul M. Koch
Assistant Attorney General