

# HANDBOOK

for

## South Dakota Municipal Officials



— SOUTH DAKOTA —  
MUNICIPAL LEAGUE

**South Dakota Municipal League**  
208 Island Drive | Fort Pierre, SD 57532  
1.800.658.3633 | 605.224.8654 | FAX 605.224.8655  
[www.sdmunicipalleague.org](http://www.sdmunicipalleague.org)

© South Dakota Municipal League 2022  
Supplemented 2023  
Supplemented 2024  
Supplemented 2025

*All rights reserved. No part of this publication may be reproduced, stored in a retrieval system, or transmitted, in any form or by any means, electronic, mechanical, photocopying, recording, or otherwise, without the prior express written permission of the South Dakota Municipal League.*

# Table of Contents

Click each chapter to go to that section.

Chapter 1	Executive Organization
Chapter 2	History, General Provisions, and Governing Bodies
Chapter 3	Vested Statutory Powers
Chapter 4	Resolutions, Ordinances, Public Records and Open Meetings
Chapter 5	Officials
Chapter 6	Public Employees
Chapter 7	Elections
Chapter 8	Law Enforcement and the Courts
Chapter 9	Health and Public Safety
Chapter 10	Public Utilities and Public Enterprises
Chapter 11	Alcoholic Beverages
Chapter 12	Finance
Chapter 13	Bids and Contracts
Chapter 14	Land-use and Zoning
Chapter 15	Legalizing Marijuana

## CHAPTER 1

### EXECUTIVE ORGANIZATION

The State of South Dakota has the following established principal departments:

- (1) Office of Executive Management
- (2) Department of Public Safety
- (3) Department of Social Services
- (4) Department of Labor and Regulation
- (5) Department of Education
- (6) Department of Game, Fish and Parks
- (7) Department of Health
- (8) Department of Agriculture and Natural Resources
- (9) Department of the Military
- (10) Department of Transportation
- (11) Department of Revenue
- (12) Department of Human Services
- (13) Department of Tourism
- (14) Department of Veterans Affairs
- (15) Department of Tribal Relations
- (17) Department of Corrections (SDCL 1-32-2)

## CHAPTER 2

### HISTORY, GENERAL PROVISIONS AND GOVERNING BODIES

2.000	Introduction	2.500	Aldermanic Form
2.050	Definitions	2.550	Commission Form
2.100	Municipalities as a Creation of the State	2.600	City Manager Form
2.150	History of Incorporation	2.650	Home Rule
2.200	General Provisions	2.700	Change of Form of Government
2.250	Incorporation	2.750	Dissolution
2.300	Historical Cities	2.800	Associations of Municipalities
2.350	Classes	2.850	Observances by Municipalities
2.450	Trustee Form		

#### **2.000 INTRODUCTION**

This chapter of the Handbook will deal with the history of incorporation, general provisions governing municipalities, classes of municipalities, incorporation and dissolution, home rule, and the different forms of municipal government allowed by the state. The thought here is to present an overview of municipal government showing its working relationship with the state as well as the internal environment in which municipal officials must operate.

#### **2.050 DEFINITIONS**

The word "municipality" is defined as all cities and towns organized under South Dakota law. "Governing body" is defined as "the board of trustees, the board of commissioners, or the common council of a municipality. (SDCL 9-1-1)

#### **2.100 MUNICIPALITIES AS A CREATION OF THE STATE**

Municipalities in the State of South Dakota are legal creations of the state legislature. They are provided for in the State Constitution, and with these two limitations, have only those powers granted by the constitution, or the statutes created by the legislature. Even with the advent of home rule, municipal corporations are not sovereign units of government because their powers are still restricted both by constitutional provision and by statute. (See Hdbk., sec. 2.650)

Where specific powers are conferred upon a municipality, the powers are vested with discretion as to the method of implementing the powers, unless the method is prescribed or limited by the State Constitution or by legislative enactment. (Robbins v. Rapid City, 71 SD 171, 23 NW 2d 144) The State, as principal creator of municipal corporations, has absolute control over them, unless some constitutional provision intervenes. (Hurley v. Rapid City, 80 SD 180, 121 NW 2d 21) As administrative agents, municipalities may not exercise powers which are not granted to them by the state legislature in its statutes or incorporated in the State Constitution. (City of Sioux Falls v. Kirby, 6 SD 62, 60 NW 156; Missouri River Tel. Co. v. City of Mitchell, 22 SD 191, 116 NW 67)

## **2.150 HISTORY OF INCORPORATION**

In Dakota Territory prior to March 11, 1887, each municipality was incorporated by a special act of the territorial legislature. During the seventeenth session of the Legislative Assembly of the Territory of Dakota, "An Act to Provide for the Incorporation of Cities" was passed which provided for substantially the same procedure for incorporation as is included in Chapter 9-3 of the SDCL. By virtue of this Act of 1887, any municipality in the territory, upon petition of one eighth of its voters could hold an election to approve incorporation under the provisions of the bill.

Municipal government is a subject of Article IX of the Constitution which provides for the use of general laws for the organization and classification of municipal corporations.

At the first session of the State Legislature in 1890, an act to provide for the incorporation of cities was passed. This act provided that any municipality in the state existing under a special charter "may become incorporated under this act" in the same manner as had been provided in the Territorial Act of 1887. Cities incorporated under the Territorial Act of 1887 were automatically subject to the provisions of the Incorporation Act of 1890. (AGR 1891, p. 40) The provisions of this act of the State Legislature are for the most part nearly the same as those of the Territorial Act, and likewise, very similar to Chapter 9-3 of the SDCL.

Whether a municipality with a special charter voted to incorporate itself under the Incorporation Act of 1890, or whether the municipality continued to operate under a special charter was optional. A municipality could validly continue to exist under the special charter. (*Tripp v. City of Yankton*, 10 SD 516, 74 NW 447)

## **2.200 GENERAL PROVISIONS GOVERNING MUNICIPALITIES**

- 2.205 Governed by Title 9 of SDCL
- 2.210 Corporate Name and Seal
- 2.215 Judicial Notice of Existence of Municipality
- 2.220 Citizens Remedies to Enforce Title 9

### 2.205 Governed by Title 9 of SDCL

All municipalities organized under the provisions of Title 9 shall be governed by the provisions of Title 9. (SDCL 9-1-2)

### 2.210 Corporate Name and Seal

Municipalities must have and use a corporate seal that may be changed by a majority vote of the governing body. Each municipality must have a corporate name which must be used when exercising municipal power. (SDCL 9-1-4)

### 2.215 Judicial Notice of the Existence of Municipality

The courts of the state are required to take judicial notice of the existence of all municipalities organized under the laws of this state and of any change of organization authorized by law. (SDCL 9-1-3)

### 2.220 Citizens Remedies to Enforce Title 9

SDCL 9-1-6 says any resident of a municipality may maintain an action or proceeding to prevent a violation of any provision of Title 9 by that municipality.

**2.250 INCORPORATION OF MUNICIPALITIES**

- 2.255 Legal Population Requirements
- 2.260 Application by Petition - Contents of Survey
- 2.265 Distance Required from an Incorporated Municipality
- 2.270 Vote on Incorporation
- 2.275 Officers Elected

**2.255 Legal Population Requirements**

Municipalities are incorporated in accordance with Chapter 9-3 of the SDCL. Under the provisions contained therein, a municipality may not be incorporated unless it contains at least one hundred legal residents and at least forty-five registered voters. (SDCL 9-3-1)

**2.260 Application by Petition - Contents of Survey**

The application for incorporation of a proposed municipality must be by a petition verified by the circulator and signed by not less than twenty-five percent of the qualified voters who are either residents and registered voters in the proposed municipality or landowners in the proposed municipality who are also registered voters of this state. The application shall identify the type of government to be formed, the number of trustees, commissioners, or wards in the proposed municipality, the boundaries and area according to the survey, and the legal resident population according to the census taken. The application must include the name of the proposed municipality. The name may not be the same as any incorporated municipality in the state. The application must be filed with the county auditor and heard at a regular or special meeting of the board of county commissioners within sixty days of being filed. (SDCL 9-3-5)

Any person making application for the organization of a proposed municipality shall cause an accurate census to be taken of the landowners and the legal resident population of the proposed municipality not more than thirty days prior to the time of presenting the application to the board of county commissioners. The census must list the name of each landowner and legal resident residing in the proposed municipality. The census must be verified by the affidavit of the person taking the census. (SDCL 9-3-3; See Hdbk., sec. 14.050)

**2.265 Distance Required From an Incorporated Municipality**

A municipality may not be incorporated if any part of the proposed municipality lies within three miles of any point on the perimeter of the corporate limits of an incorporated municipality, unless:

- (1) The incorporated municipality refuses or fails to annex a territory that is contiguous to the incorporated municipality after the contiguous territory has properly petitioned the municipality to be annexed as provided by § 9-4-1; or
- (2) The territory to be incorporated has a post office and:
  - (a) Is in a different county than the incorporated municipality; or
  - (b) The incorporated municipality has a population of less than five thousand. (SDCL 9-3-1.1; See Hdbk., sec. 14.150)

**2.270 Vote on Incorporation**

The vote upon the question of incorporation is by ballot in the form prescribed by SDCL 9-3-10. If the board of county commissioners is satisfied of the legality of the election, they must make an order declaring the proposed municipality is incorporated by the name adopted. (SDCL 9-3-12)

A certified copy of an order of incorporation must be filed with the Secretary of State. (SDCL 6-10-1; 6-10-2)

2.275 Officers Elected

The person having the highest number of votes respectively for each office to be filled is declared elected. If there is a tie, the county auditor must determine by lot the person deemed elected. The county auditor shall notify each person elected of the person's election within two days after the result of the election is declared. (SDCL 9-3-18.1)

**2.350 CLASSES OF MUNICIPALITIES**

- 2.355 Constitutional Creation
- 2.360 Classes of Municipalities
- 2.375 Change of Classification
- 2.380 Change of Name of Municipality

2.355 Constitutional Creation

The Constitution authorizes the legislature to have plenary powers to organize and classify units of local government. (Cn. IX, sec. 1) In Chapter 9-2 the legislature established three classes of municipal corporations. The fourth class is comprised of the special charter municipalities.

2.360 Classes of Municipalities

There are three classes of municipal corporations:

- (1) Municipalities of the first class are municipal corporations with a population of 5,000 and over;
- (2) Municipalities of the second class are municipal corporations with a population between 500 and 4,999;
- (3) Municipalities of the third class are municipal corporations with a population of fewer than 500. (SDCL 9-2-1)

2.375 Change of Classification

Municipalities can change their classification. Whenever the municipal boundaries included in the last preceding census substantially differ from the current boundaries of the municipality, the governing body by resolution may direct the finance officer to determine the population by filing a certificate showing the number of persons who voted at the last preceding annual municipal election. That number multiplied by three constitutes the population for the purpose of classification until the next federal census is completed. (SDCL 9-2-2; See Hdbk., sec. 2.700)

Change of classification can also be made through the circuit courts. If the population of a municipality, as shown by the last preceding federal census, increases or decreases causing the municipality to pass into a different class of municipality pursuant to § 9-2-1, the municipality may, through its governing body, apply to the circuit court having jurisdiction for a judgment authorizing the classification change. Upon the presentation of the application, the court must establish a time and place for hearing the application. Notice of the hearing must be given by publishing the order once a week for two successive weeks, the last publication to be not less than ten days prior to the day of the hearing. Not less than ten days prior to the date of the hearing, the notice of hearing must also be posted in three public places in the municipality. (SDCL 9-2-2.1) After the hearing, if the facts warrant the granting of the application, the court must make and enter its judgment changing the status of the municipality to that of a municipality of the appropriate class, pursuant to § 9-2-1. The court shall establish the time when the change is effective and shall determine the manner in which the change must be made. A certified copy of the judgment shall be filed in the office of the secretary of state and the office of the register of deeds of the county where the municipality is located. (SDCL 9-2-2.2)

2.380 Change of Name of Municipality

Any person interested in changing the name of a municipality or platted or mapped portion of a municipality may proceed as provided by SDCL 21-37-7 to 21-37-9, inclusive. (SDCL 21-37-6)

**2.450 TRUSTEE FORM**

- 2.455 Composition and Qualification
- 2.465 Term of Office
- 2.470 Vacancies
- 2.475 President Elected
- 2.480 Meeting of the Board

**2.455 Composition and Qualification**

The board of trustees of a municipality shall consist of either three or five members elected at large. Each shall be a legal voter of the municipality. The number of trustees of a municipality may be increased to five or reduced to three in the manner prescribed by Chapter 9-11. (SDCL 9-7-1; See Hdbk., sec. 2.715 and sec. 5.100)

**2.465 Term of Office**

The term of office for trustees is three years, and until their successors are elected and qualified. However, when a municipality is organized, the trustees must be elected for terms of one, two and three years, respectively, at the first annual election. At subsequent elections each trustee is elected for a term of three years. (SDCL 9-7-3)

**2.470 Vacancies**

When a vacancy exists on a municipal governing body, the remaining members shall appoint a replacement to serve until the next annual municipal election or the vacancy may be filled by special election pursuant to SDCL 9-13-14.2 for the remainder of the unexpired term. (SDCL 9-13-14.1) If electing a person to fill the remainder of the unexpired term at an annual municipal election, the vacancy shall have occurred prior to the publication required by SDCL 9-13-6. (SDCL 9-13-14.1 See Hdbk., sec. 5.385)

The governing body of any municipality may, by ordinance enacted prior to the vacancy, require that any vacancy on the governing body or in the office of the mayor is to be filled by a special election called for that purpose to be conducted as provided in SDCL 9-13-14 and this section. No such special election may be held less than ninety days before the annual municipal election. The finance officer of the municipality shall publish a notice in the official newspaper of the municipality stating that a vacancy exists, that the vacancy will be filled by special election, the date of the election, and the time and place where nominating petitions may be filed for the office. The notice shall be published once each week for two consecutive weeks beginning at least sixty days before the date of the special election. Nominating petitions for the vacancy shall be prepared and filed as provided in SDCL 9-13-7, may not be circulated more than sixty days before the date of the special election, and shall be filed at least thirty days before the date of the special election. A notice of the special election shall be published as provided in SDCL 9-13-13 and 9-13-14. (SDCL 9-13-14.2)

A vacancy is created if no one, including an incumbent, files a petition. The vacancy shall be filled by special election or appointment (SDCL 9-13-14.1; 9-13-14.2; 9-13-14.3)

In cases where a member of the governing body is called to serve in active duty, that member may temporarily resign and a temporary replacement may be made. The replacement serves until the original member returns from active duty or until the expiration of the member's term, whichever occurs first. (SDCL 3-4-8)

In cases where any member is incapacitated by illness or an accident which causes the member to be unable to attend meetings of the governing body or fulfill the duties of the office, the member may elect to temporarily resign from the governing body or office. Notice of temporary resignation may be given in the same manner as giving notice of resignation. If the member is unable to give notice, the member's spouse or guardian or any person who has durable power of attorney for the member may give notice of resignation. A temporary replacement may be made in accordance with the provisions of statute applying to the governing body. The temporary member shall serve until the member is able to fulfill the requirements of office or until the expiration of the member's term, whichever comes first (SDCL 3-4-9).

#### 2.475 President Elected

At the first regular meeting after their election, the trustees must elect one of their members to serve as president of the board of trustees. This term of office is for one year and until a successor is elected and qualified. (SDCL 9-7-5)

#### 2.480 Meetings

The board shall hold regular meetings at such times as may be provided by ordinance. Special meetings of the board may be held at any time upon call of the president or finance officer by oral or written notice to the members present within the municipality. (SDCL 9-7-6) A majority of the members constitutes a quorum, and no action can be taken without a majority of the members approving the action. (SDCL 9-7-7) No official may participate in discussion or vote on any issue in which they have a direct pecuniary interest. (SDCL 6-1-17; See Hdbk. Sec. 13.125)

### **2.500 ALDERMANIC FORM**

- 2.505 Mayor - Term - Powers
- 2.510 Common Council - Membership - Terms of Office
- 2.513 Division into Wards and Redistricting
- 2.515 Vacancies
- 2.520 President and Vice president - Election - Powers
- 2.525 Meetings
- 2.530 Action Deferred - Reconsidered – Rescinded
- 2.540 Power to Govern Proceedings and Judge Members

#### 2.505 Mayor - Term - Powers

The chief executive officer in the aldermanic form is the mayor, who is elected for a term of not less than two but not more than five years as determined by ordinance. (SDCL 9-8-1) The mayor presides at all meetings but only votes in case of a tie. The mayor may not break a tie on an ordinance or proposal to expend or appropriate money. (See SDCL 9-8-3; 9-8-10; Hdbk. Sec. 2.525) The mayor performs the duties of office as prescribed by both laws and ordinances and is responsible for enforcing all the laws and ordinances of the municipality. (SDCL 9-8-3; See Hdbk., sec. 8.115) The mayor shall annually make recommendations to the common council. The Mayor also has the power to veto any ordinance or resolution or one or more items of appropriation ordinances or resolutions. (SDCL 9-8-3; See Hdbk., sec. 2.620 and 4.080) The veto, with written objections, must be filed with the finance officer within ten days after final passage. (SDCL 9-19- 10)

The courts have determined that the council has both legislative and executive powers. The council is, therefore, charged with the power and duty to make decisions for the municipality while the mayor is charged with the duty of executing those decisions. The mayor has no power to institute or to defend litigation on behalf of the municipality nor can the mayor authorize the city attorney to take an appeal from judgment against the municipality by vetoing a council resolution directing that no action be taken. (Shaw v. Common Council, City of Watertown, (1954) 75 SD 241, 63 NW 2d 252)

### 2.510 Common Council - Membership - Terms of Office

The common council consists of the mayor elected at large, and two aldermen elected from and by the voters of each ward of the municipality. The term of office is two years, unless a municipality adopts an ordinance establishing the term of office to be three, four, or five years. (SDCL 9-8-4). Except as otherwise provided in SDCL 9-8-2, the mayor and alderman hold office until their successors are elected and qualified. At the first election of aldermen, the council shall stagger the initial terms of the alderman. A person may hold office for more than one term.

A person may be nominated, elected, or appointed as a mayor or as an alderman if the person is a citizen of the United States, a voter of and resident of the municipality, and, if an alderman, a voter of and resident of the ward for which the person is to hold office. If they Mayor or an alderman at large moves to a permanent residence outside the corporate limits of the municipality, the office is immediately vacated. The same would apply to an alderman who moves outside the boundaries of their ward. (SDCL 9-8-1.1)

### 2.513 Division into Wards - Redistricting

The law provides that municipalities can determine by ordinance their own wards and election precincts for election purposes. There is no minimum or maximum number of wards required, however, an attorney general's opinion states that aldermen are not to be elected at large. (AG Opinion 84-11) However, the 2022 Legislature passed a law allowing municipalities of the 2<sup>nd</sup> or 3<sup>rd</sup> class to choose to elect aldermen to the common council at large, following a majority vote at an election using processes provided in SDCL 9-11-6. (SDCL 9-8-4.1) (See Hdbk., sec. 2.700) When determining the number of inhabitants in wards, the last preceding federal census is the rule of thumb. However, the governing body may, by resolution, authorize the finance officer to determine the number of inhabitants by filing a certificate showing the number of persons registered to vote in each ward. That number multiplied by two shall constitute the number of inhabitants until the next federal census. Municipalities should attempt to make all wards of equal size and must notify the county auditor forty-five days prior to any local election of any boundary changes. In even numbered years, the municipality must notify the county auditor one hundred days prior to the primary election and the general election of any boundary changes. (SDCL 9-13-16; 9-2-7; 12-14-1; 12-14-1.1; See Hdbk., sec. 2.715)

### 2.515 Vacancies

When a vacancy exists on a municipal governing body, the remaining members shall appoint a replacement to serve until the next annual municipal election or the vacancy may be filled by special election for the remainder of the unexpired term as provided in SDCL 9-13-14.2. In the aldermanic form of municipal government, the appointment must be a person from the same ward of the municipality. If electing a person to fill the remainder of the unexpired term at an annual municipal election, the vacancy shall have occurred prior to the publication required by SDCL 9-13-6. (SDCL 9-13-14.1; See Hdbk., sec. 5.350) When a vacancy exists in the office of mayor, it shall also be filled by appointment by a majority vote of the aldermen or by special election. Until the vacancy is filled, the powers and duties of the Mayor are executed by the Mayor Pro Tempore, as provided in SDCL 9-8-13. (SDCL 9-8-2; See Hdbk. Sec. 5.385)

The governing body of any municipality may, by ordinance enacted prior to the vacancy, require that any vacancy on the governing body or in the office of the mayor is to be filled by a special election called for that purpose to be conducted as provided in SDCL 9-13-14 and this section. No such special election may be held less than ninety days before the annual municipal election. The finance officer of the municipality shall publish a notice in the official newspaper of the municipality stating that a vacancy exists, that the vacancy will be filled by special election, the date of the election, and the time and place where nominating petitions may be filed for the office. The notice shall be published once each week for two consecutive weeks beginning at least sixty days before the date of the special election. Nominating petitions for the vacancy shall be prepared and filed as provided in SDCL 9-13-7, may not be circulated more than sixty days before the date of the special election, and shall be filed at least thirty days before the date of the special election. A notice of the special election shall be published as provided in SDCL 9-13-13 and 9-13-14. (SDCL 9-13-14.2)

In cases where a member of the governing body is called to serve in active duty, that member may temporarily resign and a temporary replacement may be made. The replacement serves until the original member returns from active duty or until the expiration of the member's term, whichever occurs first. (SDCL 3-4-8) In cases where any member is incapacitated by illness or an accident that causes the member to be unable to attend meetings of the governing body or fulfill the duties of the office, the member may elect to temporarily resign from the governing body or office. Notice of temporary resignation may be given in the same manner as giving notice of resignation. If the member is unable to give notice, the member's spouse or guardian or any person who has durable power of attorney for the member may give notice of resignation. A temporary replacement may be made in accordance with the provisions of statute applying to the governing body. The temporary member shall serve until the member is able to fulfill the requirements of office or until the expiration of the member's term, whichever comes first. (SDCL 3-4-9)

A vacancy is created if no one, including an incumbent, files a petition. The vacancy shall be filled by special election or appointment (SDCL 9-13-14.1; 9-13-14.2; 9-13-14.3)

#### 2.520 President - Vice president - Election - Powers

At the first meeting of the common council after the annual election in each year, the aldermen must elect from their own members a president and vice president for the ensuing municipal year. (SDCL 9-8-7) In the absence of the mayor, the president of the common council is acting mayor and has all the powers of the mayor. In the absence or disability of the mayor and president, the vice-president shall perform the duties of the mayor and president. (SDCL 9-8-7)

#### 2.525 Meetings

The council holds its meetings on the first Monday of each month but may, by ordinance, change the day of its regular monthly meeting. The council may prescribe the way special meetings may be called. A majority of all aldermen constitutes a quorum to do business. When a seat on the council is vacant due to the removal, resignation, death, or by operation of law, the quorum consists of the majority of the remaining aldermen who are qualified to serve by election or appointment. (SDCL 9-8-8) The concurrence of a majority of the aldermen is necessary for the passage of an ordinance or proposal which expends or appropriates money. A two-thirds vote of aldermen is required to sell any municipal property. (SDCL 9-8-10) The meetings must be open to the public and the council shall keep minutes of the meeting. (SDCL 9-8-8) No official may participate in discussing or vote on any issue in which they have a direct pecuniary interest. (SDCL 6-1-17; See Hdbk. Sec. 13.125)

If the mayor vetoes any ordinance, resolution, or other item, the finance officer shall present the vetoed item, along with the mayor's written objection, to the council at their next meeting and it may be reconsidered. If the ordinance or resolution passes by a two-thirds vote of the aldermen, it shall be published and become effective. (SDCL 9-19-11)

#### 2.530 Action Deferred - Reconsidered - Rescinded

A vote may be reconsidered or rescinded at a regular or special meeting if a quorum is present and a majority vote to reconsider or rescind the action. (SDCL 9-8-11)

#### 2.540 Power to Govern Proceedings and Judge Members

The council is the judge of the election and qualification of its members. The council determines its rules of procedure, and may punish its for disorderly conduct, and, with the concurrence of two-thirds of the aldermen may expel a member. Any mayor or alderman who is convicted of bribery shall vacate the position. The council may, by ordinance, establish requirements for attendance at regular meetings and provide for the expulsion of a member in violation of the attendance requirements. (SDCL 9-8-5)

**2.550 COMMISSIONER FORM**

- 2.555 Composition
- 2.560 Qualifications and Terms of Office
- 2.575 Vacancies
- 2.580 Meetings
- 2.585 General Oversight
- 2.590 Commissioner's Responsibility in a Five Commissioner City
- 2.595 Commissioner's Responsibility in a Three Commissioner City

**2.555 Composition**

The third form of government established by state law is that of the commission. Under the commissioner form of government, where a city manager is not employed, the board of commissioners consists of a mayor, and two or four commissioners who are all elected at large. (SDCL 9-9-1)

**2.560 Qualifications and Terms of Office**

A person may be nominated, elected or appointed as a mayor or commissioner if the person is a citizen of the United States and a voter and resident of the municipality. The term of the mayor and commissioners is not less than two or more than five years as determined by ordinance, except at the first election after the adoption of the commission form of government the mayor's term must be five years and the commissioners must be staggered as detailed in SDCL 9-9-3. At the annual election preceding the expiration of the term of office of mayor or any commissioner, a successor must be elected for a term of not less than two or more than five years, as determined by ordinance (SDCL 9-9-3; See Hdbk., sec. 5.100)

**2.575 Vacancies**

If the mayor or a commissioner resigns, the resignation shall be submitted in writing to the board and must specify the effective date of the resignation. If the mayor or a commissioner moves his or her permanent residence outside the corporate limits of the municipality the office is immediately vacated. A vacancy on the board is filled by appointment as provided in SDCL 9-13-14.1 or by special election pursuant to SDCL 9-13-14.2. (SDCL 9-9-6; See Hdbk. Sec. 5.385; Sec. 5.350)

If there is a vacancy in the office of mayor, the vacancy must be filled by appointment pursuant to SDCL 9-9-8 until the position is filled by election at the next annual municipal election or by special election as provided in SDCL 9-13-14.2. A vacancy on the board must be filled as provided in SDCL 9-13-14.1 or 9-13-14.2. The acting mayor has only one vote as a commissioner and may not vote as acting mayor. (SDCL 9-9-6; 9-9-8)

If the mayor is unable to perform the duties of office by reason of absence or sickness, the board shall appoint by a majority vote one of its members to act as mayor. The appointed commissioner's official designation shall be 'mayor pro tempore.' The acting president is invested with all the powers and duties of the mayor during the mayor's absence or sickness but has only one vote as a commissioner and may not vote as acting mayor. A temporary absence or incapacitation of the mayor is not considered a vacancy in the office of the mayor. (SDCL 9-9-8)

A vacancy is created if no one, including an incumbent, files a petition. The vacancy shall be filled by special election or appointment. (SDCL 9-13-14.1; 9-13-14.2; 9-13-14.3)

The governing body of any municipality may, by ordinance enacted prior to the vacancy, require that any vacancy on the governing body or in the office of the mayor is to be filled by a special election called for that purpose to be conducted as provided in SDCL 9-13-14 and this section. No such special election may be held less than ninety days before the annual municipal election. The finance officer of the municipality shall publish a notice in the official newspaper of the municipality stating that a vacancy exists, that the vacancy will be filled by special election, the date of the election, and the time and place where nominating petitions may be filed for the office. The notice shall be published once each week for two consecutive weeks beginning at least sixty days before the date of the special election. Nominating petitions for the vacancy shall be prepared and filed as provided in SDCL 9-13-7, may not be circulated more than sixty days before the date of the special election, and shall be filed at least thirty days before the date of the special election. A notice of the special election shall be published as provided in SDCL 9-13-13 and 9-13-14. (SDCL 9-13-14.2)

In cases where a member of the governing body is called to serve in active duty, that member may temporarily resign, and a temporary replacement may be made. The replacement serves until the original member returns from active duty or until the expiration of the member's term, whichever occurs first. (SDCL 3-4-8)

In cases where any member is incapacitated by illness or an accident that causes the member to be unable to attend meetings of the governing body or fulfill the duties of the office, the member may elect to temporarily resign from the governing body or office. Notice of temporary resignation may be given in the same manner as giving notice of resignation. If the member is unable to give notice, the member's spouse or guardian or any person who has durable power of attorney for the member may give notice of resignation. A temporary replacement may be made in accordance with the provisions of statute applying to the governing body. The temporary member shall serve until the member is able to fulfill the requirements of office or until the expiration of the member's term, whichever comes first (SDCL 3-4-9).

#### 2.580 Meetings

The board of commissioners is required to meet at least once each week or as otherwise determined by ordinance. (SDCL 9-9-11) A majority of the board constitutes a quorum to do business. If a seat on the board is vacant due to removal, resignation, death, or by operation of law, the quorum consists of the majority of the remaining commissioners who are qualified to serve by election or appointment pursuant to SDCL 9-13. The board may compel the attendance of any absentee under penalties as prescribed by ordinance. No action of the board is effective unless approved by a vote of a majority of the board. (SDCL 9-9-14)

A special meeting may be called at any time by the mayor or upon the request of two commissioners to consider only the matter mentioned in the call for the meeting. Notice of a special meeting must be given pursuant to SDCL 1-25-1.1 and shall be provided to each commissioner. (SDCL 9-9-12)

No official may participate in discussion or vote on any issue in which they have a direct pecuniary interest. (SDCL 6-1-17; See Hdbk. Sec. 13.125)

The board of commissioners is the judge of the election and qualification of its members. The board may by ordinance determine its rules of procedure and code of conduct, punish its members for disorderly conduct while performing the duties of office, and, with the concurrence of two-thirds of the members, expel a member. The board may by ordinance establish requirements for attendance at regular meetings and provide for the expulsion of a member in violation of the attendance requirements. (SDCL 9-9-14.1)

#### 2.585 General Oversight

The board has control over all departments of the municipality and can make and enforce rules and regulations which it may see fit for the organization, management and operation of the departments of the municipality. (SDCL 9-9-9)

**2.590 Responsibility in a Five Commissioner City**

In a five-commissioner city, the commissioners shall designate by a majority vote a Commissioner of Public Safety, a Commissioner of Public Works, a Commissioner of Utilities, and a Commissioner of Finance and Revenue, with each commissioner having oversight in each respective area as described by law. (SDCL 9-9-18 to 9-9-24)

The mayor's responsibility is to be the chief executive of the municipality. The mayor presides at all meetings of the board and has the power in the absence or inability of a commissioner to temporarily take charge of the department under the control of the absent commissioner. The mayor is charged with the responsibility to supervise all public buildings, and all city parks except in municipalities having a park board, and for the lighting of the streets, alleys, and public buildings, and to enforce all the laws of the municipality, and shall from time to time recommend measures which the mayor deems expedient to the operations of the municipality. (SDCL 9-9-20)

**2.595 Responsibility in a Three Commissioner City**

In a three-commissioner city, the mayor is the chief executive officer of the municipality, shall preside over all meetings of the board, and has general supervision over all departments and officers. In the absence or inability of a commissioner, the mayor shall temporarily take charge. (SDCL 9-9-26) All matters not designated to the mayor are to be divided as evenly as practicable between the commissioners by resolution adopted by a majority vote at the first meeting of the board in the month following the election in each year. (SDCL 9-9-27)

**2.600 CITY MANAGER FORM**

2.605 History	2.625 Powers of City Manager
2.610 Petition for Employment	2.630 Appointments
2.615 Governing Bodies - Election and Terms of Office	2.635 Bond Required
2.620 Powers of Mayor	2.640 Removal of City Manager

**2.605 History**

The city manager form of government has a long though not a popular history in South Dakota. Several municipalities (Aberdeen, Canton, Clark, Hot Spring, Huron, Madison, Rapid City, Vermillion and Yankton) have tried the city manager form of government, yet only Vermillion and Yankton have retained the form since its adoption. Currently, Aberdeen, Brookings, Sturgis, Vermillion, and Yankton use the city manager form of government.

Although the city manager form of government is not as widespread as the other forms, the state has established by statute certain guidelines and provisions for governing a municipality under this form. These are presented in Chapter 9-10 of SDCL.

**2.610 Petition for Employment**

If a petition signed by fifteen percent of the registered voters of a municipality, as determined by the total number of registered voters at the last preceding general election, is presented requesting that an election be called to vote on the question of employing a city manager, the governing body must call an election to be held within fifty days from the date of the filing of the petition with the finance officer. The election must be held upon the same notice and conducted in the same manner as other municipal election as provided in Chapter 9-13. (SDCL 9-10-1)

### 2.615 Governing Bodies - Election and Terms of Office

In cities employing a city manager under the aldermanic form of government, the mayor and aldermen are elected in the same manner as municipalities not employing a city manager. (SDCL 9-10-4; See Hdbk., sec. 2.500)

In cities under the commission form of government, the number of commissioners is nine. They are elected for a three-year, staggered term of office as prescribed in SDCL 9-10-5. (SDCL 9-10-5) At the first regular meeting in the month following the annual election, the commissioners must elect one of their members to serve as mayor for a term of one year. (SDCL 9-10-6; See Hdbk., sec. 2.560)

### 2.620 Powers of Mayor

The power and duties of the mayor under the city manager form of government are to:

- 1) Be the presiding officer of the council, commission or aldermen at-large;
- 2) Be the recognized head of the municipality for the service of civil process and for military and ceremonial purposes;
- 3) Take command of police and govern during times of public danger or emergency and may call for assistance as provided by 9-29-17;
- 4) Have such further authority and perform such other duties as are prescribed by ordinance or resolution. The mayor does not have the power of veto. (SDCL 9-10-7; See Hdbk., sec. 2.505)

### 2.625 Powers of City Manager

The city manager is responsible for the administration of all affairs of the municipality and may authorize the head of any department or office responsible to the manager to appoint or remove subordinates in such office or department. He can appoint or remove all officers or employees in the administrative service of the municipality. (SDCL 9-10-13) Further responsibilities of the city manager are to:

- 1) See to the enforcement of the law and ordinances;
- 2) Supervise the administration of the affairs of the municipality;
- 3) Make recommendations to the governing body;
- 4) Advise the governing body of the financial status of the municipality;
- 5) Prepare an annual budget;
- 6) See that all terms and conditions in any contract or franchise are kept;
- 7) Be present at all meetings of the governing body, except when the governing body is considering his removal;
- 8) Sign all warrants after approval by the governing body, which warrants must then be counter signed by the finance officer;
- 9) Prepare and introduce ordinances and take part in discussion, but he does not have the power to vote;
- 10) Carry out any further powers and duties prescribed by ordinance or resolution. (SDCL 9-10-15)

Pursuant to § 9-1-5, the governing body of a municipality may, by ordinance or resolution, delegate to the manager the authority to enter into a contract on behalf of the municipality and to execute the contract and any other instrument necessary or convenient for the performance of the contract, subject to the limitations established by the governing body. (SDCL 9-10-19).

### 2.630 Appointments

The governing body has the power to appoint the attorney, library board of trustees and the finance officer. The finance officer shall appoint their deputies and employees. All other officers and employees are appointed by the manager and may be removed by them. (SDCL 9-10-9)

2.635 Bond Required

The manager and every officer of the municipality, whether appointed by the city manager or the governing body, must furnish a bond to the municipality in the amount set by the governing body. The bond must be approved by the governing board and filed with the finance officer. An individual bond is not required provided the municipality has blanket coverage pursuant to SDCL 3-5-14. (SDCL 9-10-14; See Hdbk., sec. 5.200)

2.640 Removal of City Manager

The governing body shall appoint the city manager for an indefinite term but may suspend the manager by resolution of intent to remove the manager approved by a majority vote of the members of the governing body. The resolution of intent to remove the manager must set forth the reasons for the suspension and proposed removal, and a copy of the resolution must be served immediately upon the manager. The manager may reply in writing to the resolution and may request a public hearing within fifteen days of being served the resolution. If a public hearing is requested by the manager, the governing body must within fifteen days hold a public hearing upon the question of the manager's removal, and the final resolution removing the manager may not be adopted until the public hearing has occurred.

The manager's pay must continue until the manager's removal is effective as provided by this section. The action of the governing body in removing the manager is final. (SDCL 9-10-11)

It is a Class 2 misdemeanor for the city manager, or an officer or employee appointed by the manager, to solicit any person to vote for or against any candidate for alderman or commissioner of the municipality by which the manager is employed at any municipal election. (SDCL 9-10-17)

**2.650 HOME RULE**

2.660 Powers Under Home Rule

2.665 Restrictions on Home Rule

2.660 Powers Under Home Rule

The South Dakota Constitution provides that any county or city or combination of the two may provide for the adoption or amendment of a home rule charter. If approved, the charter must be adopted or amended by a majority vote at an election. A home rule charter may also be initiated by the people, by petition of not less than ten percent of those voting in the last preceding gubernatorial election in the affected jurisdiction.

Under a home rule charter, a municipality may exercise any legislative power or perform any function not denied by its charter, the Constitution, or the general laws of the state. The charter may provide for any form of executive, legislative, and administrative structure which is superior to statute, provided that the legislative body so established is chosen by popular election and that the administrative proceedings are subject to judicial review.

The powers and functions of home rule units are to be construed liberally. (Cn. IX, 2)

South Dakota municipalities which have adopted home rule charters include Aberdeen, Beresford, Brookings, Elk Point, Faith, Fort Pierre, Pierre, Sioux Falls, Springfield, Vermillion, and Watertown.

2.665 Restrictions Under Home Rule

To establish guidelines for home rule charters, the 1974 Legislative Session added Chapter 6-12 of the SDCL which provides, among other things, for the expenditure of funds out of the general fund to cover the cost of the election on the question of adoption or the amendment of a charter. (SDCL 6-12-1)

In addition this chapter establishes two requirements that a charter must meet. They are:

- 1) The charter must establish the form of governmental structure under which the municipality will function. (SDCL 6-12-4)
- 2) Neither the charter nor ordinances adopted pursuant to the charter can set standards which are lower or less stringent than those imposed by state law. However, the standards can be higher than state law unless state law provides otherwise. (SDCL 6-12-5)

The purpose of this is to ensure that minimum state standards are met, and that in cases where maximum standards are established, the local option of control will not go beyond those standards. Hypothetical examples can be found in the area of pollution control.

The power of a home rule charter does not include the power to:

- 1) Enact private or civil law governing civil relationships except as incident to the exercise of an independent county or municipality;
- 2) Define and provide for the punishment of a crime, but this limitation shall not abridge the power of a home rule unit to provide punishment for the violation of ordinances or charter provisions by a fine not exceeding five hundred dollars or by imprisonment not exceeding six months or by both such fine and imprisonment;
- 3) Abridge laws relating to elementary and secondary education;
- 4) Change assessment practices and procedures relating to ad valorem taxation of property;
- 5) Exempt itself from providing the necessary personnel and facilities to perform services required by general law to be performed by a like unit or units of local government;
- 6) Deny referendum or ordinances or bylaws provided by Chapter 9-19 of the SDCL.
- 7) Regulate rates, or conditions of service of any public utility regulated by the South Dakota Public Utilities Commission. (SDCL 6-12-6)

The 1997 Legislature moved to further restrict a home-rule entity's power to tax. Under the 1997 Act, no city, county, or other governmental unit, including one operating under a home-rule charter, may enact or increase any tax, fee, or charge that is: related to the state lottery; similar to a tax which provides revenue to the state; or similar to state licensing or regulatory fees enacted by statute or adopted by rule. This restriction does not affect any tax or fee enacted and imposed on or before March 1, 1996. (SDCL 6-12-14)

Chapter 6-12 of the SDCL also contains some important election requirements which any governing body considering the adoption of a home rule charter must meet. Statute requires that "(w)hen a commission has been selected or appointed to draft a proposed charter or an amendment to a charter, an election on the question must be held within one year after initiation of the proposed action." (SDCL 6-12-7)

Unless another election is already scheduled to be held within one hundred twenty days of the initiation of the action, a special election must be held. (SDCL 6-12-8; See Hdbk., sec. 7.700) The term "initiation of the action" means the point at which the governing body has passed a motion to either submit the proposed charter to a vote or to submit to a vote the question of whether a charter should be initiated pursuant to SDCL 6-12-2. (SDCL 6-12-8.1) The notice of the election and the ballots to be used must conform to the general election law. The election must be held within sixty days after the charter or an amendment to it has been drafted and approved by its initiators. (SDCL 6-12-9; 6-12-10) The person charged with the conduct of the election shall, within thirty days after the canvass and return, file with the secretary of state a certified copy of a charter or amendment adopted. (SDCL 6-12-11)

## **2.700 CHANGE OF FORM OF GOVERNMENT**

- |       |                               |       |                                |
|-------|-------------------------------|-------|--------------------------------|
| 2.705 | Changing Form of Municipality | 2.725 | Change of Form Denied/Approved |
| 2.715 | Change by Petition of Voters  | 2.730 | Ordinances Still in Effect     |
| 2.720 | Form of Ballot Used           |       |                                |

### 2.705 Changing Form of Municipality

Each first or second class municipality must be governed by a mayor and common council, a mayor and a common council with a city manager, a board of commissioners, or a board of commissioners with a city manager. Each third class municipality must be governed by a board of trustees, with or without a city manager. (SDCL 9-11-11)

### 2.715 Change by Petition of Voters

If a petition signed by fifteen percent of the registered voters of any municipality, as determined by the total number of registered voters at the last preceding general election, is presented to the governing body, requesting that an election be called for the purpose of voting upon a question of change of form of government or upon a question of the number of wards, commissioners, or trustees, the governing body must call an election that must be held within fifty days from the date of the filing of the petition with the municipal finance officer. At that election, the question of the change of form of government or the number of wards, commissioners, or trustees, or both, must be submitted to the voters. No petition is valid if filed more than six months after the circulation start date declared on the petition forms. If the petition is filed on or after January first prior to the annual municipal election and within sufficient time to comply with the provisions of SDCL 9-13-14, the question may be submitted at that annual municipal election.

The election must be held upon the same notice and conducted in the same manner as other municipal elections. (SDCL 9-11-5; 9-11-6) For election procedures refer to Chapter 7 of the handbook or SDCL Chapter 9-13.

Upon the change of form from one governmental structure to another, the court has held that there must be an election of an entirely new board and that there can be no holding over by the members of the old board. (Mitchell v. Herreman, (1950) 73 SD 261, 41 NW 2d 829)

### 2.720 Form of Ballot Used

Both the question of form of government and the number of wards, trustees, or commissioners may be submitted upon one ballot, when both questions are to be voted upon.

The vote upon the questions must be by ballot in the form and be cast in the manner provided by chapter 9-13. (SDCL 9-11-7)

### 2.725 Change of Form Denied - Change of Form Approved

If the question of changing the form fails, another election on the question cannot be held for one year. If the question passes, the new officers are chosen at the next annual municipal election or at a special election called by the governing board and held pursuant to SDCL 9-13-14. (SDCL 9-11-8; 9-11-9)

### 2.730 Ordinances Still in Effect

After a change in the form of government, any ordinance, resolution, contract, obligation, right or liability of the municipality continues in full force and effect as though no change of government had occurred. (SDCL 9-11-10)

**2.750 DISSOLUTION OF MUNICIPALITIES**

- 2.755 Dissolution by Landowners Petition
- 2.760 Referee's Findings - Judgment of Dissolution
- 2.765 Dissolution by Election - Application
- 2.770 Judgment of Dissolution
- 2.775 Copies to be Sent to the Office of the Secretary of State

**2.755 Dissolution by Landowners Petition**

A municipality can be dissolved by petition of the landowners of a majority of the real property, both in area and assessed valuation, and if the municipality has a population of less than two hundred and fifty persons. (SDCL 9-6-1)

The petition is filed with the clerk of the circuit court. During this period, the court appoints a referee to determine; a) that the population is below two hundred and fifty persons, and b) that the petition was signed by the owners of more than one-half of the real property, both in area and assessed valuation. (SDCL 9-6-2; 9-6-3; 9-6-5)

**2.760 Referee's Findings - Judgment of Dissolution**

If the referee finds that all the requirements were met, he notifies the court of his findings. The court must then make a judgment of dissolution. The municipality ceases to exist and its officers can exercise only those powers necessary to wind up the affairs of the municipality. (SDCL 9-6-7; 9-6-9)

**2.765 Dissolution by Election - Application**

The second way in which a municipality can be dissolved is by election. If an application signed by fifteen percent of the registered voters of any municipality, based upon the total number of registered voters at the last preceding general election, having less than one thousand inhabitants is presented to the governing body asking for the dissolution of the municipality, the governing body shall call a special election. The special election on the question of dissolution must be held within fifty days after filing the application. No signature on the application is valid if signed more than six months prior to the filing of the application. If any such application is presented on or after January first prior to the annual municipal election and within sufficient time to comply with the provisions of SDCL 9-13-14, the question shall be submitted at that annual election. (SDCL 9-6-10) For election procedures refer to Chapter 7 of the Handbook or SDCL chapter 9-13.

