The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

CHARLES MOLONY CONDON
ATTORNEY GENERAL

July 2, 1996

Mr. Thomas C. Styers
Executive Director
Myrtle Beach Air Base Redevelopment Authority
1063 Howard Parkway
Myrtle Beach, SC 29577

Re: Informal Opinion

Dear Mr. Styers:

You have requested advice as to whether the Redevelopment Authority (Authority)[1] may endorse the conveyance of property on the former Myrtle Beach Air Force Base to a Bible college. According to your letter, the State would not be in the chain of title. The college applied to and was approved by the United States Department of Education (Department) to receive a "Public Benefit Conveyance" at a closed military base for public education. The conveyance, if endorsed by the Authority, would be from the United States Air Force to the Department and then to the Bible college; however, my understanding from talking to you is that the Authority would have the discretion to ask that the parcels in question be conveyed to other parties, including the Authority, for other uses.

The sole question addressed herein is whether the Authority's endorsement of the conveyance would violate State or Federal law regarding aid to or the establishment of religion. Whether any other legal issues concerning this matter is neither suggested nor addressed in this letter. In addition, no fact finding has been done here because factual investigations do not fall within the scope of Opinions of this Office. (Ops. Atty. Gen. December 12, 1983).

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[1] Statutory provisions for the Authority are set forth at S.C. Code Ann. § 31-12-10, et seq (Supp. 1995).

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Art. XI provides that "[n]o money shall be paid from public funds nor shall the credit of the State or any of its subdivisions be used for the direct benefit of any religious or other private education institution." Because the conveyance of the property is from an agency other than the State and its subdivisions, this section does not appear to apply. See Ops. Atty. Gen. (February 2, 1994).

Of some guidance here as to whether the State's involvement in this matter would violate the Establishment Clause of the First Amendment of the United States Constitution is Rosenberger v. Rector and visitors of the University of Virginia, U.S. , 115 S.Ct. 2510, L.Ed. 2d (1995). That decision concluded that provision of university funding for printing costs for publication of a newspaper of a student organization with a Christian editorial viewpoint would not violate the Establishment Clause. Relevant parts of that decision include the following:

> A central lesson of our decisions is that a significant factor in upholding governmental programs in the face of Establishment Clause attack is their neutrality towards religion. (emphasis added). We have decided a series of cases addressing the receipt of government benefits where religion or religious views are implicated in some degree. The first case in our modern Establishment Clause jurisprudence was Everson v. Board of Ed. of Ewing, 330 U.S. 1, 67 S.Ct. 504, 91 L.Ed. 711 (1947). There we cautioned that in enforcing the prohibition against laws respecting establishment of religion, we must "be sure that we do not inadvertently prohibit [the government] from extending its general state law benefits to all its citizens without regard to their religious belief." Id., at 16, 67 S.Ct., at 512. We have held that the guarantee of neutrality is respected, not offended, when the government, following neutral criteria and evenhanded policies, extends benefits to recipients whose ideologies and viewpoints, including religious ones, are broad and diverse. See Board of Ed. of Kiryas Joel Village School Dist. v. Grumet, 512 U.S. ----, ----, 114 S.Ct. 2481, 2491, 129 L.Ed.2d 546 (1994) (SOUTER, J.) ("[T]he principle is well grounded in our case law [and] we have frequently relied explicitly on the general availability of any benefit provided religious groups or individuals in turning aside

Establishment Clause challenges"); Witters v. Washington Dept. of Services for Blind, 474 U.S. 481, 487-488, 106 S.Ct. 748, 751, 88 L.Ed.2d 846 (1986); Mueller v. Allen, 463 U.S. 388, 398-399, 103 S.Ct. 3062, 3069, 77 L.Ed.2d 721 (1983); Widmar, 454 U.S., at 274-275, 102 S.Ct., at 277. More than once have we rejected the position that the Establishment Clause even justifies, much less requires, a refusal to extend free speech rights to religious speakers who participate in broad-reaching government programs neutral in design. See Lamb's Chapel, 508 U.S., at ----, 113 S.Ct., at 2147-2148; Mergens, 496 U.S., at 248, 252, 110 S.Ct., at 2370-2371, 2373; Widmar, supra, at 274-275, 102 S.Ct., at 277.

