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September 5, 1985

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ATTORNEY GENERAL OPINION NO. 85- 114

Kenneth P. Hackler
Legal Counsel
Washburn University of Topeka
Topeka, Kansas 66621

Re: Cities; First Class -- Municipal Universities -- Buildings; Construction of Chapel

Synopsis: The construction by Washburn University of a multi-purpose building which would include a non-denominational, non-sectarian chapel funded by both public and private funds, and the subsequent maintenance of such a building with public funds, would not violate the Establishment Clause of the First Amendment. Cited herein: 10 U.S.C. §4354(b), 9354; U.S. Const., First Amend.

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Dear Mr. Hackler:

On behalf of Washburn University's Board of Regents, you seek our opinion on the legality of the university's proposed construction and maintenance of a chapel on its grounds.

You advise that the funds to be used for construction of the chapel consist of both public funds and private funds. The public moneys in Washburn University's building construction fund include funds originally generated by the Shawnee County mill levy. The private funds would be contributed by a private corporation, Washburn College, which would also have input on the design and construction of the chapel. The multi-purpose building, to be named the Bradbury Thompson Chapel, would include classrooms, a performance and recital hall, and a chapel.

Our review of Kansas statutes has disclosed no statutory barrier to the proposed construction of a chapel. Accordingly, the primary issue raised by the facts you have related to us is whether the construction and maintenance of such a chapel would violate the Establishment Clause of the First Amendment. ("Congress shall make no law respecting an establishment of religion.") In considering whether the erection or maintenance of religious structures on public property violates the First Amendment, courts have applied principles applicable in freedom of religion cases generally and standards developed in cases construing the Establishment Clause. 16A Am.Jur.2d Constitutional Law §482, p. 298 (1979).

In determining whether a particular state action is an improper "law respecting an establishment of religion," the United States Supreme Court has applied a three-part test:

> "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion, Board of Education v. Allen, 392 U.S. 236, 243 (1968); finally, the statute must not foster 'an excessive government entanglement with religion. Walz [v. Tax Comm'n, 397 U.S. 664, 674 (1970)]." Lemon v. Kurtzman, 403 U.S. 602, 612-613, 91 S.Ct. 2105, 29 L.Ed.2d 745, (1971).

The United States Supreme Court has recently reaffirmed that state action alleged to violate the Establishment Clause should be measured against the Lemon criteria. See e.g. Grand Rapids School District v. Ball, ___ U.S. ___, 105 S.Ct. 3216, ___ L.Ed.2d ___ (1985); Gilfillan v. City of Philadelphia, 637 F.2d 924 (C.A. Pa. 1980), cert. den., 451 U.S. 987 (City's expenditure of $204,569.00 in connection with Pope John Paul's two day visit to the city violated each prong of the Establishment Clause test).

Our research has disclosed several reported cases which have examined and upheld the legality of constructing a non-sectarian, non-denominational chapel on public property. See e.g., State v. Williamson, 347 P.2d 204 (Okla. 1959) (construction of memorial chapel on grounds of state-owned orphan's home constitutional where funded by a

private funds and used for assembly purposes including non-sectarian, non-denominational religious worship); Fenske v. Coddington, 57 So.2d 452 (1952) (construction of chapel at state industrial school legal); Reichwald v. Catholic Bishop of Chicago, 101 N.E. 266 (Ill. 1913) (construction of chapel on county poor farm constitutional.) However, the analysis used in those cases is of little help to the instant question in that all pre-date the Lemon case and therefore do not apply the three-part test currently used. Further, all three involved the use of strictly private funds.

Numerous post-Lemon cases may be found in which state actions impacting on elementary and secondary schools have been challenged under the Establishment Clause. See e.g. Wallace v. Jaffree, ___ U.S. ___, 105 S.Ct. 2479, 86 L.Ed.2d 29 (1985) (Alabama statute authorizing "meditation or voluntary prayer" unconstitutional); Aguilar v. Felton, ___ U.S. ___, 105 S.Ct. 3232, ___L.Ed.2d ___ (1985) (Title I program administered by New York City in parochial schools required excessive government entanglement in religion and violated Establishment Clause); School District of Grand Rapids v. Ball, supra, ("Shared Time" and "Community Education" programs have the primary or principal effect of advancing religion and therefore violate Establishment Clause); Committee for Public Education v. Nyguist, 413 U.S. 756, 93 S.Ct. 2955, 37 L.Ed.2d 948 (1973) (certain types of state aid to sectarian schools, students, and students' parents had primary effect of advancing religion and violated Establishment Clause). Although these and numerous other cases are helpful in demonstrating applications of the Lemon criteria, their usefulness is diminished by factual distinctions and contextual differences (i.e. no examination of religious structure in college and university context).

