June 29, 1988

Maurice Christiansen, CPA
Auditor General
435 South Chapelle
Pierre, South Dakota 57501-3292

Official Opinion No. 88-28

Expenditure of Public Funds on Election Issues

Dear Mr. Christiansen:

You have requested an official opinion from this office on the following questions:

1. Can a municipality, county, or school district expend public funds to advocate a position on an election measure?

2. Can a municipality, county, or school district expend public funds to provide information as to the impact of an election measure on the respective entity?

QUESTION NO. 1:

Although the courts of this State have not yet addressed the question, a review of court decisions in other jurisdictions leads me to conclude that municipalities, counties, and school districts may not expend public monies for purposes of promoting or advocating a particular position on an election measure.

Almost without exception the cases disallow the use of public funds for advocacy by governmental institutions in support of one side of an issue before the voters. Burt v. Blumenauer, 699 P.2d 168 (Or. 1985); Campbell v. Joint Dist. 28-J 704, Fed.2d 501 (10th Cir. 1983); Anderson v. City of Boston, 380 N.E.2d 628 (Mass. 1978); Stern v. Kramarsky, 375 N.Y.S.2d 235 (Sup.Ct. 1975); and Stanson v. Mott, 551 P.2d 1 (Cal. 1976). Only rarely have the courts determined that expenditures for such purpose were sufficiently authorized under state law and even when authorized the expenditures have been declared improper in view of other conflicting statutes and state and federal constitutional provisions.

As distinguished from legislative lobbying efforts or advocacy by elected public officials or employees strictly in their individual capacities as private citizens, advocacy constituting official action of local government for purposes of influencing election results raises serious constitutional questions.

As stated in Stanson v. Mott, 551 P.2d at 9:

While public agency lobbying efforts undeniably involve the use of public funds to promote causes which some members of the public may not support, one of the primary functions of elected and appointed executive officials is, of course, to devise legislative proposals to attempt to implement the current administration's policies. Since the legislative process contemplates that interested parties will attend legislative hearings to explain the potential benefits or detriments of proposed legislation, public agency lobbying, within the limits authorized by statute, in no way undermines or distorts the legislative process. By contrast, the use of the

public treasury to mount an election campaign which attempts to influence the resolution of issues which our constitution leaves to the 'free election' of the people does present a serious threat to the integrity of the electoral process.

A fundamental goal of the democratic electoral process is to attain the free and pure expression of the voters. Basic democratic principles mandate that the government must, if possible, avoid any activity or feature which might adulterate that free and pure choice. Gould v. Grubb, 536 P.2d 1337, 348 (Cal. 1975). The government should not " 'take sides' in election contest or bestow an unfair advantage on one of several competing factions. A principal danger feared by our country's founders lay in the possibility that the holders of governmental authority would use official power improperly to perpetuate themselves, or their allies, in office ...; the selective use of public funds in election campaigns, of course, raises the specter of just such an improper distortion of the democratic electoral process." Stanson, supra at 9.

Expenditures by municipalities and similar political subdivisions for purposes of campaigning for or against a particular ballot measure is certainly suspect and could be adjudicated a misappropriation of funds exposing government officials to potential civil liability. Generally the recognized purpose of the initiative and referendum is to measure public feeling with an aim toward effectuating majority will. Attempts by the government to control or influence the public vote have been considered repugnant not only to the guarantee of a "Republican Form of Government," under Article IV, Section 4 of the United States Constitution but also to state constitutional provisions akin to Article VI, Section 19 of the South Dakota Constitution which guarantee that elections shall be free and equal.

Further, the use of public tax dollars for purposes of influencing election results implicates the rights of those who dissent from the government supported position. Dissenters who are in effect compelled to finance the expression of views with which they disagree have reason to complain and may assert an infringement of First Amendment Rights. Burt v. Blumenauer, supra 699 P.2d at 175. The First Amendment freedom-of-speech clause protects more than direct individual expression. It also prohibits laws or programs that compel adherence to government-prescribed views. See e.g., Wooley v. Maynard, 430 U.S. 705 (1977).

Aside from the constitutional considerations, municipalities, counties, and school districts are not, in my opinion, statutorily authorized to appropriate and expend public funds for such purpose. It is well established that municipalities, counties, and school districts are creatures of statute and have no inherent authority but only such powers as are expressly conferred upon them by statute and as may reasonably be implied therefrom. Sioux Falls Mun., etc. v. City of Sioux Falls, 233 N.W.2d 306 (S.D. 1975); State v. Hansen, 68 N.W.2d 480 (S.D. 1955); and Dahl v. Independent School Dist. No. 2, 187 N.W. 638 (S.D. 1922). In view of the questionable nature, from a constitutional standpoint, of the use of public funds for such purpose the courts have generally held that the authority therefor must be explicitly granted. Stanson, supra and, Citizens to Protect Pub. Funds v. Board of Education, 98 A.2d 673 (N.J. 1953). The power to do so must be given to the governing board by "clear and unmistakable language." Stanson, at 8.

Upon review of the South Dakota statutes I can find no statutory provisions that may in any manner be construed as explicitly giving a division of local government the authority to expend

public monies for purposes of influencing election results. In fact, any claim that the expenditures are impliedly authorized under statute would be unreasonable. Accordingly, the answer to Question No. 1 is "no."

QUESTION NO. 2

On the other hand, the use of the public funds by local governments solely for purposes of informing or educating the voters on an election issue may be proper depending on the circumstances.

Expenditures to provide the voters with the relevant facts and pros and cons of a ballot measure have never been considered constitutionally objectionable and case authorities suggest that authority for such expenditures need not be expressly provided. Citizens to Protect Pub. Funds, supra at 676; Stern v. Kramersky, supra. The authority may be fairly implied from powers expressly granted.

Whether such expenditures are impliedly authorized requires close review of the initiated or referred measure and a review of those powers expressly granted under statute. The expenditures would have to be judged on an individual, case-by-case basis. Certainly, local governments may not expend public funds to provide information on all election issues, however, if passage or rejection of the ballot measure would significantly affect the ability of the municipality, county, or school district to carry out its express powers, the use of public funds for strictly informational purposes may be authorized.

Assuming that the use of public funds for such purpose is authorized, to avoid any claim of misappropriation the governing board involved must be careful to ensure that the published information constitutes a fair presentation of the relevant facts on both sides of the election issue. Along such lines, it would not be sufficient to merely refrain from exhorting a yes or no vote. Other language or statements prepared and designed to influence public opinion would also be improper. Any determination of the propriety or impropriety of the publication and ultimately the expenditure would turn on a consideration of various factors, including the style and tenor as well as the timing of the publication. Stanson v. Mott, supra at 12.

Respectfully submitted,

Roger A. Tellinghuisen
Attorney General