**2.770 Judgment of Dissolution**

If the question of dissolution fails, it cannot be taken up again for five years. However, if the question is passed by a majority, provided that at least two-fifths of the people who voted in the last election voted on the question of dissolution, the municipality is dissolved and given six months to end its affairs. After that time, the territory comes under the jurisdiction of the governing body which would have had jurisdiction had the municipality never existed. Dissolution does not affect the rights of any person under contract with the municipality. (SDCL 9-6-11; 9-6-12; and 9-6-9)

**2.775 Copies to be Sent to the Office of the Secretary of State**

As with incorporation, the dissolution is not complete until filed with the office of the Secretary of State. A copy of the articles of incorporation and a copy of the order of dissolution must also be forwarded to this office. No fees or reversions of tax money can be made until the requirements under Chapter 6-10 of the SDCL have been met. (SDCL 6-10-1; 6-10-2; and 6-10-3)

**2.800 ASSOCIATIONS OF MUNICIPALITIES**

2.805 Authorization Given - Purpose of Association

2.810 Powers of Association

**2.805 Authorization Given - Purpose of Association**

Governing bodies can form an association with the other governing bodies of municipal corporations for the purpose of securing concerted action on matters of municipal interest. (SDCL 9-17-1) The South Dakota Municipal League is the sole association in the state organized to serve municipalities only.

**2.810 Powers of Association**

The association has the authority to hold annual meetings and maintain an office, as well as compensate its officials. Municipalities are authorized to pay dues and designate their delegate(s). Municipalities have appropriate funds to pay for necessary expenses of its officers and employees in conducting business and attending meetings, both in and out of state, as the governing body deems necessary to carry out municipal activities. (SDCL 9-12-3; 9-17-2; 9-17-3; 9-17-4)

**2.850 OBSERVANCES BY MUNICIPALITIES****2.855 Observance of Legal Holidays**

SDCL 1-5-1 designates the following dates as legal holidays: Sunday; New Year's Day; Martin Luther King, Jr. Day (third Monday in January); President's Day (third Monday in February); Memorial Day (last Monday in May); Independence Day (July 4); Juneteenth (June 19); Labor Day (first Monday in September); Native Americans' Day (second Monday in October); Veteran's Day (November 11); Thanksgiving Day (fourth Thursday in November); Christmas Day (December 25); and every day declared a holiday by the President of the U.S. or the Governor of South Dakota. If July 4th, December 25, January 1, or November 11 falls on a Sunday, the following Monday is a legal holiday. If they fall on Saturday, the Friday prior is observed.

There is no law, however, which requires city halls to be closed on any holiday. A municipality is free to observe these holidays or institute their own holiday provisions.

SDCL 1-5-2 through 1-5-4 deal with business transactions and official acts permitted on Holidays.

Many municipalities have regular meetings scheduled on Monday which in some instances could fall on a legal holiday. No specific statues deal with this occurrence. It is recommended that your ordinance regarding meetings be amended to address this situation. You may reschedule your meeting with proper notice or so designate another day when a legal holiday occurs.

State law does allow the above procedure without the necessity of an ordinance. SDCL 1-5-4 states that whenever any act of a secular nature, other than a work of necessity or mercy, is appointed by law or contract to be performed upon a particular day, which day falls upon a holiday, such act may be performed upon the next business day, with the same effect as if it had been performed upon the day appointed.

## CHAPTER 3

### VESTED STATUTORY POWERS

3.000 Introduction	3.250 Powers as a Legal Corporation
3.050 The Role of the Legislature	3.300 Additional Powers of First Class Municipalities
3.100 Functions of Municipal Government	3.400 Joint Exercise of Governmental Powers
3.150 General Classification of Powers	
3.200 Powers of Finance	

#### **3.000 INTRODUCTION**

In this chapter a general overview of the vested statutory powers and obligations of municipalities will be presented. The topics under consideration will include such things as the role of the legislature, functions of municipal corporations, general powers, powers of first and second class municipalities, and joint exercise of governmental powers. The remaining chapters of the Handbook will more clearly define these powers and duties. The purpose here is to present a consolidated grouping of the vested statutory provisions granted to municipalities.

#### **3.050 THE ROLE OF THE LEGISLATURE**

The authority for actions taken by municipal corporations derives from the constitution and the statutes of the state legislature. In granting powers to municipal corporations, the legislature is prohibited from: 1) enacting any private or special laws in the incorporation of municipalities; 2) changing or amending the charter of any municipality; or 3) laying out, opening, vacating, or altering municipal plats, streets, wards, alleys and public grounds. (Cn. III, Sec. 23) Furthermore, the legislature may not delegate to any special commission, private corporation, or association any power to perform any municipal functions whatever. This includes the power to make, supervise, or interfere with any municipal improvement, funds, property, and effects whether they are held in trust or otherwise. (Cn. III, Sec. 26)

As was established in the Handbook in Section 2.100, the state is the sole creator of municipal corporations. Except for the provisions of the State Constitution in Article III, Sections 23 and 26, the legislature has complete control over municipal corporations. When viewed in this light, the question becomes, what functions do municipal corporations serve?

#### **3.100 FUNCTIONS OF MUNICIPAL GOVERNMENT**

There are two kinds of functions imposed upon a municipal corporation. They are: 1) governmental activities to be carried on by the corporation as one of the political subdivisions of the state; and 2) functions arising from the grant of some special power in the exercise of which the corporation acts as a legal individual. (O'Rourke v. City of Sioux Falls, 4 SD 47, 54 NW 1044)

A second court decision described the functions of a municipal corporation as: 1) those conferred or imposed on a local agency to be exercised not only in the interests of its inhabitants but also in the advancement of the public good or welfare as affecting the public generally; however, 2) if the powers conferred are not primarily or chiefly in the interests of the state at large, but are for the private advantage of the incorporated community, they are proprietary. (Hurd v. Blomstrom, 72 SD 526, 37 NW 2d 247)

### **3.150 GENERAL CLASSIFICATION OF POWERS**

Municipal corporations have the following general classes of powers and no others:

- 1) Those granted in express terms;
- 2) Those necessarily and fairly implied;
- 3) Those essential to the declared purposes of the corporation not simply convenient but indispensable. (City of Sioux Falls v. Kirby, (1894) 6 SD 62, 60 NW 156; 25 LRA 621)

Due to the legal technicalities involved, only the expressed powers will be presented in this chapter of the Handbook. Subsequent chapters will deal with the implied and incidental powers when consideration of these two areas is necessary.

### **3.200 POWERS OF FINANCE**

Municipal corporations have the following general powers of finance. More complete details along with explanations and the Codified Law citations can be found in Chapter 12 of the Handbook.

Every municipality has the power to:

- 1) Perform all administrative and financial functions for all purposes authorized by law or necessary to the exercise of any power granted. (SDCL 9-12-2)
- 2) Make and collect a number of special assessments for local improvements on adjoining or benefited property. (SDCL 9-43-76; 9-21-15; 9-41-3; 9-21-17)
- 3) Borrow money for authorized purposes within the constitutional limitations for municipal indebtedness and to issue its negotiable bonds under specified conditions after proper authorization. (Chapter 6-8B)
- 4) Pay the expenses of members of the governing body or any employees to represent the municipality at general meetings of the municipal officers of the state. (SDCL 9-17-4)
- 5) Appropriate funds in order to pay the necessary expenses of its officers or employees in conducting business or attending meetings within or outside of the state as the governing body shall determine necessary to carry out its authorized municipal functions. (SDCL 9-12-3)
- 6) Provide for municipal supplies to be furnished by contract to the lowest responsible bidder, except as otherwise provided by law. (SDCL 9-12-1(3))
- 7) Insure the public property of the municipality. (SDCL 9-12-1(5))
- 8) Obtain and pay for insurance protecting and insuring the municipality against such acts or omissions which may result in bodily injury or death to any person or damage to property for which the municipality may be legally liable. (SDCL 9-12-7)
- 9) Transfer surplus funds accumulated through special municipal revenue producing enterprises to public school districts operating within the municipality provided such transfer of funds shall be made through a majority vote of the governing body of the municipality and accepted by a majority vote of the governing body of such school district. No funds shall be transferred that are acquired through legal tax levy by the municipality. All such funds may be transferred by the school district to the general fund or the capital outlay of such school district. (SDCL 9-21-28)
- 10) Assign for collection any or all delinquent accounts receivable. After reasonable collection efforts, the governing body may determine that an account is uncollectible, and by formal action direct that the account be removed from the records. (SDCL 9-22-4)
- 11) Claim a lien upon the property of persons receiving the benefit of ambulance service of municipalities. (SDCL 44-13-1)

**3.250 POWERS AS A LEGAL CORPORATION**

3.255	To Sue and Be Sued	3.280	To License and Regulate
3.260	To Acquire and Dispose of Property	3.285	To Establish Employee Relations
3.265	To Maintain Facilities	3.287	To Promote the Municipality
3.270	To Adopt Ordinances	3.290	Miscellaneous Powers
3.275	Police Powers		

Municipalities have several powers as a legal corporation. The powers range from the vested statutory authority of civil suit, to licensing and police powers, and include everything between. Every municipality has the power:

**3.255 To Sue and Be Sued (SDCL 9-12-1)**

A municipal corporation has legal rights and obligations just as a private corporation. When these rights and obligations are abridged, action can be taken in the form of a civil suit.

Municipal corporations can use civil suits to protect their rights. An example can be found in contracts. Individuals can enforce municipal obligations through this means also. Civil suits against municipalities represent the liabilities of a municipal corporation.

**Liabilities of Municipal Corporations**

The liability of a municipality for torts arising out of the negligence of its employees depends upon which type of function is involved. (See Hdbk., sec. 3.100) The operation of a police department is a governmental function because police departments are operated for the welfare of all the people and are financed, for the most part, by taxes which bear no particular relationship to the service furnished and has no element of profit or gain to the municipality in pecuniary or material way. Fire protection, public health, public welfare, traffic control, and the school system are likewise governmental functions.

On the other hand, the municipal water supply, light, gas, and transportation systems are generally considered to be private functions. These are sometimes referred to as corporate or proprietary functions.

There is also a group of borderline functions which include street maintenance, sidewalks, sewers, and swimming pools. In South Dakota, municipalities have ordinarily been held liable for torts committed by employees in the exercise of these borderline functions.

**Governmental Functions**

The statutes provide that no action shall lie against any municipality, its governing body, or an auditorium board to recover for injuries sustained, as a result of the negligence of municipal personnel while engaged in the operation of a municipal auditorium. However, employees of the municipality or auditorium board may institute an action to recover damages or injuries received in the course of their public employment. (SDCL 9-52-18) Similar provisions apply in the operation of a system of public recreation and playgrounds. (SDCL 9-38-105)

The Legislature of 1968 passed an act which relieved peace officers, game wardens, firemen and policemen from liability when rendering first aid in an emergency situation, when it is given in good faith and in the judgment of the officer, emergency care is necessary at the time. This relief from liability extends to the operation of any motor vehicle in connection with any such care or services. (SDCL 20-9-4.1)

When a municipality contends that a function is governmental rather than proprietary, the defense must be pleaded, unless it appears from the allegations of the complaint, that the acts complained of were committed in furtherance of a governmental function. (Schoenroch v. City of Sisseton, 78 SD 419, 103 NW 2d 649)

#### Proprietary Functions

Another court case determined that a municipal corporation is liable when a citizen's property is flooded as a result of street improvements. The municipality must keep its culverts open. (Shuck v. City of Sioux Falls, 79 SD, 113 NW 2d 849)

A municipality which maintains a swimming pool and attendant facilities is acting in a proprietary function, irrespective of whether the municipality incurred a deficit in operation and is not immune from liability for injuries due to ordinary negligence. The patrons may assume reasonable and ordinary care against foreseeable dangers. (Orrison v. City of Rapid City, 74 NW 2d 489)

#### Options for Municipalities in A Civil Suit

When a claim is instituted against a political subdivision, the entity may elect to do one or more of the following things: 1) indemnify the officer or employee for the costs incurred in the defense of the claim or action; 2) pay or indemnify the officer or employee the reasonable attorney fees incurred by virtue of the claim or action; 3) pay or indemnify the officer or employee for a judgment based on the claim or action, or 4) pay or indemnify the officer or employee for a compromise or settlement of the claim or action. (SDCL 3-19-1)

In no case can the total amount of payment or indemnity for any one officer or employee exceed the sum of twenty-five thousand dollars. However, any political subdivision may establish a different maximum amount of payment or indemnity by a resolution approved by the governing body. Indemnity in excess of twenty-five thousand dollars or the maximum amount of payment or indemnity adopted by a resolution of the governing body, whichever is greater, may be presented as a claim to the legislature. (SDCL 3-19-2; See Hdbk., sec. 8.325)

#### Legal Notice Before Action

SDCL 3-21-2 requires that notice be given to the municipal finance officer or mayor within one hundred and eighty days after an injury. If the person injured is a minor or is mentally or physically incapacitated, the court may allow that person to serve the notice within a reasonable time after the expiration of the period of disability. (SDCL 3-21-4) (See Hdbk., sec. 8.300)

Municipalities have the power to purchase all forms of liability insurance to protect the municipality. The insurance coverage obtained shall provide protection for the municipal officers and employees in the performance of official duties and against acts committed by them that could reasonably be considered to be within the scope of their official duties. Municipalities also have the authority in lieu of insurance to make other arrangements, including entering into agreements with others to protect and assist the municipality in meeting obligations arising from such acts or omissions for which the municipality may be legally liable. (SDCL 9-12-7) This is enabling legislation. It does not, however, mandate the purchase of blanket liability insurance to cover all risks regardless of the costs. Nor does it require that once any form of liability insurance is obtained for any risk whatsoever, the municipality must then provide coverage to its officers for personal injury. (Klatt v. Continental Ins. Co. (1987) 409 NW 2d 366)

#### 3.260 To Acquire and Dispose of Property and Lease Purchase

The governing body of any municipality is authorized to acquire by lease, purchase, gift, condemnation or other lawful means, real and personal property, easements, and rights of way within or without its corporate limits for all authorized purposes. (SDCL 9-12-1(2))

Multi-year lease agreements are only legal if they do not bind a future governing body. They can be used, however, if they include a fiscal funding out clause. (AG Opinion 85-12; AG Memo 85-05) An example is below:

It is specifically understood and agreed that a lease purchase is binding upon the Municipality if, and only if, each year's financial obligations are approved and authorized by the governing body then holding office. If at anytime during the life of this agreement, the governing body of the Municipality shall fail or refuse to approve or authorize the funds due hereunder for the following municipal fiscal year, then this agreement shall terminate upon the end of the fiscal year for which funds were approved and authorized. Such a termination shall be without penalty to the Municipality.

Any lease-purchase agreement for a term exceeding one year requires the approval of more than sixty percent of the members-elect of the governing body of the municipality. A lease-purchase agreement may not exceed ten years for equipment, and twenty years for an improvement to real property. (SDCL 9-21-18.1)

A municipality has the power to lease, sell, give and convey any personal or real property of the municipality, by resolution of the governing body, to the state or any public corporation to be used for any authorized public purpose. (SDCL 9-12-5) Municipalities are also authorized to lease municipally owned property to private persons under the provisions of SDCL 9-12-5.1 and 9-12-5.2.

Municipalities may convey and transfer any real or personal property which is not held for public use or which is about to be abandoned for public purposes, to another political subdivision or nonprofit corporation for public, charitable, or humanitarian purposes and accommodations without offering the property for sale and without requiring payment from the political subdivision or nonprofit corporation. The governing body may transfer title by resolution. (SDCL 6-5-2; 6-5-3; 9-27-29; 9-27-30)

By resolution, a municipality may exchange real property with the United States government or another political subdivision. The terms and conditions of the exchange shall be agreed upon by the governing bodies. (SDCL 6-5-1; 9-27-34) A municipality may also exchange real property with a private owner after appraising the land, publishing a notice of hearing and conducting a public hearing. (SDCL 6-5-4; 9-27-34.1)

The procedure for disposing of surplus real and personal property is outlined in detail in Chapter 14, section 14.115 of this handbook.

### 3.265 To Maintain Facilities

- 1) Every municipality has the power to construct, operate, and maintain an auditorium and all necessary public buildings. (SDCL 9-12-1(4) All municipalities have the power to create an appointive board for the purpose of managing municipal auditoriums and to provide the qualifications, mode of appointment, tenure of office, compensation, powers, duties, and rules and regulations governing such boards by ordinance. (SDCL 9-52-2)
- 2) Every municipality has the power to establish, maintain, and regulate its own jail or to use the county jail if the board of county commissioners gives its consent. (SDCL 9-29-24) The municipality may enter into an agreement by which a jail may be used, owned, constructed, maintained, or operated by two or more subdivisions. (SDCL 24-11-4) When an arrangement exists for the municipality to use the county jail, the municipality is liable for the cost of the hospitalization of its inmates. (SDCL 24-11-12; AGR 1953-54, pp. 380-382)
- 3) Every municipality has the power to construct, operate, and maintain any light, heat, and power facilities; to purchase electric current from outside the municipality; and to sell municipally generated electric current and maintain transmission lines for such purposes outside the municipality. (SDCL 9-39-1) These same contracts may be negotiated with the United States, the State of South Dakota, its agencies or subdivisions or privately owned or cooperative power companies for the purchase and resale of electrical energy; to maintain existing plants for standby service; and to acquire and maintain generation facilities, as described in SDCL 9-39-4. (SDCL 9-39-4) Any municipal corporation may enter into an agreement with other governmental units for the joint or cooperative use of electrical facilities or any other joint project, which is within the scope of the municipal corporation. (SDCL 9-39-2)

- 4) Every municipality has the power to construct, acquire, operate, maintain, and regulate a system of waterworks and other necessary facilities, to dispose of surplus water to districts, subdivisions, and areas outside the municipality, and to assess, levy, and collect taxes and special assessments for such purposes, and may appropriate funds and levy taxes to accumulate funds for such purposes. The accumulated funds shall be placed in a separate fund which may not revert at the end of the fiscal year. The governing body shall establish a maximum amount to be accumulated in the fund. (SDCL 9-47-1)

The municipality may enter into agreements with any authorized federal or state agency, subdivision or unit of government to construct, establish, operate, or maintain a system of waterworks (SDCL 9-47-1) Under provisions of SDCL 34A-3, the Department of Agriculture and Natural Resources will classify all water treatment plants, wastewater treatment plants, water distribution and wastewater collection systems. SDCL 34A-3-4 and 34A-3-4.1 describe the circumstances under which all water systems need to have certified persons supervising the operation of water treatment and water distribution systems.

- 5) Every municipality shall have power to acquire, establish, maintain, and construct main, trunk, sanitary, storm, and service sewers, and septic or sewage treatment plants, drains, and manholes; and to establish tension or connection of the main sewer to all benefited property within the sewer district. (SDCL 9-48-2)
- 6) Every municipality has the power to provide for the construction and maintenance of sewer pipes on private property or in or along any stream of water or to empty or discharge the sewage into any stream of water, subject to the provisions of SDCL 34A-2, if the action does not finally create any foul or noxious odors in the air over or along the stream. (SDCL 9-48-4)
- 7) A municipality can construct and keep in repair bridges, culverts, and sluiceways. (SDCL 9-45-3)
- 8) Every municipality can establish, improve, maintain, and regulate public parks, squares, parkways, boulevards, swimming pools, and other related facilities. Some costs can be financed by bonds. (SDCL 9-38-1)
- 9) Every municipality can plant and provide for the care of trees upon public grounds and along the streets and can enclose any public grounds. (SDCL 9-38-2)
- 10) Every municipality can exercise powers as to airports and landing fields for aircraft, as provided in Title 50. (SDCL 9-12-14)
- 11) Every municipality can establish and maintain a municipal library, subject to the provisions of Chapter 14-2. (SDCL 9-12-15)
- 12) Every municipality can establish, maintain, and protect artesian wells and may adopt ordinances to protect ground water and wellheads. (SDCL 9-47-20; 46-6-25; 9-12-17)
- 13) Every municipality has power to establish, maintain, and operate golf courses, tennis courts, ball grounds, and other athletic amusements, and necessary facilities as a part of its park system, and charge fees for their use. All fees and any other money received for use of the board including tax revenues appropriated for park purposes, shall be kept in a special park fund and shall be paid upon requisition by the president and secretary of the board and warrant drawn and executed as other warrants. (SDCL 9-38-6)
- 14) Every municipality has power to install and regulate parking meters on municipal streets and properties, to collect regulatory parking fees, and to use the proceeds for traffic regulation and other traffic-connected purposes. (SDCL 9-31-5)
- 15) Every municipality has the power to acquire, improve, equip, operate, maintain, and regulate parking lots and areas for the off-street parking of vehicles, to fix and collect parking fees for this service, to issue its revenue bonds for such purposes payable solely from the parking lot and on-street and off-street parking meter revenues, and to issue its general obligation bonds for payment as authorized by statute. (SDCL 9-51-5)
- 16) Every municipality has the power to collect, dispose of, and regulate the manner of handling garbage and other waste material. For such purpose, the municipality may acquire, establish, maintain, operate, and regulate equipment and garbage disposal plants, incinerators, and dumping grounds. The municipality may fix and collect charges for such services and contract with one or more persons for the collection and hauling of garbage and other wastes from the municipality or districts established herein. (SDCL 9-32-10; 9-32-11)
- 17) Every municipality can enter into contracts for the furnishing of fire-fighting equipment and protection for the municipality. The contract may be with other political subdivisions or any non-profit fire corporation or association legally organized in this state. (SDCL 34-31-4)

- 18) Every municipality has the power to purchase from the owners or acquire through condemnation means any sewer or water mains located in any municipality, district, or subdivisions outside the municipality which shall have been, by annexation proceedings or otherwise, annexed to the municipality. (SDCL 9-47-17; 9-48-5)
- 19) Every municipality may regulate and maintain in a reasonable manner any abandoned cemetery, including mowing and cutting weeds and grass, and repairing fences and grave markers. The governing body may appoint a cemetery board of directors to manage such abandoned cemeteries. (SDCL 9-12-18)

### 3.270 To Adopt Ordinances

- 1) Every municipality has the power to enact, make, amend, revise, or repeal all ordinances, resolutions, and regulations which are proper and necessary for the powers granted, and provide for the punishment of each violation by a fine not exceeding the fines established in SDCL 22-6-2(2) or by imprisonment not exceeding thirty days or by both. (SDCL 9-19-3)
- 2) Every municipality has the power to compile, without revision or amendment, the municipal ordinances for publication in book form. (SDCL 9-19-15)
- 3) Every municipality has the power to revise the municipal ordinances. (SDCL 9-19-16)

### 3.275 Police Powers

- 1) Every municipality has the power to regulate the municipal police and to pass and enforce all necessary police ordinances. (SDCL 9-29-2)
- 2) Every municipality has the power to exercise jurisdiction for authorized purposes over all municipal territory, whether within or without its corporate limits, for the purpose of promoting the health, safety, morals, and general welfare of the community. (SDCL 9-29-1)
- 3) Every municipality has the power to preserve the peace, to prevent disorderly conduct, and to prevent and suppress riots, affrays, noises, disturbances, and disorderly assemblies. (SDCL 9-29-3)
- 4) Every municipality has the power to regulate the practice of begging. (SDCL 9-29-10)
- 5) Every municipality has the power to regulate or prohibit the storage of combustible or explosive material, the use of open flame lights, the building of bonfires, and the use or sale of fireworks. (SDCL 9-33-1) However, municipalities may not pass any ordinance that restricts or prohibits, or imposes any tax, licensure requirement or licensure fee on the possession, storage, transportation, purchase, sale, transfer, ownership, manufacture or repair of firearms or ammunition or their components. Any ordinances prohibited by this section are null and void. This does not apply to generally applicable zoning ordinances, building regulations, or fire codes. (SDCL 9-19-20)
- 6) Every municipality may prohibit or regulate the transaction of business in alcoholic beverages and the use and consumption of alcoholic beverages, consistent with Title 35 of SDCL. (SDCL 9-29-7)
- 7) Every municipality may regulate the use of motor vehicles, bicycles, house cars, house trailers, trailer coaches, traction engines, tractors and road rollers. (SDCL 9-31-1)
- 8) Every municipality has the power to regulate the speed of animals, vehicles, motor vehicles, cars, and locomotives. (SDCL 9-31-3)
- 9) Every municipality has the power to regulate traffic and sales upon the streets, sidewalks, and in public places. (SDCL 9-30-4)
- 10) Every municipality has the power to determine what shall be deemed noxious or unhealthful vegetation and to provide for the destruction thereof with the cost to be defrayed by special assessment against the property involved. (SDCL 9-32-12)
- 11) Every municipality can declare what constitutes a nuisance and prevent, abate, and remove the same. A municipality may obtain a judgment through civil action against the owner or occupant of the real property on which a public nuisance has occurred for the cost of abating a public nuisance. (SDCL 9-29-13; 21-10-6)
- 12) Every municipality has the power to do what is necessary or expedient for the promotion of health or the suppression of disease. (SDCL 9-32-1)
- 13) Every municipality has the power to compel the owner of any stable, pigsty, sewer, cesspool, or of any unwholesome or nauseous thing or place to cleanse, abate, or remove the same, and to regulate their location. (SDCL 9-32-6)

- 14) Every municipality has the power to prevent the pollution or injury to any public water supply within one mile of the municipal limits. (SDCL 9-32-8)
- 15) Every municipality can control the location and regulate the management and construction of packing houses, slaughterhouses, renderies, bone and soap factories, foundries, livery stables, and blacksmith shops, and to prohibit offensive or unwholesome businesses or establishments within or within one mile of the corporate limits. (SDCL 9-32-7)
- 16) Every municipality may establish, maintain, and regulate cemeteries within or outside of the municipality. The cemeteries may be removed or prohibited within the municipality or within one mile of its corporate limits. Municipalities may also provide for the operation and control of municipal cemeteries by a corporation or association organized for cemetery purposes. (SDCL 9-32-13)
- 17) Every municipality has the power to regulate and prohibit the use of streets, sidewalks, and public grounds for signs, signposts, awnings, flying of flags or banners, posting bills and advertisements, the exhibition or carrying of banners, placards, or advertisements, and the distribution of handbills. (SDCL 9-30-3) Special laws apply to regulation of campaign signs. (SDCL 9-30-5.1)
- 18) Every municipality has the power to regulate the use of sidewalks, streets, alleys, wharfs, parks, and public places with regard to usage and maintenance. (SDCL 9-30-2)
- 19) Every municipality has the power to require the owner of abutting property to remove ice, snow, and refuse from sidewalks, and weeds from parking areas, and to provide for their removal and payment by special assessment against the property involved. (SDCL 9-30-5)
- 20) Every municipality has the power to regulate or prohibit the running at large of dogs, animals, and poultry, to establish pounds, appoint pound-masters, regulate the impounding of animals, to impose a tax or license on dogs running at large and to prohibit and punish cruelty to animals. (SDCL 9-29-11; 9-29-12)
- 21) Every municipality has the power to regulate partition fences and party walls. (SDCL 9-29-14)
- 22) Every municipality has the power to provide for the regulation and inspection of amusement places and to require theaters and other places of amusement to provide stage curtains. Proper aisles and exits for escape from amusement places in the case of fire may be required. (SDCL 9-33-7)
- 23) Every municipality has the power to prescribe the fire limits with respect to the erection or repair of wooden buildings, and to provide that buildings damaged to the extent of fifty per cent of their value must be removed. (SDCL 9-33-2)
- 24) Every municipality has the power to authorize officers to examine all types of buildings during reasonable hours to ascertain whether such are in dangerous condition, and to provide for remedying such conditions. (SDCL 9-33-10)
- 25) Every municipality has the power to prescribe the manner of constructing buildings, to adopt certain building codes, and to require and regulate the construction of fire escapes. (SDCL 9-33-4; 9-33-4.1)
- 26) Every municipality has the power to prevent and provide for remedying any dangerous construction, equipment, or manufacturing process, and to prevent the depositing of ashes or refuse in unsafe places. All such places may be required to be kept in a safe condition. (SDCL 9-33-9)
- 27) Every municipality has the power to regulate the construction, installation, and inspection of electrical wiring and appliances, as well as gas piping, fittings, and appliances. Municipalities can also provide that fees may be collected for such inspection. The exercise of these powers, however, does not affect the liability of any public utility furnishing gas or electricity. (SDCL 9-33-5)
- 28) Every municipality has the power to provide for the inspection of steam boilers. (SDCL 9-33-8)
- 29) Every municipality has the power to prohibit and regulate the sale, transportation, and all other aspects concerning alcoholic beverages except as authorized under the statutory provisions. (SDCL 9-29-7) SDCL Chapter 35 contains the legal provisions regarding alcoholic beverages.
- 30) Every municipality has the power to designate and require the use of routes of travel of municipal streets and highways for commercial motor carriers, trucks, and busses; however, the provision for permission to deviate from the designated routes to reach a necessary destination must be authorized. (SDCL 9-31-2)
- 31) Every municipality has the power to suppress gambling, gaming, lotteries, and all fraudulent devices and practices for obtaining money or property. A municipality does not have the authority, however, to regulate or prohibit the state lottery. (SDCL 9-29-5; 22-25-27) The SD Supreme Court has held that the state's video lottery laws leave no room for supplementary regulation by municipal ordinances. (Law v. City of Sioux Falls, 2011 SD 63, 804 N W 2d 428)

- 32) For the purpose of protecting public groundwater supplies from pollution, every municipality has the power to adopt ordinances which are consistent with the provisions of the South Dakota Department of Agriculture and Natural Resources rules adopted pursuant to SDCL 34A-3A-17. (SDCL 9-12-17)
- 33) Every municipality has the power to authorize a 911 Emergency Reporting System (SDCL Ch. 34-45; Hdbk. sec. 8.600)
- 34) A municipality may, by ordinance, provide for a contemporary community standards test to regulate the sale, distribution and use of obscene material and to regulate obscene live conduct in any commercial establishment or public place. (SDCL 22-24-25.1)

### 3.280 To License and Regulate

- 1) Every municipality has the power to fix the amount, terms, and manner of issuing and revoking licenses. (SDCL 9-34-1)
- 2) Every municipality has the power to tax, license, and regulate secondhand and junk stores, and to control purchases by minors. (SDCL 9-34-9)
- 3) Every municipality has the power to license, tax, and regulate plumbers, electricians, electrical workers residential contractors, and heating, ventilation, and air conditioning contractors. (SDCL 9-34-12)
- 4) Every municipality has the power to license, tax and regulate transient merchants, auctioneers, auction stores, gift enterprises, and similar businesses. The municipality is allowed to grant certain exemptions as specified in the statutes. (SDCL 9-34-7)
- 5) Every municipality has the power to license, tax, regulate, and prescribe the compensation of dray men, parcel delivery men, bus drivers, cab men, taxi drivers, porters, express men, and others pursuing like occupations. (SDCL 9-34-10)
- 6) With the exception of insurance requirements established in state law, municipalities may regulate transportation network companies. (SDCL 32-40-23)
- 7) Every municipality has the power to provide for the licensing and numbering of motor drays, motor delivery wagons, motor tractors, and motor trucks. (SDCL 9-34-11)
- 8) Every municipality has the power to license, tax, and regulate exhibitions, shows, and amusements. (SDCL 9-34-13)
- 9) Every municipality has the power to license, tax, regulate, or prohibit palmists, clairvoyants, phrenologists, mind readers, fortune tellers, and fakirs. (SDCL 9-34-16)
- 10) Every municipality has the power to license, tax, regulate, or prohibit public dances, public dance halls, and skating rinks. (SDCL 9-34-15)
- 11) Every municipality has the power to license, tax, regulate, or prohibit pool and billiard halls and bowling alleys. (SDCL 9-34-14)
- 12) Every municipality has the power to license, tax, regulate, or prohibit hawkers, peddlers, pawn brokers, ticket scalpers, and employment agencies. (SDCL 9-34-8)
- 13) Every municipality has the power to regulate and provide for the lighting of streets, laying of gas pipes, erection of lamp posts, and electric towers; to fix and determine the charges for telephones and service connections subject to the powers of the Public Utilities Commission; to regulate or prohibit the installation of utility equipment within the municipality; and to grant the rights and franchises for such purposes and to regulate them. (SDCL 9-35-1)
- 14) Every municipality has the power to regulate openings in streets or alleys for utility installations. (SDCL 9-30-1)
- 15) Every municipality has the power to provide for, and regulate, the construction of local improvements by day's pay under the circumstances prescribed. (SDCL 9-42-3)
- 16) Every municipality has the power to regulate the construction, repair, and use of vaults, cisterns, hydrants, pumps, sewers, and gutters. (SDCL 9-32-9)
- 17) Subject to the powers vested in the Public Utilities Commission, every municipality has the power to require railroad companies to properly maintain their crossing with streets and public roads, and to maintain all improvements for drainage of the right of way and adjacent property. (SDCL 9-35-9)

- 18) Every municipality has the power to provide for the specification of improvements, openings, and connections with regard to viaducts, street lighting equipment, and the grade of roads, streets, alleys, sidewalks, and public grounds. (SDCL 9-45-1)
- 19) Every municipality has the power to provide for, and regulate, crosswalks, curbs, gutters, and drains. (SDCL 9-45-5)
- 20) Every municipality has the power to examine and require health certificates for persons who conduct or operate eating and drinking places, and for those who operate any retail or wholesale business where food and drinkable products are prepared or offered for sale to the public. (SDCL 9-32-4)
- 21) Every municipality has the power to license, regulate, fix the travel routes, speed, and point for stops of all motor carriers of passengers, operators of taxicabs, and motor buses operating in such municipality or in a zone adjacent thereto not part of another municipality and not to exceed two miles around the municipal boundaries. If such transportation service is rendered between adjoining municipalities, the governing body of each municipality may act jointly to regulate intercity service. (SDCL 9-35-11)
- 22) Every municipality has the power to name and change the name of any street, avenue, alley, or other public place, and to regulate the numbering of houses and lots. (SDCL 9-45-2)
- 23) Every municipality shall have exclusive jurisdiction by ordinance to regulate, prohibit, and consent to construction, installation, operation, and maintenance of CATV (Cable TV) systems within their corporate limits. (SDCL 9-35-18)
- 24) Every municipality has the power to regulate the practice of tattooing, including microblading, saline tattoo removal, and body piercing. (SDCL 9-34-17; 34-1-17)
- 25) Every municipality has the power to regulate day care centers. (SDCL 9-29-26)

### 3.285 To Establish Employee Relations

- 1) The municipality may adopt an ordinance establishing a civil service system for its municipal employees, policemen, and firemen. This ordinance can also prescribe the powers, duties, and compensation of a civil service board and establish the provisions of suspensions, removals, employee hearing, and similar problems. Such ordinance may not be repealed or modified to affect the standing of any covered individual, and it shall not be repealed except by an initiated ordinance. (SDCL 9-14-14)
- 2) Every municipality has the power to enter into employee insurance contracts in the form of group life insurance, salary saving, or retirement annuities, and to pay the insurance premiums out of funds deducted from the salary or wages of the covered employees. (SDCL 9-14-36)
- 3) All municipalities have the power to provide, at their discretion, either by self-insurance, or by purchase from private companies, group life, sickness, and accident, or hospitalization and surgical insurance, or any one or more of such insurance risks, for its employees and appointive officers, and hospital and surgical insurance for the dependents of the covered municipal personnel and to appropriate the necessary funds for the cost of all or any portion of the insurance. (SDCL 9-14-30; 9-14-32; 6-1-15; 6-1-16)
- 4) Municipalities have the power to investigate any and all discriminatory practices based on sex, race, color, creed, religion, ancestry, or national origin with respect to employment, labor union membership, housing accommodations, property rights, education and public accommodations or public services. Municipalities are further empowered to establish a commission on human relations to serve this purpose. (SDCL 20-12-4; 20-12-5)

### 3.287 To Promote the Municipality

A municipality may appropriate money from its general fund to promote itself. "Promotion" includes any costs incidental to the hosting of events held within the municipality. The municipality may also appropriate money to commercial clubs, chambers of commerce or industrial development corporations organized and incorporated as nonprofit corporations for the purpose of promoting the municipality. (SDCL 9-12-11) Municipalities also may form local industrial development corporations for the purpose of furthering economic development and assisting small business concerns within the community. (SDCL 9-27-37)

A municipality may use the receipts from the municipal sales tax on lodging, alcoholic beverages, eating establishments and admission sales for the promotion and advertising of the municipality. (SDCL 10-52A-2) Over the years several attorney general opinions have ruled that local governing bodies have the authority to determine what qualifies as promoting the municipality. Specifically approved by the attorney general are fund grants to industries willing to locate in the municipality; loans to industries willing to locate in the municipality; construction of facilities to be given or lent without consideration to industries willing to locate in the municipality (AG Opinion 84-46); construction, operational costs and maintenance of a museum (AG Opinion 86-16); and municipal parking lots (AG Opinion 88-7).

### 3.290 Miscellaneous Powers

- 1) Municipalities can establish, by ordinance or resolution, rental to be paid for the use of sewer (sanitary and storm) utilities. (SDCL 9-48-26)
- 2) Municipal corporations are authorized to enter into agreements with counties and school districts to acquire land or to construct, equip, improve, or maintain public buildings. (SDCL 6-3-1)
- 3) Municipalities can transfer surplus funds, under certain conditions, to the construction costs of private hospitals. (SDCL 34-9-9)
- 4) Municipalities have the authority to accumulate funds for a period longer than one year for specific future municipal improvements. (SDCL 9-21-14.1)
- 5) The governing bodies of municipalities can appropriate funds out of the general fund to support the local Civil Air Patrol Unit. (SDCL 9-21-5)
- 6) Municipalities have the power to pay for sewer construction costs from the general fund. (AGR 1959-60, p. 262)
- 7) Municipal corporations have the authority to provide ambulance service (SDCL Ch. 34-11) or to be included in a county ambulance district upon proper procedures. (SDCL 34-11A-2)
- 8) Every municipality has the power to designate the official newspaper or newspapers. (SDCL 9-12-6)
- 9) Every municipality has the power to establish drainage basin utility districts jointly with counties. (SDCL 46A-10B-2)
- 10) Municipalities may appropriate money to promote, establish and maintain recreational, educational and other activities of the elderly. (SDCL 42-2-8)
- 11) A municipality may pay compensation to a regularly scheduled commercial air carrier to provide basic or enhanced air service. (SDCL 9-12-14.1)
- 12) Under specific circumstances, a municipality may donate historical artifacts, materials, or documents to certain non-profit public museums open to the public. (SDCL 6-13-15)
- 13) Any municipality holding a license pursuant to Title 35 may serve or provide for the service of food, prepared food, and beverages at any establishment operating under such license. (SDCL 9-12-20)
- 14) The governing body of a municipality may contribute sums of money to provide general operating and capital support to any technical college and other career and technical education purposes. The funds necessary to execute this section may be appropriated out of the municipal general fund, the capital outlay fund, or both. (SDCL 9-21-33)

### 3.300 ADDITIONAL POWERS OF FIRST CLASS MUNICIPALITIES

In addition to the powers previously listed, municipalities of the first class also possess the following powers:

- 1) to pension retired employees; (SDCL 9-16-3)
- 2) to establish a fireman's relief and pension fund and to pension firemen; (SDCL 9-16-20)
- 3) to establish, maintain and support a safety council. (SDCL 9-33-18) The municipality is further empowered to establish and finance a program of education and instruction for the promotion of safety. (SDCL 9-33-17)

**3.400 JOINT EXERCISE OF GOVERNMENTAL POWERS**

The statutes provide that counties, municipalities, townships, school districts, water conservancy subdistricts, and drainage districts can jointly exercise any power, privilege, or authority except the power to tax with any other public agency of the state. (SDCL 1-24-2)

To enter into joint action or cooperation, appropriate action must be taken in the form of resolution, ordinance or other means pursuant to the law by all parties involved. (SDCL 1-24-3) The agreement must specify the following:

- 1) The duration of the joint action;
- 2) The precise organization, composition, and nature of any separate legal or administrative entity created by the agreement;
- 3) The purpose of the agreement;
- 4) The manner of financing the joint action as well as establishing and maintaining a budget for the joint action;
- 5) The permissible method or methods to be used in accomplishing the partial or complete termination of the agreement;
- 6) Any other necessary and proper matter. (SDCL 1-24-4)

The law further provides that if the function to be served lies within the constitutional or statutory jurisdiction of an officer or agency of the state, then the agreement must be submitted to that officer or agency for his approval or disapproval. (SDCL 1-24-6)

The agreements do not relieve any public agency from any obligation or responsibility imposed upon the public agency by law. (SDCL 1-24-9)

Two or more political subdivisions may establish a joint entity for economic development purposes or to provide greater efficiency or improved services among the participating political subdivisions. Such joint entities may not levy taxes but may borrow funds to finance the purchase of property or the construction of facilities. The joint entity's governing body must be comprised of elected officials from the participating governing bodies and all financing decisions will require more than a 60% vote of the governing body's members. (SDCL 1-24-19)

## CHAPTER 4

### RESOLUTIONS, ORDINANCES, PUBLIC RECORDS AND OPEN MEETINGS

4.000	Introduction	4.200	Municipal Records and Proceedings
4.050	Ordinances and Resolutions	4.300	Legal Newspapers and Publication of Notices
4.100	Initiative	4.350	Broadcast Announcements by Public Agencies
4.130	Referendum	4.400	Open Meeting Law
4.150	Public Records and Files		

#### 4.000 INTRODUCTION

When public policy is determined by the governing body, the extent of and the limitations on that policy are defined in ordinances and resolutions. Public policy which is determined by the electorate appears in the form of the initiative or the referendum. The purpose of this chapter of the Handbook is to examine the statutory procedures and requirements of ordinances and resolutions, and the initiative and referendum.

This chapter will also deal with the topics of public records and executive sessions.

#### 4.050 ORDINANCES AND RESOLUTIONS

4.055	Definition of Terms
4.060	Power to Adopt Ordinances and Resolutions
4.065	Style of Ordinances
4.070	Penalty Powers - Maximum Penalty
4.075	Readings, Passage and Publication
4.080	Veto
4.085	Effective Date of Ordinances and Resolutions
4.090	Compilation of Ordinances

#### 4.055 Definition of Terms

The word "ordinance" means "a permanent legislative act within the limits of its powers of the governing body of a municipality." (SDCL 9-19-1)

A "resolution" on the other hand, means any determination, decision, or direction of the governing body of a municipality of a temporary or special character for the purpose of initiating, effecting, or carrying out its administrative duties and functions. (SDCL 9-19-1) In the case of State ex rel. Wagner v. Summers, 33 S.D. 40, 54, 144 N.W. 730, 734 (1913) the Court ruled that the terms "resolution" and "motion" are practically synonymous.

