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THIS CORRESPONDENCE IS A LEGAL GUIDELINE OF THE  
ATTORNEY GENERAL SUBMITTED FOR YOUR GUIDANCE

Dear Betty:

This is in response to your letter of June 9, 1989. I have just received in this office the documents necessary to clarify the Sixth Street Melodrama matter which I am enclosing for your review. It is my opinion that ownership of the Sixth Street Melodrama facility in Wallace resides with Sixth Street Melodrama, Inc.

In the case of the Depot Institute in Cascade, I have been in contact with Mr. Fredrick Kellogg, General Counsel for the National Endowment for the Arts. Mr. Kellogg has forwarded to me an analysis of the legislative history of funding for the National Endowment for the Arts. This analysis is of some assistance in setting forth the standards under which funds received by the NEA are to be dispensed. It does not answer, however, the more critical question, that being whether public funds may be used to cover construction costs for organizations such as the Depot.

The issue presented by this application is whether the transfer of public funds to an entity like the Depot violates the federal or state constitution. The federal standard is set forth in the case of Lemon v. Kurtzman, 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971), and is based upon the "Establishment Clause" of the United States Constitution. In its latest pronouncement on this subject, the United States Supreme Court in County of Allegheny et al. v. ACLU, 57 U.S.L.W. 5045 (issued July 3, 1989), summarized the federal standard as follows:

In the course of adjudicating specific cases, this Court has come to understand the

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Establishment Clause to mean that government may not promote or affiliate itself with a religious doctrine or organization, may not discriminate among persons on the basis of their religious beliefs and practices, may not delegate a governmental power to a religious institution, and may not involve itself too deeply in such an institution's affairs. . . .

In Lemon v. Kurtzman, supra, the Court sought to refine these principles by focusing on three 'tests' for determining whether a government practice violates the Establishment Clause. Under the Lemon analysis, a statute or practice which touches upon religion, if it is to be permissible under the Establishment Clause, must have a secular purpose, or it must neither advance nor inhibit religion in its principal or primary effect; and it must not foster an excessive entanglement with religion. 403 U.S., at 612-613.

County of Alleghany v. ACLU, 57 U.S.L.W. at 5049-50. In applying the principles of the Lemon case to the facts of this matter, I do not believe that granting funds to the Depot Institute would violate the federal standard. Cases where violations have been found are: permitting public school students to receive religious instruction on public school premises, McCollum v. Board of Education, 333 U.S. 203 (1948); allowing religious school students to receive state-sponsored education in their religious school, School District of Grand Rapids v. Ball, 473 U.S. 373 (1985); and state sponsored prayer in public schools, Abington School District v. Schempp, 374 U.S. 203 (1963). However, in Hunt v. McNair, 413 U.S. 734, 93 S.Ct. 2868, 37 L.Ed.2d 923 (1973), the Supreme Court approved the expenditure of public funds for the financing and refinancing of building projects on institutions of higher education campuses, even though some of the institutions benefitting from this financing scheme were colleges operated by religious institutions. The three part test articulated in Lemon formed the basis of the decision rendered in Hunt. The factual record in Hunt is similar to the situation present here. It is unlikely, therefore, that granting this application would be found to violate the federal constitutional standard.

Concerning the state constitutional law issue presented, the applicable standard is found in art. 9, § 5, of the Idaho Constitution which in pertinent part provides:

Neither the legislature nor any of the county, city, town, township, school district, or other public corporation, shall ever make any appropriation, or pay from any public fund or moneys whatever, anything in aid of any church or sectarian or religious society, or for any sectarian or religious purpose, . . .

Two Idaho cases have construed this section of the constitution. In Epeldi v. Engelking, 94 Idaho 390, 488 P.2d 860 (1971), the Idaho Supreme Court prohibited the transportation of parochial school students to and from parochial schools via public school buses. In Board of County Comm's v. Idaho Health Facility Authority, 96 Idaho 498, 531 P.2d 588 (1975), the court prohibited the Authority from using its funds to assist private hospitals operated by any church, sectarian or religious society. The court stated:

The appropriation of public funds to public hospitals operated by religious sects does not violate the First Amendment to the Constitution of the United States, Bradfield v. Roberts, 175 U.S. 291, 20 S.Ct. 121, 44 L.Ed. 168 (1899). But this does not mean that such commitment of funds is not violative of the Idaho Constitution. The Idaho Constitution places a much greater restriction upon the power of state government to aid activities undertaken by religious sects than does the First Amendment to the Constitution of the United States.

See Board of County Comm's supra, at 509. Obviously, this decision is contrary to the results reached applying the federal standard in Hunt. This leads me to conclude that if the Depot is operated by a sectarian or religious organization, state public funds may not be granted to the organization. The application submitted by the Board of Directors of the Depot Institute shows that while the Depot Institute has no religious affiliation, the Institute expressly commits itself to Judeo-Christian principles.

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Further, I have reviewed the Articles of Incorporation of the Depot Institute Ltd. which provide:

The purpose of this corporation is to institute and maintain a Christian ministry, along with any and all related purposes incidental to the maintenance of the ministry.

Under the Idaho Constitution, funding for this organization is not permissible. This leaves two possible courses of action. First, the application can be denied. Second, only federal, as opposed to state funds could be granted to the applicant.

I am enclosing for your reference a copy of Attorney General Opinion 89-5, which also deals with this issue. I hope this information is helpful. Please advise if I can be of further assistance.

Very truly yours,

PATRICK J. KOLE  
Chief, Legislative and  
Public Affairs Division

PJK/tg