The governmental program here is neutral toward religion. There is no suggestion that the University created it to advance religion or adopted some ingenious device with the purpose of aiding a religious cause. The object of the SAF is to open a forum for speech and to support various student enterprises, including the publication of newspapers, in recognition of the diversity and creativity of student life. The University's SAF Guidelines have a separate classification for, and do not make third-party payments on behalf of, "religious organizations," which are those "whose purpose is to practice a devotion to an acknowledged ultimate reality or deity." Pet. for Cert. 66a. The category of support here is for "student news, information, opinion, entertainment, or academic communications media groups," of which Wide Awake was 1 of 15 in the 1990 school year. WAP did not seek a subsidy because of its Christian editorial viewpoint; it sought funding as a student journal, which it was. 115 S.Ct. at 2521, 2522.

* * *

The Court of Appeals (and the dissent) are correct to extract from our decisions the principle that we have recognized special Establishment Clause dangers where the government makes direct money payments to sectarian institutions, citing Roemer v. Board of Pub. Works of Md., 426 U.S. 736, 747, 96

> S.Ct. 2337, 2345, 49 L.Ed.2d 179 (1976); Bowen v. Kendrick, 487 U.S. 589, 614-615, 108 S.Ct. 2562, 2577, 101 L.Ed.2d 520 (1988); Hunt v. McNair, 413 U.S., at 742, 93 S.Ct. at 2874; Tilton, 403 U.S., at 679-680, 91 S.Ct., at 2096; Board of Ed. of Central School Dist. No. 1 v. Allen, 392 U.S. 236, 88 S.Ct. 1923, 20 L.Ed.2d 1060 (1968). The error is not in identifying the principle but in believing that it controls this case. Even assuming that WAP is no different from a church and that its speech is the same as the religious exercises conducted in Widmar (two points much in doubt), the Court of Appeals decided a case that was, in essence, not before it, and the dissent would have us do the same. We do not confront a case where, even under a neutral program that includes nonsectarian recipients, the government is making direct money payments to an institution or group that is engaged in religious activity. Neither the Court of Appeals nor the dissent, we believe, takes sufficient cognizance of the undisputed fact that no public funds flow directly to WAP's coffers.
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> It does not violate the Establishment Clause for a public university to grant access to its facilities on a religion-neutral basis to a wide spectrum of student groups, including groups which use meeting rooms for sectarian activities, accompanied by some devotional exercises. See Widmar, 454 U.S., at 269, 102 S.Ct., at 274; Mergens, 496 U.S., at 252, 110 S.Ct., at 2373....115 S.Ct. at 2523.

The endorsement of the conveyance by the Authority does not appear to violate the Establishment Clause. Nothing in the statutes relating to the Authority or in the information reported above concerning the proposed conveyance suggests a religious objective by the Authority. Although you refer to the endorsement of the transfer, my understanding is that this endorsement is an approval of the conveyance rather than an endorsement of any theological viewpoint of the college. Therefore, the Authority's role, including the conveyance, based upon this information, appears to be neutral under Rosenberger. While you have indicated that the Authority could request that the property be transferred to others or itself, the Authority does not now own the property.

Therefore, the above references of Rosenberger to the direct money payments may not apply. See also Hunt, supra.[2]

This letter expresses no opinion concerning the wisdom of this transfer. Such matters are for other agencies to determine.

This letter is an informal opinion. It has been written by the designated Assistant Deputy Attorney General and represents the opinion of the undersigned attorney as to the specific questions asked. It has not, however, been personally reviewed by the Attorney General nor officially published in the manner of a formal opinion.

If you have further questions, please let me know.

Yours very truly,

J. Emory Smith, Jr.
Assistant Deputy Attorney General

JESJr.

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[2] Hunt upheld a South Carolina statutory scheme for the issuance of revenue bonds and lease back arrangements related to the construction of facilities at private colleges excluding provisions for sectarian study or worship.