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April 10, 1981

ATTORNEY GENERAL OPINION NO. 81-95

Mr. Frank H. Jenkins, Jr.
Owen & Jenkins
129 W. Park
P.O. Box 149
Olathe, Kansas 66061

Re: Cities and Municipalities -- Construction Fees --
Waiver of Fees by City Council for a Church Facility

Synopsis: The waiver by the city council of construction-related fees due a city from a church constitutes a gift of public funds for a private purpose and is, therefore, improper.

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Dear Mr. Jenkins:

You have inquired as to whether it is proper for a municipality to waive certain fees incurred by a church for the construction of a new church facility. You state that the fees in question -- a building permit fee, a plumbing inspection fee, an electrical inspection fee, and a park dedication fee, totaling \$6,166.50 -- were waived by the Lenexa City Council as requested by the church's pastor, based upon the theory that the church works for the betterment of the community.

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The building permit and inspection fees exist to cover the expenses incurred by the city in the performance of its inspection duties, and the park dedication fee is imposed when no open space is dedicated for public recreational use. None of the ordinances which establish these fees provide for exceptions or waiver. The question to be resolved, then, is whether the waiver of fees by the City Council was an invalid gift of public funds.

It has long been recognized that governmental expenditures are limited in that they cannot be for purely private purposes. In Loan Association v. Topeka, 87 U.S. (20 Wall.) 655 (1874), the city of Topeka issued bonds totaling \$100,000 and contributed the proceeds to a private company so that it might manufacture iron bridges in Topeka. The Supreme Court there stated that:

"[T]o lay, with one hand, the power of the government on the property of the citizen, and with the other to bestow it upon favored individuals to aid private enterprises and build up private fortunes, is none the less a robbery because it is done under the form of a law and is called taxation." Loan Association v. Topeka, 87 U.S. (20 Wall.) at 664.

The modern rule is, "[a]ny power conferred on a municipality must be exercised for a public use or purpose as distinguished from a private purpose." 10 McQuillin Municipal Corporations, §10.31.

The church facility in this case is used for a private and not a public purpose. "A denominational church is a private institution, and while building and maintenance of religious institutions are in the public interest and may be said to promote public welfare, they lie outside public uses and purposes." Ex Parte Conger, 163 Tx. 505, 357 S.W.2d 740, 742 (1962). Although the modern trend is to expand the class of public purposes, it has not included private church facilities. 39 McQuillin Municipal Corporations, §39.19.

While this waiver of fees does not represent an actual expenditure of public funds, it does constitute a gift to the church. The inspections and dedication are mandatory, without exception. The inspection fees are intended to compensate for expenses in providing that service. This broad view of expenditure in the public purposes context is expressed elsewhere as follows: "Because the power to tax is limited to tax for

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public purposes, there is no power for a municipality to lend its aid to private enterprises, thereby incurring an indebtedness which may necessitate the exercise of the power of taxation to liquidate." 64 C.J.S. Municipal Corporations §1835b.

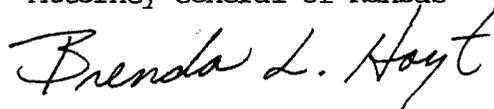
A similar view was applied where work was performed with public resources for the benefit of private persons. In Ex Parte Conger, *supra*, private property was bladed with county owned equipment so that church members might use the land as a parking lot. The court held that work performed on private property for church members to park while attending services was a public expenditure for a private purpose. 357 S.W.2d at 742.

Therefore, we conclude that the waiver of fees due the city is essentially a gift to the church which constitutes a gift for a private purpose. The gift violates the prohibition against using public funds for a private purpose and, thus, the Lenexa City Council acted improperly when it agreed to waive the fees.

Very truly yours,



ROBERT T. STEPHAN
Attorney General of Kansas



Brenda L. Hoyt
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RTS:BJS:BLH:may