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The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

CHARLES MOLONY CONDON
ATTORNEY GENERAL

November 24, 1997

Emil W. Wald, Esquire
Rock Hill City Attorney
P.O. Box 790
Rock Hill, South Carolina 29731-6790

RE: Informal Opinion

Dear Mr. Wald:

Your recent opinion request has been forwarded to me for reply. The facts, as I understand them to be, are as follows. The Saint Anne Church, which is located in Rock Hill, is currently engaged in a construction project which includes building a new school and family life center. Construction started in June of 1997 and is approximately 50% complete. As part of this project, a gravity sewer line will be built to serve the new campus of St. Anne, the Trinity Christian School, and two residences housing handicapped individuals. The cost of installing this sewer line is estimated at \$135,000 and will be initially paid by St. Anne. Once built, the City of Rock Hill will assume ownership of the sewer line and it will be included in the city waste water system. The city will then be capable of charging tap-on fees and monthly user charges to the users of the system. Questions have arisen as to whether the city may provide St. Anne with \$65,000, and in return receive ownership of the sewer line.

You acknowledge that parties disagree on several of the facts involved in this situation. Therefore, you have requested that this opinion address the following question only as it relates to Article 11, Section 4 of the South Carolina Constitution. Accordingly, this opinion will only address whether under Article 11, Section 4, a city may purchase a sewer line from a religious institution. Due to the parties' requests to expedite this opinion, the question raised will be answered as concisely as possible.

Re: Saint Anne

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.

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 may be construed to prohibit the expenditure of public funds for the primary benefit of private parties and religious institutions. See 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. 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.

Further, 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); Community Council v. Jordan, 432 P.2d 460 (Ariz. 1967); Op. Atty. Gen. dated January 8, 1997; 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.

The construction and maintenance of sewer facilities has been held to serve a public purpose of a political subdivision and is an appropriate function of a political subdivision. Marshall v. Rose, 213 S.C. 428, 49 S.E.2d 720 (1948); Op. Atty. Gen. dated July 18, 1967; S.C. Code Ann. § 5-7-30 (Supp. 1995). Thus, public funds may ordinarily be expended for sewerage systems.

The specific question raised is whether the city's purchase of a sewer line from a religious institution would violate Article 11, Section 4. This Section provides as follows:

No money shall be paid from public funds nor credit of the State or any of its political subdivisions be used for the direct benefit of any religious or other private educational institution.

In my opinion, if a court were to address this issue, it would conclude that this transaction would not violate Article 11, Section 4. It is well recognized that providing sewer service is a public purpose of a municipality on which public funds may be expended. In this case, the city will enter into an agreement where it will purchase from a religious institution an item which is within the public purpose of the municipality. This transaction may be appropriately characterized as a mere contracting of goods for a public purpose with a sectarian institution. The direct benefit of this transaction will accrue to the public in general. An incidental benefit of this transaction is that St. Anne will be reimbursed approximately one-half of its costs to build the sewer line. This incidental benefit would not be of such magnitude to bring it within the prohibitions of the State Constitution.

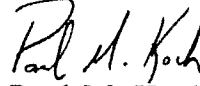
This opinion is limited to the specific question discussed above. This opinion does not address whether a purchase like the one discussed is permitted under the Rock Hill City Code. Such a determination should be made by the City Council with the advice of the City Attorney. Further, this opinion should not be viewed as an either an endorsement or condemnation of the proposed purchase.

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.

Mr. Wald
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With kindest regards, I remain

Very truly yours,

A handwritten signature in dark ink, appearing to read "Paul M. Koch". The signature is written in a cursive, slightly stylized font.

Paul M. Koch

Assistant Attorney General