#### 4.060 Power to Adopt Ordinances and Resolutions

Municipalities are authorized to enact, make, amend, revise, or repeal all ordinances, resolutions and regulations which are necessary to carry into effect their vested statutory powers. (SDCL 9-19-3; See Hdbk., sec. 3.270)

#### 4.065 Style of Ordinances

Ordinances must be in the following style:

"An ordinance \_\_\_\_\_ (Insert title)"

"Be it ordained by the (city or town) of \_\_\_\_\_ (insert the name of the municipality)" The substance of the ordinance follows. (SDCL 9-19-6)

Ordinances can only embrace one subject which must be expressed in its title. (SDCL 9-19-5) It may be helpful to note, however, that the formalities respecting the style, reading, publication, and the effective date of ordinances are not applicable to resolutions. (City of Brookings v. Martinson, 1933, 61 SD 168, 246 NW 916)

#### 4.070 Penalty Powers - Maximum Penalty

Municipalities are authorized to provide for the punishment of each violation of an ordinance, resolution or regulation with a fine not exceeding the fine established by SDCL 22-6-2(2) or by imprisonment not exceeding thirty days or by both such fine and imprisonment. (SDCL 9-19-3)

#### 4.075 Readings, Passage and Publication

All ordinances shall be read twice by title with at least five days between each reading. The ordinances, if passed, shall be signed by the mayor or acting mayor or president of the board of trustees, and filed with the finance officer. (SDCL 9-19-7) If any amendment presented and approved by the governing body at the second reading of an ordinance substantially alters the substance of the ordinance from the first reading the proposed ordinance as amended may not be considered for final adoption until at least five days after a duly noticed public meeting of the governing body pursuant to chapter 1-25. (SDCL 9-19-7.1)

After being signed and filed, the ordinances must be published at least once in the official newspaper. The only exception to this is that an ordinance incorporating or adopting comprehensive regulations or a code promulgated, approved, and published by a recognized and established national organization prescribing building, electrical, plumbing, safety, fire, or health regulations need not be published in a newspaper. All that is required is that the finance officer publish the fact of adoption once a week for two successive weeks in the official newspaper. (SDCL 9-19-7) The vote on the second reading of all ordinances must be recorded and published. (SDCL 9-19-9)

Amendments or additions to a subdivision or zoning ordinance may be published without republishing the full ordinance if the section or subsection of the ordinance containing the change is published in its entirety. (SDCL 11-4-8)

Resolutions differ from ordinances in that any resolution may be passed after only one reading. The resolution must be recorded at length either separately or in the minutes of the meeting. The votes for and against the resolution must also be published. (SDCL 9-19-8)

The statutory scheme for passage of ordinances and resolutions (meetings, notice, recording of votes and action, and the right of referendum) is mandatory and constitutes legislative limitation upon the power of municipalities to act. The court decided that a purported resolution authorizing a contract for dismantling of an abandoned electric utility was void because it was authorized at an informal town board meeting without record of motion, resolution, subsequent publication, notice and opportunity for referendum. The fact that in letting the contract, the municipality might have been acting in proprietary rather than a governmental capacity was inconsequential, since proprietary functions are not excluded from the mandatory requirements of statute. (Roush v. Town of Esmond, 1950, 73 SD 406, 43 NW 2d 547)

#### 4.080 Veto

In the aldermanic form of government, the mayor can veto any ordinance or resolution or any part or item of an appropriation ordinance or resolution. This veto must be filed, with written objections, with the finance officer within ten days after passage of the ordinance. (SDCL 9-19-10; 9-8-3; See Hdbk., sec. 2.505, 2.620)

If the veto power is exercised, the ordinance, resolution, or other item shall be presented at the next meeting of the council for purposes of reconsideration. The mayor's written objection must accompany the vetoed ordinance, resolution, or other item. The veto can only be overridden by a two thirds vote of the aldermen. (SDCL 9-19-10; 9-19-11)

If the mayor fails to take action on an ordinance or resolution, it becomes law without his signature. (SDCL 9-19-12)

#### 4.085 Effective Date of Ordinances and Resolutions

Unless an ordinance or resolution is drawn to take effect immediately upon passage, all ordinances and resolutions become effective on the twentieth day after passage and publication, unless suspended by operation of a referendum. (SDCL 9-19-13)

The question of the use of an emergency clause on resolutions and ordinances has faced the court several times. Statute defines the resolutions and ordinances which take effect immediately upon passage, as those being "necessary for the immediate preservation of the public peace, health, or safety, or support of the municipal government and its existing public institutions, or which provide for an election or for hearing on an improvement or assessment, or which call for bids." (SDCL 9-19-13)

An initial court decision involved determining how the referendum relates to these emergency clauses. In 1913 the constitutionality of the statute, which was passed in 1899 was argued in the case of the State ex rel. Wagner v. Summers. The court went on further to declare that the actions of a municipal government are subject to the referendum, irrespective of whether they are laws or matters having the effect of laws. (State ex rel. Wagner v. Summers, 1913, 33 SD 40, 144 NW 730, 50 LRA (NS) 206, Ann Cas 1916B 860)

On the basis of that case, the court later ruled that "both ordinances and resolutions, except such as may be necessary for the immediate preservation of the public peace, health or safety, or support of municipal government and existing public institutions, are subject to the referendum." (State ex. rel. Martin v. Eastcott, 1928, 53 SD 191, 220 NW 613)

The court has also ruled that to come within the scope of the grant of power to protect the public health, a municipal ordinance must be reasonable and must contribute in some real and substantial measure to the object sought to be accomplished. An ordinance prescribing the hour of closing of barbershops bore no real or substantial relation to the public health and was therefore invalid in that it was beyond the scope of the power granted by the legislature. (City of Huron v. Munson, (1939) 67 SD 88, 289 NW 416)

#### 4.090 Compilation of Ordinances

Municipalities can compile the ordinances of the municipality in book form provided that while compiling the ordinances they are not revised or amended. The finance officer shall furnish a free copy of the newly compiled book to the circuit clerk of court and the county law library of each county in which the municipality is situated. (SDCL 9-19-15) Every municipality also has the power to revise their ordinances once every five years. (SDCL 9-19-16) Revised ordinances must also be furnished to the circuit clerk or court and county library. (SDCL 9-19-17)

If a municipality posts the ordinance book or any part of the book on the municipality's official website, the municipality shall ensure the most current version of the ordinance book or any part of the book is posted. (SDCL 9-19-14.1)

**4.100 INITIATIVE**

- 4.105 Petition Proposing an Ordinance or Resolution - Contents
- 4.110 Percentage of Electors Required
- 4.115 Presentation of Initiative Petition to Governing Body
- 4.116 Amendment of Initiated Ordinance
- 4.120 Time Required to Initiate Ordinances to Nullify Bonds
- 4.125 Election on Initiative Petition
- 4.126 Initiative Proposals for Cooperation or Consolidation

**4.105 Petition Proposing an Ordinance or Resolution - Contents**

A petition to propose an ordinance or resolution shall be filed with the finance officer. The form of the ordinance or resolution must conform to SDCL 9-19-6. (See Hdbk., sec. 4.065) The petition must include: 1) the required number of resident, registered voters; 2) each signer's residence address, county of voter registration; and 3) the date of signing. The signer's post office box number may be given in lieu of a street address if the signer lives within a municipality of the second or third class. (SDCL 9-20-2) No signature is valid if signed more than six months prior to the filing of the petition. The Board of Elections has established by rule the appropriate petitions to be used.

Any person circulating an initiative or referendum petition shall verify that each person signing the petition is a resident and qualified voter of the municipality (SDCL 9-20-9).

Initiative, referendum, and nominating petitions may be challenged in the manner provided in SDCL 12-1-13 through 12-1-16.

It is important to note that the court has ruled that the power to rescind a vote authorizing a bond issue for the construction of a municipal hospital is not conferred upon either a municipality or its electors. The power to rescind a vote cannot, therefore, be made the subject of an initiative measure because the statutes provide no authority to the electors of a municipality to petition for another election to vote on the question of rescinding a former action. (Custer City v. Robinson, (1961) 79 SD 91, 108 NW 2d 211)

**4.110 Percentage of Electors Required**

Statutes provide that five percent of the registered voters of a municipality have the right to petition an initiated measure. The percentage is based on the number of registered voters of the municipality as recorded by the county auditor on the second Tuesday in January in the year of the election. (SDCL 9-20-1)

**4.115 Presentation of Initiative Petition to Governing Body**

After the petition is filed with the finance officer, it must be presented to the governing body at its first ensuing regular or special meeting. The governing body must submit it for a vote of the voters in the same manner prescribed for referendum. (SDCL 9-20-4)

**4.116 Amendment of Initiated Ordinance**

No initiated ordinance or resolution may be amended or repealed by the governing body of a municipality until at least one year has passed from its effective date. (SDCL 9-20-5.1)

**4.120 Initiated Ordinances to Nullify Bonds**

The right to initiate an ordinance shall not be applicable to ordinances proposed to nullify the purpose for which bonds have been sold by a municipality. (SDCL 9-20-3)

**4.125 Election on Initiative Petition**

Initiated ordinances and resolutions require a majority vote of the total votes cast at the election. These measures become effective the day following the completion of the canvass of the election returns. (SDCL 9-20-5)

**4.126 Initiative Proposals for Cooperation or Consolidation**

In 2000, the voters of South Dakota adopted a Constitutional Amendment to allow voters of local government units to combine, eliminate, or jointly finance local offices, functions, or governmental units by using initiated measures. While the process for these initiatives largely follows the standard initiative process, there are special provisions for these initiatives, including terms for cost sharing and allowing the governing board to place the item on the ballot without using the petition. If presented with such a petition or proposal, refer to SDCL 6-17-1 through 6-17-15.

**4.130 REFERENDUM**

4.135 Number of Signers - Time of Filing      4.145 Vote - Effective Date - Preserve Referendum Petition

4.140 Election on Referendum Petition

Any legislative decision of a governing body is subject to referendum but an administrative decision is not. State law defines a legislative decision as one that enacts a permanent law or lays down a rule of conduct or course of policy; and defines an administrative decision as one that merely puts into execution a plan already adopted by the governing body. Examples of administrative decisions are hiring, disciplining, setting salaries and supervising a program. (SDCL 9-20-19)

If the subject covered in a referendum petition is an entire ordinance or resolution, the petition must contain either the title of the ordinance or resolution, or the subject matter covered by the same. The petition must also include the date of the passage of the ordinance or resolution. If the subject covered in a referendum petition is only a portion of the ordinance or resolution, then the portion must be written in its entirety. (SDCL 9-20-7) All referendum petitions are to be liberally construed. (SDCL 9-20-10)

**4.135 Number of Signers Required - Time of Filing**

Any referendum petition to refer a measure passed by a local unit of government may be circulated immediately upon final passage of the measure. (SDCL 12-1-18)

The referendum petition shall be signed by at least five percent of the registered voters residing in the municipality. As with the initiative petition, the percentage is based on the number of registered voters of the municipality as recorded by the county auditor on the second Tuesday in January of the year of the election. Along with the signature, each voter must include his residence address, county of voter registration, and the date of signing. The signer or circulator shall add this information. (SDCL 9-20-8) Referendum petitions must be filed with the finance officer no later than normal closing hours of the city hall or city auditor's office on the twentieth day after the publication of the ordinance or resolution to be referred. (SDCL 9-20-6)

Referendum, initiative, and nominating petitions may be challenged in the manner provided in SDCL 12-1-13 through 12-1-16.

Any person circulating an initiative or referendum petition shall verify that each person signing the petition is a resident and qualified voter of the municipality. (SDCL 9-20-9)

**4.140 Election on Referendum Petition**

Upon presentation of a petition of referendum or initiative, the governing body shall submit the question to the electors at the next annual municipal election or the next general election, whichever is earlier. The governing body may, within ten days of receiving the petition, order a special election to be held on a Tuesday not less than thirty days from the date of the order of the governing body. (SDCL 9-20-11)

No municipality may submit a question at the next general election after the first Tuesday in August of the year of the general election. If submitted at the next general election, the ballot language must be certified to the county auditor by the first Tuesday in August of the year of the general election. However, the county auditor may extend the certification deadline if the auditor determines an extension will not prevent absentee ballots from being available on time. (SDCL 9-20-11.2)

Except for the ballot form, referendum elections shall be governed by the Provisions of Chapter 9-13. (SDCL 9-20-14) The ballots must conform, as nearly as possible, to the law governing the submission of questions by the legislature. The law provided that the statement which is required to be printed on the ballot must be prepared by the city attorney. (SDCL 9-20-13; See Hdbk., Chap. 7) The entire referred ordinance shall be published once a week for two successive weeks immediately preceding the election. (SDCL 9-20-12)

#### 4.145 Vote - Effective Date - Preservation of Referendum Petitions

Any referred ordinance or resolution must pass by a majority of the votes cast on the question. If a referred ordinance or resolution is passed it becomes effective the day following the completion of the canvass of the election returns. (SDCL 9-20-15)

The finance officer must preserve all petitions involving the referendum for at least two years. The petitions must be open for public inspection. (SDCL 9-20-16)

If a referred ordinance or resolution fails, it may not be voted on again by the governing body for another year. (SDCL 9-20-17)

### **4.150 PUBLIC RECORDS AND FILES**

4.155 Records Open to Inspection

4.160 Records Not Open to Inspection

4.165 Photographs and Mechanical Processes - Rules and Regulations

#### 4.155 Records Open to Inspection

Except as otherwise provided by law, public records must be available and open to inspection by any person during the normal business hours. (SDCL 1-27-1; 9-18-2) Most of the exceptions to this law are found in SDCL 1-27-1.1 through 1-27-1.15. Provisions for requesting records, allowable charges, procedures for denial of a record, and procedures to appeal a denial are found in SDCL 1-27-34 to 1-27-44.

Any written contract entered into by a municipality shall be retained in the contract's original format or in a searchable and reproducible format. Each shall be stored during the term of the contract and for two years after the expiration of the contract term. Any contract may be made available to the public through a publicly accessible website or database. (SDCL 1-27-4.1 and 1-27-4.2)

For electronic records systems, a narrative description of system purpose and functionality and such information as may be reasonably necessary for a member of the public to request public information shall be made available upon request. (SDCL 1-27-47 and 1-27-48)

If a meeting is required to be open to the public, and if any printed material relating to an agenda item of the meeting is distributed before the meeting to all members of the governing body, the material shall either be posted on the governing body's website or made available at city hall at least twenty-four hours prior to the meeting or at the time the material is distributed to the governing body, whichever is later. If the material is not posted to the governing body's website, at least one copy of the printed material shall be available in the meeting room for inspection by any person while the governing body is considering the printed material. These requirements do not apply to materials exempt from disclosure or to printed material or records related to an agenda item of an executive or closed meeting. (SDCL 1-27-1.16)

4.160 Records Not Open to Inspection

The statutes provide that records which are to be held secret or confidential by law cannot be subject to public inspection. (SDCL 1-27-3)

Documentary material or data which consists of trade secrets, or commercial or financial information made or received by a municipality or county or an economic development corporation receiving municipal funds for the purpose of furnishing assistance to a business is not a public record. (SDCL 9-34-19)

4.165 Photographic and Mechanical Process - Rules and Regulations

Public records may be in the form of punched cards, magnetic tapes, disks, and other machine- sensible data media within a data processing system. Such records shall be backed up by a duplicate, be accessible to viewing members of the public and be retained in accordance with all applicable requirements for the retention of manual records. (SDCL 6-1-11)

Any open record shall be maintained in its original format, or in any searchable and reproducible format. SDCL 1-27 does not require records to be kept in any particular format nor that any record be provided to the public in any format or media other than that in which it is stored. (SDCL 1-27-4)

**4.200 MUNICIPAL RECORDS AND PROCEEDINGS**

4.205 Records of Acts and Proceedings

4.215 Admissibility of Evidence in Courts

4.210 Publishing of Proceedings and Statement of Expenditures

4.220 Local Records Management Programs

4.205 Records of Acts and Proceedings

The law requires every municipal officer to keep a record of the official acts and proceedings of his office. The law provides further that these records must be open for public inspection during business hours under reasonable restrictions. (SDCL 9-18-2)

Any patient information identifying the patient's name, address, diagnosis, or treatment received by an ambulance service is not a public record and is confidential, except for official purposes, and may not be published or disclosed without authorization from the patient or the patient's designee. (SDCL 34-11-5.1)

4.210 Publishing of Proceedings and Statement of Expenditures

The governing body of every municipality must publish the full accounts of its meetings. The publication is to appear in the official newspaper of the municipality, or if there is no official newspaper, any legal newspaper which serves the municipality. (SDCL 9-18-1; See Hdbk., sec. 4.300)

The proceedings must be published within twelve business days after each meeting. (SDCL 9-18-1) The publication must include a detailed statement of all expenditures of money, showing the names of all persons who received payment and the service provided. It is further required that the finance officer deliver a copy of the proceedings to be published to the official newspaper within five business days after the meeting. (SDCL 9-18-1.1)

Unless an audio or video recording of a public meeting is available to the public on the governing body's website within five days after the meeting, the unapproved, draft minutes shall be available for inspection by any person within ten days after the meeting. (SDCL 1-27-1.17)

The municipality is not required to pay more than ninety percent of the legal line rates for weekly papers, or more than the legal line rates for daily newspapers. (SDCL 9-18-1; See Hdbk., sec. 4.330) Maximum fees for publication are established in SDCL 17-2-19.

4.215 Admissibility as Evidence in Courts

Copies of all papers and transcripts of all records, filed and certified by the finance officer are admissible in all courts as prima facie evidence of the facts presented in the documents. (SDCL 9-18-3)

The court ruled that pertinent pages of the ordinance book are admissible to prove the existence of a particular ordinance. (Whaley v. Vidal, (1911) 27 SD 627, 132 NW 242)

4.220 Local Records Management Program

The governing body of every county, municipality, township, or other political entity shall promote and implement the principles of efficient records management for local records. The governing body shall, as far as practical, follow the program established for the management of records by the South Dakota Office of Records Management. (SDCL 1-27-18)

**4.300 LEGAL NEWSPAPERS AND PUBLICATION OF NOTICES**

- |  |                                       |
|--|---------------------------------------|
| 4.305 Designation of Legal Newspapers              | 4.325 Substitute Publications         |
| 4.310 Qualifications of a Legal Newspaper          | 4.330 Fees Chargeable for Publication |
| 4.315 Notices to be Published                      | 4.335 Validating of Notices           |
| 4.320 Publications Where No Legal Newspaper Exists |                                       |

4.305 Designation of Legal Newspapers

Every municipality shall designate at a meeting of its governing body an official newspaper or newspapers for a period not less than one year and specified in a resolution. The newspaper must be published in the municipality. If no newspaper is published in the municipality, the municipality shall comply with the requirements provided in § 17-2-11. (SDCL 9-12-6)

It is not mandatory that a municipality of the first class, where two legal newspapers are published, designate both papers as official newspapers. In the event two newspapers are designated, the municipality is required to publish in both. (AGR 1965-66, p. 134)

4.310 Qualifications of a Legal Newspaper

Legal newspapers must meet the qualifications as established in Chapter 17-2 of the SDCL. Among other qualifications, the newspaper must be printed in English and contain at least four pages per issue with at least one hundred twenty square inches of printed matter per page. If the publication is a daily, it must be published five days each week in either printed or electronic form or both, unless the week contains a legal holiday. If the newspaper is not a daily, it must be distributed at least once a week in either printed or electronic form or both for at least fifty weeks a year. (SDCL 17-2-2.1) A legal newspaper shall, for at least one year prior to publication of legal and official notices, be intended for distribution and circulation to the general public, without regard to business, trade, or profession, and must either:

- (1) Maintain a definite price of not less than fifty percent of its published price, be paid for by no less than fifty percent of those to whom it is distributed, and have a minimum paid circulation of at least two hundred; or
- (2) Maintain a minimum of two hundred paid online subscribers and distribute an associated print edition at least once a week for at least fifty weeks per year with a circulation of at least five hundred copies, regardless of whether the print edition is made available to the public for a paid subscription or for free. (SDCL 9-12-6; 17-2-2.2)

Newspapers are also required to maintain a known office of publication in the community where its mailing permit is issued or where its principal office is located. (SDCL 17-2-2.4)

#### 4.315 Notices to be Published

The law requires all legal and other official notices to be published in a legal newspaper as defined in Chapter 17-2 of the SDCL. The affidavit of publication must state that the newspaper is a legal newspaper and must state, in plain terms, the fees charged. (SDCL 17-2-1)

If the publication of any notice, minutes, bids, document, or other information is required by law, the public notice shall bear an inscription listing the approximate cost of publication. (SDCL 17-2-28) An agreement between the State and the SD Newspaper Association states that the following format should be used at the BOTTOM of each document:

- For items published one time, state: “Published once at the approximate cost of \_\_\_\_\_”
- For items published two times, state: “Published twice at the approximate cost of \_\_\_\_\_”
- When the document is submitted to the newspaper, leave the amount blank and the newspaper will make that calculation and insert it into the form.

#### 4.320 Publication Where No Legal Newspaper Exists

When publication of any kind is required, and no legal newspaper is published in the city, town, or district requiring publication, then publication is sufficient either in any newspaper published in the county, or if none exists in the county, then in any newspaper published in an adjoining county. (SDCL 17-2-11)

When publication is required in more than one newspaper in any municipality, and not enough newspapers exist to meet the requirements, then publication in the one newspaper is sufficient. (SDCL 17-2-12)

#### 4.325 Substitute Publications

When publication of notices is required and the editor refuses to make the publication, then the notice can be published in any other legal newspaper which meets the qualifications established in SDCL 17-2-10 to 17-2-12. (SDCL 17-2-13)

An affidavit showing both the request for publication and the refusal of publication, including the reasons why publication was refused, must be made. The affidavit can be made by any disinterested person. (SDCL 17-2-13)

The statute defining a legal newspaper and requiring that notices be published in legal newspapers, nowhere attempts to impose any obligation to publish any or all of such notices. Furthermore, the publication of a newspaper does not impose any duty resulting from an office, trust, or station so that a writ of mandamus may be issued. (Mach v. Costello, 32 SD 511, 143 NW 950, Ann Cas 1916A 384)

#### 4.330 Fees Chargeable for Publication

If any legal publication is required or allowed by law, and no other fee is prescribed for that publication, the maximum fee which may be charged for the is established in SDCL 17-2-19.

#### 4.335 Validating of Notices

All publications which were made according to the provisions of Chapter 17-2 are valid, notwithstanding the fact that the hearing may have been held, or other action may have taken place in the same calendar week as the final publication. (SDCL 17-2-22)

Further provisions covering validating publications are enumerated in SDCL 17-2-23 to 17-2-27.

**4.350 BROADCAST ANNOUNCEMENT BY PUBLIC AGENCIES**

The law authorizes counties, townships and municipalities to purchase radio and television advertising time to broadcast any public interest announcements. (SDCL 1-25A-1) These broadcasts, however, cannot be construed to give radio and television legal publication status and as such cannot be used for legal notice. (SDCL 1-25A-2)

**4.400 OPEN MEETING LAW**

4.405 Meeting Requirements

4.450 Executive Sessions

4.460 Telephone Conference Meetings

4.470 Ministerial Function Exception

**4.405 Meeting Requirements**

The open meeting law is contained in SDCL chapter 1-25. Municipalities are required to hold open meetings. (SDCL 1-25-1) This includes any association, authority, board, commission, committee, council, or task force which is created or appointed by statute, ordinance, or resolution and is vested with the authority to exercise any sovereign power derived from state law. (SDCL 1-25-12)

An official meeting is defined as any meeting of a quorum of a public body at which official business or public policy of that public body is discussed or decided by the public body, whether in person or by means of teleconference, electronic mail, instant messaging, social media, text message, or virtual meeting platform, provided the term does not include communication solely to schedule a meeting or confirm attendance. (SDCL 1-25-12)

Prior to any official meeting, a notice including the date, time, and location of the meeting, along with the proposed agenda must be posted in city hall in a place where it is visible, readable, and accessible to the public for at least an entire, continuous, twenty-four hours immediately preceding the meeting. This must also be posted on the municipality's website, if one exists. (SDCL 1-25-1.1)

It is not an official meeting of one public body if its members provide information or attend the official meeting of another public body for which the notice requirements have been met, nor if the members of a public body attend a press conference called by a representative of the public body. (SDCL 1-25-1)

For any event hosted by a nongovernmental entity to which a quorum of the public body is invited and public policy may be discussed, but the public body does not control the agenda, the political subdivision may post a public notice of a quorum, containing at a minimum the date, time, and location of the event, in lieu of an agenda. (SDCL 1-25-1)

The public body shall reserve at every regularly scheduled official meeting a period for public comment, limited at the public body's discretion as to the time allowed for each topic and the total time allowed for public comment, but not so limited as to provide for no public comment. Public comment is not required at official meetings held solely for the purpose of meeting in executive session, an inauguration, swearing in of newly elected officials, or presentation of an annual report to the governing body regardless of whether or not such activity takes place at the time and place usually reserved for an official meeting. (SDCL 1-25-1)

When an entity is appointed by the governing body but does not meet the definition of an entity required to hold an open meeting, any report to the governing body must be given to the governing body in an open meeting. The governing body shall delay taking any official action on the recommendations, findings, or reports until the next meeting of the governing body. (SDCL 1-27-1.18)

For special or rescheduled meetings, all bodies shall also comply with the public notice provisions of this section for regular meetings to the extent that circumstances permit. In addition, information in the notice must be given, in person, by mail, e-mail, or by telephone to members of the local news media who have requested notice. (SDCL 1-25-1.1)

No public body may prevent a person from recording through audio or video technology, an official meeting as long as the recording is reasonable, obvious, and not disruptive. This does not apply to meetings closed to the public pursuant to specific law. (SDCL 1-25-11)

Any political subdivision of the state that is required to provide public notice of its meetings pursuant to 1-25-1.1 must annually review the explanation of the open meeting laws, and any other material, as published by the Attorney General during an official meeting of the public body. The municipality must include in its minutes of the meeting an acknowledgement that the review was completed.

#### 4.450 Executive Sessions - Closed Meetings

Municipalities are authorized to hold executive or closed meetings for specific purposes. The reasons are:

1. The elected officials may discuss the qualifications, competence, performance, character or fitness of any officer or employee including prospective officers or employees. Contractors are not included in the term officer or employee.
2. Elected school officials may discuss the expulsion, suspension, discipline, assignment of or the educational program of a student;
3. The elected officials may consult with their attorney or receive communication from their attorney about proposed or pending law suits or contract problems.
4. The elected officials may prepare for labor negotiations with the municipality's employees.
5. The elected officials may discuss marketing or pricing strategies of a business owned by the municipality (electric, liquor, telephone, etc.) if public discussion may be harmful to the competitive position of the business. This includes utility boards.
6. Discussing information pertaining to the protection of public or private property and any person on or within public or private property specific to:
  - (a) Any vulnerability assessment or response plan intended to prevent or mitigate criminal acts;
  - (b) Emergency management or response;
  - (c) Public safety information that would create a substantial likelihood of endangering public safety or property, if disclosed;
  - (d) Cyber security plans, computer, communications network schema, passwords, or user identification names;
  - (e) Guard schedules;
  - (f) Lock combinations;
  - (g) Any blueprint, building plan, or infrastructure record regarding any building or facility that would expose or create vulnerability through disclosure of the location, configuration, or security of critical systems of the building or facility; and
  - (h) Any emergency or disaster response plans or protocols, safety or security audits or reviews, or lists of emergency or disaster response personnel or material; any location or listing of weapons or ammunition; nuclear, chemical, or biological agents; or other military or law enforcement equipment or personnel. (SDCL 1-25-2)

In addition, when a municipality, county or an economic development corporation receiving municipal funds is considering furnishing assistance to a business and has made or received material or data consisting of trade secrets or commercial or financial information regarding the operation of that business, such discussion or consideration may be done in executive session closed to the public. (SDCL 9-34-19)

To go into executive or closed meeting a majority vote of the governing body is required. The matters discussed during the executive or closed meeting are restricted to the purposes specified in the motion to go into executive or closed session. (SDCL 1-25-2)

No official actions (votes) may be taken in an executive or closed meeting. (SDCL 1-25-2)

A violation of the open meeting law is a Class 2 misdemeanor. If you have any questions about the law, please contact your city attorney. When in doubt, keep the meeting open.

4.460 Telephone Conference Meetings

Meetings including executive sessions may be conducted by teleconference. Members are deemed present if they answer "present" to the roll call taken by teleconference. Any vote at a meeting held by teleconference may be taken by voice vote. If any member answers in the negative the vote shall proceed to a roll call vote. Except for executive or closed meetings held by teleconference, there shall be provided one or more places at which the public may listen to and participate in the proceeding. (SDCL 1-25-1.5; 1-25-1.6)

4.470 Ministerial Function Exception

If a quorum of township supervisors, road district trustees, or trustees for a municipality of the third class meet solely for purposes of implementing previously publicly adopted policy, carrying out ministerial functions of that township, district, or municipality, or undertaking a factual investigation of conditions related or public safety, the meeting is not subject to the provisions of the open meeting laws. (SDCL 1-25-1)

## CHAPTER 5

### OFFICIALS

5.000	Introduction	5.250	Compensation of Officers
5.050	Municipal Officers	5.300	Indemnification of Officers
5.100	Qualifications and Terms of Office	5.350	Removal from Office-Vacancies
5.150	Administration of Oaths	5.400	Malfesance, Misfeasance, Nonfeasance
5.200	Official Bonds	5.450	Expiration of Term of Office

#### **5.000 INTRODUCTION**

In addition to the elected officials under each of the various forms of municipal government which were mentioned in Chapter 2 of this Handbook, there are several appointed officers who complete the statutory organizational structure of a municipal corporation. This chapter of the Handbook will examine the duties and responsibilities of the appointed officers of a municipality, and then will focus on the statutory requirements which both elected and appointed officials must meet before and during the discharge of their duties.

Topics under consideration will include qualifying for office, official bonds, oaths, indemnification, and removal from office.

#### **5.050 MUNICIPAL OFFICERS**

5.055	Appointment	5.070	City Engineer
5.057	Warrant or Certificate of Appointment	5.080	Peace Officers
5.060	Financial Official	5.085	Additional Duties
5.062	City Treasurer	5.090	Compatible and Incompatible Offices
5.065	City Administrator	5.095	Salaries and Fringe Benefits
5.067	City Attorney		

#### **5.055 Appointment**

A municipality shall appoint such officers as needed and provided for by ordinance. Such officers shall be appointed annually or at intervals determined by the governing body. (SDCL 9-14-3)

Except when a city manager is employed, in municipalities with the aldermanic form of government, the mayor makes appointments with the approval of the common council. In municipalities with the commission and trustee form of government appointed officers shall be appointed by a majority vote of the members elected to the governing body. (SDCL 9-14-3)

In municipalities with a city manager, the financial official, attorney, library board and treasurer are appointed by the governing body. The auditor and treasurer shall appoint all deputies and employees in their offices. All other officers and employees, except as otherwise provided, shall be appointed by the manager and removed by him. (SDCL 9-10-9)

Municipalities are also given the authority of appointing various boards and commissions such as the Planning Commission, Board of Adjustment, Library Board, and Park and Recreation Board. By ordinance the municipal governing body may appropriate funds to provide compensation to members of municipal boards and commissions not already compensated. (SDCL 9-12-3.1)

### 5.057 Warrant or Certificate of Appointment

All appointed officers except the auditor shall be commissioned by warrant, under the corporate seal, signed by the mayor and auditor. The mayor shall issue a certificate of appointment under the seal of the municipality to the auditor. (SDCL 9-14-4; See Hdbk., sec. 5.150 and 5.200)

### 5.060 Municipal Financial Official

The major responsibility of a municipal finance officer is to supervise the accounting system of all departments and offices of the municipal corporation, except when a city manager is employed, in which case the city manager has supervision over the accounting system. (SDCL 9-14-19; See Hdbk., sec. 12.055)

The authority for the keeping of the books and records of the municipality is established in SDCL 9-14-17. Statute requires that the records must show all indebtedness of the municipality and at all times show the financial condition of the municipality. The records must show the amount of bonds, warrants, certificates or other evidences of indebtedness, the amount which has been redeemed of the same, as well as the amount outstanding. (SDCL 9-14-18; See Hdbk., sec. 12.070)

The finance officer must draw and countersign all warrants, bonds and other evidences of indebtedness, showing the amount paid, to whom it was paid, and for what purpose. (SDCL 9-14-18)

Another responsibility is to make estimates on work to be performed and to countersign all contracts. (SDCL 9-14-17) The finance officer is also required to keep a list of all certificates issued for work and before the levy of any special tax, must report to the governing body a schedule of all lots which may be subject to the proposed levy or assessment. (SDCL 9-14-20; See Hdbk., sec. 12.150)

The finance officer may destroy any record which the records destruction board, acting pursuant to SDCL 1-27-21, declares to have no further administrative, legal, fiscal, research or historical value.

The finance officer is responsible for the corporate seal of the municipality, all papers and records, and must record the proceedings of the governing body. The law requires that the finance officer attend the meetings of the governing body. (SDCL 9-14-17)

For more information concerning the duties and responsibilities of the finance officer, refer to Chapter 4, section 4.100; Chapter 7; Chapter 10, section 10.070; and Chapter 12, of this Handbook.

### 5.062 City Treasurer

The major responsibility of the treasurer is to receive all moneys belonging to the municipality and to keep accurate records of the money. (SDCL 9-22-2) Specific duties of the treasurer are outlined in Chapter 9-22 and 9-23.

More information concerning the duties and responsibilities of the treasurer is contained in Chapter 12 of the handbook.

### 5.065 City Administrator

The governing board of a municipality may by ordinance appoint such officers as needed, including a city administrator. A city administrator may perform such duties and have such authority as the governing board may determine. (SDCL 9-14-3)

### 5.067 City Attorney

It is the duty of the city attorney, whenever required by the governing body, to furnish an opinion on any matter relating to the affairs of the city. The city attorney is also required to conduct the prosecution of all violators of ordinances as well as to perform such other services incident to his office, as may be required by ordinance or directed by the governing body. (SDCL 9-14-22)

Even though the city attorney serves only in a capacity as dictated by the governing body, some significant court decisions have broadened the role of the municipal attorney. For example, while the city attorney is required to follow the directions of the city council in suits that concern the municipality as an individual, in quasi-criminal matters such as violations of ordinances, where the preservation of peace and public safety is involved, the court ruled that the city attorney needs no express written authority from the city council to proceed with the prosecution. (City of Redfield v. Wharton, (1962) 79 SD 557, 115 NW 2d 329)

The right of appeal, however, is not a charge given the city attorney. The city attorney has only the power to advise and represent the municipality and has no power to decide whether litigation should be brought or defended by the municipality. (Shaw v. Common Council, City of Watertown, (1954) 75 SD 241, 63 NW 2d 252) However, the court cannot deny continuance of action when the city attorney knows that he would be able to furnish a resolution authorizing an appeal. (City of Redfield v. Wharton, (1962) 79 SD 557, 115 NW 2d 329)

All bonds issued by any public body shall be countersigned by an attorney licensed and actually residing in the state of South Dakota. (SDCL 6-8B-21; 6-8B-22)

### 5.070 City Engineer

The city engineer must be a licensed professional engineer. The governing body prescribes the engineer's duties and fixes compensation by ordinance or agreement. Statute requires that all surveys, profiles, plans or estimates made by the city engineer must be carefully preserved in the municipality's office or the office of the engineer and must be open to public inspection. (SDCL 9-14-24)

### 5.080 Peace Officers

Since the roles and duties of municipal peace officers can be assumed as common knowledge, a detailed discussion is not warranted at this time. For more information concerning peace officers, municipal officials should refer to Section 8.050 and 8.100 of this Handbook. However, there are two things which should be noted here.

The first is that every chief of police as well as the policemen must account for and pay over at the end of the month, all fees received by him in the service of civil process, taking a receipt and filing an itemized account with the finance officer. (SDCL 9-14-29)

The second is that the jurisdiction of the municipal police extends one mile outside the municipal boundaries. (SDCL 9-29-1) The jurisdiction of municipal peace officers in municipalities situated in more than one county extends to both counties. (SDCL 9-14-26)

### 5.085 Additional Duties

The governing body is authorized to prescribe additional duties not inconsistent with the laws of the state to any municipal officer. (SDCL 9-14-27)

### 5.090 Compatible and Incompatible Offices

In many instances, individuals in a specific municipality will hold two or more positions. While there are some statutory restrictions as to which offices are compatible and which offices are incompatible, the major lines of delineation in this area have been made by the Attorney General. For example, the Attorney General has determined that there are essentially four instances when offices are incompatible. They are: 1) when there are statutory prohibitions; 2) when one is subordinate to the other; 3) when one has supervision over the other; and 4) when the duties of the two offices are conflicting. (AGR 1949-50, p.37)

However, the Attorney General has also determined that, while the determination of whether a person may hold two or more positions is usually based upon incompatibility or inconsistency, the question of incompatibility or inconsistency never arises when there is a special statutory prohibition. The rule which governs will change from situation to situation. (AGR 1959-60, p.45)

Those positions which are compatible include the following:

- 1) Mayor and state's attorney; (AGR 1907-08, p. 215)
- 2) Office of mayor and member of the board of county commissioners; (AGR 1949-50, p. 37)
- 3) Mayor and state senator; (AGR 1949-50, p. 358)
- 4) Treasurer of a school district and trustee of an incorporated municipality; (AGR 1949-50, p. 75)
- 5) Assessor and register of deeds; (AGR 1949-50, p.56)
- 6) Office of county commissioner and membership on the governing board of a municipality; (AGR 1929-30, p. 278)
- 7) Office of state's attorney and city attorney; (AGR 1949-50, p. 331)
- 8) Municipality marshal and sheriff or deputy sheriff; (AGR 1953-54, p. 84)
- 9) Police magistrate and candidate for the state legislature; (AGR 1953-54, p. 292)
- 10) Office of county clerk of courts and city councilman;(AGR 1955-56 p. 68-9)
- 11) Office of register of deeds and mayor; (AGR 1955-56, p. 217)
- 12) Office of county sheriff and peace officer of a municipality within the county; (AGR 1955-56, p.420)
- 13) Appointed municipality treasurer and treasurer of a school district. (AGR 1959-60, p. 45)
- 14) No mayor, alderman, commissioner, or trustee in a municipality is disqualified from holding office as a result of holding any liquor license. (SDCL 9-14-16)
- 15) City council and county commission (AG Opinion 88-24)
- 16) Any mayor, alderman, commissioner, or trustee may serve in a volunteer, unsalaried municipal position or provide any service for the municipality if the compensation for such service does not exceed \$5,000 per calendar year. Any mayor, alderman, commissioner or trustee may receive compensation in excess of \$5,000 per calendar year for services to a municipal ambulance service in municipalities under 5,000 in population. (SDCL 9-14-16.1)

Those positions which are incompatible include the following:

- 1) No mayor, alderman, commissioner, or trustee shall hold any other office under the municipality while an incumbent of any such office. No auditor or clerk may hold the office of treasurer in the municipality while an incumbent of such office. (SDCL 9-14-16)
- 2) A mayor may not be an attorney for a defendant in a criminal case for a crime committed within the municipality of which he is mayor. (State ex rel. Jones v. Taylor, 46 SD 354)
- 3) A city councilman may not be the defense attorney or counselor for a defendant charged with the violation of a municipal ordinance or a state law where the facts would also be a violation of the laws of his municipality (AGR 1953-54, pp. 184-186)
- 4) Member of municipality board and janitor of a municipal building; (AGR 1932-34, p. 492)

- 5) County judge and city attorney; (AGR 1949-50, p. 133)
- 6) Member of a city council and municipal building, electrical, and plumbing inspector; (AGR 1955-56, pp. 105-106)
- 7) Member of city council and county high school board; (AGR 1949-50 p. 75 and 1953-54, p. 73)
- 8) Office of director of assessments and member of municipal governing board; (AGR 1955-56, p. 304)
- 9) County justice of the peace and the municipal chief of police; (AGR 1957-58, p. 116)
- 10) Municipality auditor and county auditor. (AGR 1959-60, p. 84)
- 11) Legislator and school board member. (AG Opinion No. 84-24)
- 12) Mayor and school board member of encompassing school district (AG Opinion No. 85-23)  
Raymond v. Richardson, 6th Judicial Circuit, Sept. 18, 1985)
- 13) County director of equalization and school board member (AG Opinion 86-6)
- 14) Alderman and planning and zoning commission (AG Opinion 94-07)

#### 5.095 Salaries and Fringe Benefits

The governing body shall fix and determine by ordinance or resolution the amount of salaries and compensation of all municipal officers and the times at which the same shall be paid. (SDCL 9-14-28) Any elected official who serves full-time and who votes on his own salary increase may not receive the increase until the expiration of the term for which such official was elected, or until two years after the passage of such increase, whichever is less. (SDCL 3-8-12)

The municipal governing body may, by ordinance, authorize the appropriation of funds to provide compensation to members of municipal boards and commissions (SDCL 9-12-3.1)

The governing board of each municipality shall publish once annually with the minutes of the first meeting following the beginning of the fiscal year, or within thirty days thereafter, or in the minutes of the first meeting following the completion of salary negotiations with employees for that fiscal year, or within thirty days thereafter, a complete list of all the salaries of all officers and employees and thereafter shall publish once any salary paid to any officer or employee who has been added or whose salary has been increased. The governing board shall publish in their minutes, at least monthly, a total of payroll by department. (SDCL 6-1-10)

Municipalities are authorized to contract for legal services or employ an attorney under such terms as the governing body deems appropriate. Accordingly, such a contract, adopted by ordinance or resolution, shall set forth the compensation to be paid and the specific services to be rendered. (SDCL 9-14-23)

The requirement that compensation be fixed by ordinance was defined by the court to mean that the compensation be a fixed sum. It was ruled that an ordinance fixing the amount which the municipality pays as a percent of the amount involved in litigation is invalid. (City of Huron v. Campbell, (1892) 3 SD 309, 53 NW 182)

Municipalities are authorized to provide group life, sickness and accident, or hospitalization and surgical insurance for their officers and employees. (SDCL 9-14-30) The responsibility for administering these insurance programs lies with the governing body, either individually or jointly with other governing bodies. (SDCL 9-14-34)

The governing body is authorized to include retired employees and officers and their spouses provided the retired employee or officer served for at least fifteen years and participated at least five years immediately preceding retirement in the municipal insurance program. (SDCL 9-14-35)

The governing body is authorized to appropriate the necessary funds for the cost of all or any portion of the insurance provided by SDCL 9-14-30. Municipalities are authorized to deduct from the salaries or wages, the employee's or officer's share of the cost of such an insurance program. (SDCL 9-14-33; For more information see Hdbk., Sec. 6.200 to 6.300)

Municipalities should establish personnel policies which include such items as sick leave, vacation time and holidays for municipal employees.

### **5.100 QUALIFICATIONS AND TERMS OF OFFICE**

- 5.105 Residence Requirements
- 5.110 Acting Without Qualifying
- 5.115 Discharge of Duties

#### **5.105 Residence Requirements**

No person may hold any elected municipal office who is not a qualified voter of the municipality and who has not resided therein at least three months next preceding his election or appointment. However, if the person has resided in an area annexed for at least three months, he is eligible for any municipal office. Statute further provides that no person who is a defaulter to the municipality can be an officer. Two Attorney General letter opinions have defined a defaulter to be an official who, while serving in an official capacity, misappropriates or fails to account for public funds. The opinions further state the terms defaulter and debtor should not be considered synonymous. This section does not apply to appointive officers. (SDCL 9-14-2) (AGR 1942, June 22)

A member of the governing body who is displaced from the ward or municipality from which the member was elected to serve by flood, tornado, fire, or other natural disaster may continue to serve until the expiration of the member's term. (SDCL 6-1-22)

#### **5.110 Acting Without Qualifying**

Every person who executes any of the functions of a public office without having taken and duly filed the required oath of office or security, is guilty of a class 2 misdemeanor. In addition to the required punishment, the offender forfeits his right to office. (SDCL 3-1-8)

However, this is not to be construed to affect the validity of acts done by a person exercising the functions of a public office, in fact, where other persons are interested in maintaining the validity of these acts. (SDCL 3-1-8) The court has ruled that in order to protect the public and prevent failure of justice, apparently official acts of an individual who has the color of authority to hold and perform duties of a public officer, though adjudged not to have such authority, are valid in respect to the rights of interested third persons, but the acts are void insofar as they may be of exclusive interest or ultimate benefit to the individual performing the acts. (Fylpaa v. Brown County (1895), 6 SD 634, 62 NW 962)

#### **5.115 Discharge of Duties**

Every appointive municipal officer will begin the discharge of his duties as soon as the officer has qualified by filing an oath or affirmation of office in the usual form provided by law. The officer shall file the form within ten days after the first meeting of the month following the appointment. The officer shall hold office until the appointment and qualification of a successor. (SDCL 9-14-5)

Every elective municipal officer, when elected to fill a vacancy, will perform the duties of the office as soon as he has qualified by filing an oath or affirmation of office in the usual form provided by law. The officer shall file the form within ten days after the first meeting of the month following the election. Except as otherwise provided, every officer who is elected for a full term will begin to discharge the duties of the office on the first meeting of the month next succeeding the election or as soon thereafter as the officer has qualified. (SDCL 9-14-5)

**5.150 ADMINISTRATION OF OATHS**

Every person, elected or appointed to any civil office, must qualify by taking an oath or affirmation to support the Constitution of the United States and of this State, and to faithfully discharge the duties of his office, naming it; and by giving a bond, when one is required, conditioned that he will faithfully and impartially discharge the duties of his office, naming it, and render a true account of all money, credit, accounts and property of any kind that may come into his hands while performing his duties. (SDCL 3-1-5; 9-14-6)

The following officers are authorized to administer oaths:

1. Supreme Court justices, circuit judges, magistrates, notaries public, and the clerk and deputy clerk of the Supreme Court, and clerks and deputy clerks of the circuit court, within the state, and federal judges and federal magistrates;
2. The county auditor, the county treasurer, the register of deeds, and the deputy of each (in the county);
3. Mayors, Town Board Presidents, municipal finance officers, deputy municipal finance officers and township clerks (in their respective boundaries);
4. Sheriffs and deputies (for specific purposes);
5. Other officers in cases specifically provided by law. (SDCL 18-3-1)

No tax may be levied or fee be charged for the administration of an oath. (SDCL 18-3-6)

In third class municipalities, the clerk, assessor, treasurer, and marshal must take the oath and furnish the bond within ten days after the first meeting of the month following the election or appointment. (SDCL 9-14-7)

**5.200 OFFICIAL BONDS**

- |       |                                  |       |                    |
|-------|----------------------------------|-------|--------------------|
| 5.205 | Officials Required to Have Bonds | 5.215 | Sureties on Bonds  |
| 5.210 | Coverage of Bonds                | 5.220 | Bond of Incumbents |

**5.205 Officials Required to Have Bonds**

Along with the oath, a bond is required of certain elective and appointive municipal officers in order to qualify for their office. (SDCL 3-1-5)

The governing body may purchase a blanket bond, blanket crime coverage, an insurance policy, or an individual bond. If the blanket bond or blanket coverage exceeds the individual bond requirements, no individual bond is required. Blanket coverage may not be less than the total coverage of all individual bonds purchased for the year prior to January 1, 2015. (SDCL 3-5-14)

The amount of the bond for the municipal finance officer shall be set at an amount equal to the maximum monetary total estimated to be on hand at any one time, but the amount of the bond may not exceed \$250,000 in first class municipalities or \$150,000 in second and third class municipalities. (SDCL 9-14-6.1)

The amounts of all other bonds shall be established by the governing body. (SDCL 9-14-7) All bonds are required to be filed with the governing body. (SDCL 9-14-9)

In third class municipalities the finance officer within ten days after notice of their appointment shall take and subscribe an oath or affirmation of office in the form required by the Constitution and furnish an undertaking to be approved by the board of trustees in such sum as it shall direct. (SDCL 9-14-7; Cn. XXI, sec. 3)

### 5.210 Coverage of Bonds

The bonds and oaths of all civil officers are to be construed to cover the duties required by law subsequent to giving them. Bonds are not declared void for want of compliance with this requirement, but the bond is valid in law for the matter contained in the bond. (SDCL 3-5-11)

### 5.215 Sureties on Bonds

Statute requires every official bond to have at least two sureties. In lieu of a bond with personal sureties, a bond executed by a surety company authorized to transmit business in this state may be approved. (SDCL 3-5-4) When official bonds are made, the governing bodies are authorized and required to pay the premium of the bond, out of the general fund. (SDCL 3-5-5)

The surety is authorized to limit its liability in two ways. The first is by inserting after the surety's name the words "not to exceed" and naming the amount to which the surety wishes to limit its liability. The second statutory limitation a surety can impose is its liability as to time. This is done by inserting in the bond a provision to the effect that the surety is not liable for any acts of the principal prior to the date of the bond. (SDCL 3-5-6)

### 5.220 Bonds of Incumbents

The law requires that when the incumbent of an office is re-elected, his bond cannot be approved until he has produced and accounted for all public funds and property in his control during his term. (SDCL 3-5-7)

## **5.250 COMPENSATION OF OFFICERS**

The governing body is authorized to fix and determine by ordinance or resolution all salaries and wages of its officers and employees. (SDCL 9-14-28; See Hdbk., sec. 5.095)

As a result of a U.S. Supreme Court Decision (Garcia v. San Antonio Metropolitan Transit Authority, 53 LW 4135 1985) municipalities are now required to pay federal minimum wage and time and one-half or compensatory time at a rate of one and one-half hours for any hours over 40 worked in any week. While there are some minor exceptions, especially in police and fire departments, virtually all municipal employees are now covered by the Federal Fair Labor Standards Act.

