

OFFICIAL OPINION NO. 08-02, Sale of State land for economic development

STATE OF SOUTH DAKOTA  
OFFICE OF  
THE ATTORNEY GENERAL

April 28, 2008

The Honorable Jarrod R. Johnson  
Commissioner School & Public Lands  
500 E. Capitol Avenue  
Pierre, SD 57501-5070

OFFICIAL OPINION NO. 08-02

**Sale of State land for economic development**

Dear Commissioner Johnson:

You have requested an official opinion of this Office based upon the following facts:

FACTS:

Recently your office was approached by the Governor's Office of Economic Development, which is working with a private company that wishes to acquire and develop a tract of State owned land managed by your Office. The Governor's Office of Economic Development wishes to know whether a city or local economic development organization can obtain the land in question pursuant to South Dakota Codified Laws 5-9-34 and 5-9-35 for the purpose of economic development, and then rent the land to the private company that wishes to develop it. It also wishes to know whether, under these statutes, economic development constitutes a "public purpose."

Based on the foregoing facts you have asked the following question:

QUESTION:

May the Office of School & Public Lands, acting pursuant to SDCL 5-9-34 and 5-9-35, sell small tracts of land to a city or a local economic development organization so that the land can be leased to a private company for economic development?

IN RE QUESTION:

SDCL 5-9-34 and 5-9-35 provide as follows:

5-9-34.

Whenever a civil, state, religious, or public organization makes an application for the purchase of any common school or endowment land to be used for public purposes, not exceeding one hundred sixty acres, and files a plat and a statement of the purpose for which the land is to be used in the Office of the Commissioner of School and Public Lands, the commissioner may appraise the tract in the manner provided by law for the appraisalment of school and public lands.

5-9-35.

Upon the payment of the full amount of the appraised price of such tract, a conveyance may be executed by the Governor, attested by the commissioner of school and public lands, with the seal affixed, conditioned that should such lands cease to be used for two successive years for the purpose stated in the application, the title shall revert to the state.

These statutes allow civil, state, religious, and public organizations to apply for purchase of common school or endowment lands 160 acres in size or less, to be used for "public purposes." A plat must be filed with the Office of School & Public Lands and an appraisal must be performed by the Commissioner. The organization then pays the full amount of the appraisal in cash. The Governor and Commissioner then execute an appropriate conveyance, which must contain a reversion if the lands cease to be used for the stated purpose for two years.

Your question involves interpretation of these two statutes. When interpreting a statute, I follow the applicable case law from the Supreme Court of South Dakota. The Court stated the following in 1993:

The purpose of statutory construction is to discover the true intention of law which is to be ascertained primarily from the language they expressed in the statute. The intent of a statute is determined from what the legislature said, rather than what the courts think it should have said, and the court must confine itself to the language used. Words and

phrases in a statute must be given their plain meaning and effect. When the language in a statute is clear, certain, and unambiguous, there is no reason for construction, and the court's only function is to declare the meaning of the statute as clearly expressed. Since statutes must be construed according to their intent, the intent must be determined from the statute as a whole, as well as enactments relating to the same subject. But, in construing statutes together it is presumed that the legislature did not intend an absurd or unreasonable result. When the question is which of two enactments the legislature intended to apply to a particular situation, terms of a statute relating to a particular subject will prevail over the general terms of another statute.

U.S. West Communications, Inc. v. Public Utilities Commission, 505 N.W.2d 115, 122-23 (S.D. 1993) and cases cited. The Court has repeatedly reaffirmed this method of statutory construction. See Unruh v. Davison County, 2008 S.D. 9, 744 N.W.2d 839; Fair v. Nash Finch Company, 2007 S.D. 16, ¶ 7, 728 N.W.2d 623 at 628; McKittrick v. McKittrick, 2007 S.D. 44, ¶ 8, 732 N.W.2d 404, 407; Sioux Falls Argus Leader v. Hagen, 2007 S.D. 96, ¶ 13, 739 N.W.2d 475, 480; Benson v. State, 2006 S.D. 8, ¶ 71, 710 N.W.2d 131, 158; Martinmaas v. Engelmann, 2000 S.D. 85, ¶ 49, 612 N.W.2d 600, 611; Loesch v. City of Huron, 2006 S.D. 93, ¶ 8, 723 N.W.2d 694, 697; Dahn v. Trowsell, 1998 S.D. 36, ¶ 14, 576 N.W.2d 535, 539; Moss v. Guttormson, 1996 S.D. 76, ¶ 10, 551 N.W.2d 14, 17.

