

OFFICIAL OPINION NO. 94-05, Leases of School and Public Lands

April 25, 1994

The Honorable Curt Johnson
Commissioner of School and Public Lands
500 East Capitol Avenue
Pierre, SD 57501-5070

OFFICIAL OPINION NO: 94-05

Leases of School and Public Lands

Dear Commissioner Johnson:

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

FACTS:

Your office has begun a planning process for utilization of the South Dakota Human Services Center Campus, Yankton, South Dakota, and would like clarification on the leasing and use of that particular real estate. You have observed that SDCL 5-1-7.2 provides that you may lease lands for commercial purposes.

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

QUESTION NO. 1:

What types of leases does the Commissioner of School and Public Lands have the authority to execute?

QUESTION NO. 2:

Are there restrictions as to the length of a nonagricultural lease?

QUESTION NO. 3:

Are there restrictions as to occupancy via lease by another unit of government, including federal, county or city?

QUESTION NO. 4:

Is it permissible to lease public land to a private, nonprofit corporation?

QUESTION NO. 5:

May the Commissioner of School and Public Lands enter into contracts with local development corporations for development projects?

QUESTION NO. 6:

Can the purpose and use of the entire Human Services Center Campus be changed? Can only a portion of its use be changed?

QUESTION NO. 7:

May the South Dakota Building Authority release designated tracts of buildings so that new uses may be made of the property?

IN RE QUESTION NO. 1:

The authority of the Commissioner of School and Public Lands to enter into leases is established in SDCL Title 5. Traditionally, the Commissioner has entered into agricultural and grazing leases of school and public lands pursuant to SDCL ch. 5-5. The Commissioner also may grant mineral leases on school and public lands under SDCL ch. 5-7. Further, the Commissioner has authority under the administrative provisions of SDCL ch. 5-4 to grant various kinds of easements, rights-of-way and other use licenses.

I have determined, however, that the types of leases your question suggests may be accomplished best under SDCL 5-1-7.2 if they are to be entered into by the Commissioner. That statute reads as follows:

In addition to agricultural and grazing leases pursuant to chapter 5-5 and mineral leases pursuant to chapter 5-7, the commissioner of school and public lands may, from time to time, as circumstances warrant, provide, by rules promulgated pursuant to chapter 1-26,

for the establishment of additional types of subsidiary leases on school and public lands. Such leases may be for commercial or forestry purposes and shall be both economical and consistent with the stewardship of the schools and public lands. Rules promulgated pursuant to this section may provide for all necessary considerations including the creation, marketing, administration and termination of such leases.

Please note that the statute requires that the leases be for "commercial" or "forestry" purposes and that they fulfill various criteria. Lacking any statutory definition, the term "commercial" is given its common, ordinary meaning. SDCL 2-14-1. Dictionary definitions of the term indicate that "commercial" means either characteristic of commerce, or pertaining to business or doing business for a profit. The term thus defined is a broad one and should be viewed from the standpoint of the State; that is, such "commercial" leases could be issued in furtherance of a profit motive by the State as well as in furtherance of the business of the lessee. I also note that, like their component terms, statutes are interpreted by their plain and ordinary meaning. *Cimarron Ins. Co. v. Croyle*, 479 N.W.2d 881, 886 (S.D. 1992).

No leases may be constructed under the statute unless you adopt rules promulgated pursuant to chapter 1-26 to establish with more particularity the additional types of subsidiary leases that you wish to develop. In addition to designating types of leases, the rules also must detail all necessary considerations for entering into such leases, including procedures and means for creation, marketing, administration and termination of the leases. Thus, before the Code section is implemented, you will need to promulgate fairly detailed rules.

IN RE QUESTION NO. 2:

You next ask whether there are any restrictions on the length of nonagricultural leases. I first note that no such restrictions are provided in SDCL 5-1-7.2. On the basis of the statute's language, it is my opinion that the rule-making authority extended to you in that section is such that you by rule may adopt restrictions on the length of nonagricultural leases. I note, in passing, that agricultural leases are issued for a maximum of five years, but are renewable for an additional five years. SDCL <185><185> 5-5-12; 5-5-25; 5-5-27. Although, as I noted above, SDCL 5-1-7.2 contains no such restriction, general law limits nonagricultural leases to ninety-nine years. See SDCL 43-32-2. It is my opinion that this

limitation is applicable here; thus, your rules may not provide for a nonagricultural lease term longer than ninety-nine years.