## **5.300 INDEMNIFICATION OF OFFICERS**

In legal action against a municipality, the municipality may elect to do any one or more of four things. They are: 1) indemnify the officer for the court costs incurred in the defense of the claim; 2) pay or indemnify the officer the reasonable attorney fees incurred by virtue of the claim or action; 3) pay or indemnify the officer for a judgment based upon the claim or action; 4) pay or indemnify the officer for a compromise or settlement of the claim or action. (SDCL 3-19-1; See Hdbk., sec. 3.255)

**5.350 REMOVAL FROM OFFICE - VACANCIES**

- |       |                         |       |                               |
|-------|-------------------------|-------|-------------------------------|
| 5.355 | Grounds for Removal     | 5.375 | Removal by Recall             |
| 5.360 | Proceedings for Removal | 5.380 | Removal of Appointed Officers |
| 5.365 | Suspension of Officials | 5.385 | Vacancies in Office           |
| 5.370 | Judgment of Ouster      |       |                               |

**5.355 Grounds for Removal**

Statute provides that any officer of any local unit of government may be charged, tried, and removed from office for misconduct, malfeasance, nonfeasance, crimes in office, drunkenness, gross incompetency, corruption, theft, oppression, or gross partiality. (SDCL 3-17-6)

**5.360 Proceedings for Removal**

This is a special proceeding and is, therefore, brought in the name of the state by the state's attorney for the county. The proceeding is commenced by filing a complaint in the office of the clerk of courts of the county. The complaint must include: 1) the facts which constitute the cause of action, without unnecessary repetition; and 2) a relief summons which requires the defendant to answer the complaint within ten days after he has been served the summons. (SDCL 3-17-7)

**5.365 Suspension of Officials**

After commencement of proceedings, the court must, upon satisfactory showing, suspend the accused from the functions of his office. The court must immediately appoint some competent person to fill the office during such suspension. (SDCL 3-17-8)

**5.370 Judgment of Ouster**

If the judgment is against the defendant, statute requires immediate ouster from office and a declaration to the effect that the office is vacant. If the judgment is in favor of the defendant, any suspension does not require a forfeiture of salary during the period of suspension. (SDCL 3-17-9) The officer, if found innocent, is also allowed the reasonable and necessary expenses of his defense. The expenses are to be paid by the political subdivision of which he is an officer. (SDCL 3-17-10)

**5.375 Removal by Recall**

In any municipality, with or without a city manager, the mayor, any commissioner, any alderman or any member of the board of trustees may be removed from office at any time by the electors qualified to vote for his successor as provided in SDCL 9-13-30 to 9-13-32, inclusive. (SDCL 9-13-29)

The petition for recall must be signed by fifteen percent of the registered voters of the municipality, based upon the total number of registered voters at the last preceding general election. The petition must demand the election of a successor to the mayor, commissioner, alderman, or trustee sought to be removed. The petition must contain a specific statement of the grounds on which the removal is sought. Allowable grounds for removal are misconduct, malfeasance, nonfeasance, crimes in office, drunkenness, gross incompetency, corruption, theft, oppression, or gross partiality. Statute requires that the petition is to be filed with the finance officer, who then must present the petition to the governing body at its next meeting. However, no signature on a petition is valid if signed more than sixty days prior to the filing of the petition. Only the petition signatures may be challenged in the manner established in SDCL 12-1-13 to 12-1-16. A failure to challenge petition signatures does not prevent any interested person from challenging the filing of the recall petition or the sufficiency of the statement of grounds of the recall petition. Such a challenge must be filed in circuit court within five days of the filing of the recall petition. The circuit court shall conduct an expedited declaratory judgment hearing with no right to trial by jury. (SDCL 9-13-30)

Within ten days after presentation of the petition to the governing body, the governing body shall order and fix a date for holding a special election. The election day is required to be held on a Tuesday which is not less than thirty nor more than fifty days from the date of the order of the governing body. If a petition is filed after December 31st prior to the annual municipal election and within sufficient time to comply with the provisions of SDCL 9-13-14, the question of a successor is to be submitted at that annual election. (SDCL 9-13-31)

Unless the official sought to be removed requests otherwise in writing, the finance officer must place his name on the ballot without nomination. Every other candidate must file a nominating petition as provided in Chapter 9-13. If no other candidate is nominated for the position, no recall election may be held and the incumbent shall remain in office. If required, a runoff election can be conducted to determine the successor. (SDCL 9-13-32; See Hdbk., sec. 7.250; 7.600)

If the incumbent is re-elected, he shall continue in office and is not obliged to qualify for office again. (SDCL 9-13-33) If someone other than the incumbent is elected, the incumbent is deemed removed from office and his successor then has ten days in which to qualify for office. (SDCL 9-13-34; See Hdbk., sec. 5.150; 5.200) The successor holds office during the unexpired term of his predecessor. (SDCL 9-13-35)

### 5.380 Removal of Appointed Officers and Employees

Any appointive officer of a municipality governed by a board of Trustees or board of Commissioners may be removed by a majority vote of the members of such board. (SDCL 9-14-12)

In an aldermanic-governed municipality, the mayor, except as otherwise provided, may remove from office any officer appointed by the mayor, if the mayor believes that the interests of the municipality demand such removal. The mayor shall report the reasons for removal to the council at its next regular meeting. (SDCL 9-14-13)

In municipalities where a city manager is employed, the manager has the power to remove any officer appointed by him or authorize the head of any department responsible to them, to remove subordinates in said offices. (SDCL 9-10-13; See Hdbk., sec. 2.630)

As a result of a U.S. Supreme Court Decision (Cleveland Board of Education v. Loudermill 470 U.S. 532) public employees have a constitutional right to a hearing before they can be fired. The public employee is entitled to oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side.

### 5.385 Vacancies in Office

The removal of any elected or appointed official from the ward or municipality for which he was elected or appointed, or an officers' failure to qualify within ten days after the first meeting of the month following the election or appointment, causes a vacancy in the office. (SDCL 9-14-10; See Hdbk., sec. 5.150, 5.200)

SDCL 3-4-1 lists the following events which cause a vacancy in office. If the person:

- 1) Dies;
- 2) Resigns;
- 3) Is removed from office;
- 4) Fails to qualify as provided by law;
- 5) Ceases to be a resident of the state, district, county, municipality, township, ward, or precinct in which the duties of the office are to be exercised or for which elected;
- 6) Is convicted of any infamous crime or of any offense involving a violation of the official oath;
- 7) Has a judgment obtained against the person for a breach of an official bond.

Completion of a term of office does not create a vacancy. Except when otherwise expressly provided, every lawful incumbent of any public office, with a definite term, upon the expiration of such term shall continue to discharge its duties until his successor shall have been elected or appointed and has qualified and shall be entitled to receive the prescribed compensation of such office during the time he shall so discharge its duties. (SDCL 3-14-1) In cases where a member of the governing body is called to serve in active duty, that member may temporarily resign and a temporary replacement may be made. The replacement serves until the original member returns from active duty or until the expiration of the member's term, whichever occurs first. (SDCL 3-4-8)

A member of the governing body who is displaced from the ward or municipality from which the member was elected to serve by flood, tornado, fire, or other natural disaster may continue to serve until the expiration of the member's term. (SDCL 6-1-22)

In cases where any member is incapacitated by illness or an accident which causes the member to be unable to attend meetings of the governing body or fulfill the duties of the office, the member may elect to temporarily resign from the governing body or office. Notice of temporary resignation may be given in the same manner as giving notice of resignation. If the member is unable to give notice, the member's spouse or guardian or any person who has durable power of attorney for the member may give notice of resignation. A temporary replacement may be made in accordance with the provisions of statute applying to the governing body. The temporary member shall serve until the member is able to fulfill the requirements of office or until the expiration of the member's term, whichever comes first (SDCL 3-4-9).

All vacancies are to be filled as required by law. (See Hdbk., sec. 2.470, 2.515 and 2.575)

#### **5.400 MALFEASANCE, MISFEASANCE, AND NONFEASANCE IN OFFICE**

- |  |                                     |
|--|-------------------------------------|
| 5.405 Willful Failure to Perform Duties  | 5.415 Contracts and Bribes          |
| 5.410 Misuse of Public Funds or Property | 5.420 Criminal Conflict of Interest |

#### **5.405 Willful Failure to Perform Duties**

The willful omission to perform any duty is punishable as a Class 2 misdemeanor. (SDCL 3-16-1) Statute extends this provision on performance of duties to require that all books, papers, records, or other property belonging to the municipality must be kept in the official's office. (SDCL 3-16-2)

These statutes have been condensed for municipal officers in SDCL 9-14-37, which reads as follows: It is a Class 2 misdemeanor for any member of the governing body or other municipal officer to commit a palpable omission of duty or to intentionally commit oppression, misconduct, or malfeasance in the discharge of the duties of his office.

#### **5.410 Misuse of Public Funds or Property**

It unlawful for any person charged with the collection, receipt, safekeeping, transfer, or disbursement of any public funds, to use such public funds for his own benefit or to benefit any other person. The same requirement applies to public property. (SDCL 9-22-5; 5-24-8)

#### **5.415 Contracts and Bribes**

No public officer who is authorized to sell or lease any property, or make any contract in the officer's official capacity, may become voluntarily interested individually in any sale, lease or contract, directly or indirectly, with such entity. A violation is a Class 2 misdemeanor unless the act is exempted by law. (SDCL 3-16-7; See Hdbk., sec. 13.125)

#### 5.420 Criminal Conflict of Interest

Any public official, defined as an elected official, appointed official, officer, employee and others, who knowingly uses funds or property that has been entrusted to the public official in violation of the public trust and that results in a direct financial benefit to the public official commits a direct criminal conflict of interest. Any public official who commits a direct criminal conflict of interest is guilty of theft. (SDCL 22-30A-45; 22-30A-46)

#### **5.450 EXPIRATION OF TERM OF OFFICE**

Every lawful incumbent, with a definite term is authorized to continue to discharge the duties of his office until his successor is elected or appointed and has qualified. (SDCL 3-14-1)

On going out of office at the expiration of his term, every officer is required to deliver to his successor all public money, books, records, accounts, papers, documents, and property in his possession, or under his control during his term of office. (SDCL 3-14-2) The penalty for noncompliance with this statute is established in SDCL 3-14-3. (See Hdbk., sec. 5.405) Municipal officials can, in addition, be held liable for all the damages caused by not delivering the required documents and can be subject to penalties which may be prescribed by ordinance. (SDCL 9-14-39)

If an officer after removed from office continues to exercise any of the functions of his expired office, he is guilty of a Class 2 misdemeanor. (SDCL 3-14-4)

## CHAPTER 6

### PUBLIC EMPLOYEES

6.000	Introduction	6.300	Certification and Minimum Standards
6.050	Definition of Public Employee	6.400	Public Employees Unions
6.100	General Provisions Governing Employees	6.500	Civil Service Systems
6.200	Salaries and Fringe Benefits	6.600	Deputies and Assistants
6.230	Municipal Retirement System	6.700	Firearms and Dangerous Weapons

#### **6.000 INTRODUCTION**

The subject of municipal employees is one that is continually being changed by the legislature and the courts. The balance between benefits to employees and management of public services is an added pressure to the municipal official. This chapter will focus on the responsibilities of a governing body to its employees.

#### **6.050 DEFINITION OF PUBLIC EMPLOYEE**

The first thing that must be established is the difference between an appointive official and a municipal employee. An appointive office may be defined as a public position, but it must be remembered that not every public position is an office. For example, the manager of the municipality light plant (AGR 1932-34, p. 526), the manager of a municipal liquor store and a street superintendent are municipal employees and not public officers. (*Hooper v. Hahn*, 69 SD 275, 9 NW 2d 502) Likewise, janitorial work in a municipal building is not an office holding position. (AGR 1932-34, p. 492)

Municipalities may appoint such officers as needed and provided for by ordinance. These officers shall be appointed. A municipal employee, on the other hand, is anyone employed by the municipality who is not an appointive official. (SDCL 9-14-3)

The question of whether an individual is an appointive official or a municipal employee is primarily one of statutory powers and duties. Investigating the services done by employees, and the duties imposed on them determines if they hold a public office or not. There are other criteria such as a fixed tenure of position, the taking of an oath of office, and the giving of official bond which distinguish a public officer from an employee. These requirements should be taken as a whole and not separately. (*Giggs v. Harding County et al.*, 69 SD 429, 3 NW 2d 485)

#### **6.100 GENERAL PROVISIONS GOVERNING EMPLOYEES**

6.105	Hiring	6.115	Firing
6.110	Veterans Preference in Employment	6.120	Discrimination

The state and federal governments have adopted numerous laws and regulations affecting how a municipality may deal with its employees. These mandates include hiring and firing, minimum salary and overtime, discrimination, and unemployment and workers' compensation insurance. This section of the handbook will try to itemize some of the requirements municipalities must be aware of. To ensure that employees are being treated equally and fairly, the SDML recommends that each municipality adopt formalized, written personnel practices and procedures and follow them.

### 6.105 Hiring

Both State and Federal law make it illegal for employers to discriminate against persons because of their race, religion, color, national origin, creed, ancestry, sex, age or handicap. Particular attention must be given to the application form and pre-employment interview to ensure that only questions based on a bona fide occupational qualification are asked.

The Immigration Reform and Control Act of 1986 prohibits hiring any individual without a verification of nationality or alien status. For **all** persons hired on or after November 6, 1986, nationality must be verified on a form designed by the U.S. Attorney General. Employees must prove their legal status by presenting the municipality with documents establishing their identity **and** eligibility for employment.

No person who is required to register for the selective service but has not done so may be hired by a municipality in any capacity. (SDCL 3-1-1.1)

A municipality may require any person over the age of eighteen who is seeking employment with the municipality to submit to a state and federal criminal background investigation by means of fingerprint checks by the SD Division of Criminal Investigation and the Federal Bureau of Investigation. (SDCL 9-14-42)

### 6.110 Veterans Preference in Employment

The legislature has required in SDCL Chapter 3-3 that municipalities give preference in employment, appointment and promotion to any veteran as defined by SDCL 33A-2-1, who is a citizen of the United States. A veteran disabled due to a service-connected cause shall be given preference over a non-disabled veteran. Under some conditions the spouse of a disabled veteran is also entitled to this preference. (SDCL 3-3-1; 3-3-7)

To determine if the veteran's preference applies, each applicant for employment shall complete an employment application on which the applicant is asked if the applicant is a veteran as defined by law. (SDCL 3-3-1)

Whenever a veteran applies for appointment or employment, the appointing authority is required to investigate the qualifications of the applicant. If the applicant possesses at least the minimum qualifications necessary to fill the position, the officer, board, or person shall interview the applicant. (SDCL 3-3-2) If the veteran is not given this preference, statute authorizes an action to right the wrong. Statute requires further that no veteran holding a public position by appointment or employment can be removed without a hearing. The employee is authorized to a review of writ by certiorari. The burden of proof of incompetency or misconduct lies with the appointing body. (SDCL 3-3-3; 3-3-4)

### 6.115 Firing

As a result of the U.S. Supreme Court Decision (Cleveland Board of Education v. Loudermill 470 U.S. 532) public employees have a constitutional right to a hearing before they can be fired. The public employee is entitled to oral or written notice of the charges against him or her, an explanation of the employer's evidence, and an opportunity to present his or her side.

### 6.120 Discrimination

State and federal agencies are responsible for ensuring that employees are not discriminated against on the basis of their race, religion, color, national origin, creed, ancestry, sex (including pregnancy), age, health, disability, political affiliation, and marital or veteran status.

The South Dakota Commission on Human Rights is responsible for administering and enforcing state laws. The U.S. Equal Employment Opportunity Commission enforces the federal Civil Rights Act, the Equal Pay Act and the Age Discrimination in Employment Act.

Mandatory age requirements were repealed in 1987. Federal law, however, allows personnel policies in force on May 2, 1983 to remain in force until December 31, 1993.

Court cases have determined that sexual harassment is considered sex discrimination for purposes of the Civil Rights Act.

## **6.200 SALARY AND FRINGE BENEFITS**

- |       |                           |       |   |
|-------|---------------------------|-------|---|
| 6.205 | Minimum Wage and Overtime | 6.220 | Unemployment Compensation                   |
| 6.210 | Social Security           | 6.225 | Public Employees' Health and Life Insurance |
| 6.215 | Workers' Compensation     |       |   |

The provisions outlined in Section 5.095, 5.250, and 5.300 of this Handbook which relate to municipal officers are also extended to their employees. In general these sections authorize municipalities to: 1) fix compensation; 2) provide group life, sickness, and accident or hospitalization and surgical insurance; 3) establish retirement programs; and 4) indemnify employees in legal actions against the municipality.

### 6.205 Minimum Wage and Overtime

The U.S. Supreme Court Decision Garcia v. San Antonio Metropolitan Transit Authority, 53 LW 4135, 1985, brought all municipal employees under the federal Fair Labor Standards Act. Municipalities are now required to pay federal minimum wage and time and one-half or compensatory time at a rate of one and one-half hours for any hours over 40 worked in any week. These requirements apply to virtually all municipal employees with some exemptions in the police and fire departments.

Certain benefits for municipal employees are also mandated by the state and federal governments. Municipalities are required to deduct and pay social security and to provide their employees with compensation in the event they become injured in the workplace or become unemployed.

### 6.210 Social Security Coverage

In 1951, the first provision for social security coverage to be applied to all employees of the state and its political subdivisions was passed. (SDCL 3-11-1) For purposes of definition, the state and all of its political subdivisions may come under and are within the provisions of Title II of the Federal Social Security Act, as amended. (SDCL 3-11-5)

The finance officer or other proper officer of the political subdivisions shall issue warrants for amounts as may be required to pay the employer's tax on the wages and salaries of its employees. The proper officers are further authorized to deduct from wages and salaries, the employees share of the tax. (SDCL 3-11-16)

Municipalities are authorized and directed to provide sufficient funds for this purpose in their annual appropriation ordinance. (SDCL 3-11-18) Municipalities are further authorized to provide additional funds by special appropriation ordinances, and by transferring surpluses from other accounts, in order to provide their share of the tax. (SDCL 3-11-20)

### 6.215 Workers' Compensation

Federal and state law requires employers of virtually every employee, including seasonal employees, to be responsible for injuries to the employee arising out of and in the course of employment. The amount of employee's compensation for injury or death is determined by the state. To ensure having funds to pay workers' compensation claims a municipality should obtain workers compensation insurance, self-insure or enter into a reciprocal agreement.

Workers' compensation is a measure of responsibility which the employer has assumed for injuries to, or the death of, any employee. (SDCL 62-3-1) The liability under the provisions of workers' compensation is founded not on negligence, but on relationship. The compensation received by an employee under the provisions of SDCL Title 62 is not in the nature of damages for a tort but is based on such employee's employment. (Benson v. Sioux Falls Medical and Surgical Clinic, 62 SD 324, 252 NW 864)

Volunteer firemen are covered by workers' compensation while in the performance of their duties only if the governing body has appointed the volunteers to the Fire Department. Other volunteers of the state or its political subdivisions who have been officially appointed and whose appointments have been recorded in the minutes of the entity are also considered employees for the purposes of workers' compensation. (SDCL 62-1-5.1) Firemen and other volunteers are to be considered as earning a wage that would entitle them to the maximum compensation for death or injury. (SDCL 62-1-5)

Various chapters under Title 62 define the notice and claim procedures, what injuries can be claimed and what injuries are exempted, as well as some of the occupational diseases which are covered by workers' compensation.

### 6.220 Unemployment Compensation

Unemployment compensation insurance coverage was extended to municipal employees during the 1977 Legislative Session. Municipalities have the option of becoming a "reimbursable" or a "taxpaying" employer. Under the reimbursable method, municipalities will reimburse the state unemployment compensation fund for actual benefits paid to former employees. Under the taxpaying method, employers must remit a regular contribution determined by experience-rating. (SDCL Chapters 61-5; 61-5A)

### 6.225 Public Employees' Life and Health Insurance

Municipalities are empowered to self-insure for health, accident, or life insurance purposes. (SDCL 9-14-30) In addition, municipalities are authorized to obtain and pay for all forms of health insurance, a dental insurance plan, or both, or in lieu thereof, make other arrangements, including entering into agreements with others (for example, the SDML offers the Health Pool of South Dakota). (SDCL 6-1-15)

## **6.230 MUNICIPAL RETIREMENT SYSTEM**

- 6.235 Voluntary Salary Deductions
- 6.240 United States Savings Bonds
- 6.245 Tax Sheltered Annuities
- 6.250 Deferred Compensation Program

The 1974 legislature consolidated existing retirement systems. The supreme and circuit court judicial retirement system, district county court, and municipal court judges' retirement program, South Dakota law enforcement retirement system, South Dakota public employee's retirement system are now known as the South Dakota Retirement System. (SDCL 3-12) An Attorney General's Opinion declared that a municipality may not enter into contracts for a trust fund retirement system. (AGR 74-50)

### 6.235 Voluntary Salary Deductions

The benefits available to municipal employees cover many areas. They include social security coverage, health and life insurance, workers' compensation, unemployment compensation, and retirement programs. They may also include voluntary plans such as purchase of savings bonds, tax sheltered annuities or deferred compensation programs. Employees may have deductions from their salary used for any of these voluntary purposes. No municipality may establish any retirement plan for its employees, however, unless the municipality has enrolled its employees in the state retirement system. (SDCL 3-12-66)

### 6.240 United States Savings Bonds

Municipalities may provide for the purchase of United States savings bonds or similar United States obligations by salary or wage deductions. These salary deductions can only be made upon the written request of the employee. (SDCL 3-10-1)

Upon the written request for the salary deductions, all auditors, treasurers, and other disbursement officers are required to establish a trust fund in order that sufficient amounts can be accumulated to purchase the bonds. (SDCL 3-10-3)

### 6.245 Tax Sheltered Annuities

Another voluntary salary deduction is the area of tax-sheltered annuities. The employees may authorize their employer to withhold a designated amount from their salary for a retirement annuity or accounts, or both, purchased for their benefit. (SDCL 3-10-4)

Statute further provides that when an employee working for a private employer, changes to a position with a public employer, any annuity which the employee has previously purchased may be transferred to the public employer. (SDCL 3-10-7)

### 6.250 Deferred Compensation Program

Any municipality may establish by ordinance a deferred compensation program for its volunteer fire fighters. Such program may be funded by the municipality or by the volunteer fire fighters. (SDCL 9-16-4.1)

The 1987 legislature authorized the South Dakota Board of Retirement to establish a compensation plan for state government and certain political subdivisions. (SDCL 3-13-49) Municipalities also have the authority to establish their own deferred compensation program for their employees. Participation in such program shall be by written agreement between the employees and the governing body of the municipality. The agreement shall provide for the deferral of compensation and the investment and administration of such funds. (SDCL 3-13-49.1)

## **6.300 CERTIFICATION AND MINIMUM STANDARDS**

6.305 Water Supply and Treatment Systems Operators

6.310 Law Enforcement Officers

State law requires certain municipal employees to have minimum standards. These include water supply and treatment systems operators and law enforcement officers.

### 6.305 Water Supply and Treatment Systems Operators

Water supply and treatment systems operators are the subject of Chapter 34A-3. The secretary of water and natural resources is required to certify persons as to their qualifications and to supervise successfully the operation of such water treatment plants, wastewater treatment plants, water distribution and wastewater collection systems. (SDCL 34A-3-3)

This chapter further provides that it is unlawful for any person, firm, or corporation, municipal or private, operating a water supply system or wastewater system to operate the water collection or distribution system unless the competency of the operator is certified under the provisions of this chapter within one year. (SDCL 34A-3-13)

The secretary is charged with the duty to prepare and administer the examinations, as well as to issue certificates upon satisfactory completion of the examinations. (SDCL 34A-3-11) All certificates expire on the first of February every year and must be renewed annually. (SDCL 34A-3-18) A fee not to exceed sixty dollars may be charged for the annual renewal certification. (SDCL 34A-3-19)

### 6.310 Law Enforcement Officers

The South Dakota Law Enforcement Standards Commission was created in 1971 and was given the authority to establish minimum curriculum and training programs and set qualifications of all law enforcement officers including municipal police. (SDCL 23-3-35)

All full-time and part-time law enforcement officers are required to be certified within the first year of employment. Third class municipalities may be granted an additional year to certify their police officers if approved by the Commission. (SDCL 23-3-41)

## **6.400 PUBLIC EMPLOYEES UNIONS**

- 6.415 Areas Open to Negotiation
- 6.420 Binding Agreements
- 6.425 Procedures for Negotiations

### 6.415 Areas Open to Negotiation

The areas open to negotiation between public employers and employees have been defined in AGR 72-10. Representatives designated or selected by the majority of the employees in a unit shall be the exclusive representatives of all employees in such unit for the purpose of representation in respect to rates of pay, wages, hours of employment, or other conditions of employment. (SDCL 3-18-3)

The interpretation of the phrase "terms and conditions of employment" was the subject matter of the case of Westinghouse Electric Corp. v. N.L.R.B., 387 F 2d 542. The court held that the phrase was not intended to be interpreted in its broadest sense. Specifically, the court said:

"In the instant case we arrive at the conclusion. . .that since practically every managerial decision has some impact on wages, hours, or other conditions of employment, the bargaining subject (matter) must depend upon whether a given subject has a significant or material relationship to wages, hours, or other conditions of employment."

The attorney general concluded that the term other conditions of employment, as used in SDCL 3-18-3, means conditions of employment which materially affect rates of pay, wages, hours of employment and working conditions. Governing bodies should not concern themselves with those other items which are petty, which can be used for harassment purposes, or which are inapplicable to the bargaining process.

#### 6.420 Binding Agreements

The court has held that the power to bind the government, including the power to fix the terms and conditions upon which government shall perform its governmental function, necessarily has the force and effect of law - this power is legislative or the power to make law. (Schneberger v. State Board of Social Welfare, 228 Iowa 399, 291 NW 859)

The Constitution in Article III, Section 26, provides that:

"The legislature shall not delegate to any special commission, private corporation, or association, any power to make, supervise, or interfere with any municipal improvement, money, property, effects, whether held in trust or otherwise, or levy taxes, or to select a capital site, or to perform any municipal functions whatever. (Cn. III, sec. 26)

In the City of Sioux Falls, v. Sioux Falls Fire Fighters Local 813, the court held that this is an unlawful delegation of legislative power and is contrary to the provisions of Article III, Section 26, of the Constitution of South Dakota. (City of Sioux Falls v. Sioux Falls Fire Fighters Local 813 234 NW 2d 35 (1975)

#### 6.425 Procedures for Negotiations

Discussion thus far has concluded that public employees can organize into unions (SDCL 3-18-2); because their services are governmental and serve the public as a whole, as opposed to private employment, they do not have the right to strike, (SDCL 3-18-10); and, when arbitration reaches an impasse, decisions made by an arbitration committee can not be binding on the governing body. (City of Sioux Falls v. Sioux Falls Fire Fighters Local 813, supra.)

A final area of significant municipal interest is the procedure to be followed in negotiations. Obligations made in negotiations are not binding on the governing body. Tentative settlements are recommendations presented to the governing body which is required, as soon as practicable, to consider the recommendations and take such action, if any, deemed appropriate. (SDCL 3-18-7)

Further sections of Chapter 3-18 provide for grievance procedures and appeals to the Department of Labor.

### **6.500 CIVIL SERVICE SYSTEMS**

The governing body of any municipality can establish, by ordinance, a civil service system for its policemen, firemen, and other municipal employees. The ordinance must include provisions for establishing a civil service board which must outline the powers of the board, and the duties of and compensation for its members. The ordinance must further provide that any employee, firemen, or policeman may be removed or suspended for cause, but the action of removal or suspension may be reviewed at a hearing by the civil service board if requested by the individual concerned. The individual is entitled to be present at the hearing in person or by counsel. (SDCL 9-14-14)

After passage of the civil service ordinance, the ordinance may not be repealed or modified in any way which affects the standing of any employee hired under its provisions. The civil service ordinance may be repealed only by an initiated ordinance. (SDCL 9-14-14; See Hdbk., sec. 4.100)

An employee, policeman or fireman represented by a labor or employee organization, authorized by Chapter 3-18, may not request the civil service board to review any suspension or removal, unless the labor contract covering such employee specifically provides for such review. Any employees listed above and not represented by any labor or employee organization authorized by Chapter 3-18 may be removed only pursuant to the provisions of such ordinance. Officers and employees appointed by a city manager may be removed by him. However, nothing in this section restricts the Governor's authority, pursuant to SDCL 3-17-3, to remove local law enforcement officers, including those appointed under any civil service ordinance. (SDCL 9-14-14 and 9-14-15)

Regarding the hiring of employees when a municipality has enacted a civil service ordinance, the courts have determined that preference must be given to the individual who has been employed previously and who is listed on the reinstatement eligible lists, or to any qualified individual who is listed on the eligible list. These qualified persons may not be ignored. A person should not be employed who has not qualified under the civil service ordinance, nor can an individual who has previously been employed seasonally and who has performed satisfactory service, be replaced by another person. (Wheeler v. Hugill et al., 67 SD 545, 295 NW 638)

Another important court decision determined that, if the evidence is sufficient to establish that the civil service board did not act fraudulently or in an arbitrary or with a willful disregard of undisputed proof in determining that an officer had discharged an employee (chief of police discharging a policeman) in good faith or cause, the removal will stand. In this case the employee was discharged for violating instructions prohibiting outside employment. A review of the board's approval of such action involves a determination as to whether the board has acted either outside or in excess of its jurisdiction. In reviewing the board's ruling, the court is precluded from reviewing the board's actions pertaining to admission or rejection of testimony. (Willard v. Civil Service Board of Sioux Falls, 63 NW 2d 801)

### **6.600 DEPUTIES AND ASSISTANTS**

Deputies and assistants are required to be appointed in writing. Their removal is also to be in writing. Statute further requires the written appointment be kept on file with the deputy's oath and bond. (SDCL 3-2-1)

Deputies are required to take the same oath as the officer who appointed them. (SDCL 3-2-3) A bond of the deputy or assistant may be required by the appointing officer for the officer's own protection. Statute provides, however, that the penal sum of the bond can not be greater than one half of the amount of the bond of the appointing officer. (SDCL 3-2-4)

### **6.700 FIREARMS AND DANGEROUS WEAPONS**

The governing body of a municipality may not, by any method or means, prohibit or restrict an individual who is a municipal employee, officer, or volunteer, from lawfully possessing any concealed firearm and compatible ammunition, while the individual is within any municipal building, facility, or vehicle, or while on any real property, owned or leased by the municipality. This section does not apply to possession of a concealed firearm and compatible ammunition by:

- (1) An individual who is an inmate;
- (2) An individual, other than a law enforcement officer, while present in the secure area of any detention facility, a mental health crisis center, or a substance use disorder residential treatment facility; or
- (3) An individual, other than a law enforcement officer, while using a municipal vehicle to transport another individual apprehended in accordance with chapter [27A-10](#).

No injury or damage resulting from an individual possessing a concealed firearm may be construed to be an act of the municipality, and no liability may be imputed to the municipality.

For purposes of this section, any "method or means" includes the adoption of a policy, the issuance of a guidance letter or statement, and any similar directive, whether written or oral.

Notwithstanding SDCL 9-14-44 or 9-19-20, a municipality may, by any method or means, prohibit or restrict an individual from lawfully carrying a dangerous weapon, as defined in SDCL 22-1-2, within a building or facility at which an event is occurring, provided metal detectors are utilized to screen for any dangerous weapons and armed security personnel are posted at each public entrance. (SDCL 9-14-44 and 9-14-45)

## CHAPTER 7

### ELECTIONS

7.000	Introduction	7.500	Absentee Voting
7.025	Forms for Elections	7.550	Automatic Tabulating Systems
7.050	Dates and Hours of Elections	7.600	Canvass of Votes
7.100	Elected Officials	7.610	Recount Authorized
7.150	Voters	7.625	Tie Vote
7.250	Nominating Petitions	7.650	Required Notices
7.300	Precincts	7.700	Special Elections
7.350	Precinct Election Officials	7.750	Campaign Finance Reports
7.400	Ballots	7.800	Provisional Voting
7.450	Arrangements and Conduct of Voting	7.900	Rank Choice Voting Prohibited

#### **7.000 INTRODUCTION**

Election laws are primarily found in Title 12 of the South Dakota Codified Laws. Provisions dealing specifically with municipal elections are found in SDCL 9-13. This chapter of the Handbook will deal with the general provisions governing municipal elections.

#### **7.025 FORMS FOR ELECTIONS**

The State Board of Elections has established by rule the required forms for petitions, ballots, public notices and other similar aspects of municipal elections. Copies of these forms can be found in the South Dakota Election Code, published by the Secretary of State. The rules are distributed by the SDML.

#### **7.050 DATES AND HOURS OF ELECTIONS**

Annual elections for officers of municipalities traditionally are held on the second Tuesday of April each year. (SDCL 9-13-1) The members of the governing body of a municipality may choose to hold a general municipal election in conjunction with a school district on a date agreed upon by the governing bodies. Details of this provision can be found in SDCL 9-13-1.1. The 1996 Legislature also gave municipalities the ability to hold the general election in conjunction with any political subdivision, including on the June primary date or on the first Tuesday in June. (SDCL 9-13-37; 12-2-5; 12-2-6; 9-13-40) If the governing body chooses a different election day as provided in SDCL 9-13, that election date must be established by January 14 of the election year. Statute further provides that the polls must be kept open continuously from seven o'clock a.m. to seven o'clock p.m. (SDCL 9-13-1)

#### **7.100 ELECTED OFFICIALS**

Municipalities elect their officers according to their form of government. (See Hdbk., sec. 2.450, 2.500, 2.550, and 2.600)

**7.150 VOTERS**

- 7.155 Persons Entitled to Register
- 7.160 Duties of the County Auditor
- 7.165 Registration - Procedures and Requirements
- 7.170 Registration Lists
- 7.175 Voter Registration Challenge

**7.155 Persons Entitled to Register**

Every person who has the qualifications to vote or will have the qualifications by the next ensuing election shall be entitled to register. (SDCL 12-4-1)

Every person who, at the time of the election, maintains residence in this state, will be eighteen years of age or older on or before the next election, is not otherwise disqualified, and complies with the law regarding the registration of voters may vote at any election in the state. (SDCL 12-3-1)

It was the opinion of the Attorney General (AG Opinion 84-19) that having a business but not a residence within the corporate limits of a municipality did not qualify an individual to be eligible to register to vote.

No person may vote at any municipal election unless the person is registered to vote pursuant to Chapter 12-4 and resides in the municipality at the time of the election. For purposes of voter eligibility, a person resides in a municipality if the person actually lives in the municipality for at least 30 days each year, is a full-time postsecondary education student who resided in the municipality immediately before leaving for the postsecondary education or is on active duty as a member of the armed forces whose home of record is within the municipality. A voter's qualification as a resident may be challenged in the manner provided in SDCL 12-18-10. (SDCL 9-13-4.1)

**7.160 Duties of the County Auditor**

The county auditor is in complete charge of the registration of all electors in the county. SDCL 12-4-2 designates that the finance officer of each municipality shall conduct voter registration.

The voter registration forms can be printed at your local printing company or you can print the form from the Secretary of State's website at <http://www.sdsos.gov/voteregistration/registrationvoting.shtm> and make copies yourself.

**7.165 Registration - Procedures and Requirements**

The form of the registration cards is to be prescribed by the State Board of Elections and furnished by the county auditor. (SDCL 12-4-8) The voter registration form must include a certification of voter eligibility. (SDCL 12-4-1.2)

Voter registration shall be conducted by each municipal finance officer. (SDCL 12-4-2) It is the duty of the registration official to see that the registration card is filled out completely.

A person cannot establish residency for voter registration or absentee voting by using only a commercial mail receiving agency, mail forwarding service, or post office box as their address (SDCL ch. 12). Such individuals may only be registered as a federal voter, meaning they can vote exclusively for U.S. president and vice president, U.S. senator, and U.S. representative as outlined in SDCL § 12-8-8. The county auditor must provide these voters with a federal-only ballot and designate them accordingly.

The deadline for registration of voters is not later than 5:00 p.m. local time, fifteen days prior to the election. (SDCL 12-4-5)

### 7.170 Registration Lists

The county auditor is required to compile a master registration file which is open to public inspection under SDCL 12-4-9. The master registration file is to include the names of all persons registered to vote according to each voting precinct in the county. Public access to each voter's date of birth, social security number and driver license number is restricted. (SDCL 12-4-5 to 12-4-9) A person registered to vote may request that the county auditor remove the person's name from the master registration list. (SDCL 12-4-56)

From the master registration file, the county auditor is required to compile precinct registration lists. (SDCL 12-4-10) The procedure for changes in either the master registration list or the precinct registration lists are provided in SDCL 12-4-11 to 12-4-19.4

The precinct registration lists are to be delivered to the finance officer at least one day before the election. It is the duty of the finance officer to deliver the lists to each of the superintendents of the election. (SDCL 12-4-24) The auditor must design the precinct registration list so that each name can be distinctly marked when the voter requests a ballot, and must contain a space in which may be recorded the record of any challenge, affidavit, or other information as required. (SDCL 12-4-10) The precinct registration list furnished by the county auditor shall also be the list used for any runoff election; however, any voter who may have registered fifteen days preceding the runoff election shall have his name added to the list for the runoff election. (SDCL 12-4-5)

### 7.175 Voter Registration Challenge

South Dakota law (SDCL 12-4-58 through 12-4-61) sets forth the process for challenging voter registrations. Challenges can be filed by the Secretary of State, county auditors, or registered voters. They must be filed no later than 30 days before an election if the claim is that the voter is deceased or disqualified (SDCL 12-4-58), and no later than 90 days before an election if the claim is that the voter is a nonresident or registered in another state (SDCL 12-4-59). All challenges require a signed affidavit with documented evidence, not just unsupported allegations, and must follow a format established by the State Board of Elections (SDCL 12-4-60).

If a county auditor finds the challenge valid, they must send a verification request to the voter, who then has 30 days to respond with documentation proving eligibility. Voter registration may only be canceled if the voter fails to provide documentation and does not vote by the next general election. Importantly, cancellations cannot occur within 90 days of an election for residency-based challenges (SDCL 12-4-61). Voters have the right to a hearing and may appeal cancellations to the county commission or circuit court. Records of challenges must be retained for at least 22 months, and confidential information disclosed in the process is strictly protected.

### 7.250 NOMINATING PETITIONS

For elections held the second Tuesday in April, nominating petitions must be filed with the finance officer not later than five p.m. on the last Friday in February preceding the day of election. These petitions shall include the name of the candidate, his residence, mailing address, and the office for which he is nominated. (SDCL 9-13-7) A candidate is required to have signed the "declaration of candidate" prior to the circulation of a nominating petition.

Each voter signing a nominating petition or the person circulating a petition must add the voter's residence mailing address (ditto marks may not be used) and the date of signing. The signer's post office box number may be used instead of a street address if the signer lives within a municipality of the second or third class. The petition may be composed of several sheets, which shall have identical headings and be verified under oath by the persons circulating

it. (SDCL 9-13-11) If multiple sheets are used, each petition sheet must be a self-contained sheet of paper that includes all required sections of a petition. (SDCL 12-1-3)

The finance officer may only accept petitions that are on the prescribed form and were circulated and submitted in accordance with the statutes. If the nomination petition meets the statutory requirements, the filing of the petition shall constitute nomination.

Any person who has filed a nominating petition may withdraw his name from nomination by a written request, signed by the person and properly acknowledged and filed with the finance officer of the municipality. The name of a withdrawn or deceased candidate may not be printed on the ballot if the candidate withdraws or dies no later than five p.m. on the deadline day for filing nominating petitions. If the withdrawal or death of a candidate occurs at any time prior to 5:00 p.m. on the deadline day for filing nominating petitions results in there being no contest on the ballot, that ballot need not be voted. In addition, if that contest constitutes the only ballot to be voted upon then the election shall be cancelled and the unopposed candidate shall be issued a certificate of election. (SDCL 9-13-7.1)

Nominating, initiative, and referendum petitions may be challenged in the manner provided in SDCL 12-1-13 through 12-1-16. No petition submitted may be made available to the public until the validation process has been completed and the office where that petition was submitted has filed or rejected the petition. (SDCL 12-1-39)

In first and second class municipalities, if a candidate is to be voted on at large, a nominating petition shall be signed by five percent of the registered voters of the municipality based on the number of registered voters recorded by the county auditor on the second Tuesday in January of the year of the election. No petition need be signed by more than fifty voters. If the candidate is to be voted for by the voters of a ward or subdivision of a municipality having more than one ward or subdivision, a nominating petition shall be signed by five percent of the registered voters of the ward based on the number of registered voters recorded by the county auditor on the second Tuesday in January of the year of the election. No petition need be signed by more than fifty voters. (SDCL 9-13-9)

In third class municipalities, if the candidate is to be voted for by the voters at large, the nominating petition shall be signed by not less than three voters. If the candidate is to be voted for by the voters of a ward or subdivision of a municipality having more than one ward or subdivision, the nominating petition shall be signed by not less than three voters of the ward or subdivision.

A voter from a third class municipality is not restricted to the number of petitions which the person may sign. (SDCL 9-13-9)

No nominating petition may be circulated until on or after the last Friday in January prior to the election (SDCL 9-13-9) or four months prior to the election if the election is combined with the school district and scheduled for June. (SDCL 13-7-6)

### **7.300 PRECINCTS**

The Board of County Commissioners is charged with the duty to provide for election precincts throughout the county. The municipal governing body should establish its own precinct boundaries for municipal elections and the person in charge of the local election must notify the county auditor of any boundary changes at least forty-five days before the election. In even numbered years, the official in charge of a local election shall notify the county auditor at least one hundred days before the primary election and at least one hundred days before the general election if any external boundary changes have been made. (SDCL 12-14-1; 12-14-1.1) The resolution establishing new precincts or making any change in precincts already established must clearly set forth and define the boundaries of the new precincts. (SDCL 12-14-2) (See Hdbk., sec. 2.375)

Statute establishes the guideline that the polling places be selected with reference to the convenience of the voters and should be as near the center of the precinct as practicable. Polling places can, however, be located outside the boundaries of the precincts. (SDCL 12-14-9)

In 2012, legislation passes allowing municipalities the option of using voting centers. (SDCL 12-14-17)

### **7.350 APPOINTMENT AND COMPENSATION OF PRECINCT SUPERINTENDENTS AND DEPUTIES**

Each voting precinct shall be presided over by an election board consisting of a minimum of two precinct deputies and one precinct superintendent. The governing body of the municipality shall appoint the election board and determine the compensation of each precinct superintendent and deputy. (SDCL 9-13-16.1) By federal law, election workers are exempt from social security and Medicare withholding if they earn less than \$1,500 a year do not hold any other city position. Also, Form 1099 does not need to be issued. Election workers are not considered employees eligible for unemployment or workers' compensation benefits under SDCL 61-1-10.2 and 61-1-10.3.

