

OFFICIAL OPINION NO. 87-11, Nonprofit corporation

April 21, 1987

Steven M. Christensen  
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P.O. Box 392  
Deadwood, South Dakota 57732

OFFICIAL OPINION 87-11

**Nonprofit corporation**

Dear Mr. Christensen:

You have requested an official opinion from this office based upon the following factual situation:

*FACTS:*

The city of Deadwood is considering joining with a group of its citizens to form a nonprofit corporation for the economic development of the City of Deadwood. The City of Deadwood purchased real estate from Burlington-Northern Railroad when it abandoned its line in this area. The City would like to see this property developed so as to increase the tax base and feels that SDCL 9-27-36 and SDCL 9-27-37 provide a good mechanism for putting the property into use. For the purpose of your opinion, you may assume that any proceeds realized by the nonprofit corporation would be returned to the City treasury.

Based upon the foregoing facts, you have asked the following questions:

*QUESTIONS:*

1. Can the City of Deadwood pursuant to SDCL 9-27-36 and SDCL 9-27-37 transfer real property to a nonprofit corporation for that corporation to sell or lease said property to private entities without having to

go through the surplus property provisions set forth in SDCL 9-27-18 through 28?

2. Can the City Commissioners be members of the nonprofit corporation?

*IN RE QUESTION NO. 1:*

SDCL § 9-27-36 provides:

Every municipality shall have power to lease or sell on a negotiated basis and to convey any of its real property to a county or the state or another municipality, or to a nonprofit local industrial development corporation as defined by § 9-27-37 and located therein, to be used by such grantee for an authorized public purpose or industrial development purpose as enumerated in § 9-54-1. Such lease or sale shall be authorized on the terms and in the manner provided by resolution of the governing body.

To the extent that § 9-27-36 is inconsistent with the surplus property provisions of SDCL §§ 9-27-18 to 9-27-28, inclusive, § 9-27-36 takes precedence over the general surplus property statutes because the exception contained in § 9-27-36 is a more specific statute (the more specific statute generally controls over the more general statute) and a more recently enacted statute (the newer statute generally supersedes the older statute).

Therefore, the answer to your first question is yes.

*IN RE QUESTION NO.2:*

Prior to answering your second question, let me respond to your factual statement that it may be assumed "that any proceeds realized by the nonprofit corporation would be returned to the City treasury."

In my view, a nonprofit corporation, created pursuant to SDCL 9-27-37, is a legal entity separate and distinct from any city government. Therefore, it is not permissible to commingle city and corporate funds, although the Articles of Incorporation of the nonprofit corporation could provide that any excess funds of the corporation and all property upon dissolution of the corporation would be transferred to the City.

In answer to your second question, however, it is my opinion that a city commissioner may be a member of a nonprofit industrial development corporation provided that the commissioner is not in violation of SDCL §§ 3-16-7 or 6-1-1, reading as follows:

3-16-7. Every public officer, being authorized to sell or lease any property, or make any contract in his official capacity, who voluntarily becomes interested individually in such sale, lease, or contract, directly or indirectly, is guilty of a Class 2 misdemeanor.

6-1-1. It shall be unlawful for any officer of a county, municipality, township or school district, who has been elected or appointed, to be interested, either by himself or agent, in any contract entered into by said county, municipality, township or school district, either for labor or services to be rendered, or for the purchase of commodities, materials, supplies, or equipment of any kind, the expense, price or consideration of which is paid from public funds or from any assessment levied by said county, municipality, township or school district, or in the purchase of any real or personal property belonging to the county, municipality, township or school district or which shall be sold for taxes or assessments or by virtue of legal process at the suit of such county, municipality, township or school district. Such contract shall be null and void from the beginning.

See also South Dakota Constitution, Article 11, § 11.

The follow-up question is under what circumstances a commissioner is directly or indirectly interested in a city contract. The answer to this question depends upon the specific facts in each case. I will, however, endeavor to provide some general guidelines.

In my opinion, the interest restricted by §§ 3-16-7 and 6-1-1 is a financial interest and, therefore, one must review the nature of the pecuniary gain received by the commissioner from a city contract.

In my view, a commissioner is limited to receiving actual out-of-pocket expenses for service on the corporate board - and no more. The commissioner may not receive salary, per diem, or other pecuniary advantage by virtue of service on the board.

Parenthetically, the general benefit to a community of economic development - i.e., more business for a commissioner who operates a mainstreet business - is not, in my opinion, a sufficient interest to violate §§ 3-16-7 and 6-1-1.

Therefore, the answer to your second question is a guarded yes.

Sincerely,

Roger Tellinghuisen  
ATTORNEY GENERAL