STATE OF KANSAS

OFFICE OF THE ATTORNEY GENERAL

2ND FLOOR, KANSAS JUDICIAL CENTER, TOPEKA 66612

CURT T. SCHNEIDER
ATTORNEY GENERAL

MAIN PHONE: (913) 296-2215
CONSUMER PROTECTION: 296-3751

December 28, 1978

ATTORNEY GENERAL OPINION NO. 78-392

Mr. J. F. McCormack
Deputy Secretary
Kansas Department of Aging
610 West 10th Street
Topeka, Kansas 66612

Re: Department of the Aging--Nutrition Centers--Churches

Synopsis: The expenditure of public funds in order to make structural modifications in church facilities which are used as nutrition centers in programs sponsored by the Department of the Aging in order to make such facilities accessible to physically handicapped persons is not prohibited by the Establishment Clause of the First Amendment to the United States Constitution.

* * *

Dear Mr. McCormack:

You inquire concerning the expenditure of public funds to make certain modifications of certain facilities used as nutrition centers in programs sponsored by the Department of Aging. You advise that many nutrition centers are located in churches. Section 504 of the Rehabilitation Act of 1973, you state, requires that the facilities used for such projects be barrier-free in order to permit access by handicapped persons. In order to comply with section 504, structural modifications must often be made in many of the buildings used for nutrition centers. You advise that some of the projects would like to fund these structural modifications with public funds, including those from federal sources, but question whether it is legal to use such monies to modify and enhance a building owned and operated as a church.

You inquire, thus, whether the doctrine of separation of church and state prohibits this particular use of funds provided under the Older Americans Act.

The First Amendment to the United States Constitution provides that "Congress shall make no law respecting the establishment of religion, or prohibiting the free exercise thereof . . . ." In Establishment Clause cases, the United States Supreme Court has evolved a threefold test to be applied in evaluating church-state relationships. As summarized in *Lemon v. Kurtzman*, 403 U.S. 602, 29 L. Ed. 2d 745, 91 S. Ct. 2105 (1971),

> "Every analysis in this area must begin with consideration of the cumulative criteria developed by the Court over many years. Three such tests may be gleaned from our cases. First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion . . . . ; finally, the statute must not foster 'an excessive government entanglement with religion.'" 403 U.S. at 612-613.

The Court has emphasized that these tests "must not be viewed as setting the precise limits to the necessary constitutional inquiry, but serve only as guidelines with which to identify instances in which the objectives of the Establishment Clause have been impaired." *Meek v. Pittenger*, 421 U.S. 349 at 359, 44 L. Ed. 2d 217 at 228, 95 S. Ct. 1753 (1974). Foremost of those objectives is the "sponsorship, finanial support, and active involvement of the sovereign in religious activity." *Walz v. Tax Commission*, 397 U.S. 664, 25 L. Ed. 2d 697, 90 S. Ct. 1409 (1970).

Applying these three tests, here, the first criterion is clearly satisfied. The proposed expenditure in question here has an obvious secular purpose. The operation of nutrition centers for the elderly is an entirely secular program, having no religious overtones. It clearly promotes the objective of that program to make the facilities accessible to the physically infirm and the handicapped. The expenditure of public funds in order to provide barrier-free access to such facilities serves a manifestly legitimate secular purpose. Likewise, the proposed expenditures entails virtually no entanglement whatever between the state and religious bodies. Certainly, standards have been promulgated

by government agencies which define the objectionable features which must be removed in order to provide the necessary access, and the facilities which must be provided to assure such access. A determination whether a particular facility has been modified to comply with such requirements poses no occasion for "entanglement," *i.e.*, intrusion of the state into the religious affairs of a church.

It may be objected, however, that the expenditure of public funds for this purpose fails the second criterion because such expenditure confers a benefit upon the religious bodies whose facilities are modified by such funds for that purpose. As stated in *Meek v. Pittenger*, *supra*, "it is clear that not all legislative programs that provide indirect or incidental benefit to a religious institution are prohibited by the Constitution." 421 at 359, 44 L. Ed. at 228. "The problem, like many problems in constitutional law, is one of degree." *Zorach v. Clauson*, 343 U.S. 306 at 314, 96 L. Ed. 954, 72 S. Ct. 679 (1952). It is important, under the second criterion, that the "principal or primary effect [of the expenditure is] one that neither advances nor inhibits religion."

In *Tilton v. Richardson*, 403 U.S. 672, 29 L. Ed. 2d 790, 91 S. Ct. 2091 (1971), the Court considered a challenge to certain expenditures under the Higher Education Facilities Act of 1963, 20 U.S.C.A. § 711 *et seq.*, providing construction grants for essentially secular facilities at four church-related colleges. The Court upheld the grants on a number of grounds. Importantly, it found sufficient safeguards in the Act that federally subsidized facilities would be devoted to the secular and not the religious functions of the recipient institutions, stating in part thus:

> "Construction grants surely aid these institutions in the sense that the construction of buildings will assist them to perform their various functions. But bus transportation, textbooks, and tax exemptions all gave aid in the sense that religious bodies would otherwise have been forced to find other sources from which to finance these services. Yet all of these forms of governmental assistance have been upheld. [Citations omitted.] *The crucial question is not whether some benefit accrues to a religious institution as a consequence of the legislative program, but whether its principal or primary effect advances religion.*" [Emphasis supplied.] 403 U.S. at 679, 29 L. Ed. 2d at 799.

In my judgment, the expenditure of public funds to make structural modifications in church facilities which are used as nutrition centers in programs sponsored by the Department of the Aging in order to make such nutrition programs accessible to physically handicapped persons has no principal or primary effect of advancing religion. The improvements serve a strictly secular purpose. The churches whose buildings are modified in order to be barrier-free doubtless benefit, in that members and others who might otherwise be unable to attend religious services there may be able to do so if the modifications are made. In my judgment, this is clearly the kind of indirect or incidental benefit from a strictly secular program which the Establishment Clause does not prohibit. Certainly, the improvements may be used by persons attending the churches both for secular and for sectarian purposes. Yet, the overriding purpose is a secular one, and the benefit to the church is unavoidable and clearly incidental.

Accordingly, it is my opinion that such expenditures are not prohibited by the United States Constitution or by the Constitution of the State of Kansas.

Yours truly,

Curt Schneider

CURT T. SCHNEIDER
Attorney General

CTS:JRM:kj