

OFFICIAL OPINION NO. 75-20, Physical Education Recreation Facility-USD

February 4, 1975

Dr. Robert DeZonia  
Commissioner of Higher Education  
State Capitol  
Pierre, South Dakota 57501

OFFICIAL OPINION NO. 75-20

**Physical Education Recreation Facility-USD**

Dear Dr. DeZonia:

You have requested my opinion as to the Resolution of General Approval of Dakota Dome Development Corporation recently adopted by the Board of Regents of the State of South Dakota.

The resolution concerns the organizational structure of the private foundation which will provide additional financing for the construction of the Dakota Dome.

Briefly, the situation is this: Chapter 148, Laws of South Dakota, 1974, authorized a facility with a cost not to exceed \$8,800,000 and further authorized the South Dakota Building Authority to finance \$5,200,000 of the facilities cost. The Board of Regents was authorized to accept and expend in an amount not to exceed \$3,600,000 any funds obtained by the Board from gifts, contributions or any other source for the purpose of assisting in the project.

Title to the structure would be in the Building Authority. The Authority sells revenue bonds and uses those funds to construct the building. The Authority then leases the building to the State agency for which it was built. The lease rentals are set in the amount sufficient to amortize the bonds of the Authority. At the end of the lease period and full retirement of the Authority's indebtedness for the building, title to the building is conveyed to the leasing state agency. In this case the Building Authority will be the original title holder and lessor, where the Board of Regents will be a lessee of the facility until amortization of the

Authority's bonds for this facility.

The Dakota Dome Development Corporation, hereafter called the "Corporation," was established by a group of interested persons to build the facility allowed by the authorizing act. This corporation proposes to obtain from a group of banks and other lending institutions an irrevocable letter of credit in an amount not to exceed \$3,600,000. The beneficiary of the letter of credit will be the Board of Regents and the letter will be assignable to the Building Authority.

The Board of Regents, after receiving the letter of credit, will assign the same to the Building Authority and thereby receiving funds for the construction of the facility not in excess of the maximum allowed by chapter 148, Laws of South Dakota, 1974. In order to repay the group of banks and other banking institutions for the money expended by the banks pursuant to the terms of letter of credit, the Corporation proposes to transfer to those institutions cash to the extent available and thereafter bonds or notes of the Corporation to be retired in ten years. The Corporation sought and obtained the approval of the general plan in the special resolution 33-1974. The Corporation also desires to execute a sublease agreement with the Board of Regents which would provide that the Corporation would have the right to sell tickets for a certain number of seats to all home games, the right to all food, parking and souvenir concessions for the entire facility for an undetermined period of years and to further sublease the facility for a specified number of days to political subdivisions in the vicinity.

The Corporation proposes to use its revenue from the sale of seating tickets, concessions and rentals, along with gifts and contributions to retire the bonds or notes issued by it. At the conclusion of the Corporation's indebtedness, the Corporation shall be dissolved and all assets and property of the Corporation shall be transferred to the Board of Regents for the purpose of assisting the educational programs at the University.

Concerning this, you have inquired as to whether or not the action of the Board of Regents in the referred-to Resolution would in any way increase the liability of the State of South Dakota or of the Board of Regents as a result of such actions of the nonprofit Corporation.

It is my opinion that the mere action of approval by the Board of Regents and the appointment of directors to the Dakota Dome Development Corporation in no way could be construed to increase the liability of the State of South Dakota beyond that authorized by

the Legislature and the Resolution specifically sets forth the fact that neither the faith, credit nor taxing power of the State of South Dakota, the Board of Regents or the Building Authority is pledged to the payment of the principal of or the interest on such bonds or notes.

You inquire secondly as to the effect of a letter of credit and whether that can be utilized by the Regents and the Building Authority in proceeding on the construction of the building. In other words, whether the term "funds received" as used in section 1 of chapter 148, Laws of South Dakota, 1974, is met when an irrevocable letter of credit is received.

A letter of credit is a commonly used financial instrument whereby the issuer of the letter of credit agrees to honor demands for payment by the beneficiary of the letter of credit so long as the demand for payment complies with the terms established in the letter of credit. SDCL 57-23 covers the use of letters of credit in South Dakota. A clean letter of credit may require only a demand for payment by the beneficiary. 50 Am. Jur. 2d, "Letters of Credit"; *American National Bank and Trust Company v. Banco Nacional of Nicaragua*, 166 So. 8 (Ala. 1936). Clean letters of credit fall within the scope of SDCL 57-23-2 (3). The word "funds" has been defined as a generic and all embracing term which may include in its broader meaning "property of all types," *Moore v. Cavett*, 368 P. 2d 224, 229 (Okl., 1961); *State v. Finney*, 141 Kan. 12, 40 P. 2d 411, 421 (1935) and cases cited therein. South Dakota statutory definition of public funds is in line with this broad definition, SDCL 4-4-2.

It is my opinion that an irrevocable letter of credit, whether clean or documentary, issued by a group of banks with the Board of Regents as the beneficiary and assignable to the Building Authority meets the "funds received" standard set forth in section 1, chapter 148, Laws of South Dakota, 1974, so long as under the terms of the letter the beneficiary's demand for payment will be honored during the course of construction as such funds are needed, conditioned only upon certifications of the Building Authority to the issuer as to such need.

Additionally, you asked questions that have to do with leasing and subleasing of the premises of the facility. Specifically these questions are:

1. Can the Board of Regents lease a specified number of seats to a charitable organization?

2. Can the lease concerning concessions and parking be negotiated without following the bidding process?
3. Are there any restrictions or limitations on the monetary value of the lease; i.e. can the Regents lease 4,000 seats for the sum of \$1.00 or does the form of lease have to be on the basis of a discounted purchase price per seat?
4. Does the Board of Regents have the authority to lease or assign the income of the concession and/or parking operations to the charitable organization?
5. May the Board of Regents rent for a nominal fee the total facility or any portion of it to the charitable organization for the purpose of the charitable organization sponsoring fund raising events?

With regard to questions 1 and 4, the South Dakota Building Authority adopted the following rules pertaining to leasing arrangements for projects under their jurisdiction:

39:02:10:01. *Leasing of facilities.* The authority shall lease facilities to those boards, officers, departments, commissions, agencies, or persons as authorized by statute.

39:02:10:02. *Subleasing of Facility.* Such lessees may sublease the facility for such period of time, in such manner, and upon such terms as the lessee may from time to time determine. Any such sublease shall at all times be subject to the paramount, absolute, and unqualified power and right of the authority to terminate the lease, and any sublease in connection therewith, in the event of a default in any term or covenant therein by the lessee.

With these rules in effect, you do have the authority to sublease facility as planned; in addition SDCL 13-49-13 does give the Board of Regents "power to govern and regulate each institution under its control in such manner as it shall deem best calculated to promote the purpose for which the same is maintained, and shall have charge and supervision of all buildings and property connected therewith." With reference to questions 2 and 5, there is no specific law requiring public bidding on the leasing of public facilities. SDCL 13-49-13 does give the Board of Regents power to lease portions of a facility under its control so long as the lease is in the public interest. With reference to question 3, the only restriction that is placed on the monetary value of the lease is that if the contract is to be valid there must be

monetary consideration for services received.

It is my opinion that the proposed financing arrangement is legally permissible.

Respectfully submitted,

WILLIAM J. JANKLOW  
ATTORNEY GENERAL

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