

OFFICIAL OPINION NO. 70-41, Advertising levy of city; uses of funds; payments to commercial clubs.  
SDCL 9-12-11

STATE OF SOUTH DAKOTA  
OFFICE OF  
THE ATTORNEY GENERAL

August 14, 1970

Eldon Stoehr, Auditor General  
State of South Dakota  
Pierre, South Dakota 57501

OFFICIAL OPINION NO. 70-41

**Advertising levy of city; uses of funds; payments to commercial clubs. SDCL 9-12-11**

Dear Mr. Stoehr:

You have requested my interpretation and answer to the questions submitted relative to SDCL 9-12-11:

1. Can the word "advertising" as used in such statute be interpreted to include memberships, entertainment, salaries, travel and other similar expenditures?
2. Does this statute authorize the transfer of moneys raised by such tax levy therein authorized, in a lump sum to a commercial club in monthly, quarterly or semi-annual installments or allotments?
3. If Question 2 is answered in the affirmative, would such commercial club be required to establish separate accounting and bank accounts of such funds, subject to audit by the South Dakota Department of Audits and Accounts?

SDCL 9-12-11 originated in Ch. 244 of the Session Laws of 1911, as such was broadened or amended by Ch. 124 of the Laws of 1913. Initially, such tax levy not exceeding one mill on the taxable property within the municipality was authorized for the "purpose of creating a fund for the purpose of advertising the city's possibilities and advantages to the world as a home and as a location for factories and other legitimate enterprises. In the codification of

such statutes for the 1919 Code (Sec. 6170(15) the Legislature added the provision of using all or a portion of such fund to a commercial club incorporated under the laws of South Dakota for payment of expenses incurred for advertising and publicity as so provided.

The statute was again, revised for the 1939 Code (SDC 45.0202(13) and appears in identical substantive language in SDCL 9-12-11 which reads as follows:

Every city shall have power to levy a tax not exceeding one mill each year on each dollar of taxable property within the city for the purpose of advertising the city and in case there is in such city a commercial club organized and incorporated under the laws of the state for the purpose of developing such city, the funds so raised or any part thereof may be paid to such organization for expenses incurred for advertising such city.

Before considering your questions, it would seem proper to discuss the purpose of this statute and its interpretation by my predecessors.

Initially, it is my opinion that while the language used may be in a slightly different form, the fundamental purpose of such statute, that is "to advertise the city's possibilities and advantages to the world as a home and as a location for factories and other legitimate enterprises" has not been changed by shortening such purpose to "advertising the city." It should also be pointed out that all or a portion of the funds derived from such tax collection cannot be turned over to any entity. Such entity must be "a commercial club organized for the purpose of developing such city," and must be incorporated under the laws of South Dakota.

This statute has been subject to but three previous opinions of this office. In 1923-24 AGR 79 it was held that such funds could not be used by a commercial club to construct a free campground in the city. It was there held that the term "advertising" as used in such statute refers to printed matters sent out to the world. That the use of such funds for a public campground, a triumphal arch at the entrance to the city, to send the city band to Chicago or some city outside of South Dakota, laudable as such purposes may seem, was not encompassed in the term "advertising."

In 1963-64 AGR 187 it was held that moneys from such funds could be used by the city in printing and distributing a brochure which explained the needs of the city for the issuance of revenue bonds for a new sewerage disposal plant. (Whether to agree or disagree with the conclusion therein reached is unnecessary at this time.) It is significant that such

"advertising" was limited to printed matters. Attention is also called to the inclusion of the dictionary definition of "advertising."

1923-24 AGR 84. This is the most significant opinion relative to the statute issued from this office. In such opinion it was pointed out that the proceeds collected from tax levy is in a nature of a public trust. That in making expenditures from such public trust, the city and its governing board could no more delegate to other persons, anymore than it could delegate to others, the duty to levy such tax. It was further pointed out that even when proceeds of such funds were turned over to a commercial club, such moneys could neither be used to lend financial aid to those whom the advertising was designed to attract to the city, any more than such funds could be used to maintain such commercial club, including payment of expenses and salaries of its officers and employees.

