OPINION NO. 71-044

Syllabus:

A municipality may not make an outright, unrestricted gift of funds to a nongovernmental organization, regardless of whether or not such organization may be generally engaged in performing a beneficial, public purpose.

To: Joseph T. Ferguson, Auditor of State, Columbus, Ohio
By: William J. Brown, Attorney General, August 24, 1971

I am in receipt of your request for my opinion, which you state, in part, as follows:

"The City of Upper Arlington wishes your opinion as to whether or not it may donate public funds to the Columbus Zoological Park Association, which is in need of financial assistance. The 'Association' is a non-profit corporation operating and managing the Columbus Zoo for the City of Columbus.

"May a municipality operating under charter donate public funds to a private non-profit corporation which manages and operates a zoo for another municipality?"

From the materials submitted with your request, it appears that the City of Upper Arlington wishes to donate funds to an association organized not for profit, that operates the Columbus Zoo under contractual arrangements with the City of Columbus. (No question is involved respecting the City of Columbus.) Nothing appears in the materials to indicate that the proposed donation is restricted in any way but, rather, appears to be a complete and unconditioned grant of public funds to a corporation not for profit, whose purposes may be characterized as of a charitable, public purpose type.

Restrictions on grants of state funds were explored generally in the various opinion filed in State, ex rel. v. Defenbacher, 164 Ohio St. 142 (1955), where the issues were considered from a variety of perspectives. The decision allowed the payment of state money to various veteran's organizations pursuant to provisions of the state appropriation act. Four of the judges entertained doubt concerning the unconstitutionality of the grant and, accordingly, upheld the constitutionality of it. No purpose would be served here by extensive analysis of the various views expressed. Certain conclusions, however, may be drawn with reasonable certainty.

First, the grants involved were made by Act of the General Assembly. While the minority felt the grants could only be made pursuant to specific legislation, the majority expressed the view that the appropriation act alone was sufficient.

Second, some public purpose must be served by the grants. The majority felt the recited purpose of "rehabilitation of war veterans and for the promotion of patriotism" was sufficient.

Third, some limitations on the use of the funds must be specified in order to insure they are used for a public purpose. The majority felt that the semi-annual reports of expenditures required as a condition of further expenditures was satisfactory.

Fourth, the language of the majority indicates that the extreme limit on grants of public funds was not only explored but had been reached in that case.

All the judges agreed that public moneys could be used

only for a public purpose. That doctrine rested on Article VIII, Section 4, Ohio Constitution, applicable to the state itself, which is as follows:

> "The credit of the state shall not, in any manner, be given or loaned to, or in aid of, any individual association or corporation whatever; nor shall the state ever hereafter become a joint owner, or stockholder, in any company or association in this state, or elsewhere, formed for any purpose whatever."

State, ex rel. Leaverton v. Kerns, 104 Ohio St. 550 (1922), had held that such provision does not prevent grants being made to corporations or associations not for profit where the purpose of the grant is a public one. Neither the majority nor minority in Defenbacher, supra, entertained any doubt about the correctness of that holding. Donees of public funds therefore are not restricted as to type of organization by the above quoted provision, with the exception of private business entities. The grant itself, however, must be made for a public purpose. Both majority and minority also concurred in the view that some control must be imposed to give reasonable assurance that the funds are actually used for the granted purpose. See, also, McGuire v. Cincinnati, 35 Ohio L. Abs. 423, 424 (1941).

As heretofore stated, Defenbacher, supra, relates to the limitation on state power. It has been discussed extensively, however, because of the analyses contained in the various opinions. Such analyses are appropriate, also, to the restrictions on municipalities, as contained in Article VIII, Section 6, Ohio Constitution, which is as follows:

> "No laws shall be passed authorizing any county, city, town or township, by vote of its citizens, or otherwise, to become a stockholder in any joint stock company, corporation, or association whatever; or to raise money for, or to loan its credit to, or in aid of, any such company, corporation, or association: provided, that nothing in this section shall prevent the insuring of public buildings or property in mutual insurance associations or companies. Laws may be passed providing for the regulation of all rates charged or to be charged by any insurance company, corporation or association organized under the laws of this state, or doing any insurance business in this state for profit. (As amended September 3, 1912.)"

That provision has also been construed to require funds to be used for a public purpose. Bazell v. Cincinnati, 13 Ohio St. 2d 63 (1968); State, ex rel. McElroy v. Baron, 169 Ohio St. 439 (1959); State, ex rel. Gordon v. Rhodes, 156 Ohio St. 81 (1951). Those cases were concerned with publicly owned property and not the

grant of funds. In light of the similar language used by the Supreme Court as to both Sections 4 and 6, supra, and the evident similarity of purpose of the two Sections, it is reasonable to conclude that the legal principles applicable to the state with respect to grants of funds are equally applicable to municipalities.

The cases cited above with respect to municipalities, accorded the legislative authorities thereof wide latitude in determining that the projects they desired to foster were in the public interest, latitude substantially as broad as that accorded the General Assembly in Defenbacher, supra.

Applying these principles to the subject matter of your question, it may be concluded that the grant of funds by a city to a corporation not for profit is not objectionable. State, ex rel. v. Kerns, supra; State, ex rel. v. Defenbacher, supra. Likewise, the fostering of a zoo is a public purpose and the grant of funds for that purpose is not objectionable. McGuire v. Cincinnati, supra. (Since the type of legislative source for the proposed donation is not described in your request, i.e., charter, legislative ordinance or appropriation, it is not necessary here to consider more than the standards applicable to a donation.)

This leaves for consideration the third element, that some limitations must be imposed in order to assure that the funds are actually used for the prescribed purpose. Absent such limitation, the recipient could use the funds in some way not directly connected with the public purpose, e.g., as a bonus to the chief administrative employee. Put in other terms, the existence of the limitation sets a standard. The standard may then be enforced by the donor by appropriate devices, such as reports, audits, etc. In this respect, I believe the donation involved here fails in meeting the necessary standards for grant of public funds. That conclusion rests on my understanding that the City of Upper Arlington proposes to make an outright, unrestricted gift of funds to the Columbus Zoo Association.

In specific answer to your question, it is my opinion and you are so advised that a municipality may not make an outright, unrestricted gift of funds to a nongovernmental organization, regardless of whether or not such organization may be generally engaged in performing a beneficial, public purpose.