In applying the Lemon criteria to the fact situation you pose, we first examine whether the construction of the chapel would have a primary secular purpose. The United States Supreme Court has recognized that a government action may have both a religious and secular purpose. See e.g. 637 F.2d at 929. If the primary purpose of the government's action is secular and the religious purpose merely incidental, the government's action will be upheld under this element of the three-part test. For example, statutory grant programs directed toward providing students with a greater opportunity for a college education have no difficulty satisfying the constitutional criteria of secular legislative purpose, even if students receiving such grants attend religious

institutions. See e.g. Americans United for Separation of Church and State v. Bubb, 379 F.Supp. 872, 888 (D. Kan. 1974) and cases cited therein.

Here, if the primary intent of the university in constructing the multi-purpose building in question is to provide additional space for classrooms and student activities of a non-religious nature, to serve as a memorial to Bradbury Thompson, and to provide a more intimate setting for such ceremonies as initiations or weddings, and not to advance the cause of religion, the primary purpose would likely be viewed as secular.

The second prong of the Establishment Clause analysis requires a determination whether the principal or primary effect of the government action advances religion. An indirect and incidental effect beneficial to religion has never been thought a sufficient defect to warrant the invalidation of state action. See Committee for Public Education v. Nyquist, supra. The United States Supreme Court has long recognized that university students are young adults, are less impressionable than younger students, and should be able to appreciate that the government's policy is one of neutrality toward religion. See Tilton v. Richardson, 403 U.S. 672, 686, 91 S.Ct. 2091, 29 L.Ed.2d 790 (1970). Students at the college level are more critical than students at elementary or secondary schools and are therefore less susceptible to religious indoctrination. Americans United for Separation of Church and State v. Bubb, 379 F.Supp. 872, 891 (D. Kan. 1974).

Because of the inherent differences between the college level and the elementary and secondary level of education, courts have found state aid to church-related colleges valid even though similar aid to parochial schools may violate the Establishment Clause. See e.g. 379 F.Supp. at 891; (Kansas statute providing tuition grants to qualified students enrolled at private colleges and universities within state was not necessarily violative of First Amendment even though all eligible colleges were church related); Tilton v. Richardson, supra (one-time federal grant to church-related colleges which required no on going supervision was not violative of First Amendment); Hunt v. McNair, 413 U.S. 734, 93 S.Ct. 2868, 37 L.Ed.2d 923 (1973) (state construction grant to be used for secular education purposes at higher educational institutions including a church-controlled college was not violative of First Amendment); Roemer v. Maryland Public Works Board, 426

U.S. 736, 96 S.Ct. 2337, 49 L.Ed.2d 179 (1976) (state aid to religious colleges to be used for "any non-sectarian purpose" was not violative of First Amendment); Americans United for Separation of Church and State v. State, 648 P.2d 1072 (Colo. 1982) (Colorado statute providing grants to qualified students at private religious institutions of higher education was not violative of First Amendment).

Considering the adult status of Washburn students and the inclusion of the proposed chapel in a multi-purpose building, we view it unlikely that the direct or primary effect of the construction would advance or promote religion.

The final criterion is whether the construction or maintenance of the chapel would foster an excessive government entanglement with religion. It is well established that allowing religious worship and religious discussions on public property does not of itself demonstrate excessive government entanglement with religion. See Widmar v. Vincent, 454 U.S. 263, 102 S.Ct. 269, 70 L.Ed.2d 440 (1981) (state university's policy of equal access to campus facilities for all organizations including those of a religious nature does not violate Establishment Clause); O'Hair v. Andrews, 613 F.2d 931, 937 (D.C. Cir. 1979). Here, where the chapel would be located in a pervasively secular environment, and where the university could by policy ensure the absence of denominational or sectarian teaching therein, the traditional entanglement issue does not arise.

While it is always difficult to predict what a court will say on a matter which is not before it, especially when First Amendment questions are involved, we believe that the proposed construction and maintenance of a chapel on Washburn University's property would withstand a constitutional challenge.

We also take note that the maintenance of a chapel on the grounds of federal institutions of higher education is a common practice. See 10 U.S.C. §4354(b) (authorizing the erection of a building for religious worship at the West Point Military Reservation); 10 U.S.C. §9354 (authorizing the erection of a building for religious worship at the U.S. Air Force Academy); O'Hair v. Andrus, 613 F.2d 931, 937 (D.C. Cir. 1979) (U.S. Naval Academy can provide a chapel for voluntary worship regardless of the accessibility of nearby city churches). Similarly, several of the state universities in Kansas maintain chapels on their property with public funds. No constitutional challenge to the maintenance of such

chapels has been made, or in our judgment, would be successful if made.

In our opinion, Washburn University's construction of a multi-purpose building which would include a non-denominational, non-sectarian chapel financed by both public and private funds, and the subsequent maintenance of such a building with public funds, would not violate the Establishment Clause of the First Amendment.

Very truly yours,

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