The United States Supreme Court has, in condemnation cases, differentiated between a "public purpose" and "public use." Kelo v. City of New London, 545 U.S. 469, 488-89, 125 S.Ct. 2655, 2668, 162 L.Ed.2d 439, 456-57 (2005). In that case, the Court held that "public purpose" is broader, and its more natural interpretation is that "public purpose" does not require an actual use by the public. The term "public use" on the other hand, would require use by the public or some limited portion of it. Id. at 2668. The South Dakota Supreme Court has also recognized the difference between "public purpose" and "public use." Illinois Central Railroad Company v. East Sioux Falls Quarry Company, 33 S.D. 63, 77, 144 N.W.2d 724, 728 (1913); quoted and explained, Benson v. State, 2006 S.D. 8, ¶ 42, 710 N.W.2d at 146. Both the United States Supreme Court and the South Dakota Supreme Court have, therefore, contrasted public use with public purpose. The statute in this instance uses the broader term "public purpose," and the legislature's use of this judicially defined term suggests that the broader interpretation applies to SDCL 5-9-34. The statute therefore includes economic development in its purposes.

This is confirmed by a number of cases from the South Dakota Supreme Court that have explicitly found that economic development is a public purpose. Meierhenry v. City of Huron, 354 N.W.2d 171, 176 (1984) (use of tax increment financing, although it may provide a substantial benefit to a private developer, is constitutional because urban redevelopment is a public purpose); In the Matter of the Request for an Advisory Opinion Concerning HB 1255, 456 N.W.2d 546, 458 (1990) (State may own and conduct agricultural processing facility because it is proper for State to promote, stimulate, and develop general economic welfare and prosperity of the State); In the Matter of the Master Contract Between the Oahe Conservancy Subdistrict and the United States, 85 S.D. 443, 459, 185 N.W.2d 682, 691 (1971) (State has had power to create South Dakota Conservancy District for, among other purposes, providing for the future economic welfare and prosperity of the people); Clem v. City of Yankton, 83 S.D. 386, 401-402, 160 N.W.2d 125, 133 (1968) (under proper legislative grant, cities may issue revenue bonds to acquire, equip and rent facilities to promote economic welfare of the State, since economic welfare and prosperity of the State are valid public purposes. Whether particular action is a valid public purpose is largely within the discretion of the legislature.)

According to the cases setting out the rules of statutory construction, I am to give the words of the statute their plain meaning and effect. In this instance, the plain meaning and effect of "public purposes" is broad, in line with the South Dakota Supreme Court cases that have defined this concept. The legislature could have used more limited language by restricting the Commissioner's power to sell land under these statutes to circumstances involving a public use. The legislature did not, however, enact the statute in that fashion. Rather, it allowed purchase of land for "public purposes."

It is also enlightening that the legislature allowed organizations other than strictly public or governmental bodies to purchase public lands under this statute. Had it sought to restrict the statute to "public use," it very likely would have restricted the purchasers to public or governmental organizations. It appears to me that the legislature recognized that organizations other than governmental bodies may promote "public purposes" by purchasing land. This argues strongly that the legislature did not intend to restrict uses under the statute by any test other than the broad "public purpose" test that has been repeatedly explained in the South Dakota Supreme Court cases.

Therefore, the answer to your question is as follows: yes, a city or local economic development organization may obtain land under SDCL 5-9-34 and 5-9-35 for the purpose of economic development.

Respectfully submitted,

Lawrence E. Long  
Attorney General

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