If a municipality is divided into wards and all of the wards use the same polling places, the governing body of the municipality may appoint a single election board for all of the wards. The election board shall consist of a minimum of one judge and two clerks. Election board members shall receive compensation as fixed by the governing body. (SDCL 9-13-36)

Each precinct superintendent, deputy, and precinct assistant shall take an oath in the form prescribed by SDCL 12-15-9. The members of the precinct election board may administer the oath to each other. (SDCL 12-15-9) Any person who fails to take the oath is replaced in the manner provided for in SDCL 12-15-10.

### **7.400 BALLOTS**

Official ballots for municipal elections are to be prepared by the finance officer at the expense of the municipality. The ballots shall be prescribed by the State Board of Elections, of good quality print paper, printed in black ink and in the English language only. (SDCL 9-13-21) The finance officer may destroy voted ballots and poll books 60 days after the election at which such ballots were voted unless a recount or contest of such election is pending. (SDCL 12-20-31)

The ballots for municipal elections shall be available for absentee voting no later than 15 days prior to Election Day. If the ballots are for a runoff election, the ballots shall be available no later than seven days prior to the runoff Election Day. (SDCL 9-13-21)

The name of each candidate for each office in the precinct shall appear without any information other than the office the candidate is seeking. The finance officer shall determine, by lot, each candidate's position on the ballot. When more than one commissioner or alderman is to be elected, the ballot must contain instructions as to how many candidates may be voted for. (SDCL 9-13-21)

Optical Scan ballots have separate requirements.

When an election is held for the issuance of bonds, it is to be conducted in accordance with the provisions of SDCL chapter 6-8B. (See Hdbk., sec. 12.305)

### **7.450 ARRANGEMENTS AND CONDUCT OF VOTING**

The superintendent of the election precinct is in charge of conducting the election in that precinct. The superintendent must erect and have ready a sufficient number of booths to accommodate the voters in the precinct. The superintendent must also see to it that all ballots, electronic ballot marking systems, and supplies convenient to the voters are at the polling place. All materials are to be furnished by the finance officer. (SDCL 12-18-1) The American flag shall be displayed inside or outside of all polling places at each election. (SDCL 12-14-13)

The precinct election officials must be at the polling place at all times after the polls are opened. (SDCL 12-18-1.4)

A member of the precinct election board belonging to a political party which is not the same as the political party of the member of the precinct election board who has the registration list shall keep a poll list in paper or electronic format which contains in numerical order the names of all persons voting at the election and the type of ballot voted. (SDCL 12-18-5)

Each person presenting themselves to vote must show a photo ID. The ID must be a SD driver's license or non-driver ID card, a passport or photo ID issued by the US government, a tribal photo ID, or a current student photo ID issued by a SD high school or post secondary institution. If the voter does not have one of these IDs, the voter may sign an affidavit of their identification and be allowed to vote a regular ballot. (SDCL 12-18-6.1 through 12-18-6.5)

Other voting procedures relating to poll watchers, spoiled ballots, marking of ballots, and penalties for falsification of affidavits or misconduct of the election can be found in SDCL Chapter 12-18.

All voting at the polling place shall be in private voting booths or compartments and except as provided in SDCL 12-18-25, shall be screened from observation. (SDCL 12-18-1)

### **7.500 ABSENTEE VOTING**

- 7.505 Application for Absentee Ballot Authorized
- 7.510 Form and Contents of Application
- 7.515 Delivery and Marking of Absentee Ballot
- 7.520 Return and Canvass of Absentee Ballots

#### **7.505 Application for Absentee Ballot Authorized**

Any registered voter may vote by absentee ballot. (SDCL 12-19-1) The person in charge of the election shall preserve a record of the name, post office address and voting precinct of each applicant for the superintendent of the election of the home precinct of the applicant.

#### **7.510 Form and Contents of Application**

An absentee voter desiring to vote by mail may apply for an absentee ballot. The application, filed with the person in charge of an election, shall be completed in writing. The application shall state the voter's registration address. The voter's signature must be witnessed by a notary public or other officer authorized to administer an oath. If the signature is not witnessed, this application must be accompanied by a copy of the voter's valid ID pursuant to SDCL 12-18-6.1. No person may distribute an absentee ballot application to a voter that is prefilled with the voter's name and registration address. This provision does not apply to a person who is authorized to request an absentee ballot for a person requiring assistance in voting. (SDCL 12-19-1.3) The ballot must be sent to the voter's residence or any temporary residence address designated in writing by the voter when applying for the absentee ballot. (SDCL 12-19- 2)

Upon receipt of the written application for an absentee ballot, the finance officer must, within forty-eight hours after receiving the application, or if the ballots are not then on hand, then within forty-eight hours after receipt of the ballots, confirm that the applicant is registered and mail one of each of the official ballots, a set of instructions and an unsealed return envelope to the address requested on the application. If a registration form is received simultaneous with an absentee ballot request and prior to the registration deadline, the absentee ballot shall be based on the submitted registration form. (SDCL 12-19-3)

The return envelope has a statement printed on the reverse side of it. The signature does not need to be witnessed by a notary public. (SDCL 12-19-4)

At any time prior to an election a voter may apply in person for an absentee ballot during regular business hours or until five p.m. of the day before the election. If absentee voting at the office of the person in charge of the election, the voter must complete a combined absentee ballot application/return envelope and show a valid ID or sign the personal identification affidavit. (SDCL 12-19-2.1 and 12-19-4)

#### 7.515 Delivery and Marking of Absentee Ballots

The envelope containing the enclosure, if not delivered to the voter personally by the person in charge of the election or authorized messenger filing the voter's request for an absentee ballot, shall be sent first class to the absentee voter at the address stated in the application. No absentee ballot may be mailed to a voter after the Monday prior to election day. (SDCL 12-19-5)

The ballot must be completed in the usual fashion. The voter shall place the voted ballots in the return envelope provided and seal the envelope. The voter shall execute the statement on the return envelope and return the ballot by mail, by delivering in person, or by providing the ballot to an absentee ballot messenger. (SDCL 12-19-7) Ballot drop boxes may not be used. (SDCL 12-19-9.3)

#### 7.520 Return and Canvass of Absentee Ballots

When the finance officer receives the absentee ballots, he must deliver the ballot and the written application for absentee ballot to the precinct superintendent of the election of the voter's home precinct. (SDCL 12-19-10)

The ballot shall be delivered with the election supplies to the polling place or, if received later, before the polls close. The board must process the ballot in the following manner:

- 1) Compare the statement on the reverse side of the return envelope with the written application.
- 2) The election officials must be satisfied that the ballots received were voted by the voter whose name appears on the statement, that the written application and statement were both signed by the voter, and that he is a registered voter of the precinct and not previously voted at that precinct in that election.
- 3) The voter's name is then entered in the poll book and the registration list is marked.
- 4) The envelope is opened, the ballots are removed and stamped with the official stamp and deposited in the ballot box without opening, unfolding, or examining the ballot itself.

If the board determines that an envelope cannot be opened because it does not meet the requirements for opening, the reason shall be written on the envelope, signed by a member of the board, and the envelope placed in a larger envelope for unopened absentee ballots. (SDCL 12-19-10)

The written application and official return envelope shall be preserved by the election officers and returned by them to the proper office together with the other election supplies. (SDCL 12-19-11)

If any ballot is received after the polls have closed, the ballot cannot be counted or opened. (SDCL 12-19-12)

#### **7.550 AUTOMATIC TABULATING SYSTEMS**

Governing bodies of counties and municipalities are authorized to use automatic tabulating or electronic ballot marking systems in any or all elections. No election voting system may be connected to the internet. (SDCL 12-17B-2) Statute also authorizes contracting for the use of the machines with other governing bodies. (SDCL 12-17B-4; See Hdbk., sec. 3.400)

The finance officer shall insure that a sufficient number of voting machines, booths and supplies are available to avoid unreasonable waiting times for voters. (SDCL 12-17B-6)

Automated tabulating systems must be tested not more than ten days before election day. (SDCL 12-17B-5; 12-17B-5.1; 12-17B-5.2; 12-17B-12 and ARSD 5:02:09:01.02)

Further information on automated tabulating systems may be found in SDCL 12-17B and ARSD 5:02:09

### **7.600 CANVASS OF VOTES**

The election returns are to be canvassed (use canvass form 5:02:17:11) by the officer in charge of the election, with the assistance of a majority of the governing board within seven days after the election. After canvassing, the result must be declared, and a statement must be made in the journal. (SDCL 9-13-24)

In all municipalities the person who receives the highest number of votes is elected. However, in any municipality the governing body may, on or before the first of October preceding, approve an ordinance requiring a runoff election as found in SDCL 9-13-26.1 and 9-13-27.1. (SDCL 9-13-25)

If a municipality has passed an ordinance requiring a runoff election and no candidate in a race involving three or more candidates receives a majority of the votes cast in the race, a runoff election shall be held three weeks from the date of the first election. Provisions for tie votes in the first election are also provided for. The runoff election shall be held in the same manner as the first election. The person receiving the highest number of votes at the runoff election is elected. (SDCL 9-13-26.1)

The finance officer, within two days after the result of the election is declared, shall notify each person elected to office of the person's election. If a person does not qualify within ten days after the first meeting of the month next succeeding the election, the office becomes vacant. (SDCL 9-13-28)

### **7.610 RECOUNT AUTHORIZED**

If any candidate for the municipal governing body is defeated by a margin not exceeding two percent of the total votes cast for all candidates or by a margin of five votes or less, the candidate may, within five days, after the official canvass, file with the municipal finance officer a written request for a recount. (SDCL 9-13-27.3). The finance officer shall set the time and place for the recount to occur within ten days of the date of the receipt of the recount request. A recount board shall be established consisting of one person chosen by each candidate declared elected and by each candidate who is eligible to request a recount. If this board consists of an even number of persons, one additional recount board member shall be appointed by the finance officer who shall be mutually agreeable to each candidate involved in the recount. Each representative to the recount board shall be named within three days of the receipt of the recount request by the finance officer. The person having custody of the ballot boxes containing the ballots to be recounted shall deliver them to the recount board. Any question arising on the recount shall be determined by majority vote of the recount board. (SDCL 9-13-27.3)

Recounts on ballot questions, initiative, referendum, or recall shall be conducted if, within five days after completion of the official canvass of a municipal ballot question election at which a question is approved or disapproved by a margin not exceeding two percent of the total votes cast in the election, any three registered voters of the municipality file a petition duly verified by such voters. The finance officer shall set the time and place for the recount to occur within ten days of the date of the receipt of the recount request. A recount board shall be appointed by the finance officer who shall appoint one person on each side of the question and one person who shall be mutually agreed upon by the other two appointed. Each representative to the recount board shall be named within three days of the receipt of the recount request by the finance officer. The recount shall be conducted according to the provisions of SDCL 9-13-27.3.

**7.625 TIE VOTE**

If a tie vote exists after a canvass of original official returns, the governing body making the canvass shall certify the vote to the finance officer. The finance officer shall then notify the candidates that if no request for recount is made in writing to the finance officer within five days after the certification, a time and place shall be set for the drawing of lots. (SDCL 9-13-27.2)

**7.650 REQUIRED NOTICES**

Municipal officials are required to make the following legal publications in the official newspaper in conjunction with municipal elections:

- 1) Two notices identifying which vacancies will occur by termination of the terms of office of elective officers, stating the time and place where nominating petitions may be filed. For elections held the second Tuesday in April, the notices are to be published once each week for two consecutive weeks between January 15th and January 30th (SDCL 9-13-6) (See Hdbk., sec. 7.250)
- 2) Two notices of the availability of registration officials, stating when registration will be terminated and the effect of a failure to register. This notice must be published on-line and in the official newspaper at least once each week for two consecutive weeks. The last publication to be not less than ten nor more than fifteen days before the deadline for registration. (SDCL 12-4-5.2)
- 3) Two notices of election published once each week for two consecutive weeks, the first publication being not less than ten days prior to the election. A facsimile of the official ballot shall be published in the week prior to each election. (SDCL 9-13-13)
- 4) If there is to be a runoff election, a notice of election shall be published once during the week before any runoff election, which shall include a list of all persons appearing on the ballot for the election. (SDCL 9-13-27)

**7.700 SPECIAL ELECTIONS**

Special elections, except those held to fill a vacancy on the governing body pursuant to SDCL 9-13-14.2, are to be held upon the same notice, at the same polling places, be conducted, returned, and canvassed, and the result declared as provided for the annual municipal election. (SDCL 9-13-14) Statute also requires that the notice of the special election must state any question or questions to be voted upon. (SDCL 9-13-14)

Special elections, for example, are required to be held on certain ordinances, and initiated measures; and when creating boards and commissions, increasing the tax levy and/or imposing certain special mill levies in addition to the twenty-seven mil levy requirement for general purposes.

Special elections held to determine a bond issue must follow the election provisions in SDCL 6-8B.

**7.750 CAMPAIGN FINANCE REPORTS**

- 7.755 Candidates' Financial Statements
- 7.760 Statements for Ballot Questions
- 7.770 Local Campaign Finance Ordinances

**7.755 Candidates' Financial Statements**

Each candidate for commissioner, councilman or mayor in first class municipalities, shall file a statement of financial interest with the municipal finance officer no more than fifteen days after filing nominating petitions or, if otherwise nominated, no more than fifteen days after the candidate's nomination is certified. (SDCL 12-25-30) The Secretary of State prescribes and provides forms for this report. These reports are open to the public. (SDCL 12-25-31) Persons elected to office are required to file, within fifteen days after assuming office, any additions or corrections to this statement. (SDCL 3-1A-4)

**7.760 Statements for Ballot Questions**

State law regarding campaign financing for organizations contributing to ballot question committees applies to elections on ballot questions in first class municipalities. All other municipalities have the option of adopting these provisions. Information to be contained in the statements is found in SDCL 12-27-19 and 12-27-22 through 28, although nothing prevents any municipality from adopting additional standards or requirements that are more stringent than state law. (SDCL 12-27-45)

The Secretary of State prescribes the style of these forms, which are open to the public.

**7.770 Local Campaign Finance Ordinances**

Any municipality, regardless of size, may adopt an ordinance to make the provisions of SDCL Chapter 12-27 with or without amendments applicable to elections for municipal office. SDCL chapter 12-27 requires candidates to file campaign contributions and expenditure reports. (SDCL 12-1-2.1 and 12-27-39)

**7.800 PROVISIONAL VOTING**

When a voter is requesting a ballot, the voter shall present a valid form of personal identification in the form of a SD driver's license or non-driver identification card; a passport or an identification card, including a picture, issued by an agency of the US government; a tribal identification card, including a picture; or a current student identification card, including a picture, issued by a high school or an accredited institution of higher education, including a university, college, or technical school, located within the State of South Dakota. (SDCL 12-18-6.1)

If a voter is not able to present one of the above forms of identification, the voter may complete an affidavit in lieu of the personal identification. The affidavit shall require the voter to provide his or her name and address and must be signed under penalty of perjury. (SDCL 12-18-6.2)

If a member of the precinct election board cannot determine from the personal identification presented that the person making an application for a ballot is the person listed on the voter registration list, the member may consider other forms of identification, personal knowledge and an explanation from the person making an application for a ballot to match that person's name to a name on the registration list. If identity cannot be proven to the satisfaction of the member of the election board, or if the person making an application for a ballot is challenged on the basis of identity by a member or poll watcher, the person may vote a provisional ballot. (SDCL 12-18-6.3)

The provisional ballot is not counted on election night. Following Election Day, the finance officer working with the county auditor will determine if, in fact, the voter was properly registered in this precinct by the registration deadline but was inadvertently left off the registration list. If this is the case, the ballot will be counted prior to the official canvass. If there is no record of the person being registered, the ballot will not be counted. (SDCL 12-18)

The finance officer within ten days of the official canvass will notify all provisional ballot voters, whether or not their ballot was counted. If the ballot was not counted, the finance officer will note the reason why. (SDCL 12-20-13.4)

**7.900 RANK CHOICE VOTING PROHIBITED**

A political subdivision may not adopt or enforce in any manner a system of voting for any office where:

- (1) Voters rank candidates in order of preference;
- (2) Tabulation proceeds in rounds where in each round either a candidate is elected or the last-place candidate is eliminated;
- (3) Votes are transferred from elected or eliminated candidates to the voter's next-ranked candidate in order of preference; and
- (4) Tabulation ends when a candidate receives the majority of votes cast or the number of candidates elected equals the number of offices to be filled. (SDCL 12-1-9.1)

## CHAPTER 8

### LAW ENFORCEMENT AND THE COURTS

8.000 Introduction	8.300 Actions Against Municipalities
8.050 Law Enforcement Agencies	8.350 Courts
8.100 General Police Powers	8.375 Finance of the Court System
8.150 General Areas of Enforcement	8.400 Jails
8.200 Criminal Proceeding Against Minors	8.500 Civil Rights
8.250 Elders and Adults with Disabilities	8.600 911 System

#### **8.000 INTRODUCTION**

One of the most basic functions of a municipal corporation is to protect the lives and property of its residents. The statutory responsibilities of a municipal corporation in this area are the subject of this chapter of the Handbook. The intent is not to present an outline which will prepare municipal officials for law enforcement. The intent is rather, to present an overview of the state laws relating to crime and law enforcement agencies to acquaint the municipal official with the guidelines established for police officers and criminal offenders.

#### **8.050 LAW ENFORCEMENT AGENCIES**

A law enforcement officer is defined as any employee or officer of the state or any political subdivision who is responsible for the prevention and detection of crime and the enforcement of the criminal or highway traffic laws of this state. (SDCL 23-3-27)

All law enforcement officers of the state are organized into a state constabulary. The constabulary is empowered to have such powers and perform such duties, as may be necessary to preserve and protect the peace, security, safety, and welfare of the state and the people. (SDCL 1-12-1)

Municipal police agencies are governed by SDCL Title 9. (SDCL 23-3-1) The chief law enforcement agency in the state is the Division of Criminal Investigation. (SDCL 23-3-6) Within the Division a Law Enforcement Standards Commission has been created and given the authority to promulgate rules and regulations governing police officers, establish minimum educational and training standards, certify persons as to their qualifications, and conduct training schools and programs for courses of instruction. (SDCL 23-3-35)

All full-time and part-time law enforcement officers are required to be certified within the first year of employment. Third class municipalities may be granted an additional year to certify their police officers if approved by the Commission. (SDCL 23-3-41)

Municipalities are authorized by statute to exercise jurisdiction for all authorized purposes over all territory within the corporate limits and over any public ground or park belonging to the municipality and within one mile of the corporate limits. (SDCL 9-29-1)

**8.100 GENERAL POLICE POWERS**

- |   |                           |
|---|---------------------------|
| 8.105 Territorial Jurisdiction                | 8.115 Mayor's Authority   |
| 8.110 Regulation of Municipal Police Officers | 8.120 Powers of Policemen |

**8.105 Territorial Jurisdiction**

Every municipality may regulate the police of the municipality and may pass and enforce all necessary police ordinances. (SDCL 9-29-2)

**8.110 Regulation of Municipal Police Officers**

Every municipality may regulate the police of the municipality and may pass and enforce all necessary police ordinances. (SDCL 9-29-2)

**8.115 Mayor's Authority**

The mayor of a municipality having a common council and each member of a board of city commissioners possess all the powers conferred by law upon sheriffs to suppress disorder and keep the peace. (SDCL 9-29-16; See Hdbk., sec. 2.620) The Attorney General has opined that SDCL 9-29-16 does not confer upon a mayor all the power and authority of a duly certified law enforcement only the power to suppress disorder and keep the peace. (AG Opinion 87-4)

The mayor of every municipality is authorized to call upon every inhabitant over the age of eighteen years to aid in enforcing the laws and ordinances. (SDCL 9-29-17) When a private citizen is called into service by a police officer, or mayor in this case, the court has ruled that the municipality becomes liable to the citizen for a reasonable value of service. (Gulbrandson v. Town of Midland, 72 SD 461, 36 NW 2d 655)

**8.120 Powers of Policemen**

All policemen of every municipality possess the powers of constables. As such they can execute and serve warrants. They may pursue and arrest any person fleeing from justice in any part of the state and they are empowered to arrest and detain any person guilty of any breach of the peace or any violation of the laws of the state or ordinance of the municipality. (SDCL 9-29-19)

**8.150 GENERAL AREAS OF ENFORCEMENT**

- |   |  |
|---|--|
| 8.155 Solicitors, Peddlers, Transient Merchants | 8.175 Food and Drugs                   |
| Transient Merchants                             | 8.180 Vandalism and Damage to Property |
| 8.160 Weed Control                              | 8.185 Traffic Regulation               |
| 8.165 Gambling and Lotteries                    | 8.187 Golf Carts on Streets            |
| 8.170 Obscenity and Public Indecency            | 8.190 Animal Licenses and Regulations  |
|   | 8.195 Public Intoxication              |

**8.155 Solicitors, Peddlers, Transient Merchants**

Court cases throughout the United States have overturned a wide variety of municipal ordinances that were commonly called "Green River Ordinances." In both 1985 and 1992, the South Dakota Legislature repealed most state laws dealing with transient merchants, peddlers, and solicitors.

Municipalities may license, tax, regulate, or prohibit hawkers, peddlers, solicitors, pawn brokers, ticket scalpers and employment agencies. (SDCL 9-34-8) Municipalities are also allowed to license, tax, and regulate transient merchants, auctioneers, transient, bankrupt, and auction stores, and stores of like nature and to regulate door to door sales, peddlers, and solicitors. (SDCL 9-34-7; 9-34-18)

Traditionally, a peddler has goods or services for immediate delivery and a solicitor has goods or services for future delivery. Any municipal regulation of solicitors, peddlers, and transient merchants should be done by ordinance.

Municipalities may not regulate the peddling or soliciting of telecommunications services subject to the provisions of Chapter 49-13 or 49-31. (SDCL 9-34-8)

Deceptive advertising, deceptive pricing, and deceptive trade practices are regulated by the state. (SDCL Chapter 37-24) All businesses must have a South Dakota sales tax license.

#### 8.160 Weed and Pest Control

Municipalities no longer have the entire responsibility to enforce the noxious weed control provisions of Chapter 38-22 of the SDCL. The authorization to control weeds and pests is now delegated to the county weed and pest board. The board of County Commissioners may, based upon the budget submitted by the county weed and pest board, appropriate and expend money from the general fund of the county for the purposes of eradicating weeds and pests. (SDCL 38-22-24)

#### 8.165 Gambling and Lotteries

Municipalities have the power to suppress gambling, gaming, and gambling houses, lotteries, and all fraudulent devices and practices. This power does not apply to any lottery owned and operated by the state. (SDCL 9-29-5) Although the state video lottery may not be restricted, municipalities may impose a fee for the privilege of locating video lottery machines on certain licensed premises. If a person holds an alcoholic beverage license and is issued a video lottery establishment license, the municipality issuing the alcohol license may charge a fee not to exceed \$50 per year per video lottery machine. The proceeds from the fee are to be deposited in the general fund. The fee is in addition to any alcoholic beverage licensing fee or video lottery establishment license fee. The municipality may not impose this additional fee on more than one license per location. (SDCL 35-4-103) Municipalities may use additional criteria given in SDCL 42-7A-64 to authorize video lottery machine placement in establishments issued an on-sale license. (See Hdbk., sec. 11.425) No video lottery machines may be placed in a municipal event center or recreation facility with an on-sale license issued pursuant to 35-4-14.1. (SDCL 42-7A-44.2)

The restrictions on gambling and lotteries are found in Chapter 22-25. These restrictions range from gambling with cards, dice or other implements or devices (SDCL 22-25-1), to betting on animal races. (SDCL 22-25-6) Slot machines (SDCL 22-25-13), bingo (SDCL 22-25-23), and pull-tabs (SDCL 22-25-44) are also restricted.

A bona fide nationally chartered veterans, religious, charitable, educational and fraternal organizations, civic or service club, political party or volunteer fire department or political committee must give 30 days written notice of any lottery. The governing body may pass a resolution objecting to the lottery within 30 days of receiving the notice. (SDCL 22-25-25)

#### 8.170 Obscenity and Public Indecency

Municipalities may prohibit the sale or exhibition of obscene or immoral publications, films, pictures, or illustrations. (SDCL 9-29-9) Chapter 22-24 of the SDCL defines and prohibits indecent exposure, obscene live conduct in a commercial establishment or public place, and the sale or distribution of obscene matter.

### 8.175 Food and Drugs

Municipalities also have a responsibility to protect the health and safety of persons in respect to food, drugs, oils, and compounds. According to the provisions of SDCL Title 39, the Secretary of Agriculture and Natural Resources or his agents can require any police officer to inspect any place or product subject to the supervision of such secretary. (SDCL 39-1-13)

### 8.180 Vandalism and Damage to Property

Vandalism and intentional damage to property are another area in which municipal police officers protect the rights of others. According to statute, intentional damage to property is brought about by any person who intentionally injures, damages, or destroys any public or private property without the consent of the public or private owner. (SDCL 22-34-1)

### 8.185 Traffic Regulation

Municipalities may regulate the use of motor vehicles, bicycles, house cars, house trailers, trailer coaches, traction engines, tractors and road rollers. (SDCL 9-31-1) Municipalities are also authorized to regulate the speed of animals, vehicles, motor vehicles, cars, and locomotives. (SDCL 9-31-3) Municipalities are also authorized to restrict the use of bicycles, motorized foot scooters, and electric personal assistive devices from operating upon a sidewalk or sidewalk area. (SDCL 32-26-21.1; 32-26-21.4; 32-26-21.5; 32-26-21.6)

State laws governing traffic regulation are applicable to local governments. (SDCL 32-14-2)

Except where specifically allowed, local authorities may not alter any speed limitations declared in chapter 32-25 or enact or enforce any provision duplicating the state's laws regarding driving while intoxicated; or enact or enforce any rule or regulation contrary to the provisions of chapters 32-14 to 32-19, inclusive, or 32-22 and 32-24 to 32-34, inclusive. (SDCL 32-14-3)

Local authorities may regulate the speed of vehicles in public parks and may provide by ordinance for the regulation of traffic on highways under their jurisdiction by means of traffic officers or traffic control devices on any portion of the highway where traffic is heavy or continuous or local authorities may prohibit other than one-way traffic upon certain highways and may regulate the use of the highway by processions or assemblages. (SDCL 32-14-4; 32-14-5; See Hdbk., sec. 10.355)

### 8.187 Golf Carts on Streets

Any municipality may adopt, by ordinance, traffic regulations permitting the use of golf carts on a highway within its platted boundaries. The ordinance must require the golf cart is insured and the person operating the golf cart to hold a driver license and to obtain a permit from the municipality. The municipality may charge a fee for the permit. The ordinance may also require the golf cart to display a slow-moving vehicle emblem or a white or amber warning light. No person may operate a golf cart on a state or county highway except to cross under certain conditions. The term, golf cart, means a four wheeled vehicle originally and specifically designed and intended to transport one or more individuals and golf clubs for the purpose of playing the game of golf on a golf course. (SDCL 32-14-13; 32-14-14; 32-14-15; 32-14-16)

### 8.190 Animal Licenses and Regulation

Municipalities are authorized to prohibit and punish cruelty to animals. (SDCL 9-29-11) They also have the authority to regulate or prohibit the running at large of dogs, animals, and poultry and can establish pounds and regulate the impoundment of animals and can impose a tax or license on dogs running at large. (SDCL 9-29-12)

In interpreting SDCL 9-29-12, the court has ruled that it authorized the municipality to license dogs as well as to prohibit their running at large. The result of this is that a conviction under such an ordinance can be sustained even though the dog was licensed. More importantly the court ruled that the legislative intent was that the enactment of an ordinance providing for a tax or license on dogs does not exclude the power to regulate or prohibit the running of dogs at large and the municipality can do either or both, i.e., license or tax and regulate or prohibit the running at large of dogs, without enactment of one ordinance excluding the other. (Rapid City v. Tuning, 82 SD 442, 147 NW 2d 604)

#### 8.195 Public Intoxication

Any person who appears to be intoxicated or incapacitated by the effects of alcohol or drugs and is clearly dangerous to the health and safety of oneself or others may be taken into protective custody by law enforcement authorities, acting with probable cause. If the person is taken into protective custody, the person must be taken to an approved treatment facility offering detoxication services for emergency detainment. If emergency detainment is not appropriate, as determined by the administrator of the treatment facility or an authorized designee, the person may be detained as a patient in protective custody until no longer intoxicated or up to forty-eight hours after admission. If no approved treatment facility is readily available, the person must be taken to an emergency medical service or a jail, but only until the person is no longer intoxicated or incapacitated or only so long as may be necessary to prevent injury to oneself or others. (SDCL 34-20A-55)

### **8.200 CRIMINAL PROCEEDINGS AGAINST MINORS**

8.205 Dependent, Neglected and Delinquent Children

8.210 Offenses By and Against Minors

8.215 Criminal Proceedings

#### 8.205 Dependent, Neglected and Delinquent Children

A neglected or dependent child is defined by statute to mean a child whose parent, guardian or custodian has abandoned him or subjected him to mistreatment or abuse. In addition to this there are several other conditions which define a neglected or dependent child. (SDCL 26-8A-2)

#### 8.210 Offenses By and Against Minors

Offenses by and against minors is the subject of Chapter 26-10 of the South Dakota Codified Laws. Among others this chapter specifically cites cruelty to or abuse of a child as being a Class 4 felony. (SDCL 26-10-1)

In the area of offenses against minors, the law requires doctors, medical and mental health professionals, social workers, EMTs, paramedics, and law enforcement officers, along with others specifically listed, to report all cases of child abuse. (SDCL 26-8A-3) The report shall be made orally and immediately by telephone or otherwise to the state's attorney of the county in which the child resides or is present, or to the department of social services, the county sheriff, or the municipal police. Upon receipt of a report, the state's attorney or law enforcement officers must immediately notify the department of social services. (SDCL 26-8A-8) The State's Attorney shall investigate or request one by the department of social services and the county sheriff or municipal police. (SDCL 26-8A-9)

#### 8.215 Criminal Proceedings

Any State's Attorney or resident of the state may file a petition with the clerk of courts in order to bring action for or against neglected, delinquent or dependent children. (SDCL 26-7A-43) The court is then compelled to hold a hearing to determine if any action is to be taken. (SDCL 26-7A-44)

Any child can be taken into temporary or protective custody by a law enforcement officer without an order of the court when the child is:

- 1) subject to arrest;
- 2) abandoned or seriously endangered;
- 3) when there are reasonable grounds to believe the child has run away from home; or
- 4) when the officer reasonably believes that protective custody is warranted because there exists an imminent danger to the child's life or safety.
- 5) if the child is under the influence of alcohol, inhalants, or a controlled drug or substance. (SDCL 26-7A-12)

In the case of neglected and dependent children, the court, after investigation of the circumstances, can make an order of protection. The order of protection can require the parent, guardian, or any other person who is a party to the proceeding to do several things, which are outlined in SDCL 26-7A-107.

### **8.250 ABUSE, NEGLECT, OR EXPLOITATION OF ELDERS OR ADULTS WITH DISABILITIES**

State law defines elders as people sixty-five of age or older, and adults with disabilities as people 18 years of age or older who have a condition of intellectual disability, infirmity of aging as manifested by organic brain damage, advanced age, or other physical dysfunction to the extent that the person is unable to protect himself or herself or provide for his or her own care. (SDCL 22-46-1)

Chapter 22-46 outlines offenses against elders and adults with disabilities, and requires medical and mental health professionals, along with any criminal justice employee or law enforcement officer, to report known or suspected abuse, neglect, or exploitation to the state's attorney, Department of Human Services, or to a law enforcement officer. (SDCL 22-46-9)

### **8.300 ACTIONS AGAINST MUNICIPALITIES**

Before any action to enforce collection of a claim can be brought against a municipality the governing body must be notified in writing according to the provisions of SDCL chapter 3-21. For more information concerning tort liability of municipalities See Hdbk., section 3.255.

#### **8.325 Sovereign Immunity**

The 1986 Legislature granted sovereign immunity to local governments in all acts, ministerial or discretionary, governmental or proprietary. Sovereign immunity is waived to the extent a municipality purchases liability insurance or participates in a risk sharing pool. (SDCL 21-32A-1) This grant of sovereign immunity has not been tested by the South Dakota courts. Municipalities should contact their city attorneys for further information on sovereign immunity.

The 1987 Legislature limited the liability of directors, trustees, committee members, or officers serving without compensation, other than reimbursement for actual expenses, of nonprofit corporations, organizations, certain hospitals and governmental entities. No cause of action may be brought against these individuals for damages resulting from the exercise of judgment or discretion in connection with the duties or responsibilities while acting in their official capacity, unless the act or omission involved willful or wanton misconduct. (SDCL 47-23-2.1)

**8.350 COURTS**

The judicial function of government in South Dakota is vested solely with the state government. The Chief Justice of the S.D. Supreme Court is the presiding officer of the Unified Judicial System. Each judicial circuit has a presiding judge and other judges. Each circuit may also have a number of law-trained and/or lay magistrates. Municipalities no longer maintain either a municipal court or a justice of the peace.

**8.375 FINANCE OF THE COURT SYSTEM**

The state, the counties and the municipalities together fund the activities of the court system. Municipalities are required to remit quarterly to the state treasurer 35% of the fine money they receive for support of the Unified Judicial System. (SDCL 16-2-34)

**8.400 JAILS**

Jails are defined as any building or place provided or used for the detention of persons convicted or accused of the violation of any law or ordinance. (SDCL 24-11-1) Political subdivisions can jointly operate jails with other subdivisions. (SDCL 24-11-4; See Hdbk., sec. 3.265(2)) Other provisions related to jails are outlined in SDCL Chapter 24-11.

**8.500 CIVIL RIGHTS**

The South Dakota Human Relations Act prohibits discrimination because of sex, race, color, creed, religion, national origin, ancestry, or disability. The law covers employment practices, labor union membership and services, housing accommodations, education, public accommodations, public services, and property rights. The South Dakota Commission on Human Rights is responsible for administering and enforcing the state law. (SDCL Chapter 20-13)

**8.600 911 SYSTEMS**

The governing body of any municipality may pay allowable recurring and nonrecurring costs of the 911 system in whole or in part from proceeds of a 911 emergency surcharge. (SDCL 34-45-3) The surcharge is imposed on all telecommunications services, wireless telecommunications services, or interconnected voice over Internet protocol. The surcharge is set by state law at \$2.00 per month per line and is collected by the telecommunications service provider, then remitted to the state and distributed from there to local entities and to the 911 Coordination Fund. (SDCL 34-45-4; 34-45-5)

Each governing body of a public safety answering point shall submit an annual report to the board by March thirty-first of each year. Contents of the annual report are described in SDCL 34-45-4.4.

Any governing body imposing the surcharge may enter into an agreement directly with the service suppliers of the 911 system or may contract and cooperate with any public agency or with other states or their political subdivisions for the administration of a 911 system. (SDCL 34-45-11)

The governing body, its employees, and its agents are immune from liability for a failure in the use or operation of the 911 system. This immunity does not apply to willful or wanton negligence or intentional acts, or to the installation or maintenance of the 911 system. (SDCL 34-45-17)

## CHAPTER 9

### HEALTH AND PUBLIC SAFETY

9.000	Introduction	9.225	Smoking Prohibitions
9.050	Hospitals and Related Facilities	9.250	Water Pollution Control
9.100	County and Municipal Drug Education Programs	9.300	Solid Waste Disposal
9.125	Day Care Centers	9.350	Fire Protection
9.150	Sanitation and Health Measures	9.400	Civil Defense
9.200	Air Pollution Control	9.500	Amusement Rides
		9.600	Building and Property Maintenance Codes

#### **9.000 INTRODUCTION**

Public officials have long been concerned with the safety and health of people living within the state and in the communities of the state. Hospitals, sanitation facilities, air, and water pollution, fire protection and civil defense are the backbone of public health and safety. As such they will comprise the major components of this chapter of the Handbook.

Before we examine these different areas, it is important to note that municipalities under the laws of this state, can have a strong influence and have an even stronger responsibility to protect and preserve the health and public safety of the residents of this state.

#### **9.050 HOSPITALS AND RELATED FACILITIES**

9.055	Regulation of Hospitals and Related Facilities
9.060	Municipal Hospitals in General
9.065	Mental Health Centers, Clinics, and Community Support Providers
9.070	Health and Educational Facilities Authority
9.075	County and Municipal Loans and Grants for Medical Services
9.080	Ambulance Service
9.085	Services for the Disabled

#### **9.055 Regulation of Hospitals and Related Facilities**

Municipalities have been granted the authority to "do what may be necessary or expedient for the promotion of health or the suppression of disease." (SDCL 9-32-1) This is a broad grant of power which municipalities have had since 1890.

However, to come within the scope of this grant of power to protect public health, a municipal ordinance must be reasonable and must contribute in some real and substantial manner to the object sought to be accomplished. For example, an ordinance prescribing an hour of closing for barbershops does not meet these two conditions. (City of Huron v. Munson, 67 SD 88, 289 NW 416) However, an ordinance prohibiting the maintenance of stockyards within the residence district of a municipality is not invalid when the municipality is empowered to declare what constitutes a nuisance and if its decision is reviewable by the courts. (Town of Colton v. South Dakota Central Land Co., 25 SD 309, 126 NW 507, 28 LRA(NS) 122)

Municipalities are also authorized to appoint a Board of Health and prescribe its powers and duties. These Boards of Health are subject to the supervision of the State Department of Health. (SDCL 9-32-2)

State law requires that no person, partnership, association, or corporation (including both public and municipal corporations) shall establish, construct or maintain any hospital, maternity home, home for the aged or related institution, without obtaining a license from the South Dakota Department of Health. (SDCL 34-12-2)

The Department of Health may promulgate, alter, and enforce regulations which are necessary to protect the health and safety of patients. (SDCL 34-12-13) The Department shall periodically inspect these establishments to ensure that they are in compliance with Chapter 1-26 which relates to administrative procedures and rules. There are some limitations to inspections required of accredited hospitals. (SDCL 34-12-16)

The Department is authorized to revoke or suspend any license on the following grounds:

- 1) Violations of any provision of Chapter 34-12 or any rule or regulation established pursuant to the chapter.
- 2) Permitting, aiding, or abetting the commission of any unlawful act in such institution.
- 3) Conduct of practices detrimental to the welfare of the patient.
- 4) Failure to allow department inspections. (SDCL 34-12-19)

#### 9.060 Municipal Hospitals in General

Municipalities are granted the power to establish, construct, purchase, and maintain hospitals and medical clinics, as well as to regulate those facilities. Municipalities may also lease any hospital and medical facilities to persons and private or public corporations, associations, or other organizations for the purpose of operation. This lease can not, however, exceed ninety-nine years. Municipalities may "receive and accept financial aid from counties for the erection and construction of public hospitals..." (SDCL 34-9-1)

The term "hospital", as used above, includes nursing homes and homes for the aged. (SDCL 34-9-2)

If the municipality is in a county with no established county hospital, and the municipality has made provisions for such a facility with a capacity of not less than twenty patients, they may ask the board of County Commissioners for financial aid. When the Board of County Commissioners deems that the operation of a public hospital will be beneficial to and necessary for the public, and that to construct such a facility it is necessary for the county to render financial aid to the municipality, the county is authorized to give financial aid in an amount not to exceed one half of the cost of construction of the facility. (SDCL 34-9-5; See Hdbk., sec. 3.400)

The financial aid may come from any one or any combination of the following sources:

- 1) Funds out of unappropriated funds belonging to the county;
- 2) Funds created by issuance and sale of general obligation bonds. (SDCL 34-9-5)

The Board of County Commissioners may also render financial aid to a municipality for the cost of equipment, operation and maintenance of such hospital. (SDCL 34-9-7.1)

Statute also permits the transfer of surplus municipal funds accumulated through special municipal revenue producing enterprises under the conditions imposed by SDCL 34-9-10. (SDCL 34-9-9; See Hdbk., sec. 12.070)

### 9.065 Mental Health Centers, Clinics, and Community Support Providers

Counties and municipalities may support any mental health center, clinic, or community support provider by appropriating funds out of their general funds. (SDCL 27A-5-9)

An accredited public prevention or treatment facility must meet the standards prescribed by the Department of Social Services. These facilities are subject to periodic inspections and must at all times comply with the rules and regulations adopted by the department. (SDCL 34-20A-27 and 34-20A-44)

### 9.070 Health and Educational Facilities Authority

The legislature has created a state authority whose purpose is to lend money to health institutions and to educational institutions. This is the Health and Educational Facilities Authority. The Authority is empowered to acquire, construct, reconstruct, repair, alter, improve, extend, own, lease and dispose of properties in order to promote the health, education and welfare of the people of the state. (SDCL 1-16A-1)

The Authority consists of seven members, one of whom is to be experienced in the field of state and municipal finance. (SDCL 1-16A-4)

The Authority has the power to determine the location and construction of any facility to be financed under the provisions of Chapter 1-16A. (SDCL 1-16A-20) The Authority can acquire by purchase, lease, gift, devise or otherwise such lands, structures, property - real or personal, rights of way, franchises, easements, and other interests in lands. (SDCL 1-16A-21; See Hdbk., sec. 14.100)

All facilities created by the Authority are subject to the planning, zoning, sanitary, and building laws, ordinances, and regulations applicable to the locality in which the facilities are located. (SDCL 1-16A-30; See Hdbk., sec. 14.210)

The major impact of the Authority is its power to make loans to or for the benefit of any participating health or educational institution for the cost of its facilities. (SDCL 1-16A-31) The Authority can also refund outstanding obligations, mortgages, or advances issued by an institution for the cost of its facilities. (SDCL 1-16A-32)

The authority also has the power to establish a funding program for the financing of real property and equipment for public bodies. The authority may issue bonds to finance a lease/purchase fund for public bodies. (SDCL 1-16A-74.1)

### 9.075 County and Municipal Loans and Grants for Medical Services

The Board of County Commissioners and/or the governing body of any municipality may, by unanimous vote of its members, grant, loan, or pay to an individual monies from any source for the purpose of ensuring the availability of professional medical services within the county. (SDCL 34-8A-1) The governing bodies can do this singly or jointly and in doing so can set forth the time and method of reimbursement, if any, by the individual. (SDCL 34-8A-2; 34-8A-3)

Counties and municipalities are also authorized to establish a home health service revolving fund. (SDCL 34-3A-1) They may contract for health services with any public or private agency and expend funds from the revolving fund. (SDCL 34-3A-5)

Expenditures from the fund are to be used to assist in paying the salaries and expenses of employees who provide services to patients in their home. (SDCL 34-3A-4)

**9.080 Ambulance Service**

Counties and municipalities may provide ambulance service and may enter into agreements with other governmental subdivisions and with other persons. (SDCL 34-11-1; See Hdbk., sec. 3.400) Funds can be appropriated or counties and municipalities may contract with persons to provide the services. Counties and municipalities are further authorized to license and regulate these services. (SDCL 34-11-1)

The 1982 Legislature also authorized the establishment of ambulance districts which municipalities may be included upon proper procedures. (SDCL 34-11A-2)

For provisions dealing with 911 systems, see section 8.600 of this handbook.

**9.085 Services for the Disabled**

Each municipality shall ensure that all facilities, programs, and services are accessible to persons with a disability of any kind and are in compliance with the provisions of the Americans with Disabilities Act.

