

Church/State - Issues Eligibility of Lane College

January 14, 1991

MEMORANDUM FOR: Raymond A. Harris, Regional Administrator- Regional Housing Commissioner, 4

ATTENTION: Richard B. Barnwell, Manager Office of the Manger, 4.7S

FROM: Anna Kondratas, Assistant Secretary for Community Planning and Development, C \S\

SUBJECT: Eligibility of Lane College for Community Development Block Grant (CDBG) funding City of Jackson, Tennessee

This is in response to the Knoxville Office's May 30, 1990, request for an eligibility determination on whether the City of Jackson could provide CDBG funds to rehabilitate one of Lane College's dormitories. Thank you for your patience while the Constitutional issue raised was reviewed.

The May 30 request had two parts. First, we were asked if the Constitutional principle of separation of Church and State was at issue in this case. Second, the Field Office asked if rehabilitation of student housing is an eligible CDBG activity.

The Constitutional issue was referred to the Office of General Counsel (OGC). After review of the available facts, OGC determined that providing CDBG funds to Lane College "is Constitutionally permissible. . . provided the building is not used for sectarian activities. The October 1, 1990, memorandum from Vincent Landau, Assistant General Counsel, containing the entire opinion is attached.

On the second issue, the rehabilitation of "privately owned buildings and improvements for residential purposes" is eligible under 24 CFR 570.202(a)(1). A college dormitory is a residential building, and thus is eligible for CDBG-funded rehabilitation. Further, this dormitory is eligible for the National Historic Register, so "CDBG funds may be used for the rehabilitation, preservation or restoration" of such structures (570.202(d)).

To meet a national objective, it was proposed to carry out the activity under the rules for spot slum and blight (570.208(b)(2)). Rehabilitation activities under 570.202(a)(1) are limited to the extent necessary to eliminate specific conditions detrimental to public health and safety." Historic preservation activities under 570.202(d) have to correct such specific conditions," but are not limited to them. That is, all activities necessary to complete the historic preservation or restoration of the structure can be carried out under spot slum and blight rules. As an alternative to the spot slum and blight objective, another possible way to meet a national objective is to demonstrate that 51 percent of the residents of the structure qualify as low- and moderate-income persons (570.208(a)(3)).

If you have any further questions on this matter, please call the Entitlement Communities Division at FTS 458-1577.

Attachment

cc: Ed Garnder 7106

ATTACHMENT

OFFICE OF THE GENERAL COUNSEL

10/1/90

MEMORANDUM FOR: Donald I. Patch, Director
Office of Block Grant Assistance, CCB

FROM: Vincent R. Landau, Assistant General Counsel Block Grants Division, GCB \s\

SUBJECT: Church/State Issue - Lane College

This is in response to your request for guidance regarding the eligibility of Lane College, a church affiliated institution, to receive community development block grant (CDBG) funds to rehabilitate a dormitory at the school. Our review of this matter is limited solely to the Church/State issues presented.

Based on materials presented for review, Lane College is an accredited liberal arts college founded in 1881. While established by the Colored Methodist Episcopal (CME) Church, the College is chartered by the State of Tennessee to carry out secular educational functions. Although some of the trustees are church officials, the College is administered by a Board of Trustees entirely independent of the CME Church. Faculty members and students are selected without regard to religious affiliation. Students are required to attend a minimum of twelve Chapel services and/or convocations per semester. However, the college states as policy that "it makes no attempt to force denominational views upon students or faculty." Lane College is accredited by the Southern Association of Colleges and Schools.

As we understand it, Lane College applied to the City of Jackson, Tennessee for CDBG funds to rehabilitate a student dormitory. As proposed, the facility would not be used for religious instruction or other religious purposes. The City has requested a determination as to whether in the context of Church/State guidelines, it would be permissible to provide CDBG assistance to rehabilitate this facility.

After reviewing the facts of this case, we are of the opinion that the issues presented are not unlike those presented in *Tilton v. Richardson*, 403 U.S. 672 (1971) and *Roemer v. Board of Public Works*, 426 U.S. 736 (1976).

