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Opinion No. 08-73

City Funds for Non-Profit Organization

QUESTIONS

1. May a city make a commitment to provide funding over a five (5) year period to a non-profit charitable organization such as the YMCA, to be funded from the proceeds obtained from the local option sales and use tax?

2. The YMCA of Middle Tennessee describes itself as a "worldwide charitable fellowship united by a common loyalty to Jesus Christ for the purpose of helping people grow in spirit, mind and body." In light of this statement, may a city constitutionally donate city funds to this organization?

3. Would the language of the referendum question adopted by the voters of a city prohibit the use of any monies obtained from the sales and use tax for any of the arrangements described in the introductory paragraphs?

4. Could the YMCA extend reduced membership rates to city employees if the same reduction is not available to all city residents?

OPINIONS

1. No statute of general applicability authorizes a city to make a five-year binding commitment or pledge to appropriate funds either from current or from future revenues. Unless the city's charter expressly or by necessary implication authorizes such a commitment, the city is not authorized to make it.

2. Courts use the following guidelines to determine whether government aid violates the Establishment Clause of the United States Constitution. First, when it is claimed that a denominational preference exists, the initial inquiry is whether the law facially differentiates among religions. Second, if no such facial preference exists, courts examine three criteria to determine if governmental aid violates the Establishment Clause: (1) whether the program or authorization for the aid has a secular legislative purpose; (2) whether its primary effect is one that neither advances nor inhibits religion; and (3) whether it fosters excessive government entanglement with religion. Generally, a grant to a "pervasively sectarian" organization advances religion in violation of the

Establishment Clause. Thus, the purpose and activities of the YMCA should be examined to determine whether the organization is a "pervasively sectarian" organization as defined by federal courts. If it is pervasively sectarian, then a city grant would violate the Establishment Clause. If it is not pervasively sectarian, then the aid should be examined under the three-part test.

3. Whether an ordinance prohibits a particular use of local option sales tax revenues would depend on the language of the ordinance.

4. The YMCA's authority to adopt any rate structure, of course, depends on that organization's charter and by-laws. This Office is unaware of any state law that would prohibit such a rate structure. If the reduced rates are extended in return for city support, the arrangement may be subject to the statutes and rules governing city contracts.

ANALYSIS

1. Five-Year Commitment to Appropriate Funds for Charitable Organization

This opinion addresses the authority of a city to use tax funds to donate to a charitable organization. A definitive answer to this question will depend on additional facts and circumstances, especially the city charter. The first question is whether a city is authorized to make a commitment to provide funding over a five-year period to a non-profit charitable organization such as the YMCA with the proceeds obtained from the local option sales and use tax. We assume that the funding in question is a charitable donation. This Office addressed a similar issue in 1999. Op. Tenn. Att'y Gen. 99-225 (December 3, 1999). In that opinion, this Office concluded that the City of Millington was not authorized, either under its charter or any provision of general law, to make a binding commitment to appropriate funds to a non-profit organization for fifteen years.

The legal authorities underlying that opinion have not changed since it was issued. Generally, municipalities may exercise those express or necessarily implied powers delegated to them by the Legislature in their charters or under statutes. *Arnwein v. Union County Board of Education*, 120 S.W.3d 804, 807 (Tenn. 2003)*; Southern Constructors, Inc. v. Loudon County Board of Education,* 58 S.W.3d 706 (Tenn. 2001); *City of Chattanooga v. Tennessee Electric Power Co.*, 172 Tenn. 524, 533, 112 S.W.2d 385, 388 (1938) (a municipal corporation may exercise only such powers "as are expressly granted in its charter or arise by necessary implication in order to carry out the declared objects and governmental purposes for which the corporation was created"). No general law authorizes a city to enter into a five-year commitment to make an annual charitable donation to a non-profit organization. Tenn. Code Ann. § 6-54-111 authorizes a city to appropriate funds to a non-profit association, as long as the conditions within that statute are met. But that statute does not authorize a city to make a five-year binding commitment or pledge to appropriate funds either from current or from future revenues, nor is such a transaction "necessarily implied" by this or any other general law. Unless the city's charter expressly or by necessary implication authorizes such a commitment, the city is not authorized to make it.

2. Direct Grant of City Funds to Religious Organization

Your second question concerns the "stated mission" of the YMCA. The request includes material apparently issued by the YMCA of Middle Tennessee. The material states: "The YMCA is a worldwide charitable fellowship united by a common loyalty to Jesus Christ for the purpose of helping people grow in spirit, mind and body." The question is whether, in light of this mission, a city contribution to the YMCA would present constitutional problems. We assume your question refers to the Establishment Clause. The Establishment Clause of the First Amendment to the United States Constitution provides that "Congress shall make no law respecting an establishment of religion[.]" The First Amendment is applicable to the states through operation of the Fourteenth Amendment. At a minimum, the First Amendment guarantees that the government may not coerce anyone to support or participate in a religion or its exercise, or otherwise act in a way that establishes a state religion or religious faith or which tends to do so. *Lee v. Weisman*, 505 U.S. 577, 112 S.Ct. 2649, 2655, 120 L.Ed.2d 467 (1992). Similarly, Article 1, Section 3, of the Tennessee Constitution provides that "no preference shall ever be given, by law, to any religious establishment or mode of worship."