Any disabled person who displays license plates issued under SDCL 32-5-76 on an automobile used in transporting him shall be entitled to park without limitation in areas where parking is normally restricted by time factors. This does not apply to fire lanes or rush hour traffic. (SDCL 32-30-11.1) "Any person who is not a person with a physical disability and who exercises the privileges granted to a person with a physical disability under SDCL 32-30-11.1 is guilty of a Class 2 misdemeanor, (SDCL 32-30-11.3) and any person not displaying a serially-numbered license plate or special license plate who parks in, stops in, or blocks a parking space designated for the physically disabled is guilty of a Class 2 misdemeanor." (SDCL 32-30-11.4)

No owner of a vehicle may park, stop, or stand in an access aisle or lane immediately adjacent to reserved parking spaces or in front of a ramp or curb-cut in such a manner that blocks access to a person with a disability who uses a wheelchair. A violation is a Class 2 misdemeanor. (SDCL 32-30-11.8)

In addition to the penalties above, the court shall assess a fine of not less than \$100 if the parking space is marked in accordance with the Americans with Disabilities Act guidelines as of January 1, 2002. (SDCL 32-30-11.3; 32-30-11.4)

Municipalities shall, by ordinance, designate special parking spaces which shall be accessible to and usable by persons with physical disabilities. Each municipality may by ordinance, designate parking spaces that are only for use by a person using a wheelchair. The parking spaces shall be designated in accordance with the Americans with Disabilities Act as amended January 1, 2002. (SDCL 32-30-11.6) Each sign designating a parking space for a person with a physical disability shall state the penalties for illegal use of the parking space. This only applies to new signs or signs replacing an existing sign after July 1, 2002, however, any fine imposed applies whether or not the penalty is stated on the sign. (SDCL 32-30-11.9)

**9.100 COUNTY AND MUNICIPAL DRUG EDUCATION PROGRAMS**

Municipalities and counties are authorized to establish funds and make appropriations in order to enforce Chapter 34-20B of the Codified Laws which relate to drugs and substances. (SDCL 34-20B-58)

Under Chapter 34-3B of the SDCL, the Board of County Commissioners and the governing bodies of municipalities are authorized to:

1. Create and operate programs for alerting area citizens to incidence, causes, and nature of misuse and abuse of drugs and their effects;
2. Create and apply broad, coordinated, and effective remedial programs to reduce the drug misuse and abuse problem;

3. Institute both preventive and rehabilitative community programs among youth and adult groups; and
4. Contribute sums of money annually to establish, promote and support non-profit organizations engaged in preventive or rehabilitative community programs among youth or adult groups. (SDCL 34-3B-1)

The governing bodies of the counties and municipalities can appropriate funds out of their general funds to be used for the aforementioned purposes. (SDCL 34-3B-3)

### **9.125 DAY CARE CENTERS**

Local units of government are authorized to establish and finance day care centers as defined in SDCL 26-6-14(3). (SDCL 26-6-18.1.)

### **9.150 SANITATION AND HEALTH MEASURES**

Municipalities are specifically authorized to inspect and regulate sanitation and health measures in several areas under Chapter 9-32 of the SDCL. Powers of the municipality in this area include:

1. Inspection of meats and food products (SDCL 9-32-3);
2. Inspection of persons employed in food service establishments and stores (SDCL 9-32-4);
3. Maintenance of public toilets in business districts (SDCL 9-32-5);
4. Regulation of stables, privies, and cesspools (SDCL 9-32-6);
5. Regulation of slaughterhouses, foundries, livery stables, and blacksmith shops (SDCL 9-32-7);
6. Protection of public water supply (SDCL 9-32-8);
7. Regulation of cisterns, hydrants, pumps, sewers, and gutters (SDCL 9-32-9);
8. Regulation and prevention of refuse in public places and streams (SDCL 9-32-10);
9. Establishment of municipal garbage disposal systems (SDCL 9-32-11);
10. Regulation and determination of noxious and unhealthful vegetation (SDCL 9-32-12);
11. Regulation and operation of cemeteries. (SDCL 9-32-13)

### **9.200 AIR POLLUTION CONTROL**

In the area of air pollution control, each municipality and each county may with the approval of the Board of Minerals and Environment establish and administer an air pollution control program which provides by ordinance for requirements as strict or stricter and more extensive than those imposed by Chapter 34A-1 of the SDCL, or upon prior approval by the board, less restrictive requirements. The air pollution control jurisdiction authorized shall apply to state facilities located within the boundaries of the municipality or county. (SDCL 34A-1-36)

Municipalities can jointly exercise all or any part of their programs with other political subdivisions of this state or other states provided that the conditions for joint exercise of governmental powers are met. (SDCL 34A-1-37; See Hdbk., sec. 3.400)

However, if the board finds that the control of a particular class of air contaminate source is beyond the reasonable capability of the local or county air pollution control authorities it may assume and retain jurisdiction over that class of air contaminant source. (SDCL 34A-1-38)

State and federal laws and rules have been adopted regarding asbestos. Chapter 34-44 of South Dakota Codified Laws defines an asbestos abatement project and outlines reporting requirements and establishes who can work on such projects. Penalties have been established to ensure compliance with these air quality requirements.

## **9.225 SMOKING PROHIBITIONS**

No person may smoke or carry any lighted tobacco product, including vapor products, in any public place or place of employment. For purposes of this smoking ban, a public place is any enclosed indoor area to which the public is invited or permitted. The smoking ban does not apply to private residences unless they are used as a daycare; designated sleeping rooms in lodging establishments; or to certain specialty cigar and tobacco shops meeting strict criteria. (SDCL 34-46-13 through 34-46-19, inclusive)

## **9.250 WATER POLLUTION CONTROL**

9.255 Legislative Intent - State Control

9.260 Water Quality Standards

9.265 Publicly Owned Treatment Works

9.255 Legislative Intent - State Control

Because the pollution of the waters of the state constitutes a menace to public health and welfare, the legislature passed a law whose intent was to conserve the waters of the state and to protect, maintain, and improve the quality of water supplies in the state. (SDCL 34A-2-1)

9.260 Water Quality Standards

The Water Management Board is charged with the duty to establish water quality standards and to classify water according to its beneficial uses. (SDCL 34A-2-11) These standards are required to be reviewed at least once every three years. (SDCL 34A-2-17)

The board must formulate effluent standards, which include as a minimum all categories for which the federal government has set standards pursuant to the Federal Water Pollution Control Act. (SDCL 34A-2-13) The Secretary of Agriculture and Natural Resources is empowered to grant extensions to meet the standards. (SDCL 34A-2-39.1)

Municipalities have been granted the authority to adopt ordinances to protect public groundwater supplies from pollution. The ordinances shall be consistent with the wellhead protection program guidelines developed by the department and may contain provisions to establish wellhead protection areas, zone for purposes of preventing pollution, monitor and regulate activities and sources of potential or actual pollution and to provide for the containment and cleanup of pollution. A municipality may enter into agreements with the state and other political subdivisions to implement and enforce a wellhead protection program. (SDCL 9-12-17)

9.265 Publicly Owned Treatment Works

The Secretary of the Department of Agriculture and Natural Resources may impose, as conditions in permits for the discharge of wastes from publicly owned treatment works, appropriate measures to establish and ensure compliance by industrial users with pretreatment standards, and any system of user charges. (SDCL 34A-2-41)

All water treatment plants, wastewater treatment plants, water distribution and wastewater collection systems serving 500 or more persons, and all water treatment plants using surface water or groundwater under the direct influence of surface water, shall be under the supervision of a operator certified according to standards of the Department of Agriculture and Natural Resources. (SDCL 34A-3-4) SDCL 34A-3-4.1 describes additional circumstances under which all water systems are required to have a certified operator supervising the water treatment plant and water distribution system.

The question of toxic effluent standards and pretreatment standards has been further defined in Chapter 34A-2 of the SDCL. This law requires the board to make rules and regulations governing these standards when industrial users introduce "pollutants into publicly owned treatment works, which interfere with, pass through, or otherwise are incompatible with such treatment works." (SDCL 34A-2-14)

SDCL 34A-2-15 provides that it is unlawful to violate pretreatment standards. Statute further authorizes the Secretary of the Department of Agriculture and Natural Resources and owners of publicly owned treatment works to enforce compliance with such standards by use of the enforcement procedures of Chapter 34A-2. (SDCL 34A-2-16)

As a further condition in the permits for the discharge of pollutants from publicly owned treatment works, the Secretary may require information concerning new introductions of wastes or substantial changes in the volume or character of wastes being introduced into the treatment works. (SDCL 34A-2-42)

### **9.300 SOLID WASTE DISPOSAL**

No person may construct, alter or operate a solid waste disposal site or facility without a permit issued by the Department of Agriculture and Natural Resources. (SDCL 34A-6-1.4)

#### **Municipal Operation**

Municipalities are authorized to acquire property necessary for the operation of a solid waste management program. The property may be acquired by gift, devise, lease, purchase, or eminent domain and includes both real and personal property. A contract for the purchase or lease of such property may be for a term not to exceed 20 years. (SDCL 34A-6-38; See Hdbk., sec. 14.105, 14.110)

For the use of these facilities municipalities can levy and collect fees and charges and require licenses. The schedule for collection of these fees, charges or licenses may be established by ordinance or resolution. (SDCL 34A-6-29) This statute also provides for the collection of delinquent fees.

Governing bodies can establish policies for the operation of the system including hours of operation, and such other rules as may be necessary for the safety of employees. These policies must be in compliance with the rules and regulations of the Department. (SDCL 34A-6-40)

Any local governing body can adopt standards by ordinance or resolution, for the location, design, construction, and maintenance of solid waste disposal systems which are more restrictive than those adopted by the Department of Agriculture and Natural Resources. (SDCL 34A-6-41)

#### **County Operation**

By agreement or contractual agreement, the board of county commissioners may assume responsibility for solid wastes generated within municipalities, whether within the county or with other counties. (SDCL 34A-6-20)

#### **Contracts for Service**

Municipalities can enter into a contract for disposal of solid wastes with a county or counties, with one or more other municipalities, with private persons, corporations, trusts or any combination thereof for a period not to exceed thirty-five years. (SDCL 34A-6-26)

#### **Franchises**

SDCL 34A-6-24 authorizes the governing body of a municipality to grant and regulate franchises for the purpose of collection and disposal of solid waste. Franchises must be approved by a majority of the voters, but in case the electors of any political subdivision cooperating under the section reject the franchise, the franchise will be granted for those subdivisions approving it. Notice of the election must be given. (SDCL 34A-6-25; 34A-6-27; 34A-6-28)

**9.350 FIRE PROTECTION**

9.355 Municipal Safety Councils

9.360 Safety Regulations

9.365 Fire-Fighting Equipment

**9.355 Municipal Safety Councils**

Municipalities of the first class are empowered to establish, maintain, and support municipal safety councils. These councils can be operated on any plan of membership and action as formulated by the National Safety Council. (SDCL 9-33-18)

In addition, first class municipalities may establish safety education programs for the promotion of safety and the prevention of accidents. (SDCL 9-33-17; See Hdbk., Sec. 3.300(3))

**9.360 Safety Regulations**

Municipalities are authorized to establish safety regulations and can inspect premises to ensure that the regulations are being met. The following is a list which appears in Chapter 9-33 of the South Dakota Codified Laws, relating to areas in which municipalities are authorized to establish safety regulations.

- 1) Storage of combustible or explosive material; (SDCL 9-33-1)
- 2) Fire limits for wooden buildings; (SDCL 9-33-2)
- 3) Lumber and combustible materials; (SDCL 9-33-3)
- 4) Building construction, including the adoption of uniform building codes; (SDCL 9-33-4; 9-33-4.1)
- 5) Electrical wiring and gas appliances; (SDCL 9-33-5)
- 6) Theaters and places of amusement; (SDCL 9-33-7)
- 7) Steam boilers; (SDCL 9-33-8)
- 8) Factories and buildings; (SDCL 9-33-9)
- 9) Dwellings and enclosures. (SDCL 9-33-10)

**9.365 Fire-Fighting Equipment**

SDCL 9-33-11 authorizes municipalities to construct, operate, and maintain fire stations, fire engines, fire apparatus, and equipment for the prevention and extinguishment of fires.

In order to carry out these provisions, municipalities can contract with the county, or any other political subdivision, or with any non-profit fire protection corporation. These contracts can be for a term of not more than ten years. (SDCL 34-31-4)

**9.400 CIVIL DEFENSE**

Civil defense is another component of all the state programs to protect the health and safety of the citizens of the state. Each organized county in this state shall establish local civil defense organizations to develop an emergency plan for emergency and disaster service in accordance with the state emergency and disaster program. (SDCL 33-15-26)

County government has the duty to assist all other local government subdivisions to meet local effort eligibility requirements. (SDCL 34-48A-31)

Whenever the Governor declares an emergency or disaster to exist, the Governor may direct the resources of any political subdivision or any agency or department of the state to assist another political subdivision. (SDCL 34-48A-6)

In addition, municipalities, by July 1 of each year, shall provide to the Department of Public Safety, Division of Emergency Management, information that will enable emergency agencies to reach the members of the municipal government board and the mayor at any time, day or night. The information shall include home, business and other personal telephone numbers including any facsimile transmission machines and cellular or mobile telephone numbers; home, business, and other personal addresses; employer's name and telephone number; and home, business, and other personal email or internet addresses. (SDCL 34-48A-13)

Contact information must also be provided for municipal employees responsible for the following functions if the municipality employs a person in such a capacity:

- 1) City administrator or city manager;
- 2) Building inspection;
- 3) Engineering;
- 4) Electrical;
- 5) Fire;
- 6) Police and law enforcement;
- 7) Public works;
- 8) Streets and highways;
- 9) Sewer and wastewater;
- 10) Water;
- 11) Telephone;
- 12) Utilities;
- 13) Emergency services or civil defense;
- 14) Coroner;
- 15) 911 Coordinator (SDCL 34-48A-14)

The information provided pursuant to these requirements is to remain confidential and may only be used for emergency purposes. (SDCL 34-48A-18)

### **9.500 TRAVELING AMUSEMENT RIDES**

The owner of an amusement rides of a non-permanent nature shall file an inspection affidavit attesting that the amusement ride has passed the most recent annual inspection required by law with the sponsoring organization and the governing board of the local unit of government before the amusement ride is operated at each location. The inspection affidavit shall identify the amusement ride by name, manufacturer, and serial number and identify the date the inspection was performed, the inspector's name, and the inspector's certification number. (SDCL 42-10-5)

### **9.600 BUILDING AND PROPERTY MAINTENANCE CODES**

If the governing body of any local unit of government adopts any ordinance prescribing standards for construction, alteration, movement, enlargement, replacement, repair, equipment, use and occupancy, location, removal, and demolition of any building other than a residential structure, the ordinance shall comply with the 2021 edition of the International Building Code as published by the International Code Council, Incorporated. The governing body may amend, modify, or delete any portion of the International Building Code before enacting such an ordinance. Additional deletions, modifications, and amendments to the municipal ordinance may be made by the governing body and are effective upon their adoption and filing with the municipal finance officer. (SDCL 11-10-5)

The governing body of a municipality may enact requirements for construction, alteration, movement, enlargement, replacement, repair, equipment, use and occupancy, location, removal, and demolition of a residential structure by adopting the 2021 edition of the International Residential Code, as published by the International Code Council, Incorporated. The governing body may, at any time, amend any provision of the International Residential Code. The governing body may not require the installation of a sprinkler system in a residential structure or impose any requirements that are more stringent than the requirements in the 2021 edition of the International Residential Code. For purposes of this section, the term, residential structure, means a detached one-family or two-family dwelling, and townhouses not more than three stories in height with a separate means of egress and their accessory structures. (SDCL 11-10-12)

Similarly, if the governing body of any local unit of government adopts any ordinance prescribing standards for maintenance of existing structures and premises, the ordinance shall comply with the 2021 edition of the International Property Maintenance Code as published by the International Code Council, Incorporated. The governing body may amend, modify, or delete any portion of the International Property Maintenance Code before enacting such an ordinance. Additional deletions, modifications, and amendments to the municipal ordinance may be made by the governing body and are effective upon their adoption and filing with the municipal finance officer. (SDCL 11-10-11)

## CHAPTER 10

### PUBLIC UTILITIES AND PUBLIC ENTERPRISES

10.000 Introduction	10.400 Airports
10.050 Municipal Utilities in General	10.450 Parks and Recreational Facilities
10.100 Franchises for Public Utilities	10.500 Libraries
10.150 Electrical Suppliers	10.550 Municipal Auditoriums
10.200 Municipal Telephone Systems	10.600 Public Convention Halls
10.250 Water Supply Systems	10.700 Cemeteries
10.300 Sewer Systems	10.800 Bus or Transit Service
10.350 Highways and Streets	

#### **10.000 INTRODUCTION**

Providing the level of services which citizens desire is one of the fundamental purposes of local government. This chapter of the Handbook is an examination of the statutory limits relating to the services connected with public utilities and public enterprises. Some of the specific topics under consideration will include electric power operations, sewer and water facilities, streets, airports, parks, libraries, municipal auditoriums, convention halls, and cemeteries.

Before these areas are examined, it might be helpful to note the distinction between a public utility and a public enterprise. The courts have determined that a public utility implies a public use of an article, product, or service, carrying with it the duty of the producer or manufacturer to serve the public and treat all persons alike, without discrimination, as to make the welfare to the public, or a substantial part thereof, dependent on the proper conduct of such business it becomes the subject of the exercise of the regulatory power of the state. (Highland Dairy Farms Co. v. Helvetiz Milk Condensing Co., 139 NE 418, 420, 308 Ill. 294)

A public enterprise then is a municipality's operation of a public utility, although it may be a proprietary activity. (Wolgamood v. Village of Constantine, 4 NW 2d 697, 701, 302 Mich. 384)

#### **10.050 MUNICIPAL UTILITIES IN GENERAL**

10.055 General Authorization for Municipal Utilities	10.065 Municipal Utility Boards
10.057 Deposits	10.070 Accounting for Utility Funds
10.059 Utility Disconnection	10.075 Sale or Lease of Utilities
10.060 Joint Operation of Municipal Utilities	10.080 Sale of Municipal Water or Sewer System

#### **10.055 General Authorization for Municipal Utilities**

Municipalities are authorized to construct, operate, and maintain facilities to provide light, heat, and power to consumers. This authorization extends beyond the territorial limits in order to allow municipalities to purchase or sell electric current, and municipal corporations can maintain transmission lines for these purposes. (SDCL 9-39-1)

Any municipality may purchase, construct or otherwise acquire, establish, equip, maintain, operate, extend or improve any system or part of system for the purpose of providing electric, gas or other light, heat and power for municipal, industrial and domestic purposes; or any system or part of system of waterworks for the purpose of providing water and water supply for municipal, industrial, and domestic purposes; or any system or part of system for the collection, treatment, and disposal of sewage and other domestic, commercial and industrial wastes; or any system for the control of floods and drainage; or any combination of such light, heat and power, waterworks, sewage or flood and drainage control systems, together with extensions, additions, and necessary appurtenances. (SDCL 9-40-1)

Municipal utilities are not subject to regulation by the Public Utilities Commission. (SDCL 49-34A-1(12))

#### 10.057 Deposits

Nothing in state law specifically addresses the matter of utility deposits. Any interest, however, received from utility deposits is the property of the municipality. (SDCL 9-22-11 and 4-5-5)

#### 10.059 Utility Disconnection

The municipality has the authority to terminate any utility service except solid waste pickup for nonpayment; however, adequate notice and a chance to be heard must be given to the customer.

The South Dakota Public Utilities Commission has promulgated rules (ARSD 20:10:20) that utilities regulated by the PUC must follow when refusing or discontinuing service. While these rules are not applicable to municipal utilities, it is useful as a guide to be aware of what is required of other utilities.

The South Dakota Public Utilities Commission has recommended that no disconnection take place during the winter months, November 1 to March 31.

Within these rules are specified a list of five conditions, all of which must be satisfied before disconnection of service can take place. Briefly, the conditions are as follows:

- 1) Only the class of service for which payment is delinquent can be disconnected;
- 2) Customer has had twenty days from billing date to due date plus an additional notice period of at least ten days;
- 3) Customer must receive both written notice and personal notice, both containing a statement of his right to appeal and where to appeal, and the opportunity for the customer to exercise that right, prior to any discontinuance;
- 4) The customer has been unwilling to enter into a reasonable agreement with the utility to liquidate the debt;
- 5) There is no bona fide and just dispute surrounding the bill.

Additionally, there are a few other exceptions and additions to the above list.

The required notice of disconnection must include the grounds upon which the proposed disconnection is based; the utility's intention to discontinue service unless the customer corrects the pattern; the corrective action which the customer must take to avoid disconnection; notice of right to appeal and the opportunity to do so. The customer also has the right to pay the delinquent bill up to the last minute without losing service.

The rules also specify that service cannot be discontinued on a weekend or holiday, during the winter months unless an additional thirty-day notice is given, or in event of a medical emergency of not more than 30 days.

If any fee, charge, or license, other than a municipal garbage collection fee, becomes delinquent, it may be certified to the county treasurer and shall be collected by the county treasurer in the following year. (SDCL 34A-6-29) The procedure for the county to use to collect these delinquent assessments is found in SDCL 10-22-62.

The finance officer of a municipality shall collect a delinquent municipal garbage collection fee as a condition precedent to the payment of any water, sewer, utility, or other charge collected by the municipality. (SDCL 34A-6-29)

What this law deals with is the situation when a customer refuses to pay his garbage bill but pays the other utility bills due. The municipality has the power to transfer the utility bill paid to the delinquent solid waste account. After this has been done, the utility bill becomes delinquent and you may proceed with the procedures outlined for termination of utility service. A municipality does not have the power to terminate solid waste pickup.

#### 10.060 Joint Operation of Municipal Utilities

Municipalities may enter into agreements with other governmental units for the joint or cooperative exercise of any power or duty required or authorized by statute regarding providing electric service. These agreements may provide a plan for prorating any expenditures involved. (SDCL 9-39-2) Special authorization to contract with the federal government for certain purposes is given in SDCL 9-39-4.

The governing body may enter into contracts with the federal government to provide water, gas, and electricity. State law provides that any contract entered into with the United States government, or any agency or department may be for as long as the governing body determine. If these contracts extend for more than one year, an appropriation need not have been previously made concerning such expense, except sufficient to cover the amount payable or estimated to become payable under such contract for the first year. Such contracts shall be subject to referendum as ordinance. (SDCL 9-21-11)

#### 10.065 Municipal Utility Boards

A municipality may, by vote of its electors, place any utility which the municipality owns or may acquire under the control of a municipal utility board. (SDCL 9-39-6)

The petition to establish a utility board must be signed by fifteen percent of the registered voters. A special election, governed by the provisions of SDCL 9-13-14, must then be held. (SDCL 9-39-7)

The form on the ballot is prescribed by SDCL 9-39-8. This form provides for either a three- or five-member board. If the question passes, the mayor or chairman of the municipality board appoints the designated number of members to the utility board. This appointment must be confirmed by the governing body. (SDCL 9-39-8; 9-39-9; See Hdbk., sec. 5.055)

Each member of the utility board must execute a bond in the amount of twenty-five hundred dollars. (SDCL 9-39-13; See Hdbk., sec. 5.200) Members of the utility board can be removed only under the provisions of SDCL chapter 3-17. (SDCL 9-39-14; See Hdbk., sec. 5.350) Vacancies are to be filled in the same manner as the original appointments were made. (SDCL 9-39-12)

The municipal utility board assumes management and control of the utility or utilities which are placed under its jurisdiction at the time of the first regular meeting of the governing body after the special election. (SDCL 9-39-18) The municipal utility board has the power to extend, modify or rebuild any public utility under its management and control, and to do anything such board deems necessary for the proper and efficient operation of such utility. The board is also empowered to enter into contracts to carry out these powers. (SDCL 9-39-19) These contracts, however, are subject to the provisions of Chapter 5-18A and SDCL 6-1-1 and 6-1-4 relating to advertisement of bids and participation in contracts by members of the governing board, respectively. (SDCL 9-39-20; See Hdbk., sec. 13.055; 13.060)

To carry out the powers outlined in SDCL 9-39-19, municipal utility boards are authorized to employ personnel (SDCL 9-39-21), appoint a municipal industrial development director (SDCL 9-39-21.1), and purchase supplies for all utilities under their control. (SDCL 9-39-22)

Municipal utility boards are further empowered to fix reasonable rates and to adopt reasonable rules and regulations for the utility service supplied by the municipality. (SDCL 9-39-23) These boards may also enter into all necessary working agreements with the officials and governing body of the municipality. These agreements may include arrangements for furnishing utility services; compensation; and transfers of surplus funds to the general fund of the municipality. (SDCL 9-39-24)

The examination of municipal utility boards thus far has revealed some extremely broad grants of power. It important to note, however, that these powers can not be construed as vesting any power or powers in any such municipal utilities board or in any municipality beyond the powers now vested in municipal corporations relative to the management and control of utilities. (SDCL 9-39-25)

Just as the electors of a municipality created the municipal utility board, so can the electors abolish the board or terminate its authority over a specific utility. (SDCL 9-39-30) The provisions for abolishing a municipal utility board are very similar to the manner in which the board was established. These provisions are outlined in SDCL 9-39-31 to 9-39-35.

#### 10.070 Accounting for Utility Funds

To record receipts and disbursement of monies, a separate fund must be established in the municipal treasury. The utility board must maintain separate accounts for each utility. (SDCL 9-39-26; See Hdbk., sec. 12.070)

The finance officer must draw his warrant for the amounts authorized by the utility board. The president of the utility board must countersign all warrants in lieu of the mayor. The warrants must then be countersigned by the municipal finance officer and paid as pursuant to SDCL 9-23-7. (SDCL 9-39-28; See Hdbk., sec. 12.075)

Every municipality has the authority to turn over delinquent accounts to a collection agency or to attempt to secure payment through small claims court. The procedure for writing off uncollectible utility accounts is the same as for other uncollectible municipal accounts. (SDCL 9-22-4; See Hdbk., sec. 12.200)

The municipal utility board must at the end of the fiscal year, and additionally when required by the governing body, prepare a detailed written report of all monies received and dispersed by the board. (SDCL 9-39-29; See Hdbk., sec. 12.080) For purposes of an audit conducted in accordance with SDCL 4-11-4, municipalities may subtract the annual revenue received from any municipal enterprise or utility system, except utility systems defined in SDCL 9-40-1, from total annual revenue, if the municipal enterprise or utility is audited separately. (SDCL 4-11-4)

At the end of the fiscal year, the governing body by a two-thirds vote may transfer any surplus from a utility fund to any other fund in accordance with the provisions of SDCL 9-21-26.1. (SDCL 9-40-32, See Hdbk., sec. 12.070) Transfers from the sewer fund shall be in accordance with the provisions of SDCL 9-48-29. (See Hdbk., sec. 10.300)

#### 10.075 Sale or Lease of Utilities

Every municipality is authorized to sell, convey, and dispose of the plant or equipment of any public utility owned by the municipality. The public utilities may also be leased or leased with the option to purchase to any individual or corporation. (SDCL 9-39-36)

Before these utilities may be sold or leased, a petition containing at least fifteen percent of the registered voters must be filed with the municipal finance officer and a special election must be held. (SDCL 9-39-37) This statute, however, is inapplicable when a public utility is owned or operated under a "joint works" contract. (*Robbins v. Rapid City*, (1946) 71 SD 171, 23 NW 2d 144) The question on the sale of public utility must be approved by at least sixty percent of the voters. (SDCL 9-39-38)

**10.080 Sale of Municipal Water or Sewer System**

The governing body of a municipality may by ordinance authorize the sale of land, improvements and capital equipment comprising all or a portion of a system or part of any system of waterworks, or sewage and waste disposal.

Any sale made pursuant to this section is subject to the following conditions:

- 1) The sale price shall not be less than the greater of an amount equal to the depreciated value of the facilities sold or any amount sufficient to pay, redeem or discharge all outstanding indebtedness of the municipality incurred with respect to the facilities sold;
- 2) The sale proceeds are subject to SDCL 6-13-8; and
- 3) At the time of the sale the municipality shall enter into a franchise agreement, a utility service contract, or other contract requiring the purchaser to furnish to the municipality, its residents and users located in the area now served by the facilities sold, utility service, at such rates as are approved by the municipality or another governmental entity having rate regulating authority, if any, and on such further terms and conditions as are determined by the municipality's governing body. (SDCL 9-40-38)

**10.100 FRANCHISES FOR PUBLIC UTILITIES**

The authorization for municipal corporations in South Dakota to control and regulate public utility franchises appears in SDCL chapter 9-35. The ability to franchise was limited during the 1975 Legislative Session: Municipal corporations shall have no authority or jurisdiction over rates and conditions of service of any public utility subject to the jurisdiction of the South Dakota public utilities commission under the provisions of this act. (SDCL 49-34A-5)

The procedure for adopting a utility franchise begins with the adoption of an ordinance incorporating the proposed franchise and submitting the question to the electors not sooner than thirty days after passage and publication of the ordinance. (SDCL 9-35-4) A majority vote of the electors is needed for passage and no franchise can be granted for a period of longer than twenty years. (SDCL 9-35-5; 9-35-6) Cable TV franchises do not require an election. (SDCL 9-35-18; See Hdbk., sec. 10.125) No franchise election is required when granting a franchise to a natural gas utility regulated by the Public Utilities Commission. (SDCL 9-35-3)

When granting franchises for buses and taxis, municipalities are authorized license, regulate, fix routes, speed, and points for stops. (SDCL 9-35-11)

The specific requirements for franchises for collection and disposal of solid waste are contained in SDCL 34A-6-24 through SDCL 34A-6-28.

The courts have determined that the municipality rather than the state is the proper authority to consent to the erection of service lines, i.e. telephone lines, cables to TV, etc., and the municipality has the power to limit the period during which such franchises are valid. A franchise containing no time limitations does not vest a company with a perpetual franchise. The important thing to note is that a company's rights are at all times subject to legislative action. (City of Vermillion v. Northwestern Telephone Exchange Co., (1911) 189 Fed. 289 111 C.C.A. 21)

Municipalities cannot franchise or affix rates for any utility that has been assigned a service area by the Public Utilities Commission. Most gas, electric, and telephone rates are regulated by the P.U.C. (SDCL 9-35-1) Municipally owned utilities are not subject to any rate regulation by the PUC. Service area boundaries for municipal gas, electric, and telephone utilities are subject to regulation by the P.U.C. (SDCL 49-34A-5)

Boundaries cannot be altered without the consent of the PUC. Any municipality which owns an electric utility wishing to extend its corporate boundaries must make arrangements with the annexed utility. (SDCL 49-34A-49)

An electric utility as well as a municipally owned utility cannot extend service to customers in each other's service area. New customers with a minimum demand of 2,000 kilowatts are not obligated to take electric service from the electric utility having the assigned service area where they are located. Electric and municipal utilities may, however, construct power lines to service their own facilities such as water and sewage systems, landfills, and airports. (SDCL 49-34A-56; 49-34A-57)

**10.150 ELECTRICAL SUPPLIERS**

- 10.155 Consumers Power District Formation
- 10.160 Consumers Power District Powers and Operations
- 10.165 Municipal Power Agency

**10.155 Consumers Power District Formation**

The purpose of establishing a consumer's power district is defined by state statute as being to organize for the purpose of supplying electric energy and encouraging and extending the use within or without the state. (SDCL 49-35-2) These districts may be composed of the territory of one or more municipalities or rural areas whether contiguous or otherwise. The formation of these districts, however, cannot divide any municipality or voting precinct. (SDCL 49-35-4)

Information on the procedures to establish and amend these districts can be found in SDCL 49-35.

**10.160 Consumers Power District Powers and Operations**

Consumers power districts, subject to the limitations of the petition for its creation and all amendments to it, possess all the usual powers of a corporation. (SDCL 49-37-1) These powers include the power to contract as established in SDCL 49-37-4. These districts are required to sell electrical energy at wholesale directly to any municipality or political subdivision belonging to the district. (SDCL 49-37-5)

A consumer's power district has no power to tax nor can any governmental authority levy or collect taxes for the purpose of paying any indebtedness or obligation of the district. (SDCL 49-37-7) Statute also provides that no political subdivision, nor any individual person or corporation, can be held liable for any obligation of any consumers power district. (SDCL 49-37-8)

These districts are subject to taxation. The tax is called an occupational excise tax and is equal to all the taxes, including license, excise, property, and special assessment taxes, which a private corporation engaging in a similar business would be required to pay. These districts are, however, exempt from federal taxes. (SDCL 49-37-13)

Contracts made by a municipality with the district are to be made in the same manner and subject to the same provisions as other contracts or franchises. (SDCL 49-37-20; See Hdbk., sec. 10.100)

**10.165 Municipal Power Agency**

By resolution of the governing bodies, a Municipal Power Agency can be created by two or more municipalities entering into an agreement. (SDCL 9-41A-2) A power agency may plan, acquire, construct, reconstruct, operate, maintain, repair, extend, or improve one or more projects within or outside the state; or acquire any interest in or any right to capacity of a project and may act as an agent in connection with the planning acquisition, construction, reconstruction, operation, maintenance, repair, extension, or improvement of the project. (SDCL 9-41A-19 to 9-41A-32)

**10.200 MUNICIPAL TELEPHONE SYSTEMS**

The authorization for municipalities of the first or second class to establish, maintain, operate, and regulate a telephone system and related services for its inhabitants is the subject of Chapter 9-41 of the SDCL. This includes the power to contract with rural telephone suppliers as well as the federal government. (SDCL 9-41-1)

The rates to be charged for the telephone service are subject to the supervision of the public utilities commission but must be sufficient to provide for the payment of interest upon all bonds and to create a debt service fund to pay the principal when it becomes due and to provide for the operation and maintenance and repairs and depreciation. (SDCL 9-41-9; See Hdbk., sec. 12.325)

**10.250 WATER SUPPLY SYSTEMS**

Every municipality is authorized to construct, establish, operate, and maintain a system of waterworks and facilities in connection therewith. Municipalities are further authorized to regulate the distribution and use of water supplies, to acquire a suitable supply on water, and to provide water to districts, subdivisions, and areas outside the corporate limits. Municipalities may also accumulate funds for water purposes. The governing body shall establish a maximum amount allowed to be accumulated in the fund. (SDCL 9-47-1)

The second way the cost of a water system can be paid is by special assessments. (See Hdbk., sec. 12.160) Statute provides that these special assessments are to be levied and collected in the same manner as all special assessments. (SDCL 9-47-5) The courts have ruled that when the special assessment method is used, and bonds issued in lieu of special assessment certificates are obligations only against the property benefited and do not constitute a general debt of the municipality. (Sutter v. Town of Wentonka, (1934) 62 SD 339, 253 NW 64)

The governing body prior to the assessment of real property within the municipality for the next fiscal year, may levy, annually, for the purpose of maintaining or repairing public improvements, a special maintenance fee upon the lots fronting and abutting any improvements within the municipality that are maintained by the municipality. The governing body prior to the assessment of real property may, by resolution, designate the lot or portion of lots against which the fee is to be levied and the amount of the fee to be assessed against each lot or portions of lots for such purposes, or may apportion the fee pursuant to SDCL 46A-10B-20. The governing body may directly bill the affected property owner for the fee in a manner determined by the municipality, or the governing body may require the county treasurer to add the fee assessed to the general assessment against the property and certify the fee assessed together with the regular assessment to the county auditor to be collected in the same manner as municipal taxes are collected for general purposes. The fee assessed is subject to review and equalization the same as assessments or taxes for general purposes. Lots with a tax freeze under SDCL Chapter 10-6A (dwellings of disabled and senior citizens) or classified as agricultural may be exempted from this fee. (SDCL 9-43-138)

Statute allows municipalities to acquire private water pipes or mains. Protest by property owners is also provided for. (SDCL 9-47-13)

Municipalities are also authorized to purchase, lease with purchase option, lease or otherwise acquire from the owners, or condemn any water mains located outside of the corporate limits which shall have been annexed to the municipality. (SDCL 9-47-17)

In municipalities under 5,000 in population, each building in which plumbing fixtures are installed is required to connect to a public water supply system if the system is within two hundred feet of the property line. This does not require any municipality to provide service outside of municipal boundaries. (SDCL 9-47-28)

Second or third class municipalities may purchase, lease with purchase option, lease or otherwise acquire from the owners, any preexisting private wells located within the municipality. (SDCL 9-47-28)

A final note on water supply systems concerns fluoridation of water. Statute requires every municipality having jurisdiction over a municipal water supply, whether publicly or privately owned, to control the quantities of fluoride in the water to maintain the minimum fluoride content prescribed by the State Department of Agriculture and Natural Resources. (SDCL 34-24A-1)

Municipal water supply systems serving a population of five hundred or more are required to fluoridate the water. However, when the water supply naturally contains the minimum standard of fluoride, municipalities cannot be required to fluoridate the water. (SDCL 34-24A-3)

**10.300 SEWER SYSTEMS**

The authorization for municipalities to construct and maintain main, trunk, sanitary, storm, and service sewers appears in SDCL 9-48-2. This statute also provides for the extension of this authority to within ten miles of its corporate limits. This parallels the corresponding statute for water supply systems.

Surplus funds in the sewer fund may be transferred to any other fund in accordance with statute. (SDCL 9-48-29; 9-21-26.1)

Municipalities can finance the construction of service sewers by paying directly out of its general fund any specified amount or any fraction of the total cost. The remaining expense can be paid from the proceeds of general obligation bonds as authorized by Chapter 9-43 of the SDCL. See Hdbk., sec. 12.310) Municipalities are also authorized to accumulate funds for sewer purposes. The governing body shall establish a maximum amount allowed to be accumulated in the fund. (SDCL 9-48-2)

The governing body prior to the assessment of real property within the municipality for the next fiscal year, may levy, annually, for the purpose of maintaining or repairing public improvements, a special maintenance fee upon the lots fronting and abutting any improvements within the municipality that are maintained by the municipality. The governing body prior to the assessment of real property may, by resolution, designate the lot or portion of lots against which the fee is to be levied and the amount of the fee to be assessed against each lot or portions of lots for such purposes, or may apportion the fee pursuant to SDCL 46A-10B-20. The governing body may directly bill the affected property owner for the fee in a manner determined by the municipality, or the governing body may require the county treasurer to add the fee assessed to the general assessment against the property and certify the fee assessed together with the regular assessment to the county auditor to be collected in the same manner as municipal taxes are collected for general purposes. The fee assessed is subject to review and equalization the same as assessments or taxes for general purposes. Lots with a tax freeze under SDCL Chapter 10-6A (dwellings of disabled and senior citizens) or classified as agricultural may be exempted from this fee. (SDCL 9-43-138)

Municipalities of the second or third class may purchase, lease with purchase option, lease or otherwise acquire from the owners or condemn any preexisting private sewers located within the municipality. (SDCL 9-48-53)

The process for acquisition of sewer mains through annexation is similar to water supply statutes, including authorizing the lease, and lease with the option to purchase, methods of paying the cost of sewer mains in property newly annexed to the municipality. (SDCL 9-48-5)

Special provisions authorize municipalities to treat or dispose of industrial waste originating within ten miles of its corporate limits. (SDCL 9-48-32)

Any municipality, sanitary district, other political subdivision of this state, or any combination thereof which maintains, has installed, or plans to install sewer utilities for public use may establish, by ordinance or resolution, fair and equitable rates and charges for sewer utilities to be paid by the users of the sewer utilities and others connected thereto. The rates and charges may be established to recover past capital costs and pay for the capital costs of developing new capacity. (SDCL 9-48-32.1)

The court has ruled that a contract between the municipality and a private firm, whereby the municipality bound itself to dispose of a firm's industrial waste through the sewerage system for a period of fifteen years, was beyond the power of the municipality to execute. The only privilege which a municipality can grant to a person or firm is a license or permit to make the proper connection to empty sewage into the system for treatment and disposal. The result of this is that the license or permit is necessarily contingent upon the ability of the sewage system and disposal plant to digest sewage. (Ericksen v. City of Sioux Falls, (1944) 70 SD 40, 14 NW 2d 89)

**10.350 HIGHWAYS AND STREETS**

- 10.355 Streets
- 10.360 Parking Facilities
- 10.365 Sidewalks

**10.355 Streets**

Under South Dakota law every municipality has the power to lay out, establish, open, vacate, alter, widen, extend, improve, repair, grade, gravel, surface, pave, repave, bridge, construct viaducts over, erect equipment for street lighting, and otherwise improve roads, streets, alleys, sidewalks, and other public grounds. (SDCL 9-45-1) When vacating a street within the extraterritorial jurisdiction area, a municipal governing body must have the approval of the board of county commissioners. (SDCL 9-45-13.1)

The authority is not necessarily as all-encompassing as it appears. The courts have ruled that the legislature may grant power to a municipality to regulate the use and improvement of streets, regulate the use and speed of motor vehicles and may provide specific regulations for and limits in the exercise of those powers. The court continued in its decision by ruling that the legislature has permanent control over all public highways of the state, including municipal streets and county roads and may exercise it directly, or the state may delegate such power and once delegated, may recall it. The fact that a municipality consented to plans for an interstate highway was not an exercise of a municipality's right of eminent domain. (Hurley v. Rapid City, 80 SD 180, 121 NW 2d 21)

Municipalities have the power to name and change the name of any street, avenue, alley, or other public place and to regulate the numbering of houses and lots. (SDCL 9-45-2)

The governing body may establish the grade of any street, alley or sidewalk within the municipality by ordinance. (SDCL 9-45-14) Once the grade of a street, alley or sidewalk has been established, and the governing body decides to change the grade, the municipality shall be liable to the property owners for any damage they may sustain by reason of any permanent improvements which were made based on the first grade. (SDCL 9-45-15)

The statutory procedure for financing street improvements using special assessments is outlined in SDCL Chapter 9- 43.

**10.360 Parking Facilities**

Many statues relating to highways and motor vehicles can also be found in Titles 31 and 32.

Municipal parking facilities are the subject of SDCL chapter 9-51. To manage public parking facilities, municipalities are empowered to create an appointive board of not more than seven and not less than three members. Statute also provides that after creating such a board, municipalities can provide by ordinance the qualification, powers, duties of and rules and regulations governing such board. (SDCL 9-51-1.1)

At least fifty percent of the revenues generated from parking meters must be placed in a special fund known as the "parking lot and area fund". (SDCL 9-51-2) The monies accumulated in this fund are to be disbursed only for the purpose of acquiring parking lots and areas, and for surfacing or otherwise improving the lots. This does not mean that these funds can not be used to retire revenue bonds or general obligation bonds issued for the financing of the purchase of parking lots and areas. (SDCL 9-51-4; See Hdbk., sec. 12.070; 12.315; and 12.325)

The concept of using parking meters as a revenue source when considered with the legislative intent of establishing parking lots as an exercise of the police power of a municipality was a focal point in the court case of City of Rapid City v. Rensch. In this case, the courts ruled that proceeds from the use of meters for purposes of traffic control do not subvert the basis of the statute from legitimate exercise of police power to a mere revenue measure. (City of Rapid City v. Rensch, (1958) 77 SD 242, 90 NW 2d 380)

Statute provides seven methods to pay for costs incurred in providing parking facilities. They are:

- 1) Appropriate money from the general fund;
- 2) Appropriating any or all of the net revenues derived from parking meters;
- 3) Imposing reasonable rates, rents, fees or other charges for the use of a parking privilege or facility;
- 4) Leasing the facilities at specified or determinable rents;
- 5) Borrowing money and issuing revenue bonds;
- 6) Borrowing money and issuing general obligation bonds;
- 7) Any combination or all of the foregoing. (SDCL 9-51-11)

Specific questions on property tax levies for parking facilities and the creation of parking districts can be answered in other sections of Chapter 9-51.

### 10.365 Sidewalks

Every municipality may prescribe the width and determine the kind of material of which sidewalks are to be constructed by ordinance. (SDCL 9-46-1)

The statutes which contain the procedure for enforcing sidewalk maintenance, repair and construction are contained in SDCL Chapter 9-46. The proceedings for the levy and collection of sidewalk assessments are governed by Chapter 9-43. (SDCL 9-46-4.1) Any owner of real property who fails to keep the sidewalks abutting or adjoining the property in repair creates or maintains a public nuisance and the owner is liable to the municipality for any damage or injury caused by neglect and responsible for the costs of abating the public nuisance. (SDCL 9-46-2)

### 10.400 AIRPORTS

Municipalities in South Dakota are authorized to acquire, establish, construct, own, control, lease, equip, improve, maintain, operate, and regulate airports and landing fields. Municipalities may also, by resolution, create an airport board. (SDCL 50-7-2)

To acquire land for airport construction, municipalities can purchase, condemn or otherwise convey property for public purposes under the provisions of SDCL 50-7-4. (See Hdbk., sec. 14.105 and 14.110)

Taxes can be levied, and bonds can be issued to finance the purchase of property to be used for the airport. (SDCL 50-7-8; See Hdbk., sec. 12.155 and 12.325) Governing bodies are also authorized to appropriate money raised by taxes to operate and improve airports. (SDCL 50-7-9)

The maximum liability of any municipality operating an airport is five million dollars for any accident resulting in bodily injury or death to any person, or damage to property. (SDCL 9-24-7)

Any municipality may by resolution establish an airport authority. The procedures for establishing and operating a regional airport authority are outlined in SDCL chapter 50-6A.

Municipalities and regional airport authorities may pay compensation to a regularly scheduled commercial air carrier to provide basic or enhanced air service. (SDCL 9-12-14.1 and 50-6A-38.1)

### 10.450 PARKS AND RECREATIONAL FACILITIES

The power to establish, improve, maintain, and regulate public parks is given to every municipality in SDCL 9-38-1. These parks are under the control and supervision of the governing body unless a park board is created as provided in Chapter 9-38. (SDCL 9-38-7)

Park boards may be created by ordinance. (SDCL 9-38-8; 9-38-10) Such ordinance shall specify the number, the qualifications, the term of office of the members, the frequency of board meetings, the officers to be selected and a description of their duties, the number of members necessary for a quorum, and the scope of the board's authority. (SDCL 9-38-8, 9-38-10) If a municipality employs a city manager, however, the park board may be abolished by ordinance and the powers returned to the governing body. (SDCL 9-38-9)

Park Boards or Recreation Boards may accept any gift, grant, devise, or bequest made or offered by any person, private agency, agency of state government, the federal government, or any of its agencies, for park or recreation purposes.

