

OFFICIAL OPINION NO. 92-06, Use of Municipal Non-ad Valorem Tax Revenues for Promotion Advertising of Archaeological Site Outside of City and State.

June 29, 1992

Honorable Harvey Krautschun
State Representative
Post Office Box 157
Spearfish, SD 57783-0157

OFFICIAL OPINION NO. 92-06

Use of municipal non-ad valorem tax revenues for promotion advertising of archaeological site outside of city and state

Dear Representative Krautschun:

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

FACTS:

The City of Spearfish, pursuant to SDCL ch. 10-52, has imposed an additional municipal non-ad valorem tax at the rate of one percent upon the gross receipts of lodging, alcoholic beverages, prepared foods and admissions ("hospitality tax"). A request has been made for the city to expend revenues raised by the hospitality tax to provide matching funds for the promotion and advertising of a significant archaeological site in Wyoming 14 miles west of Spearfish, four miles over the state line. Spearfish is the nearest population center to the site.

Several residents and businesses located in Spearfish are encouraging the city to expend hospitality tax revenues to support the development of this attraction. A University of Wyoming study has projected the site's visitation to be 500,000 tourists a year, with a projected economic impact to this area of \$30.35 million annually. It is the position of supporters support of the this attraction with the use of these revenues that they may legally be expended. Opponents argue that the language in SDCL 10-52-8 and relevant Attorney General's opinions make such appropriation illegal because the attraction is not located within the city limits of Spearfish.

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

QUESTIONS:

May revenues raised pursuant to SDCL 10-52-8 be used for promoting and advertising an attraction which is located outside of the city limits?

Does the answer to Question No. 1 change if the "attraction" is located across state boundaries?

In Re Question No. 1:

SDCL 10-52-8 provides:

Notwithstanding the tax rate limitations of 10-52-2 or 10-52-2.1, any incorporated city or town may impose an additional municipal non-ad valorem tax at the rate of one percent upon the gross receipts of all leases or rentals of hotel, motel, campsites or other lodging accommodations within the municipality for periods of less than twenty-eight consecutive days, or sales of alcoholic beverages as defined in 35-1-1, or establishments where the public is invited to eat, dine or purchase and carry out prepared food for immediate consumption, or ticket sales or admissions to places of amusement, athletic and cultural events, or any combination thereof. The tax shall be levied for the purpose of land acquisition, architectural fees, construction costs, payments for civic center, auditorium or athletic facility buildings, including the maintenance, staffing and operations of such facilities and the promotion and advertising of the city, its facilities, attractions and activities. Such taxes shall conform in all respects to the state sales and use tax on such items with the exception of the rate.

SDCL 9-12-11 provides:

A municipality may appropriate money from its general fund to promote itself. If there are commercial clubs, chambers of commerce, or industrial development corporations organized and incorporated as nonprofit corporations under the laws of the state of South Dakota for the purpose of promoting the municipality, the appropriations or any part thereof may be paid to such organizations for expenses incurred for promoting the municipality. Payments to these organizations shall be based on programs previously submitted to the governing board by them and they shall be required to maintain complete records on all their activities

and shall provide a certified audit of those records to the governing board of the municipality at the close of each fiscal period. In lieu of a certified audit, the governing board may accept a financial statement.

My predecessors have construed both of the above statutes when read together as authorizing the city to expend funds from hospitality tax revenues for grants or loans to industries willing to locate in the city; to construct new facilities to be given or loaned without consideration to industries willing to locate in the city; to aid non-profit organizations in the cost construction of facilities for the public, to construct municipal parking lots. See A.G.R. 84-46, A.G.R. 86-16 and A.G.R. 88-07. My predecessors opined that the promotion portion of SDCL 9-12-11 and SDCL 10-52-8 should be broadly construed to encompass anything which contributes to the growth, enlargement, or prosperity of the city or otherwise furthers, encourages or advances the same. It was also opined that the Legislature in enacting the above provisions intended to delegate broad discretion to local officials to determine the needs of their communities and to determine whether or not financial contributions by the city would constitute promotion of the city or its attractions and activities.

I concur with my predecessors that under SDCL 9-12-11 and SDCL 10-52-8, cities are given broad discretion in determining what constitutes promotion. This discretion, however, is not unlimited. For the purposes of your first question, it is my opinion that the phrase "the promotion and advertising of the city, its facilities, attractions and activities . . ." [emphasis supplied] in SDCL 10-52-8 and the phrase "[a] city may appropriate money from its general fund to promote itself. . ." [emphasis added] in SDCL 9-12-11 are controlling. Applying the standard rules of statutory construction, it is my opinion that the Legislature in using the words "city," "its" and "itself" meant to restrict the expenditure of hospitality tax revenue to those facilities, attractions and activities within the city's jurisdictional confines. Thus, it is my opinion that the City of Spearfish cannot expend funds for the purpose of construction, development or operation of the archaeological site. However, the city, through billboards and other promotional tools, may advertise the city as a destination or stop for tourist visiting the archaeological site, but may not promote solely the site itself. The above statutes just cannot be construed as authorizing the city to expend funds on facilities, attractions and activities that are outside of the jurisdictional confines merely due to the fact that there may be some positive economic impact on the city itself. This interest is too indirect and goes beyond the statutorily authorized expenditure activities.

I realize that this opinion does not convey a great deal of guidance, but the statute does not contain a great deal of depth; construction of a statute does not guarantee a practical result in all cases. I suggest your unusual situation was not anticipated. I encourage you to consider legislative clarification either way.

Therefore the answer to your first question is a qualified "no."

IN RE QUESTION NO. 2:

Given the answer to question 1, I find it unnecessary to answer your second question.

Respectfully submitted,

MARK BARNETT
ATTORNEY GENERAL

MB:JPH:sks