Tilton involved title I of the Higher Education Act of 1963, a Federal statute which authorized grants to institutions of higher learning for the construction of buildings or facilities. Expressly excluded from eligibility under the statute was any facility used for sectarian instruction or as a place or facility used for sectarian instruction or as a place of religious worship or any facility which is used or to be used primarily in connection with any part of a program of a school or department of divinity. The statute originally provided for the recovery of the Federal grant, or a portion thereof, if the facility was used for religious

purposes during a 20-year period. This statutory restriction was to be enforced primarily by on-site inspections.

The Tilton colleges used the Federal funds for two library buildings, a music building, drama and arts buildings, a science building and a language laboratory. The institutions presented evidence that there had been no religious services or worship in the federally-financed facilities and that they had been used solely for nonreligious purposes.

The constitutionality of the Act was challenged by citizens and taxpayers of Connecticut who brought suit against Federal officials and four church-related colleges and universities receiving funds under the Act. They challenged the Act as violative of the First Amendment in that it provided aid to churches or church-related institutions.

Acknowledging that constitutional adjudication regarding First Amendment principles does not lend itself to absolutes, Chief Justice Burger speaking for the Supreme Court observed that any standard must be viewed as a "guideline" with which to identify instances in which the objectives of the Religion Clauses have been impaired. Against such a backdrop, with the attendant limitations, the Court has generally applied what has now evolved as the so-called three-part Lemon test:

First the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances or inhibits religion...;finally the statute must not foster excessive government entanglement with religion. *Lemon v. Kurtzman*, 403 U.S. 603, 612 (1971).

The Court found that, without question, the Higher Education Act of 1963 promoted a legitimate secular objective, entirely appropriate for governmental action, i.e., the provision of construction grants for educational facilities to further the aims of higher education.

In addressing the second prong of the test, except for the 20-year provision, the Court determined that the grants did not advance religion. In this regard, the Court took cognizance of the lack of evidence of any sectarian influences relative to the use of facilities. There had been no religious services or worship in them; they had no religious symbols or plaques in or on them; the acquisition of books for libraries were no subject to any restrictions; the use of the language laboratories was limited to the teaching of modern languages having no relationship to religious indoctrination; and the teaching of courses at the institutions was according to the academic requirements intrinsic to the subject matter and the individual teacher's concept of professional standards. Moreover, the Court noted that the evidence showed all the schools to be characterized by an atmosphere of academic freedom rather than religious indoctrination. This was in stark contrast to the pre-college religious schools which the Court has traditionally viewed as virtually an extension of the sponsoring church. See *Lemon*, 403 U.S. at 617; *Tilton*, 403 U.S. at 685.

Similarly, the characterization of these schools as religiously-affiliated but predominantly institutions of higher secular learning formed the touchstone for the analysis of the third prong of the Lemon test. In this regard, the Court stated:

Since religious indoctrination is not a substantial purpose of activity of these church-related colleges and universities, there is likelihood than in primary and secondary schools that religion will permeate the area

of secular education. This reduces the risk that government aid will in fact serve to support religious activities. Correspondingly, the necessity for intensive government surveillance is diminished and the resulting entanglement between government and religion lessened. *Id.* At 687.

The majority opinion further noted that "[t]here is substance to the contention that college students are less impressionable and less susceptible to religious indoctrination" than pre-college church school children. 403 U.S. at 686. Thus, the need for close and continuing surveillance is further reduced.

The Court did hold that the existence of the possibility of a religious use for a grant financed activity after the 20-year period, when the structure might still have substantial value, trespassed First amendment principles, and consequently struck down the time limitation contained in the statute.

The *Roemer* decision involved a Maryland statute which authorized the payment of State funds for annual grants to private institutions of higher learning which met certain minimum criteria and refrained from awarding only seminarian or theological degrees. The grants were noncategorical in nature, but the statute was later amended to specifically prohibit the use of funds for any sectarian purposes. The program was administered by the Maryland Council for Higher Education, a State agency. A suit was brought by four Maryland citizens and taxpayers challenging the statutory scheme as violative of the Establishment Clause of the First Amendment and claiming that appellees, four colleges affiliated with the Catholic Church, were constitutionally ineligible for State aid.

As for the first prong of the *Lemon* test, the Court summarily concluded that the Maryland statute had a laudible secular purpose, supporting private higher education as an economic alternative to higher public education. The focus of the Constitutional inquiry was thus again limited to an application of the second and third parts of the *Lemon* test.