None of the funds may revert to the general fund of the municipality. (SDCL 9-38-112; 9-38-113)

The municipal park board has a broad range of power including the power to establish, care for, regulate and manage the parks; establish the channel of any stream or watercourse within the park; grant concessions for places of public amusement; and to park and boulevard the streets adjacent to the park and to assess abutting property for the costs incurred in relation to the boulevards and streets. (SDCL 9-38-24)

The financing of the cost of purchasing or constructing buildings and facilities may be accomplished by borrowing money on the credit of the municipality, or by issuing negotiable bonds as conditioned by SDCL 9-38-60 to 9-38-75. (SDCL 9-38-77; See Hdbk., sec. 12.310 and 12.325)

Other statutes concerning campgrounds, swimming pools, sale of bonds, joint exercise and use of parks with other governmental entities, and recreation boards can be found in SDCL Chapter 9-38.

The board of county commissioners or the governing body of any municipality may cooperate with the Department of Game, Fish and Parks or with each other, in the acquisition, development and maintenance of parks and recreation areas. (SDCL 42-2-10) The board of county commissioners or the municipal governing body may appropriate out of their general fund a sum not to exceed five thousand dollars per year in carrying out this provision. (SDCL 42-2-11)

### **10.500 LIBRARIES**

Upon receipt of a petition signed by at least five percent of the voters (as determined by the number of votes cast in the municipality for governor at the last gubernatorial election), the governing body is required to submit the question to the voters at the next general election. (SDCL 14-2-32) The governing body also is authorized to establish a public library by ordinance or resolution. (SDCL 14-2-30)

If a municipality elects to establish a public library, a five-member board of trustees shall be appointed to oversee its operation. In addition, the governing body may also appoint one of its own members to serve as a full voting member of the library board. (SDCL 14-2-35)

Among the responsibilities of the board of trustees is a requirement that the board prepare and submit an annual budget request to the governing body. The governing body is not obligated to automatically grant this request but may appropriate within its annual budget an amount the governing body deems advisable. The library board of trustees is then empowered to adopt a final annual budget within those funds certified to it as being appropriated in the annual budget of its governing body. (SDCL 14-2-40)

The public library board of trustees is empowered to contract for the provision or improvement of services. It may also contract with a school district for provision of any or all school library services. (SDCL 14-2-38)

To prevent access by minors of obscene content, each public library in the state shall:

- (1) Equip each public access computer with software that will limit minors' ability to gain access to obscene matter or material, as defined by § 22-24-27, or purchase internet connectivity from an internet service provider that provides filter services to limit access to obscene material; and
- (2) Develop and implement, by January 1, 2025, a local policy that establishes measures to restrict minors from accessing obscene matter or materials. The policy must allow for an individual to appeal to the governing body of the library, as defined in SDCL 14-2-27, to determine whether any matter or material is obscene. Any determination made by the governing body is subject to judicial review. This policy must be published on the official website of the political subdivision that maintains the library; or published annually in a legal newspaper designated by the governing body. (SDCL 22-24-56)

In the opinion of the Attorney General a person who after notice refuses to return a library book is subject to criminal prosecution for theft of public property. (AG Opinion 84-35)

### **10.550 MUNICIPAL AUDITORIUMS**

Every municipality has the authority to construct, operate and maintain an auditorium. (SDCL 9-52-1) Municipalities are further authorized to lease such facilities under certain conditions. (SDCL 9-52-1.1)

Every municipality may create an appointive board for the purpose of managing municipal auditoriums and to provide by ordinance the number, qualifications, mode of appointment, tenure of office, compensation, powers, duties of and rules and regulations governing such board. (SDCL 9-52-2)

The governing board may authorize by resolution the issuance of revenue bonds to acquire the auditorium. (SDCL 9-52-3) Payment on outstanding revenue bonds may be made from the net revenues collected from charges for the admission of persons to the auditorium and rents for the use and occupancy of the premises by any person or firm whether public or private. (SDCL 9-52-16; See Hdbk., sec. 12.325)

The municipality and the auditorium board are exempt from liabilities for negligence of its officers and employees. (SDCL 9-52-18; See Hdbk., sec. 3.225)

### **10.600 PUBLIC CONVENTION HALLS**

A public convention hall is defined as a real estate site and building, structure, or edifice which may be used by the general public or portions of the public for the purposes of meetings, discussions, conventions, shows, displays, amusements and any other public purpose. (SDCL 9-53-1)

The governing body may impose rents and charges for the use of the convention hall. The proceeds from these charges may be used for expenses incurred in maintaining, insuring and repairing the hall; the retirement of bonds issued for construction or repair of hall; and after any indebtedness has been paid in full, proceeds may be transferred to the general fund. (SDCL 9-53-16)

There are several sections authorizing the cost of construction for these halls to be assessed against property in "benefit districts" which are established in SDCL 9-53-3. A recent court case had determined, however, that Chapter 9-53 is unconstitutional in so far as it purports to authorize municipal corporations to finance the cost of convention halls by special assessment of certain privately owned property, since the convention hall would not confer a benefit on the real estate. Such a special assessment levied upon property regardless of special benefits to such property for public use without just compensation is in violation of Article VI, sec. 13 of the State Constitution. (Ruel v. Rapid City, 84 SD 79, 167 NW 2d 541)

**10.700 CEMETERIES**

Municipalities have the power to establish, maintain, and regulate cemeteries within or without the municipality. (SDCL 9-32-13) Municipal cemeteries are exempt from the perpetual care provisions of Chapter 55-12 of law but must comply with the provision of Chapter 9-32. (SDCL 9-32-15)

Municipal cemeteries may be maintained as perpetual care cemeteries. (SDCL 9-32-14) Payments for perpetual care shall be permanently set aside in a trust fund. Only the income from the trust fund investments shall be used for the care and maintenance of the cemetery except under very limited conditions. The income from the trust fund and the income from the sale of burial spaces shall be credited to the cemetery maintenance account. (SDCL 9-32-18)

If the trust fund exceeds fifty thousand dollars, one thousand dollars for each three thousand dollars in excess of fifty thousand dollars may be used for land acquisition for the cemetery. (SDCL 9-32-20)

Any municipality may expend a portion of the perpetual care trust fund to maintain the cemetery. However, only amounts in excess of fifty thousand dollars may be expended and used for cemetery purposes only. For expenditures in excess of five thousand dollars, notice of hearing shall be published twice, with the second notice not less than ten days in advance of the hearing. (SDCL 9-32-20.1)

The governing body of any municipality may regulate and maintain in a reasonable manner any abandoned cemetery, which regulation and maintenance may include, but need not be limited to, mowing, and cutting weeds and grass, repairing fences and corrective measures relative to grave markers. The governing body may appoint a cemetery board of directors to manage such abandoned cemeteries. The cemetery board shall have the same powers as nonprofit corporations and shall submit annual reports to the governing body on its activities. Necessary funds may be appropriated from the municipal general fund. (SDCL 9-12-18)

**10.800 BUS OR TRANSIT SERVICE**

A municipality may, by a vote of its electors, provide bus or transit service within the municipality or a zone adjacent to it. The municipality may enter into agreements with other persons for such services and appropriate funds for such purpose. (SDCL 9-35-12)

Fifteen percent of the registered voters, based upon the total number of registered voters at the last preceding general election may petition for the special election. (SDCL 9-35-13) The petition shall state the question or questions the petitioners desire to be submitted to the voters and be filed with the finance officer. (SDCL 9-35-14)

## CHAPTER 11

### ALCOHOLIC BEVERAGES

11.000 Introduction	11.400 Licensing - Procedures and Policy
11.100 Local Option	11.500 Age Requirements
11.200 Regulatory Authority	11.600 Liquor Tax Reversion
11.300 Municipal Liquor Operations	

#### **11.000 INTRODUCTION**

Since prohibition municipalities have been given broad authority to regulate liquor operations within their borders. The Legislature first authorized municipalities to operate liquor stores in 1935 and to license them in 1945. At the present time approximately one-third of South Dakota's municipalities hold liquor licenses and either operate directly or through operating agreements the liquor business in the municipality. The other half of the municipalities either issue liquor licenses to private individuals or allow no liquor sales within their borders.

In addition to their regulatory authority liquor operations are of interest because the operation and licensing of liquor sales is a traditional source of revenue for municipalities.

Because the subject of liquor control is broad in its scope and implications, subheadings in this chapter run the range from local option to liquor reversions. Some of the specific topics under consideration in this chapter will be liquor regulations in general, licensing powers and procedures, and age requirements. The Secretary of the Department of Revenue administers the laws set forth in Title 35 of the South Dakota Codified Laws. (SDCL 35-1-2)

#### **11.100 LOCAL OPTION**

11.125 Election Allowing On-Sale Licenses	11.175 Election on Renewal of Municipally Owned Licenses
11.150 Election on Municipally Owned Licenses	
11.160 Effect on Other Licenses	

Before any alcoholic beverages other than malt beverages can be sold by on-sale dealers within the municipality, an election must be held. An election is also required for the municipality to hold the off-sale or on-sale licenses. A decision not to renew the municipally owned licenses is also determined by an election.

On any of these questions, fifteen percent of the voters may petition for a special election to determine such questions. If the municipality has a mayor, the number of signers is to be determined by the total vote cast for that office. If the municipality does not have a mayor, the number of petitioners is to be determined by the total vote cast in the last preceding regular municipal or township election. The petition must be filed with the finance officer or township clerk. (SDCL 35-3-8)

The manner of calling the special election, the giving of notice, the conduct of the election, and canvass and return of votes are to be governed by the provisions of state laws relating to special elections in incorporated municipalities as referred or initiated ordinances. (SDCL 35-3-9; See Hdbk., sec. 4.100)

### 11.125 Election Allowing On-Sale Licenses

The form to be used to determine whether alcoholic beverages, except malt beverages, are to be sold by on-sale dealers is as follows: "Shall on-sale licenses be permitted within this municipality?" (SDCL 35-3-10) If the majority vote is in the affirmative, on-sale licenses may be granted. When the majority vote on such question is in the negative, all on-sale licenses shall be terminated thirty days after the canvass of the vote. (SDCL 35-3-11)

### 11.150 Election on Municipally Owned Licenses

The form for submitting the question of whether the municipality should procure a license or licenses for the sale of alcoholic beverages can be in one of two forms, depending upon whether an on-sale or an off-sale license is desired. The general form is: "Shall an (on-sale/off-sale, depending on the specific question) license for the sale of alcoholic beverages, except malt beverages, be issued to \_\_\_\_\_ (naming the municipality or organized township)?" (SDCL 35-3-12) If the question passes by majority vote, the governing body must make the proper application to the Secretary of the Department of Revenue. All similar licenses within the municipality terminate thirty days after the canvass of the votes. (SDCL 35-3-13)

### 11.160 Effect on Other Licenses

When a special election is held under SDCL 35-3-13, it has been noted that all other licenses are terminated thirty days after the canvass of the votes. Statute provides that whenever an existing license is terminated as the result of a special election, a pro rata portion of the license is to be refunded to the licensee. The portion to be refunded is determined by figuring the portion of the license period that has not lapsed when the license was terminated. These refunds are to be made by both the state and the municipality. (SDCL 35-3-27)

In the event that a private individual is forced out of business due to a special election at which the municipality is authorized to engage in such business, the municipality must acquire the stock, equipment, and fixtures from the licenses. The acquisition can be by purchase, condemnation or arbitration. (SDCL 35-3-15) Special provisions governing the use of arbitration in this instance are found in SDCL 35-3-16.

### 11.175 Election on Renewal of Municipally Owned Licenses

The third question which can be submitted to the electors of a municipality deals with the renewal of licenses owned by the municipality. The general form for these questions appears in SDCL 35-3-23. If the majority vote on the question is in the negative, the governing body cannot make application for renewal of the licenses held by the municipality. (SDCL 35-3-24) The questions proposed by SDCL 35-3-13 and 35-3-23 cannot be re-submitted to the voters within one year after the original question has failed. (SDCL 35-3-26)

If the majority vote is for nonrenewal, the governing body must then liquidate the business and its assets by resolution in a manner consistent with Title 35. (SDCL 35-3-25)

**11.200 REGULATORY AUTHORITY**

11.205 Determination of Number of Licenses

11.230 Sunday Sales

11.225 Times When Sales Prohibited

11.250 Municipal Police Powers

**11.205 Determination of Number of Local Licenses**

State law establishes the maximum number of liquor licenses that can be issued by a municipality. Municipalities have the option of setting a number under the maximum or not issuing any licenses. State law on the number of licenses applies in those municipalities that hold liquor licenses as well as in those municipalities that issue private licenses. If a municipality annexes an area containing an establishment holding a valid on-sale liquor license, that license falls under the jurisdiction of the annexing government and may be renewed, even if that license places the municipality over its maximum (SDCL 35-4-13)

If the number of on- and off-sale licenses is not fixed by ordinance, the governing body may, on or before the first of September, determine by resolution the number of on- and off-sale licenses and the fees to be charged for each. Such fee shall apply to all such on-sale licenses issued in the ensuing calendar year. (SDCL 35-4-11)

**Off-Sale Licenses**

The formula for determining the number of off-sale licenses is that no more than three off-sale licenses may be issued to operate in a municipality of one thousand or less. For each additional one thousand five hundred population or fraction thereof, the governing body may issue one more off- sale license. The number of off-sale licenses may not be less than the total number of licenses allowable or issued as of July 1, 1981. For purposes of issuing liquor licenses, “population” is equal to the population estimates published by the U.S. Census Bureau for each even number year except for the decennial year. (SDCL 35-4-10)

**On-Sale Licenses**

The number of on-sale licenses cannot exceed three in municipalities with a population of one thousand or less. For each additional one thousand five hundred population or fraction thereof, the governing body may issue one more on-sale license. The number of licenses available may not be less than the total number of licenses allowable or issued as of July 1, 1981, and that have never been revoked or not reissued. For purposes of issuing liquor licenses, “population” is equal to the population estimates published by the U.S. Census Bureau for each even number year except for the decennial year. (SDCL 35-4-11)

**Airport Licenses**

Any county or municipality operating an airport pursuant to SDCL chapter 50-7 may by resolution make application for the issuance of an on-sale license at such airport. These licenses may be renewed annually if the municipality or regional airport authority operates the airport. No municipal airport license issued after July 1, 2018, may be sold, transferred or operated at any location other than the airport. (SDCL 35-4-14)

**Convention Center Licenses**

Notwithstanding the provisions of SDCL 35-4-11, each municipality may issue two convention facility on-sale licenses for convention facilities substantially constructed within the two years following issuance of such license, or previously completed. A hotel-motel convention facility as used in this section is a facility located in South Dakota and in a bona fide manner used and kept open for the hosting of large groups of guests for compensation and convention facilities. In a municipality with a population of 20,000 or greater, the facility must have at least one hundred rooms which are suitable lodging accommodations and convention facilities with seating capacity for at least 400 persons. In a municipality with a population of less than 20,000 people, the facility must have at least forty sleeping rooms and convention facilities with seating for at least one hundred and fifty people. If a municipality’s population changes, the facility is only required to meet the criteria established at the time the license was originally issued. (SDCL 35-4-11.2)

### **Malt Beverage Licenses**

There is no maximum number of malt beverage licenses that may be issued. The determination of the number of these licenses to be issued within the municipality is left to the governing body of the municipality. (SDCL 35-4-11)

#### 11.225 Times When Sales Prohibited

Municipalities have the power to be more restrictive than state law on selling times or closing times but cannot go beyond the legal times set by law.

### **On- and Off-Sale**

No on-sale or off-sale establishments may sell, serve, or allow to be consumed on the premises alcoholic beverages between the hours of two o'clock a.m. and seven o'clock a.m. However, any municipality may, by ordinance, prohibit or restrict the sale, service, and consumption of alcoholic beverages on Sundays, Christmas Day, or Memorial Day. (SDCL 35-4-81; 35-4-81.2)

#### 11.250 Municipal Police Powers

Every municipality has the power to provide for police supervision and enforcement of the provisions of Title 35 as to any licenses who operate within the municipality and within one mile of the territorial limits of the municipality. (SDCL 35-3-1) Municipal ordinances regulating Sunday sales and hours of operation may also be enforced within one mile of the municipal borders. (AGR 1951-52, p. 230 and AG Opinion 81-43) The authority to issue licenses for the territory outside the municipality within one mile of the municipal limits, however, rests with the county.

### **11.300 MUNICIPAL LIQUOR OPERATIONS**

- |  |   |
|--|---|
| 11.305 Application and Renewal of Municipal Licenses | 11.340 Operating Agreements                     |
| 11.310 Management of Municipal Liquor Operations     | 11.350 Competition Prohibited                   |
| 11.315 Markup and Advertising                        | 11.375 Municipal Liability for Criminal Offense |

#### 11.305 Application and Renewal of Municipal Licenses

After an election approving municipal ownership of liquor licenses, the municipality must make application to the Department of Revenue on the application forms provided by the Department. (SDCL 35-2-1.1) The Department has determined that hearings on municipally-owned licenses are not necessary. The procedure for the renewal of such licenses is the same as the original application.

#### 11.310 Management of Municipal Liquor Licenses

Every municipal liquor establishment must be operated and conducted under the direction of the governing body of the municipality. The governing body may fix the prices to be charged on all sales of liquor. (SDCL 35-3-18) The gross receipts are to be remitted to the municipal finance officer and disbursements from the funds are to be made pursuant to the presentation of verified vouchers as are other municipal expenditures. (SDCL 35-3-19; See Hdbk., sec. 12.075)

Every municipality engaged in the sale of alcoholic beverages is required by law to keep a separate accounting of all transactions involving purchases, sales and inventories conducted under each license pertaining to the business. (SDCL 35-3-21; See Hdbk., sec. 12.070)

Any municipality which holds an off-sale license under SDCL 35-4-2(5) is eligible for a license under SDCL 35-4-2(16). Any municipality which holds an on-sale license under SDCL chapter 35-4 is eligible for a license under SDCL 35-4-2(12) or 35-4-2(16) or both. (SDCL 35-4-2.4)

Any municipality operating a golf course may, by resolution, without an election, but subject to referendum, make application for the issuance of an on-sale license at the golf course. (SDCL 35-4-106)

### 11.315 Markup and Advertising

Every municipality has the power to engage in retailing alcoholic beverages as provided in Title 35. (SDCL 9-29-6)

As a collateral reference, an American Law Review article states that it is a legal practice for municipal liquor operations to engage in advertising of their products.

Every municipal liquor establishment shall be operated and conducted under the direction of the governing body of the municipality, and the governing body may fix the prices to be charged on all sales of liquor. When such prices are fixed by the governing body, the manager and his assistants shall conform in the making of all sales. (SDCL 35-3-18)

Alcoholic beverages may not be sold below the wholesale cost of the beverages. Wholesale cost is the consideration paid by a retailer to a wholesaler to acquire alcoholic beverages including purchase price and freight charges. Sales below cost are only allowed if the product is being discontinued by the retailer. (SDCL 35-4-129)

A licensee holding an off-sale license pursuant to subdivisions (3) or (5) of SDCL 35-4-2 may provide samples of wine, cider, distilled spirits, liqueurs, and cordials to the general public without obtaining an additional license. The regulations for sampling are in SDCL 35-4-10.2.

Malt beverage establishments licensed by a municipality with an off-sale license must purchase all malt beverages from the municipality if the municipality requires such purchases by ordinance. The city may not charge more than five percent above the cost plus freight unless the city had such an arrangement with any licensee prior to April 1, 1988. The municipality shall charge all such licensees the same price for malt beverages. Special provisions exist for municipalities over 8,000 in population. (SDCL 35-4-60.2)

### 11.340 Operating Agreements

An option related to the operation of a municipal liquor operation is an operating agreement. If a municipality has been issued an on-sale license, an off-sale license, or both, then the governing body may by resolution, enter into an operating agreement with any person for the specific purpose of operating the on-sale establishment, the off-sale establishment, or both for the municipality. (SDCL 35-4-19)

The provisions of SDCL 35-4-19 apply to malt beverage licenses as well. Therefore, if an individual who has an operating agreement with the municipality, wishes to operate a malt beverage license as well, the municipality may acquire the license and enter into an operating agreement for that license. (See Hdbk. sec. 11.310)

A municipality holding an off-sale license only, may, by resolution of the governing body, enter into an operating agreement with a manager of a legitimate operating business concern for the specific purpose of operating the off-sale establishment for the municipality. (SDCL 35-4-22)

The operating agreement must include the following provisions:

- 1) The manager is responsible for all operating expenses including, but not limited to taxes, insurance, and license fees;
- 2) The manager will dispense only alcoholic beverages supplied by the municipal off-sale establishment;
- 3) The agreement will be for a period not to exceed five years with an extension of five more years at the discretion of the governing body;
- 4) The agreement may be cancelled upon ninety days written notice by either party;

- 5) The manager will pay for all alcoholic beverages supplied by the off-sale establishment at actual cost including transportation charges, markup, and any additional compensation or fee as may be agreed upon;
- 6) A complete and accurate record of all liquors supplied the on-sale manager must be prepared in triplicate. One copy must be kept with the on-sale manager, one copy must be kept by the off-sale establishment, and one copy is to be filed with the municipal auditor or clerk. (SDCL 35-4-21)

A municipality may prohibit an operator from purchasing alcoholic beverages on credit (SDCL 35-3-28)

The number of operating agreements is limited to the same number of licenses a municipality could issue. A municipality may determine the number of operating agreements in the municipality. (SDCL 35-1-1.1)

### 11.350 Competition Prohibited

No alcoholic beverage license issued under SDCL chapter 35-4, except for malt beverage and wine licenses, may be granted to operate within any municipality which has obtained a liquor license. If the municipality has been issued an off-sale license only, then the governing board may approve or disapprove applications for on-sale licenses. (SDCL 35-4-19; 35-3-13)

### 11.375 Municipal Liability for Criminal Offense

The Attorney General ruled in 1965 that a municipality, acting in a proprietary capacity of a liquor licensee, is subject to prosecution the same as any other licensee. (AGR 1965-66, p.70-72).

This ruling was based on State v. Schull, 66 SD 103, 279 NW 241. The Attorney General summarized this case by saying, "it seems to be well-settled law in this state that the licensee is criminally liable for violations of the liquor laws committed by his agent or employee."

The Attorney General did note, however, that, it would be impossible to imprison the municipal corporation; however, a fine may be imposed upon it. (AGR 1965-66, p. 70-72) In recent years the Department of Revenue has imposed suspension of municipal licenses for several days as a means of invoking penalties on municipalities for violations.

SDCL 35-4-78 prohibits the sale or service of any alcoholic beverage to any person who is obviously intoxicated. While that statute further states "no licensee is civilly liable to any injured person or the injured person's estate for any injury suffered, including any action for wrongful death, or property damage suffered because of the intoxication of any person due to the sale or consumption of any alcoholic beverage in violation of these provisions." Certain court rulings have questioned the effectiveness of the last statement. Therefore, it is still recommended that municipalities in the liquor business purchase "dram shop" or liquor liability insurance.

## **11.400 LICENSING - PROCEDURE AND POLICY**

11.405 Permanent and Temporary Licenses  
 11.425 Application  
 11.435 Hearing  
 11.445 Renewal of Licenses  
 11.455 Transfers

11.465 Duration of Licenses  
 11.475 Conflict of Interest  
 11.476 Sale and Consumption on Adjoining Property  
 (Sidewalk Sales)

Statute provides that it is a class 1 misdemeanor to transact any business authorized by this title without a license. (SDCL 35-1-5)

## 11.405 Permanent and Temporary Licenses

### **Permanent Licenses**

There are several classes of licenses each with an accompanying fee. The following is a list of the licenses and the statutory fee of each contained in SDCL 35-4-2. Missing numbers reflect repealed license types which are listed in statute as repealed.

- (2) Wholesalers of alcoholic beverages—five thousand dollars;
- (3) Off-sale—not less than three hundred dollars. The renewal fee for the license may not exceed five hundred dollars;
- (4) On-sale—not less than one dollar for each person residing within the municipality as measured by the last preceding federal census. The renewal fee for the license may not exceed fifteen hundred dollars;
- (5) Off-sale licenses issued to municipalities under local option—not less than two hundred fifty dollars;
- (6) On-sale licenses issued outside municipalities—not less than the amount the nearest municipality to the applicant is charging for a like license. The renewal fee shall be the same as is charged for a like license in the nearest municipality. If the municipality to which the applicant is nearest holds an on-sale license, pursuant to SDCL 35-3-13 and does not charge a specified fee, then the fee shall be the minimum amount that could be charged as if the municipality had not been authorized to obtain on-sale licenses pursuant to SDCL 35-3-13. The renewal fee shall be the same as could be charged for a like license in the nearest municipality;
- (8) Transportation companies—twenty-five dollars;
- (9) Carrier—one hundred dollars. The fee licenses all conveyances the licensee operates in this state;
- (11) On-sale dealers at publicly operated airports—two hundred fifty dollars;
- (12) Wine and cider retailers, being both package dealers and on-sale dealers—five hundred dollars;
- (13) Convention facility on-sale—not less than one dollar for each person residing within the municipality as measured by the last preceding federal census. The renewal fee for the license may not exceed fifteen hundred dollars;
- (15) Wholesalers of malt beverages—four hundred dollars;
- (16) Malt beverage and wine produced by a farm winery licensee, being both package dealers and on-sale dealers—three hundred dollars;
- (21) Retail on premises manufacturer—two hundred fifty dollars;
- (23) Off-sale delivery—one hundred fifty dollars.

Full-Service Restaurant Licenses. A city may, by ordinance, issue additional on-sale licenses for full-service restaurants at a specified price per license. (SDCL 35-4-111)

A full-service restaurant has a waiter or waitress deliver food and drink offered from a printed food menu to patrons at tables, booths, or the bar. A Restaurant is any area in a building maintained, advertised, and held out to the public as a place where individually priced meals are prepared and served primarily for consumption in such area and where at least 60% of the gross revenue of the restaurant is derived from the sale of food and non-alcoholic beverages. (SDCL 35-4-110)

Any new licenses issued to full-service restaurants will have an additional condition of renewal for their license – they will have to document annually, under oath, that no more than 40% of their gross sales are derived from the sale of alcohol or alcoholic beverages. (SDCL 35-4-114)

No smoking is allowed for these licenses. (SDCL 35-4-115)

Within 90 days of adopting the ordinance to allow the issuance of these licenses, the municipality must set the price of the licenses. To allow this, each person who owned a license as of January 1, 2008, and who purchased or had a license transferred to them in the 5 years prior to January 1, 2008 shall report, under oath, the amount originally paid for the on-sale license. This report shall include documents establishing the amount paid. If the transaction included real or personal property, that value is deducted from the total amount of the transaction. (SDCL 35-4-116; 35-4-2.10)

The price of the most recently sold or transferred license, in an arms length transaction, minus any real or personal property, is deemed to be current fair market value. The municipality must set the price of the new licenses at or above current fair market value. Once set, this price cannot change for 10 years. (SDCL 35-4-116)

Each city that adopts the ordinance allowing more licenses shall maintain a registry of each on-sale license that is being offered for sale at the price established by the city (current fair market value), and furnish a copy of the registry to anyone who requests a new full-service restaurant on-sale license. A city may only issue a new full-service restaurant on-sale license if no on-sale license is on the registry, or a person desiring to purchase an on-sale license listed on the registry provides documentation showing that the person is unable to purchase the on-sale license on terms satisfactory to both parties. The existing on-sale license holder is responsible for registering with the municipality that the on-sale license is for sale at the current fair market value as set by the city. (SDCL 35-4-118; 35-4-119)

No license granted pursuant to Title 35 may be issued unless the applicant has first obtained a sales tax license pursuant to SDCL 10-45 if applicable or a use tax license pursuant to SDCL 10-46, if applicable. (SDCL 35-2-25)

### **Temporary Licenses and Permits**

Any municipality may issue:

- (1) A special malt beverage retailers license in conjunction with a special event within the municipality or county to any civic, charitable, educational, fraternal, or veterans' organization or any licensee licensed pursuant to SDCL 35-4-111 or subdivision 35-4-2(4), (6), or (16) in addition to any other licenses held by the special events license applicant;
- (2) A special on-sale wine retailers license in conjunction with a special event within the municipality or county to any civic, charitable, educational, fraternal, or veterans' organization or any licensee licensed pursuant to SDCL 35-4-111 or subdivision 35-4-2(4), (6), or (12) or any farm winery licensee in addition to any other licenses held by the special events license applicant;
- (3) A special on-sale license in conjunction with a special event within the municipality or county to any civic, charitable, educational, fraternal, or veterans' organization or any licensee licensed pursuant to SDCL 35-4-111 or subdivision 35-4-2(4) or (6) in addition to any other licenses held by the special events license applicant; or
- (4) A special off-sale package wine dealers license in conjunction with a special event within the municipality or county to any civic, charitable, educational, fraternal, or veterans' organization or any licensee licensed pursuant to SDCL 35-4-111 or subdivision 35-4-2(3), (5), (12), or any farm winery licensee in addition to any other licenses held by the special events license applicant. A special off-sale package wine dealer licensee may only sell wine manufactured by a farm winery licensee.
- (5) A special off-sale package wine dealers license in conjunction with a special event, conducted pursuant to SDCL 35-4-124.1, within the municipality or county to any civic, charitable, educational, fraternal, or veterans organization;
- (6) A special off-sale package malt beverage dealers license in conjunction with a special event, conducted pursuant to SDCL 35-4-124.1, within the municipality or county to any civic, charitable, educational, fraternal, or veterans' organization; or
- (7) A special off-sale package dealers license in conjunction with a special event conducted pursuant to SDCL 35-4-124.1, within the municipality or county to any civic, charitable, educational, fraternal, or veterans' organization.

The municipality may issue the licenses under this section for a time not to exceed fifteen consecutive days. No public hearing is required if the person applying for the license holds an on-sale alcoholic beverage license or a retail malt beverage license or holds an operating agreement for a municipal on-sale alcoholic beverage license. The local governing body shall establish rules to regulate and restrict the operation of the special license, including limiting the number of licenses that may be issued to any person within any calendar year. (SDCL 35-4-124)

A civic, charitable, educational, fraternal, or veterans' organization holding a special event license pursuant to subdivisions 35-4-124(5) (6) or (7) may only sell wine, malt beverages, or alcoholic beverages that have been donated by members of the public to be sold at the special event. The donor must purchase any donated beverage from a licensed South Dakota retailer. (SDCL 35-4-124.1)

A municipality may allow the sale of alcoholic beverages on public property or property owned by a nonprofit corporation during a special event. The licenses above shall be issued to the person and the location specified on the application. The governing body of the municipality shall determine the fee for these licenses, and the fee is retained by the municipality. Each application shall be accompanied by the fee at the time of submission to the governing body of the municipality. (SDCL 35-4-125)

- (8) Event Center/Recreational Facility License. any municipality may by resolution, without an election but subject to referendum, issue an on-sale license pursuant to subdivision 35-4-2(4) for use at any municipality-owned entertainment venue, event venue, event center, arena, performance hall, theater, outdoor amphitheater, convention center, stadium, athletic venue, recreation facility, municipal auditorium operated pursuant to chapter 9-52, or public convention hall operated pursuant to chapter 9-53. An on-sale license issued pursuant to this section must be used to support the primary public purpose of the municipality-owned facility during the hours the municipality-owned facility is open for its primary purpose. A license issued pursuant to this section must not be used at any municipality-owned facility for the primary purpose of only providing food and beverage services to the public. There is no fee for a license under this section. The governing body of any municipality that has obtained an on-sale license pursuant to this section may contract with any person or entity for purposes of providing food and beverage services at the municipality-owned facility and the use of any license issued pursuant to this section. A license issued pursuant to this section may not be transferred. (SDCL 35-4-14.1) No video lottery machines may be placed in facilities issued these licenses. (SDCL 42-7A-44.2)
- (9) Spiking Permit. It is a misdemeanor for any person to consume any distilled spirits in any public place other than an on-sale establishment. However, the governing body of a municipality may grant authorization for persons to consume, but not sell, alcoholic beverages on property that is publicly owned or owned by a nonprofit corporation. The permit period may not exceed twenty-four hours, and the hours of authorization may not exceed those permitted for on-sale licenses. (SDCL 35-1-5.3; 35-1-5.5; 35-4-124)

A municipality may authorize consumption of alcoholic beverages to a group which has arranged to rent the National Guard Armory through the Armory Control Board even though the National Guard itself would not be permitted to consume alcoholic beverages on the premises. (AG Opinion 84-34)

#### 11.425 Application

The statutory provisions governing licensing are contained in Chapter 35-2. These require the application to be on forms prescribed by the Secretary of the Department of Revenue. (SDCL 35-2-1) Any person who knowingly makes a false statement on any application, report, or statement, which is to be filed with the Secretary of Revenue, is guilty of a Class 6 felony. (SDCL 35-1-7; 22-6-1)

All applications for the original license and renewal of manufacturer, wholesaler, transporter, or carrier and all applications for licenses to be issued to counties and municipalities must be submitted directly to the Secretary of Revenue. (SDCL 35-2-1.1) The definition of municipality is unique in that it differs from the other references in the state laws. Under this Title a municipality is any incorporated municipality, and any unincorporated platted town having a United States post office, provided that the withdrawal of a United States post office does not affect the right of established liquor licenses to be continued, renewed or transferred; and does not prevent the owner or bona fide leases of the licensed premises from receiving a renewal or reissuance of such license. (SDCL 35-1-1(11))

The Attorney General, based on this definition, has determined that a rural post office station located at an unincorporated, platted town qualified as a municipality under alcoholic beverage laws, even though the station is a seasonal post office, thereby permitting the application for alcoholic beverage licenses. (AGR 1959-1960, p. 285)

Any applications for a new retail license, except those cited in SDCL 35-2-1.1 or the transfer of an existing license are required to be submitted to the governing body of the municipality for approval. The governing body has discretion in approving or disapproving an application for a new retail license or the transfer of an existing license on the grounds that the applicant is a "suitable person" and that the proposed location is acceptable. A new or transferred on-sale or convention facility on-sale license may be denied if the approval would permit a person or entity to possess more than one-third of the licenses available to be issued within the jurisdiction and the board determines that possession of more than one-third of the licenses available is not in the public interest. (SDCL 35-2-1.2)

Any application for the reissuance of a retail license may be approved by the municipal or county governing board without a hearing unless in the past year the licensee or one or more of the licensee's employees have been subjected to a criminal penalty for violation of the alcoholic beverage control law or the license has been suspended. (SDCL 35-2-1.2)

The character requirements, as mentioned above, are further defined to mean a person of good moral character, who has never been convicted of a felony. (SDCL 35-2-6.2) However, it should be noted that the character requirements cited in the above statute are not the only requirements to be met by an applicant for a license. Such a rule would render meaningless the discretion granted in licensing matters. (Application of Ed Phillips & Sons Co. (1972) 86 SD 326, 195 NW 2d 400)

Other factors that may properly be considered are the type of business which applicant proposes to operate; the manner in which the business is operated; the extent to which minors frequent or are employed in such place of business; and the adequacy of the police facilities to police properly the proposed location. (Randall's - Yankton, Inc. v. Ranney (1965) 81 SD 283, 134 NW 2nd 297)

Another requirement relates to the proposed location. Except for certain special events involving performing arts, intercollegiate athletics, fund raising, a reception, a conference, or an occasional or scheduled event at a campus facility, statute requires that no on-sale or off-sale license may be granted to operate on the campus of any state educational institution. However, if the outside boundary of any state educational institution is extended this section shall not apply to any license granted previous to the extension. The provisions of this section shall not apply SD Services For the Deaf. (SDCL 35-2-6.1)

Finally, a municipality may consider the following criteria for authorizing video lottery machine placement in establishments issued an on-sale alcoholic beverage license pursuant to subdivisions 35-4-2 (12) and (16):

1. The number of establishments currently licensed for video lottery;
2. The proximity of the business to other establishments licensed for video lottery;
3. The type of business and manner in which the applicant proposes to operate it;
4. The location of the business in relation to other businesses, residential areas, or activities within the same general area;
5. The extent to which minors frequent a business connected to the one proposed; and
6. The effect the proposed business has on economic development.

The governing body is to certify on each application filed with the department of revenue for a license granted under subdivisions 35-4-2 (12) and (16) whether the business premises is authorized for video lottery machine placement. An existing video lottery license may not be denied renewal or transfer based upon the criteria set forth in this section. The number of alcoholic beverage licenses issued under 35-4-2 (12) and (16) and certified for video lottery may not be restricted to a number less than those licensed as video lottery establishments on March 1, 1994. (SDCL 42-7A-64)

#### 11.435 Hearing

No license for a retail on or off-sale alcoholic beverage license can be granted without public hearings and notice. (SDCL 35-2-3) The governing body of the municipality is required to schedule a public hearing and to publish notice of the hearing in the official newspaper. The notice must be published once at least one week prior to the hearing. (SDCL 35-2-5) It is also required that any resident who requests written notice of the hearing must be notified by mail a sufficient length of time before the hearing to allow the resident a reasonable opportunity to be present. (SDCL 35-2-4)

After public hearing, if the governing body refuses to grant the license, the fee is returned, and the applicant may not reapply for at least one year from the date of the denial. However, if the application was denied because of suitability of location, the applicant may reapply after three months if the application is for a different location. (SDCL 35-2-5.1) If the governing body grants the license, the fee is deposited in the general fund and the application is forwarded to the Secretary of the Department of Revenue, who can still reject or accept the application. (SDCL 35-2-5.2) If the application is for a malt beverage license, only one-half of the fee is deposited in the general fund, the remainder is transmitted to the Department of Revenue. (SDCL 35-4-2.11) A governing body may deny reissuance to the same applicant if the license has not been actively used during the previous two years. The number of licenses held by a municipality pursuant to 35-3 may not be less than the total number of licenses available to be issued as of July 1, 2010. (SDCL 35-2-5.3)

#### 11.445 Renewal of License

Any application for the renewal of a retail license may be approved by the municipal governing board without a hearing unless in the past year the licensee or one or more of the licensee's employees have been subjected to a criminal penalty for violation of the alcoholic beverage control law or the license has been suspended. (SDCL 35-2-1.2)

The procedure for the renewal of municipally owned licenses is covered in section 11.305 of this handbook.

The governing body of the municipality or county which approved the application for license under SDCL 35-2-1.2 may recommend to the Secretary of Revenue following a hearing that any license issued be suspended or revoked for violation of any of the provisions of state laws, local ordinances, or regulations of the governing body issuing the license relevant to alcoholic beverage control which occurs on the premises of the licensee. (SDCL 35-2-11.1)

#### 11.455 Transfers

When application is made for transfer of a liquor license the same procedures apply as if the application is for a new license. The fee required for transfer of a license is one hundred fifty dollars. In the case of a transfer, an affidavit of bulk sale and the existing license card must accompany the submission of the transfer application. (SDCL 35-2-7)

No license may be reissued or transferred until all taxes incurred by the licensee as a result of the operation have been paid, and all property taxes which are the liability of the licensee are paid or are not delinquent. (SDCL 35-2-24)

11.465 Duration of Licenses

A final area of importance to municipalities is the duration of these liquor licenses. Statute provides that these licenses are valid from twelve o'clock midnight on the thirty first day of December to twelve o'clock midnight on the thirty first day of the next December. The period for sale of malt beverages under SDCL 35-4-2 (16) shall be from midnight on the thirtieth day of June to midnight on the thirtieth day of the next June. (SDCL 35-4-41)

11.475 Conflict of Interest

No mayor, alderman, commissioner, or trustee is disqualified from holding such office in any municipality as a result of holding any liquor license or being the spouse of a person holding any liquor license. (SDCL 9-14-16)

11.476 Sale and Consumption on Adjoining Property (Sidewalk Sales)

Municipalities may, by ordinance, allow the sale and consumption of alcoholic beverages on a sidewalk or walkway abutting a licensed premise. Other restrictions may also apply. (SDCL 35-4-77.1)

**11.500 AGE REQUIREMENTS**

11.525 Persons to Whom Sale is Prohibited

11.550 Age Requirements to Be on Premises

11.575 Age Requirements for Sale of Liquor, Wine, and Malt Beverages

11.525 Persons to Whom Sale is Prohibited

No licensee may sell or serve any alcoholic beverage or malt beverage to any person under the age of twenty-one years or to any person who is obviously intoxicated at the time. (SDCL 35-4-78; 35-4-79)

It is a Class 2 misdemeanor for any person under the age of twenty-one years to purchase, attempt to purchase, or possess or consume alcoholic beverages except under very limited circumstances, or to misrepresent his or her age with the use of any document for the purpose of purchasing or attempting to purchase alcoholic beverages from any licensee. (SDCL 35-9-2)

State law applies a class 1 misdemeanor to sell or give for use as a beverage any alcoholic beverage to any person under the age of eighteen years unless it is done in the immediate presence of a parent or guardian or spouse, who is at least twenty-one years of age, while not on the premises of an establishment licensed for the retail sale of alcoholic beverages pursuant to SDCL 35-4-2 or at a special event for which an alcoholic beverage license has been issued. (SDCL 35-9-1)

11.550 Age Requirements to Be on Premises

Generally, persons under the age of twenty-one may not loiter on a premise licensed to sell, serve, dispense or consume alcoholic beverages. (SDCL 35-4-79)

11.575 Age Requirements to Sell Liquor, Wine, or Malt Beverages

Notwithstanding the provisions of SDCL 35-4-79, any on-sale or off-sale licensee may permit persons eighteen years or older to sell or serve alcoholic beverages if less than fifty percent of the gross business transacted by the establishment is from the sale of alcoholic beverages, or the licensee or an employee of the licensee that is at least twenty-one years of age is on the premises when the alcoholic beverage is sold or served. For the purposes of this section, the term, to sell or serve alcoholic beverages, includes tending bar or drawing, pouring, or mixing alcoholic beverages. Any person tending bar or drawing, pouring, or mixing alcoholic beverages pursuant to this section must be certified by a nationally recognized alcohol management program. A violation of this section is a Class 2 misdemeanor. (SDCL 35-4-79.4)

**11.600 LIQUOR TAX REVERSION**

As was mentioned in the introduction, municipalities not only receive revenue from the operation of an alcoholic beverage enterprise, but they also receive revenue from the various licenses and taxes imposed on alcoholic beverages.

Statute requires fifty percent of all license and transfer fees which are received under the provisions of SDCL 35-4-2(16) are to remain in the municipality in which the licensee paying the fee is located. (SDCL 35-4-2.11)

Twenty-five percent of all the funds deposited in the alcoholic beverage fund are to be reverted to the municipalities. The share of this sum is to be computed on the ratio of a municipality's population to the total population sharing the reversion. These reversions are to be made by no later than the first of November, February, May and August. (SDCL 35-5-22)

## CHAPTER 12

### FINANCE

12.000 Introduction	12.300 Municipal Bonds
12.050 Accounting for Municipal Funds	12.350 Investment of Municipal Funds
12.100 Property Tax in General	12.400 Options for Financing Municipal Improvements
12.130 Property Tax Reductions	12.450 Promissory Notes
12.150 Tax Levies	12.460 Municipal Debt Limit
12.170 Property Tax Reform Act of 1995	12.500 Accumulation of Funds
12.200 Collection of Property Taxes	12.600 Municipal Tax Exemptions
12.250 Miscellaneous Sources of Income	

#### **12.000 INTRODUCTION**

This chapter is an attempt to present an overall view of the municipal finance structure in general. As such the major topics under consideration will include statutory accounting requirements and revenue sources such as the property tax, miscellaneous sources of income, and municipal bonds.

The significance of this chapter to the policy making official is that it will examine what revenues and finance options are available and can therefore be of some assistance in determining whether "the funds are available".