In a most significant statement, my predecessor stated:

The expenditure of no part of this fund should be left to the discretion of the commercial club or its officers, or devoted to the payment of the expenses of such club in which are included the salaries and wages of its officers and employees. The governing body should specify the amount and kind of advertising and publicity to be provided and in this manner actually control the expenditure of money from this fund. The money is turned over 'for payment of expenses incurred' and should, therefore, not be delivered to the commercial club until satisfactory proof of the advertising done and of the expenses thereof actually incurred shall have been submitted to the governing body.

Sober and mature reflection convinces me that this last statement is just as true today as when it was written. Any other interpretation would be violative of the trust under which such funds are collected, and would be violative of the principle of delegation of powers.

The courts of the United States have been called upon to define "advertising". All agree that "advertising" means to call to the public attention, by emphasizing desirable qualities, the object of such advertising, in order to arouse a desire to purchase, invest, patronize, or the like, in the object of such advertising. (See **Planned Parenthood Committee v. Maricopa County**, 92 Ariz. 231, 375 P 2d 719; **Ansel v. Brooks**, 141 Conn. 288, 106 A 2d 152; **State v. Guardian Foundation of Texas** (Tex. Civ. App.) 128 SW 2d 882; and **Rast v. Van Deman & Lewis**, 240 US 342, 36 S. Ct. 370, 60 L Ed 697; LRA 1917A 421, Ann. Cas. 1917B 455). Although most of these cases state that advertising ordinarily is in the form of printed notice to the public, the later cases are pointing out that advertising may be

done by printed matter or orally. (See **State v. Cusick**, 248 Iowa 1168, 84 NW 2d 554; and **McDonough v. Board of Education**, 20 Misc. (2) 98, 189 NYS 2d 401.) It is my opinion that the main feature of "advertising" is not whether or not such may be printed, but is whether or not such is calling the attention of the general public to a certain matter in order to encourage the general public to accept the same as desirable.

With these preliminary considerations of the statutes in mind, I should consider the application of such principles to your specific questions.

**Question 1.** This question cannot be categorically answered YES or NO. The determination of the limitations to be placed upon such expenditures, either by the municipality itself or by a commercial club, must be left to the sound, impartial discretionary determination of the governing board of such city, as to whether or not in expending moneys from such public trust fund such are being expended to advertise the city. If its impartial determination is that a particular expenditure is within the sphere of advertisement, in the absence of a showing of an abuse of discretion, such determination will stand. It is not a showing of an abuse of discretion to state "if I were determining how to use such money, I would conclude an expenditure as authorized by the city council was not to advertise the city." This is merely an expression of a difference in exercising discretion, and is not a showing of an abuse of discretion.

Therefore, any conclusion that this writer, or the addressee may have as to the benefit of a "booster trip to Chicago to entice business to locate in the City of X, South Dakota," is a mere statement of a declared conclusion within discretion, binding on none. The same could be said if we were to determine buying an industrialist a steak dinner on such booster trip was advertising, but buying him a pre-dinner martini was not.

The determination of the expenditures of the fund by the Legislature is placed within the discretionary determination of the governing body of the city. Such an exercise, in the absence of a showing of impartiality or an abuse of discretion is valid.

**Question 2.** This question must be answered NO. I adhere to the principle enunciated by my predecessor in 1923-24 AGR 84. The governing body cannot turn over a lump sum of money, weekly, monthly, quarterly, or semi-annual allotments, with a general direction, "advertise the city." Rather, the governing body must advise the commercial club if and when the club can give satisfactory proof that it performed a function of advertising for the city, in the manner and form as directed by the governing body of such city, and that such

club expended a designated amount of money to perform such function. Upon receiving proof of performances, and concluding that such advertising was done in the form and manner as directed, and within the monetary limitations as required by the governing body, and determining that the amount of money claimed to have been expended was in fact expended, the governing body should approve of such claim, and direct its payment from the fund received by the collection of the tax levied in pursuance to SDCL 9-12-11.

Because of the answer to Question No. 2 being NO, there is no necessity of answering Question No.3.

Respectfully submitted,

Gordon Mydland  
Attorney General