In an attempt to provide more meaningful guidance regarding the second test, the Court revisited a refinement added in *Hunt v. McNair* 413 U.S. 734, 743 (1973) :

Aid normally may be thought to have a primary effect of advancing religion when it flows 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*, 426 U.S. at 752.

In addressing this issue, Justice Blackman, speaking for the majority in *Roemer* declared: "To answer the question whether an institution is so 'pervasively sectarian' that it may receive no direct State aid of any kind, it is necessary to paint a general picture of the institution, composed of many elements." 426 U.S. at 758.

The District Court had concluded that the colleges in question were not "so pervasively sectarian." In support of this determination was a finding that despite church affiliation, the colleges were highly autonomous, lacking the supervision and control by the sponsoring religious body which is prevalent in pre-college parochial schools (e.g., attendance not required at religious exercises, mandatory religion or theology courses merely supplement a broad liberal arts program, hiring is not generally made on the basis of religious affiliation). The fact that the applicant institutions were in all cases affiliated with and to

some extent governed by religious organizations did not defeat the finding of the District Court that the colleges were operated in an atmosphere of intellectual academic freedom. The Supreme Court refused to reappraise the evidence and was unwilling to say, based on the record, that the findings of the District Court as to the limited role of religion in particular aspects of the colleges were erroneous.

Under the Hunt refinement, although aid to church-related institutions which are not "so pervasively sectarian" is permissible, such aid may only extend to the secular side. The District Court regarded this requirement as satisfied by the prohibition against sectarian use coupled with enforcement responsibilities of the Council for Higher Education. Thus, absent evidence to the contrary, the Supreme Court was willing to assume that the colleges and the council would carry out their duties and responsibilities in compliance with the State Statute.

Turning to the third prong -excessive government entanglement, as in *Tilton*, the Court placed great significance on the nature and character of the aided institutions. Finding the colleges to be operated substantially free from the pressures of the sponsoring religious body and in an atmosphere of "intellectual and academic freedom," the Court, in language similar to *Tilton*, made the following observation:

As the District Court found, the colleges perform essentially secular education functions, 387 F. Supp. At 1288, that are distinct and separate from religious activity. . . . There is no danger, or at least only a substantially reduced danger, that an ostensibly secular activity - the study of biology, the learning of a foreign language, an athletic event - will actually be infused with religious content or significance. The need for close surveillance of purportedly secular activities is correspondingly reduced. 426 U.S. at 762.

Based on information provided to us by your office and officials of the school, Lane College is a duly licensed and separately incorporated nonprofit educational organization. While affiliated with the CME Church, the school is administered on an overall basis by a Board of Trustees composed mainly of lay persons representing all avenues of professional life. The day-to-day operation of the school is also free from church supervision in an atmosphere of academic and intellectual freedom. In this regard, as a matter of policy, the school adheres to tenets of academic freedom. At the college, religion and theology courses are optional, acting only to supplement a broad liberal arts program. The hiring of faculty is not made on a religious basis and students are chosen without regard to religious affiliation.

Having sated the above, we are of the opinion that the nature of Lane College is quite similar to the schools examined in *Tilton* and *Roemer*. As such, the College cannot be considered "so pervasively sectarian" that public assistance cannot flow to support its secular activities. As for the second component of the Hunt requirement, that public assistance extended only to the secular side, we are satisfied that, as described, the rehabilitation of the dormitory is in all material respects a secular activity. In this determination, we have considered the assurance of college officials that no religious activities will take place in the facility.

It is thus our opinion, based on information made available to us, that it is Constitutionally permissible to provide block grant assistance to rehabilitate the facility, provided the building is not used for sectarian activities. In reaching this decision we do not anticipate the surveillance required to assure compliance

with Constitutional principles will extend beyond normal HUD monitoring requirements, which we consider to be in line with the inspection methods imposed in Tilton and Roemer.

cc:

GC Kenison 8162

GCB Landau 8158

GCB Lester 8158

GCB RF 8158

GCB:Lester:rc 9-17-90 GCB-483-0

1. The Hunt case also considered the Constitutionality of public assistance to colleges. However, because of the indirect nature of the assistance involved, the case is of less significance for the purpose of this inquiry.