Courts use the following guidelines to determine whether government aid violates the Establishment Clause. First, when it is claimed that a denominational preference exists, the initial inquiry is whether the law facially differentiates among religions. *Hernandez v. Commissioner of Internal Revenue*, 490 U.S. 680, 109 S.Ct. 2136, 2146, 104 L.Ed.2d 766 (1989). Second, if no such facial preference exists, courts frequently use a three-part test articulated in *Lemon v. Kurtzman*, 403 U.S. 602, 91 S.Ct. 2125, 29 L. Ed.2d 745 (1971). Under this test, the criteria to be examined in determining whether a statute violates the Establishment Clause are: (1) whether the statute has a secular legislative purpose; (2) whether its primary effect is one that neither advances nor inhibits religion; and (3) whether it fosters excessive government entanglement with religion. The *Lemon* test has been criticized in some cases. *See, e.g., Orden v. Perry*, 545 U.S. 677, 685-86, 125 S.Ct. 2854, 162 L.Ed.2d 607 (2005). In that case, the Court found that the *Lemon* test was "not useful" in determining whether a display of the Ten Commandments on the Texas Capitol grounds violated the Establishment Clause. *Id.* At the same time, the Court did not reject use of the test in other contexts. We think the *Lemon* test still applies in determining whether a municipal grant violates the Establishment Clause. Under *Lemon* as later refined in what is known as the "endorsement test," courts look to whether a reasonable observer would believe that a particular action constitutes an endorsement of religion by the government. *Adland v. Russ*, 307 F.3d 471, 479 (6th Cir. 2002), *cert. denied*, 538 U.S. 999, 123 S.Ct. 1909, 155 L.Ed.2d 826 (2003) ("endorsement test" is a refinement of the second prong of the *Lemon* test).

Courts have found that government aid has the primary effect of advancing religion where it flows directly to an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission or when it funds a specifically religious activity in an otherwise substantially secular setting. *Roemer v. Board of Public Works of Maryland*, 426 U.S. 736, 96 S.Ct. 2337, 2347, 49 L.Ed.2d 179 (1976) (plurality); *Hunt v. McNair*, 413 U.S. 734, 93 S.Ct. 2868, 2873, 37 L.Ed.2d 923 (1973). Plainly, a church is such an institution. Moreover, monitoring a grant to a pervasively sectarian organization to ensure that funds are not used for a religious purpose may cause the government to intrude unduly in the day-to-day operations of religiously affiliated grantees. *Bowen v. Kendrick*, 487 U.S. 589, 108 S.Ct. 2562, 2578, 101 L.Ed. 520 (1988).

For this reason, this Office has concluded that a grant of public funds to a "pervasively sectarian" organization such as a church would violate the Establishment Clause of the United States Constitution. Op. Tenn. Att'y Gen. 07-94 (June 12, 2007); *see also* Op. Tenn. Att'y Gen. 08-58 (March 18, 2008) (grants to church-controlled youth groups).

Thus, the purpose and activities of the YMCA should be examined to determine whether the organization is a "pervasively sectarian" organization as defined by federal courts. If it is pervasively sectarian, then a city grant would violate the Establishment Clause. If it is not pervasively sectarian, then the aid should be examined under the three-part test outlined in *Lemon, supra.* The United States District Court for the Northern District of Ohio recently found that city grants to a local YMCA did not violate the Establishment Clause. *Conley v. Jackson Township Trustees,* 376 F.Supp.2d 776 (N.D. Ohio 2005). The case was apparently never appealed. Although it is not binding on state or federal courts in Tennessee, its analysis is consistent with Supreme Court cases interpreting the Establishment Clause.

3. Sales and Use Tax Referendum

The next question is whether language of the referendum question adopted by the voters of a city would prohibit the use of any monies obtained from the sales and use tax for a contribution to the YMCA. We assume your question refers to adoption of a local sales tax under the Local Option Revenue Act, Tenn. Code Ann. §§ 67-6-701, *et seq.* Under this statutory scheme, a city governing body may adopt an ordinance levying a local sales tax in addition to that levied by the State. Tenn. Code Ann. § 67-6-702. Voters may also initiate an ordinance to levy the tax under Tenn. Code Ann. § 67-6-707. Tenn. Code Ann. § 67-6-706 provides in relevant part:

> (a)(1) Any ordinance or resolution of a county or of a city or town levying the tax under authority of this part shall not become operative until approved in an election herein provided in the county or the city or town, as the case may be.
>
> (2) The county election commission shall hold an election on the question pursuant to § 2-3-204, providing options to vote "FOR" or "AGAINST" the ordinance or resolution, after the receipt of a certified copy of such ordinance or resolution, and a majority vote of those voting in the election shall determine whether the ordinance or resolution is to be operative.

It appears, therefore, that the ordinance authorizing the tax may also specify how the revenues may be used. Whether an ordinance prohibits a particular use of local option sales tax revenues would depend on the language of the ordinance.

4. Reduced Rates to City Employees

The last question is whether the YMCA may extend reduced membership rates to city employees if the same reduction is not available to all city residents. The YMCA's authority to

adopt any rate structure, of course, depends on that organization's charter and by-laws. This Office is unaware of any state law that would prohibit such a rate structure. If the reduced rates are extended in return for city support, the arrangement may be subject to the statutes and rules governing city contracts or to ethical standards adopted pursuant to Tenn. Code Ann. §§ 8-17-101, *et seq*.

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