IN RE QUESTION NO. 3:

Your next question is whether there are restrictions as to occupancy via lease by another unit of government. I assume you wish first to ask whether you can grant a commercial lease to another unit of government and, second, whether an entity leasing from you could sublease to a governmental entity.

Under the view that I took in Question No. 1 ("commercial" leases can be interpreted broadly to include a profit motive by the State), it is my conclusion that you can lease to a governmental entity or to a private entity subletting to a governmental unit.

IN RE QUESTION NO. 4:

The answer to Question No. 3 above also provides my legal analysis and affirmative answer to your fourth question relating to private, nonprofit entities.

IN RE QUESTION NO. 5:

Your fifth question is whether contracts may be entered with local business entities for development projects. SDCL 5-1-7.2 provides little detail on point beyond granting you authority to lease lands for commercial purposes. Notably, the term of such a lease can be quite lengthy, as I indicated above. Thus, the land could be leased to a local nongovernmental development group, to a business entity or to a governmental entity. Any type of entity could, thereafter, build or remodel commercial buildings on the land. It is my opinion that the provisions of the lease could be such as to require that any such entity engage in certain specified construction, remodeling or improvement activities, or else forfeit the lease. So long as the rules that you adopt so allow, the lease terms could be quite flexible and similar to those contained in other commercial leases.

You must, however, bear your authority in mind. The only authority you have under SDCL 5-1-7.2 is to lease the land. You would, therefore, have to include any specific provisions for improvement in the lease at the time it was entered into. It appears to me, however, that you lack authority to independently contract for improvement of school and public lands,

except at the behest of some other agency or governmental entity that does hold such authority.

IN RE QUESTION NO. 6:

In regard to your Question 6, it is my view that the best authority for changing the purpose of a campus can be found in the University of South Dakota Springfield cases. *Merkwan v. State ex rel. Janklow*, 375 N.W.2d 624 (S.D. 1985); *Kanaly v. State ex rel. Janklow*, 368 N.W.2d 819 (S.D. 1985), *aff'd*, 401 N.W.2d 551 (S.D. 1987), 403 N.W.2d 33 (S.D. 1987). Essentially, *Merkwan* held that where the campus in Springfield had been used as a "normal school" or as an institution of higher learning, the institution could be transferred and have its purpose changed without violating the perpetual trust provisions of Article VIII, Section 7 of the South Dakota Constitution. *Kanaly*, on the other hand, held that the State Legislature, when it changed the purpose of the Springfield campus, was required to fully compensate or reimburse the permanent trust fund for the market value of the property transferred. The cases, therefore, would appear to hold that trust land assets can be transferred to other purposes so long as the trust fund is completely reimbursed.

Notably, the two cases are not perfectly analogous because there were other institutions of higher learning serving the same purpose as the Springfield campus, so reimbursement for the trust assets plainly would continue to serve the same purpose, albeit at a different, already established institution. This would seem to be a distinction without a difference; so long as proceeds of the grant are used as originally intended, a campus does not have to remain in the same place. Use of certain portions of the land for commercial leasing certainly would not run afoul of the Constitution or of the cases I have cited. (In fact, a procedure for sale is set out in SDCL <185><185> 5-2-2.1 through 5-2-2.3.) Any sales or leasing of these lands would be under the trust obligations set out in the cases and in the Constitution, so any monies received from leasing a portion of the Human Services Center campus would go into the permanent trust fund for the benefit of the Human Services Center.

I note, somewhat parenthetically, that the Enabling Act, Section 17, does not specifically designate the Human Services Center as a beneficiary of a land grant. The State Constitution, however, mandates that there shall be a perpetual trust fund for those charitable institutions or purposes for which the original grant or gift applied. That requirement is specifically applicable to rents received from such lands which remain unsold,

which would include lease payments for lease of land at the Human Services Center or for lease of any other school and public lands.

IN RE QUESTION NO. 7:

I understand your final question will be answered by bond counsel.

Please feel free to contact this Office for further particulars in this matter.

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