#### **12.050 ACCOUNTING FOR MUNICIPAL FUNDS**

12.055 Custody for Funds	12.070 Fund Accounts
12.060 Depositories for Funds	12.075 Disbursements of Funds
12.065 The Budget in General	12.076 Registered Warrants
12.066 Budget Ordinance	12.080 Annual Reports
12.067 Supplemental Appropriations	12.082 Inventories
12.068 Emergency Appropriations	12.085 Auditing of Accounts
12.069 Encumbrance of Funds	12.090 Use and Acceptance of Credit and Debit Cards

#### **12.055 Custody for Funds**

In Section 3.200 of this Handbook several powers concerning municipal finance are outlined. Municipal authorizations in this area are summarized in SDCL 9-12-2. They are:

- 1) To control its finances and property;
- 2) To levy and collect taxes for general and special purposes on real property within the limits allowed by law, and
- 3) To appropriate money for authorized purposes and to provide for the payment of the debts and expenses of the municipality. (SDCL 9-12-3)

Statute requires that "all monies belonging to the municipality derived from taxation, licenses, fines, forfeiture, the operation of waterworks or other public utility owned or operated by it, or from any other source shall be paid into the municipal treasury...". (SDCL 9-22-1) This applies only to tax revenues. Fees and fines collected by the various boards may be retained by the board and expenditures made with the approval of the board. (AGR 1981-82, p. 192) Revenue generated from the sale of personal and real property in disposing of a public utility must be credited to the municipality's general fund. (AGR 1981-82, p. 222)

The finance officer is charged with the obligation of controlling the municipality's accounting system in general. Statute requires the finance officer to "supervise the accounting system for all departments and offices of the municipality in accordance with the recommendations of the state department of legislative audit...". (SDCL 9-14-19) This includes all of the various boards and commissions authorized by statute such as the park board, recreation board and library board. (AGR 1959-60, p. 137)

In municipalities in which a city manager is employed, the city manager is in charge of supervision of the municipal accounting system. (SDCL 9-14-19 and 9-10-15(4))

To meet this obligation, the finance officer is required to keep all papers and records of the municipality. The finance officer is required to "draw and countersign all warrants on the treasury in pursuance of orders or resolutions of the governing body and keep a full and accurate account thereof in books provided for that purpose. The finance officer shall make or cause to be made estimates of the expenses of any work to be done by the municipality, countersign all contracts made on its behalf and certificates of work authorized by any committee of the governing body or by any municipal office." (SDCL 9-14-17)

The finance officer is also required to keep records pertaining to all the indebtedness of the municipality. This includes both the amount of all bonds, warrants, certificates or other evidences of indebtedness which has been paid and the amount outstanding. Records of all receiving and disbursing officers, showing the amount they have received from the different sources of revenue and the amount which they have disbursed under the direction of the governing body, must also be maintained by the finance officer. (SDCL 9-14-18; See Hdbk., sec. 12.160)

Another responsibility of the finance officer is to keep a list of all certificates issued for work or any other purpose relating to any special tax or assessment. The finance officer before the levy of any special tax must report to the governing body a schedule of all lots which may be subject to the special tax or assessment and must include the amount of the tax which it may be necessary to levy on the lots. (SDCL 9-14-20)

In municipalities with an auditor or clerk and treasurer instead of a finance officer, the auditor or clerk supervises the accounts of the municipality, and the treasurer has custody of the municipal funds. (AGR 1957-58, p. 42)

The treasurer is required to receive all money belonging to the municipality and to keep accurate and detailed accounts thereof in such a manner as the governing body may direct. (SDCL 9-22-2) The treasurer must give every person paying money into the treasury, a duplicate receipt specifying the date of payment and upon what account the money was paid. The treasurer is further required to file copies of these receipts with the auditor or clerk at the time of his monthly report. (SDCL 9-22-3)

At the end of every month the treasurer and the auditor must have a settlement where the treasurer turns over all warrants, interest coupons, bonds, or other evidences of indebtedness which may have been paid by him during the month, taking the receipt of the auditor or clerk, and all such evidences of indebtedness shall be canceled by him and have written or stamped the date of their payment. (SDCL 9-22-19)

In those municipalities with a finance and revenue commissioner, it is the commissioner's duty to enforce all the laws for the assessment and collection of taxes and the collection of all revenues from any source belonging to the municipality. The revenue and finance commissioner is also required to keep the board informed as to the finances of the municipality and as to its assets and property. (SDCL 9-9-24)

Every municipality can assign for collection any or all delinquent accounts receivable, but the assignment cannot be made until after reasonable collection efforts have been made. After the assignment has been made and reasonable collection efforts have produced no results, the governing body by formal action can direct the account to be removed from the records and disclosed on that year's financial report. (SDCL 9-22-4)

For information concerning misuse of public funds and responsibilities upon expiration of term of office, municipal officials should refer to Handbook sections 5.410 and 5.450.

#### 12.060 Depositories for Funds

The governing body is required by statute to designate the official depository or depositories for municipal funds. These depositories must be a bank or banks within the state, unless otherwise specifically provided by statute. (SDCL 9-22-6)

Domestic savings and loan associations and domestic federal credit unions may also be official depositories if such funds are invested only in the accounts which are insured by the federal savings and loan insurance corporation or the national credit union administration unless such association or union qualifies as a depository as provided by SDCL 4-6A. (SDCL 9-22-6.1; 9-22-6.2)

To qualify as an official depository for municipal funds, a bank, savings and loan, or credit union must segregate as security a sum equal to one hundred per cent of the amount deposited in excess of the amount insured by FDIC. State law also specifies what can be used as security. (SDCL 51A-10-9)

For further information concerning depositories of public funds and investing municipal funds see this Handbook section 12.350.

#### 12.065 The Budget in General

The municipal fiscal year begins January first. (SDCL 9-21-1) A necessary phase in the preparation of the budget is an estimate of the expenditures and revenues for the ensuing fiscal year. Statute requires the finance officer to report annually on or before the first day of September, to the governing body an estimate of the expenses of the municipality and likewise the revenue necessary to be raised for the current year. (SDCL 9-22-23) An exception to this occurs in those municipalities where a city manager is employed, in which case the city manager must prepare and submit an annual budget to the governing body not later than August first of each year. (SDCL 9-10-15(5)) In preparing the annual estimate of expenses as provided by SDCL 9-22-23, the finance officer may include in the budget a line item for contingencies. It cannot exceed five percent of the total budget. Expenses cannot be charged to this item, but by resolution funds can be transferred out where needed. (SDCL 9-21-6.1)

To aid the finance officer in preparing the annual report, certain boards and commissions are required to submit an annual report estimating the expenses to be incurred for the ensuing fiscal year.

The park board is required to annually make an estimate of the monies necessary for maintaining, constructing, and improving any parks, parkways, roads, boulevards, and avenues which are under its control. The estimate must specify the amount required for each park district and the amount required for general park purposes. This estimate must be certified by the secretary of the park board to the municipal financial official at a time specified by the governing body. (SDCL 9-38-42)

The park board is also required to make an estimate of the expenses for forestry purposes. This estimate must be filed and certified by the same dates as the estimate of expenses for park maintenance and improvements as mentioned above. (SDCL 9-38-44)

Another board which is required to submit a budget for its activities in the next ensuing year is the library board of trustees. The board of trustees is authorized to submit an annual budget request, and then adopt a final budget within those funds certified to it as being appropriated in the annual budget of its governing body. (SDCL 14-2-40(3); 14-2-40(4); See Hdbk., sec. 10.500)

## 12.66 Budget Ordinance

No later than the first regular meeting of the governing body in September or within ten days thereafter, the annual appropriation ordinance for the ensuing year must be introduced. The purpose of the appropriation ordinance is to appropriate such sums of money as may be deemed necessary to meet the lawful expenses and liabilities of the municipality. (SDCL 9-21-2)

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, they can receive these appropriations subject to SDCL 9-12-11.

The appropriation ordinance must specify the function and sub-function for which the appropriations are made and the amount appropriated for each function or sub-function. It is not necessary to appropriate revenue to be expended from an enterprise or trust and agency fund if the fund is not supported or subsidized by revenue derived from the annual appropriated tax levy. However, an annual budget for these funds shall be developed and published no later than December thirty first of each year. (SDCL 9-21-2)

In specifying the functions and sub-functions made in the appropriation ordinance, the governing body is required to follow, as far as it is applicable, the classification of expenditures for each department and office of the municipality as prepared by the state department of legislative audit. First and second class municipalities shall conform to the uniform classification in the municipal accounting manual published in accordance with SDCL 4-11-6. (SDCL 9-21-6)

Statute provides that proceeds from municipal bonds voted on by citizens of the municipality do not have to be included in the annual appropriation ordinance. (SDCL 6-8B-6)

Neither the governing body nor any department can expend any sum in excess of the amount appropriated for any purpose within the department except as provided by SDCL 9-21-9.2, which provides that any authorized expenditures to be used for the benefit of another political subdivision shall be restored to the fund from which it was withdrawn. However, any funds made available after the final appropriation ordinance is adopted by a municipality from state, county and federal grants for expenditure by the municipality may be expended without specific provision in the appropriations ordinance. However, the municipality must publish the purpose for the expenditure and to whom the expenditures were made. (SDCL 9-21-9; 9-21-9.1)

The annual appropriation ordinance, besides containing the function and sub-function expenditures, is required to contain the annual tax levy which cannot exceed the limitations established by law. The annual appropriation ordinance must "apportion among the various funds provided for therein the amount to be applied upon each fund. It shall also specify the amount levied to pay the interest on each outstanding bond issue, and the amount levied for the purpose of each sinking fund established to pay the principal of each series of bonds when matured." (SDCL 9-21-19)

Appropriation ordinances must be approved by a majority vote of the aldermen, trustees, or members of the board of commissioners. In the aldermanic form, the mayor may not break a tie on the appropriation ordinance and a two-thirds vote of aldermen is required to sell city property. (SDCL 9-8-10; 9-7-7; 9-9-16) The mayor under the aldermanic form of government can veto any part or item of an appropriation ordinance. (SDCL 9-8-3; 9-19-10) Upon passage, the appropriation ordinance must be published in the same manner as all other ordinances. (See Hdbk., sec. 4.075)

Immediately upon passage and publication of the annual appropriation ordinance the finance officer must certify the tax levies therein made to the county auditor in the following form:

For general purposes \_\_\_\_\_  
 For interest and debt service fund \_\_\_\_\_ (SDCL 9-21-20)

All tax levies must be certified to the county auditor by the taxing district on or before the first day of October of each year. Any levy so filed may be altered by proper action of the governing body at any time before extension of the tax for said district has been commenced by the county auditor, upon filing a properly amended certificate showing the alteration. (SDCL 10-12-7)

As an alternative, a municipality may move the deadline for introducing the annual appropriation or budget to as late as the first regular meeting of the governing board in November. Each municipality that opts to move the deadlines shall, by ordinance, establish budget hearing and publication deadlines pursuant to SDCL 9-19-7. (SDCL 9-21-34)

If a municipality opts to move the budget deadlines, the provisions of SDCL 9-21-20 do not apply. On or before October first, after notice and hearing on the requested levies, the municipal finance officer shall certify the tax levies to the county auditor in the county that the municipality is situated in the following form:

For general purposes.....

For interest and debt service fund (SDCL 9-21-34.1)

#### 12.65 Supplemental Appropriation Ordinance

In the event that no provision is made in the annual appropriation ordinance to provide sufficient revenues to enable the municipality to conduct the indispensable functions of government in any department or to discharge any duty which is the lawful duty of the municipality to discharge and which requires the incurring of liabilities or expenditures of funds, the governing body can make, approve and adopt a supplemental appropriation ordinance. This supplemental appropriation ordinance must spell out in detail each item for which an appropriation is made and the amount. The adoption of supplemental appropriation ordinance is governed by the same laws pertaining to the adoption of the annual appropriation ordinance. (SDCL 9-21-7)

No other appropriations can be made except as provided in the annual appropriation ordinance or in supplemental appropriation ordinances. However, when the governing body is authorized to issue bonds by the electors, it is deemed to be an appropriation to the extent of the bonds authorized. (SDCL 9-21-8; See Hdbk., sec. 12.310)

#### 12.66 Emergency Appropriations

An exception to the statutory requirement of spending in excess of the amounts appropriated can occur by an unanticipated emergency event which is caused by any casualty, accident, circumstances or event happening after such annual appropriation ordinance is made which could not have reasonably been anticipated at the time of making the annual appropriation ordinance. When this occurs the governing body may order the mayor or president to borrow in the name of the municipality, with the attest of the finance officer, an amount sufficient to provide for the necessary expense incurred by such event. The amount borrowed, including the interest, is then added to the amount authorized to be raised by the next general tax levy. (SDCL 9-21-15) (See Hdbk., sec. 12.155)

An option to borrowing for an unanticipated event is to transfer sums of money which have been unappropriated, or which have not been pledged for the payment of any indebtedness, to be used in lieu of or supplementary to borrowing for an unanticipated event. (SDCL 9-21-16)

#### 12.67 Encumbrance of Funds

The governing body may by resolution not later than its first meeting in February, encumber that portion of unexpended appropriations from the prior year for which applicable obligations were incurred but were not paid. (SDCL 9-21-24.1)

## 12.68 Fund Accounts

In the previous section, it was noted that the annual appropriation ordinance established the various fund accounts as well as the appropriation for each fund. It has also been noted that the auditor/clerk and the treasurer or finance officer are charged with the responsibility for keeping the records of these accounts.

The requirement for separate accounts is established in several sections of South Dakota Codified Laws. The treasurer shall keep a separate account of each fund or appropriation and of the debits and credits. (SDCL 9-2-16) Except as otherwise provided no money belonging to any fund shall ever be diverted to the use of any other fund, and no warrant shall be drawn upon any fund not properly chargeable to such fund. (SDCL 9-21-25)

The establishment of a specific fund and the requirement that monies spent from such fund only be spent for the purposes for which the fund was established appears in several statutes. The following is a list of some of the statutes which require a special fund and delineate the purposes for which monies may be expended from the fund.

- 1) Auditorium Building Funds; (SDCL 6-4-1 and 6-4-3)
- 2) Depreciation Reserve Fund; (SDCL 9-21-12)
- 3) Cemetery Perpetual Care Fund; (SDCL 9-32-18)
- 4) Park Funds; (SDCL 9-38-6)
- 5) Swimming Pool Bond Fund; (SDCL 9-38-69)
- 6) Sewer Rental Fund; (SDCL 9-48-29)
- 7) Parking Meter Fund; (SDCL 9-51-2 and 9-51-4)
- 8) Auditorium Fund; (SDCL 9-52-8)
- 9) Home Health Revolving Fund; (SDCL 34-3A-1 and 34-3A-4)
- 10) Utility Funds in general; (Hdbk., sec. 10.070)
- 11) Highway Tax Fund; (SDCL 9-21-24)
- 12) Casualty Reserve Fund; (SDCL 9-21-16.1)
- 13) Sinking Fund; (SDCL 9-26-27)
- 14) Contingency Account (SDCL 9-21-6.1) (this is a line item within the general fund)
- 15) Local Endowment Fund; (SDCL 6-14-1 and 6-14-2)
- 16) Capital Replacement Reserve Fund or Account; (SDCL 9-21-31)
- 17) Internal Service Fund (SDCL 9-21-32)

Statute further provides that upon consolidation of the park and recreation boards, at the discretion of the governing body, separate accounts may be maintained for park and recreation funds or they may be combined into a single account. (SDCL 9-38-90.3)

This list is by no means exhaustive, but it does serve to demonstrate the proliferation of statutes establishing separate fund accounts. (See Hdbk., sec. 9.075, 10.070, 10.360, 11.310, and 14.220) Additional information is contained in the Municipal Accounting Manual published by the Department of Legislative Audit.

Monies may be transferred between fund accounts in the manner specified in SDCL 9-21-26.1; 9-21-27 and 9-48-29. (See also Hdbk., sec. 9.060) These statutes authorize the governing body, upon two-thirds vote, to transfer to another fund at any time any cash balance in any fund provided that all obligations chargeable to the fund have been paid in full. It is further provided that any money transferred cannot be expended for any purpose not authorized by the annual appropriation ordinance. No balance remaining at the end of any fiscal year in any fund raised for the purpose of paying the principal or interest upon the bond indebtedness of the municipality may be transferred to any other fund unless enough money is retained in the fund to retire all outstanding bonds and to pay any interest which will accrue on the bonds. (SDCL 9-21-27; See Hdbk., sec. 10.070 for information on utility fund transfers)

Upon approval by the governing body, any unrestricted cash in any municipal fund may be loaned to any other municipal fund. (SDCL 9-22-24)

### 12.075 Disbursement of Funds

Before any claim against any municipality for any property or services for which it is liable is allowed, an itemized invoice must be completed and accompanied by a voucher verified by the appropriate municipal official that the services, other than those provided by municipal employees, or materials have been received. The invoice and voucher required by this section shall be filed in the office of the municipal finance officer. The governing body may authorize the prepayment of claims against the municipality for services before they have been provided if the municipality has adopted an ordinance in advance that specifies the maximum amount allowable for any pre payment and if a service contract exists. (SDCL 9-23-1) Statute requires further that no claim against any municipality shall be audited or allowed unless it be fully itemized and memorandum of the same entered upon the minutes of the meeting of the governing body. (SDCL 9-23-2)

A municipality may establish an incidental account in an amount determined by the governing body by setting aside money from the general fund. The incidental account shall be kept and used by the officer designated by the governing body for advanced payment or for claims requiring immediate payment, not to exceed an amount established by the governing body. A detailed account of the expenditures from the incidental account shall be presented at regular intervals not to exceed one month with verified vouchers, itemized and supported by receipted bills or other information as general evidence of payment, which are subject to audit. All expenditures from this account shall be listed with other bills in the regular proceedings of the governing body. All claims made on the incidental account require the signatures of two officers of the municipality. (SDCL 9-23-23)

All funds to be expended by any duly authorized municipal board must meet these requirements too. These funds can only be expended upon presentation by written requisition, signed by the board president, or the vice president, and countersigned by the board secretary, upon the finance officer for warrants to be issued as provided in SDCL 9-23-3. (SDCL 9-23-2.1)

These requirements, however, do not apply to tort action against a municipality. (Stewart v. Rapid City, 48 SD 554, 205 NW 654; See Hdbk., sec. 3.255)

No money can be paid out of the treasury except upon the warrant of the mayor or president of the board of trustees, which must be countersigned by the finance officer. (SDCL 9-23-3) In municipalities employing a city manager, the warrant must be signed by the manager and countersigned by the finance officer before any sums can be paid. (SDCL 9-10-15(8))

Warrants on any fund are also restricted in that no liability may be incurred against the municipality in excess of the total appropriation of the fund. (SDCL 9-21-21) Statute also requires that no warrant or obligation under any appropriation shall be incurred in excess of seventy-five percent of the tax levy made for the fund prior to the second Monday in May of each fiscal year. (SDCL 9-21-22) This establishes two types of cushions in the municipal fund structure. The first is a cushion on the amount that may be expended from any one fund. The second is an assurance that monies in a fund will be spent in some proportion to the fiscal year.

Another statute relative to proportioning payments over a period of time requires that where appropriations of money are authorized and made for periods longer than one year, the expenditure in any one year shall never exceed the proportion which one year of time bears to the whole time. (SDCL 9-21-23)

Within five business days after each meeting of the governing body, a full account of the proceedings of the meetings, including a detailed statement of all expenditures of money, showing the names of the persons to whom payment is made and the service rendered, must be delivered to the official newspaper. (SDCL 9-18-1.1; See Hdbk., sec. 4.210)

Every warrant must be paid upon presentation if there is sufficient money in the proper fund to pay the warrant. (SDCL 9-23-4)

The attorney general has ruled that the term "warrant" could be interpreted to include electronic transfer if the fund involved is identified and an identifiable authorization is attached. (AG Opinion 84-06)

### 12.076 Registered Warrants

If there is not sufficient money in the fund a registered warrant must be issued. (SDCL 9-23-4) All warrants must be paid in the order in which they are presented, and the treasurer is required to note on the back of each warrant the date of presentation, when the payment is made and the date of payment. (SDCL 9-23-5; 9-23-6)

Every warrant for the payment of money by a municipality must be countersigned by the treasurer who must endorse on the warrant an order to the depository to pay the warrant and to charge the warrant to the proper account of the treasurer. No warrant can be countersigned while there are any registered warrants outstanding. (SDCL 9-23-7)

The treasurer or finance officer is required to keep a warrant register which must include the number, date and amount of each warrant presented; the fund upon which the warrant is to be drawn; the date of presentation; the name and address of the person in whose name the warrant is registered; the date of payment; the amount of interest and the total amount paid on the warrant; and the date when notice to the person holding the warrant is mailed as provided in SDCL 9-23-19. (SDCL 9-23-8)

Whenever any warrant is presented to the treasurer for payment and there are no funds in the treasury appropriated for that purpose, the treasurer must enter the warrant in his register for payment in the order of presentation. (SDCL 9-23-9) The treasurer must endorse the registry number, date of registration, and the words "not paid for want of funds", and sign the endorsement upon each warrant registered pursuant to SDCL 9-23-9. (SDCL 9-23-10)

These warrants must be paid in the order of their registration and may draw interest from the time of presentation at a rate to be determined by the governing body. (SDCL 9-23-11; 9-23-12)

As soon as there is sufficient money in the special warrant interest fund to pay one year's interest on one or more outstanding warrants, the finance officer or treasurer must notify the holder of the oldest registered warrant to present the same for payment of interest. No warrant can be called for payment of interest until it has been registered for at least a year. (SDCL 9-23-15)

Any holder of a registered warrant who fails to present the warrant within thirty days after the treasurer has mailed the required notice to him, loses priority of payment of interest as established in SDCL 9-23-15. (SDCL 9-23-16) All interest payments must be endorsed by the treasurer or finance officer on the back of the warrant. (SDCL 9-23-17)

When there becomes available sufficient money in the particular fund to pay the registered warrants, the treasurer is required to notify the person holding warrants on the fund by mail whereupon the interest on the warrants shall cease. (SDCL 9-23-19)

### 12.080 Annual Reports

The constitution of the State of South Dakota requires that an accurate statement of the receipts and expenditures of the public monies shall be published annually, in such manner as the Legislature may provide. (Cn. XI, Sec. 12)

Statute also requires that the treasurer shall report to the governing body at such time as may be prescribed by ordinance, giving a full and detailed account of all receipts and expenditures since his last report. (SDCL 9-22-20)

The finance officer shall make an annual financial report to the governing body. This report shall be made no later than the first regular meeting of May and must include the receipts, expenses, and financial condition of the municipality, including the amount of funds in the treasury at the time of making such report and where and in what amounts such funds are deposited or invested. This report shall be published in the official newspaper within thirty days after the report is made to the governing body. By the last day of May each year the finance officer shall file a copy of the report with the state Department of Legislative Audit. (SDCL 9-22-21)

The utility board, the auditorium board, and the airport board are requested to file an annual report of their operations with the finance officer. The report of the utility board must be made upon thirty days written notice at the end of the fiscal year. (SDCL 9-39-29) There is no set time for the report of the auditorium board but statute does require that its records, books, papers, and accounts shall at all reasonable times be subject to inspection. (SDCL 9-52-25)

The park board (SDCL 9-38-23) and the recreation board (SDCL 9-38-97) are also required to make annual reports to the governing body.

#### 12.082 Inventories

All municipal officers and employees shall retain one copy and file one copy of the annual inventory with the finance officer of their respective municipalities. (SDCL 5-24-3) The inventories must be completed by any county, township or municipal officer or employee having in their custody any public personal property. (SDCL 5-24-1) The inventories shall show the actual cost for each item or the estimated cost at the time of acquisition if the actual cost cannot be ascertained. (SDCL 5-24-2)

#### 12.085 Auditing of Accounts

An examination of auditing the accounts generally centers around the role of the state Department of Legislative Audit in providing the post audit. It is important to note, however, that the finance officer is authorized to perform an audit and adjustment of the accounts for the treasurer. The authorization allows the finance officer to examine all reports, books, papers, vouchers and accounts of the treasurer; audit and adjust all claims and demands against the municipality before they are allowed by the governing body; keep a record of his acts and doings; keep a book in which he shall enter all contracts; and perform such other duties as may be required by ordinance, resolution, or direction of the governing body. (SDCL 9-14-21)

The major concern of the municipal official with respect to auditing focuses on the state Department of Legislative Audit. It is the duty of the auditor general to audit the records of each municipality at least every two years. In municipalities with less than six hundred thousand dollars in annual revenue that are required to have an audit pursuant to federal regulations shall be audited in accordance with federal guidelines. Municipalities with less than six hundred thousand dollars in annual revenue that are not required to have an audit pursuant to federal regulations may submit an annual report in lieu of a formal audit. This report shall be submitted to the auditor-general on forms prescribed by the department of legislative audit. (SDCL 4-11-4)

The auditor general shall cause an internal control review to be performed in municipalities with less than six hundred thousand dollars in revenue at least once every five years if:

1. They are not required to have an entity-wide audit under SDCL 4-11-4;
2. They have revenues of one hundred thousand dollars or more in any one year; and
3. They have not had an internal control review in the last five years.

Upon the request of the governing body or for special reasons the auditor general may audit the books and records of any office or officer of the municipality (SDCL 4-11-4), or upon request by petition signed by twenty percent of the resident taxpayers of a taxing district (SDCL 4-11-5). The cost of the audit when requested by either the governing body or the taxpayers must be paid by the appropriate subdivision. (SDCL 4-11-5) The auditor general may cause an internal control review of any municipality with less than six hundred thousand dollars in revenues if it is requested by the governing body or for special reasons. (SDCL 4-11-4.1)

If the department of legislative audit is unable to perform a regular or special audit, a licensed independent public accountant may be approved by the auditor general to perform the audit. Such private audit shall not be paid for before a copy of the audit has been filed with and approved by the auditor general. (SDCL 4-11-7)

The auditor general is required to publish a notice of failure to submit a timely audit report in the legal newspaper of the municipality, at the municipality's expense. A penalty of ten dollars per day for each day of delinquency may also be assessed. An audit report is considered timely if submitted to the department of legislative audit not later than 18 months following the end of the fiscal year. (SDCL 4-2-15; 4-2-16; 4-2-17)

The period of transactions which may be covered by the audit can not exceed six years unless the period is extended by request of the governing body or upon petition by ten percent of the taxpayers. (SDCL 4-11-8)

The reports shall contain financial statements presented in accordance with generally accepted accounting principles or other accepted methods of reporting of the municipality and such other general information as may be deemed necessary by the auditor or required by the municipality. (SDCL 4-11-10)

The auditor general is required to make detailed reports of the result of any investigation made by his department within sixty days after the examination has been completed. The reports of the auditor general must be made to the governing board of the political subdivision and filed in the office of the county auditor. (SDCL 4-11-9)

Not less than ten days after filing the report with the appropriate authorities, the auditor general must cause to be published in the official newspaper for at least two issues a brief statement of the fact that he has made the audit and where the report may be found on file for public inspection. He must also include a brief recital of the substantial errors, irregularities or losses which he has discovered as a result of the audit. The expense incurred by such publication is to be paid by the municipality. Any municipality which receives an independent audit shall make the audit report available on the municipal website. (SDCL 4-11-12)

If the report discloses any malfeasance, misfeasance, or neglect on the part of any public officer, it becomes the duty of the proper legal officer to institute a civil action against the public officer within sixty days after receiving a copy of the report. (SDCL 4-11-14)

#### 12.090 Use and Acceptance of Credit and Debit Cards and Electronic Transactions

Municipalities are authorized to use credit cards or electronic transactions for the purchase of materials, supplies, equipment, or other authorized transactions for the benefit of the entity. The governing body must establish, by resolution, policies for the use and accountability of for credit card or electronic transaction purchases. Municipalities may also accept payment by credit or debit card or electronic transaction. The entity is allowed to assess and collect a fee for an amount sufficient to cover any processing fees associated with such transactions. (SDCL 4-3-27; 4-3-28)

### **12.100 PROPERTY TAXES IN GENERAL**

- 12.105 Property Tax Assessment
- 12.110 Equalization, Review and Correction of Assessments
- 12.120 Board of Equalization

#### 12.105 Property Tax Assessment

In Section 12.065 of this Handbook, the municipal budget in general was presented. In that section it was noted that a necessary step in the preparation of the annual appropriation ordinance, and therefore the budget, was an estimation of the revenues and expenditures for the ensuing year. The purpose of Sections 12.100 through 12.350 is to acquaint the municipal official with the sources of revenue available to meet the expenditures of the municipality and the limitations on those sources of revenue. It should be noted that these sources of revenue are in addition to the ones presented in Chapter 10 and 11 of this Handbook.

This section of the Handbook is an overview of the way property taxes are determined. As such an in-depth analysis of the specific assessment laws will not be presented. Information of that nature may be found in the South Dakota Assessor's Handbook which is published by the Department of Revenue, Property and Special Tax Division.

Any consideration of the property tax should begin by defining the limits and boundaries imposed on the applicability of such a tax. The constitution provides to the end that the burden of taxation may be equitable upon all property, and in order that no property which is made subject to taxation shall escape, the Legislature is empowered to divide all property including money, credits, and physical property into classes and to determine what class or classes of property shall not be subject to taxation. Taxes shall be uniform on all property of the same class and shall be levied and collected for public purposes only. (Cn. XI, Sec.2)

The Constitution specifically exempts the property, both real and personal, of the United States and of this state and its counties, and municipal corporations from taxation (Cn. XI, Sec. 5), and exempts property which is used exclusively for agricultural and horticultural societies, for school, religious, cemetery and charitable purposes, property acquired and used exclusively for public highway purposes, and personal property to any amount not exceeding in value two hundred dollars for each individual liable to taxation. (Cn. XI Sec. 6) This section does not diminish the power of the Legislature to classify property for purposes of taxation. (National College of Business v. Pennington County, 82 SD 391, 146 NW 2d 731)

The Legislature has exercised this constitutional authority to classify property for tax purposes and to determine the taxes for the several classes. Chapter 10-4 of the SDCL generally defines what property is subject to taxation. All real property in this state, including the property of corporations and the property of banks and banking companies, except as expressly exempted, is subject to taxation. (SDCL 10-4-1) Real property is defined as the land itself and all buildings, structures, and mobile homes as they are defined in SDCL 32-3-1(14) which are permanently affixed by foundation to the land and all improvements either to the structures or the land. Mines, minerals, and quarries are also considered real property. (SDCL 10-4-2)

Subsequent sections of Chapter 10-4 define the limits and conditions upon the tax exemptions provided in the Constitution. It is important to municipal officials to note that the state and all political subdivisions of the state are required to file a report with the secretary of revenue of all its tax-exempt property. (SDCL 10-4-7) Also of importance is the requirement that the county director of equalization shall publish a list of all tax exempt property at least six days prior to the last Tuesday of March in the official newspapers published in the County. (SDCL 10-4-15.1) A periodic review to be held by the county board of equalization must be held on all tax-exempt property during every five-year period. (SDCL 10-4-21)

Before examining the assessment process, it will be helpful to note the statutory requirements relating to classification of property for tax purposes. Upon petition by at least twenty percent of the resident freeholder electors of the county, the board of county commissioners may authorize the classification of all real property in the county under the provisions of Chapter 10-10 of the SDCL. This petition must be filed with the county auditor before April first of the year in which the classification is sought. (SDCL 10-10-1)

If the county board of commissioners determines to have such property classified, they must adopt a resolution to that effect and certify the same to the Secretary of Revenue. Upon receipt of the resolution, the secretary of revenue appoints and employs a person competent to make such classifications. The appointment can only be made with the approval of the county commissioners. (SDCL 10-10-2)

The person employed to make the classification must then procure a list of all real estate within the county subject to taxation. (SDCL 10-10-4) In making the classification, he is required to personally inspect the real estate and place each legal subdivision in its proper class. He then enters each classification in a permanent record. (SDCL 10-10-5) It is the duty of the county commissioners to place a value on each separate tract of land and to insert the valuation on the classification record. (SDCL 10-10-7)

The importance of this to municipalities is that after classification and valuations are made it shall be the duty of the county auditor to deliver to each and every clerk of the respective townships and municipalities of their county, a copy of the classifications and valuations of the property within said respective political subdivisions. (SDCL 10-10-10)

Municipalities may be directly involved in the classification process under the provisions of Chapter 9-21A. It is the legislative intent and purpose of Chapter 9-21A pursuant to the provisions of Article XI, Section 2 of the South Dakota Constitution, that the property within the corporate limits of municipalities be classified as urban and rural for purposes of ad valorem property taxation. (SDCL 9-21A-1)

Accordingly, urban property is defined as all platted property developed for commercial, industrial or urban residential purposes within the corporate limits of municipalities of the first and second class and placed by the governing body within the urban service district as provided by chapter 9-21A. (SDCL 9-21A-2(3))

Rural property is defined as all platted or unplatted property which is not developed for commercial, industrial or urban residential purposes and is placed in the rural service district. (SDCL 9-21A-2(2))

The rural and urban service districts are to be established by ordinance and constitute separate taxing districts for the payment of municipal ad valorem property taxes. (SDCL 9-21A-3) Because the lands in the rural service district are not benefited by municipal services to the same degree as are other lands, the tax levy and assessed valuation can not exceed the average tax levy and assessed value on unannexed agricultural land in adjoining townships in the county. (SDCL 9-21A-4 and 9-21A-6)

The establishment of the two districts and the subsequent differences in tax levies does not apply to taxes levied for the payment of bonds. (SDCL 9-21A-3)

All property subject to taxation is required to be assessed annually, but the value of such property is to be determined according to its value on the first day of November preceding the assessment. (SDCL 10-6-105) The director of equalization shall mail or transmit electronically a notice of assessment along with notice of property tax reduction programs to each property owner not later than March first. (SDCL 10-6-154)

The county Director of Equalization compiles an assessment roll for each incorporated municipality, each organized civil township, and unorganized territory either within or without his county. A copy of the assessment roll must be furnished to each municipality requesting a copy by not later than the third Monday in March. (SDCL 10-3-28)

Property is required to be assessed at its fair market value as determined by appropriate consideration of the cost approach, the market approach, and the income approach to appraisal. The director of equalization may not adopt a lower or different standard of value. (SDCL 10-6-119)

The median sales to assessment ratio of all property may not be less than eighty-five percent or more than one hundred percent. The coefficient of dispersion may not be more than twenty-five percent. (SDCL 10-6-121; 10-6-122)

#### 12.110 Equalization, Review and Correction of Assessments

The statutory procedures for equalization of assessments are contained in SDCL chapter 10-11.

After the Director of Equalization has delivered the assessment rolls to the county auditor, it becomes the duty of the county auditor to add omitted property to the assessment rolls, as provided in SDCL 10-11-2 to 10-11-8 inclusive. (SDCL 10-11-1) These sections in general provide for the addition of property and valuations to the assessment rolls (SDCL 10-11-2), notice to the property owner before adding the property to the assessment roll (SDCL 10-11-3), and the addition of taxes to the omitted property. (SDCL 10-11-5)

### 12.120 Boards of Equalization

The major concern to municipal officials in the area of equalization, however, lies with the responsibilities of the local boards of equalization. The local board of equalization, composed of the municipal governing board, the municipal finance officer and a school board member, are required to meet on the third Monday of March at the office of the municipal finance officer for the purpose of equalizing the assessment of property in each township or municipality, and such equalization board shall immediately proceed to examine, ascertain and see that all taxable property in the respective township or municipality has been properly placed upon the assessment roll and has been duly valued by the assessor. (SDCL 10-11-13) They shall, within five consecutive days, complete the equalization. (SDCL 10-11-14) The Attorney General has informed the Department of Revenue that all persons comprising the equalization board as stated in SDCL 10-11-13 (this includes the school board member) are voting members of the board. The municipal finance officer is not a voting member of the board.

The clerk of the equalization board is the township clerk or the municipal finance officer. If no quorum is present, the clerk may adjourn from day to day, and publicly announce the time to which the meeting is adjourned. (SDCL 10-11-15)

All complaints and grievances of the individuals in the taxing district, in reference to the assessment of property, are heard and decided by the board of equalization. The person shall notify the clerk of the local board of equalization no later than the Thursday preceding the third Monday in March (SDCL 10-11-16) The local board of equalization is further empowered to add any omitted property to the assessment roll and to place the true value on it. (SDCL 10-11-19) The board shall notify each appellant of the decision affecting his property in writing seven days after the adjournment of the local board of equalization (SDCL 10-11-16.1)

After completing the equalization, and on or before the fourth Monday of March, the clerk of the equalization board is required to deliver the assessment roll to the Director of Equalization with records of proceedings and a certificate that the assessment roll is correct as equalized by the local board of equalization and that the assessment roll should be accepted. (SDCL 10-11-21)

Other sections of SDCL chapter 10-11 delineate the procedures for appeals to the county board of equalization and changes of valuation of classes of property.

Local boards also have the option of consolidating the hearing process by dissolving the local board and meeting as one board with the county commissioners. Boards choosing to consolidate must agree upon membership on the board no later than the second Tuesday of November. The majority of the board always must consist of county commissioners. Consolidating entities may determine time and place of meetings and expenses as mutually agreed upon. (SDCL 10-11-66) The board may begin hearing appeals on the second Tuesday in April and may meet no longer than three weeks. Members of the board may vote on only the equalization of property from within that member's taxing district. (SDCL 10-11-71) All provisions regarding the consolidated board are in SDCL 10-11-66 through 77.

## **12.130 PROPERTY TAX REDUCTIONS**

- 12.134 Property Tax Reductions for Economic Development
- 12.135 New Residential Structures or Additions
- 12.136 Municipal Property Tax Reductions for Elderly and Disabled

Municipalities have been given the authority to specifically classify property for reduced taxation to encourage economic development, housing, and to reduce municipal property taxes for the elderly and disabled.

### 12.134 Property Tax Reductions for Economic Development

If the board of county commissioners of a county has not adopted a formula pursuant to SDCL 10-6-137, the governing board of a municipality where the structures are located, or within three miles of the corporate limits, may at their discretion adopt all or any part of the formula for assessed value pursuant to SDCL 10-6-137. (SDCL 10-6-138) For purposes of state aid to education, the state recognizes the following valuation in each year of the discretionary formula: 20 percent the first year; 40 percent the second; 60 percent the third; 80 percent the fourth, and 100 the fifth. (SDCL 13-13-20.4)

Any second- or third-class municipality may rebate the municipal property taxes paid by any industry that furthers the municipality's industrial development goals. Any such municipality shall, by ordinance, develop a program that provides for the type of industry that qualifies for the rebate, the length of time the rebate may apply, and the criteria the industry shall meet to qualify for the rebate. (SDCL 9-12-21)

### 12.135 New Residential Structures or Additions

New residential structures or additions to existing structures which are in a redevelopment neighborhood, as defined by SDCL 10-6-141, may be assessed using a discretionary assessment formula pursuant to SDCL 10-6-137. (SDCL 10-6-141; 10-6-142) A commercial residential structure with four or more units may be assessed using a discretionary assessment formula pursuant to SDCL 10-6-137. The boundaries of the redevelopment neighborhood need not be contiguous. (SDCL 10-6-141)

For residential property described in SDCL 10-6-137 (5), (6), and (7), the governing body of a municipality may adopt a formula that differs from any formula adopted by the board of county commissioners. (SDCL 10-6-138) The discretionary formula for residential properties described in SDCL 10-6-137 (5), (6), and (7), must include reductions outlined in SDCL 10-6-137.1, which allows the reductions for a period of seven years.

Any municipality may rebate the municipal property taxes paid on housing that furthers the municipality's housing goals. Any such municipality shall, by ordinance, develop a program that provides for the type of housing that qualifies for the rebate, the length of time the rebate may apply, and the criteria the housing shall meet in order to qualify for the rebate. (SDCL 11-7A-8)

### 12.136 Municipal Property Tax Reductions for Elderly and Disabled

The governing board of a municipality may, by resolution, adopt the provisions of SDCL chapter 10-6B to reduce the property taxes for the elderly and disabled. (SDCL 10-6B-2) In addition, counties may prohibit collection of property taxes on single-family homes under certain circumstances. (SDCL 10-6C-1 through 10-6C-11) Finally, the county is authorized to establish a public works program to provide work for any person for the purpose of providing income for the payment of the property taxes on the person's single-family dwelling. The program may include any unit of government within the county. (SDCL 7-8-39 and 7-8-40)

**12.150 TAX LEVIES**

12.155 Tax Levies and Limitations

12.160 Special Assessments

12.156 Tax Levies for Municipal Bonds

12.170 Property Tax Reform Act of 1995

**12.155 Tax Levies and Limitations**

The preceding section served to acquaint the municipal official, in a general fashion, with the manner in which property is assessed for tax purposes. With an estimate of expenses and assessed valuation serving as a background, consideration can now be given to determining the tax levies.

The 1988 Legislature passed legislation substituting the term "tax levy" for all references to "mill levy." As future supplements and revisions of the South Dakota Codified Laws are printed that change will be made. The term "one mill" wherever it is used in state law means "one dollar per thousand dollars of taxable valuation."

The annual tax levy is to be included in the annual appropriation ordinance. (SDCL 9-21-19) Upon the passage and publication of the annual appropriation ordinance, the tax levies contained must be certified to the county auditor. (SDCL 9-21-20) The rate percent of all municipal taxes must be calculated and fixed by the county auditor in dollars and cents within the limitation prescribed by law. (SDCL 10-17-2) The maximum rate of the tax levies in municipalities can not exceed twenty-seven dollars per thousand dollars of taxable value. (SDCL 10-12-32)

In general, when statute authorizes a municipality to provide some type of service and appropriate funds for the support of that service, these appropriations are to be kept within the general tax levy limitation as established by SDCL 10-12-32. Some examples of this are:

- 1) providing ambulance service; (SDCL 34-11-1)
- 2) providing bus service; (SDCL 9-35-12)
- 3) supporting the civil air patrol; (SDCL 9-21-5) and
- 4) supporting mental health. (SDCL 27A-5-9)

There are some cases where funds are not only required to be placed within the general tax limit but are also subject to other restrictions. These are essentially restrictions on the tax levy for creating the fund and restrictions in the way monies may be expended from the fund.

The governing body may establish a casualty reserve fund for the purpose of paying the expenses to replace and repair property of the municipality which was damaged or lost as a result of a casualty loss. At no time can the money in this fund exceed one hundred thousand dollars. (SDCL 9-21-16.1)

Municipalities can levy taxes in excess of the general tax levy limit in only a few instances, including the following:

- 1) **Emergency Replacement or Repair.** When a municipality as the result of some casualty, accident, or event, does not have the necessary funds available to replace, repair or improve some service which is provided by the municipality, the governing body can borrow in the name of the municipality, an amount sufficient to cover the costs incurred by the emergency replacement or repair. The principal and interest are then added to the tax levy for the next year. (SDCL 9-21-15)

- 2) Judgments. If any judgment is obtained against the municipality, it may borrow for a period of time not exceeding the close of the fiscal year a sum sufficient to pay the judgment, if a tax levy of ten dollars per thousand dollars of the taxable valuation of the municipality will be sufficient to pay all judgments subsisting and final at the time of making the levy. No tax levy greater than ten dollars per thousand dollars of taxable valuation may be made in any one year for the payment of a judgment or judgments. If a levy of ten dollars per thousand dollars of taxable valuation per year on such valuation will be insufficient to pay any final judgment within ten years from the date it becomes final in a municipality with a population in excess of five hundred, a tax levy may be made of any amount sufficient to pay every judgment and the interest thereon in ten equal installments with ten years from the date it becomes final. In a municipality with a population of five hundred or less a tax levy of ten dollars per thousand dollars of taxable valuation of such municipality may be made for the payment of the judgment and the interest thereon. However, the levy may not be made for a period in excess of nineteen years for the purpose of any one judgment. (SDCL 9-21-17)

#### 12.156 Tax Levies for Municipal Bonds

One special area concerning tax levies in addition to the general tax levy limit is the special levies in connection with municipal bonds. In general, it is provided that the levy limits fixed by Chapter 10-12 shall not be construed to limit or include any levy or levies made to pay the annual interest on the bonded indebtedness of any taxing district at the maturity thereof; nor shall the levy limits fixed by this chapter include the levies for any purpose which have been or may hereafter be, authorized by a vote of the people. (SDCL 10-12-35) This applies to the following cases:

- 1) Levy for Retirement of General Obligation Bonds. Statute provides for the governing body to levy a tax in an amount sufficient to pay the principal and the interest on the general obligation bonds. (SDCL 9-26-25)
- 2) Levy to Retire Bonds Held by Sinking Funds. When the sinking fund is invested in other funds of the municipal corporation, the governing body is required to levy a tax of sufficient amount to pay the interest and the principal thereof when due. (SDCL 9-22-14)
- 3) Levy for Municipal Improvement Bonds. Municipalities can pay up to one-half of the total principal and interest due on municipal improvement bonds through ad valorem property taxation. Before delivering municipal improvement bonds, the governing body must direct an annual irrevocable tax on the property in the municipality to pay the proportionate part of each installment of principal and interest as the same becomes due. Said tax may not exceed the part of principal and interest so payable by more than five percent. (SDCL 9-44-6)
- 4) Levy for Municipal Improvement Bonds on Deficiency in Improvement Fund. In the event of a deficiency in the improvement fund, the governing body is authorized to levy a tax sufficient to pay the deficiency. These taxes can not exceed by more than five percent the deficiency for which they are levied. (SDCL 9-44-8)
- 5) Levy for Principal and Interest on Revenue Bonds Issued for Parking Facilities. Municipalities may decide to pay any part of the principal and interest incurred from the issuance of revenue bonds for parking facilities through ad valorem property taxation. The tax levy must be in amounts sufficient to pay the proportionate parts of the principal and interest of the bonds when they become due. The levy may not exceed by more than five percent the proportionate part of the principal and interest when due. (SDCL 9-51-24)
- 6) Levy for Deficiency in Fund Account of Revenue Bond Issued for Parking Facilities. In the event a deficiency occurs in the fund account of revenue bonds issued for parking facilities, the governing body can levy a tax sufficient to pay the deficiency provided the levy does not exceed by more than five percent the deficiency for which they are levied. (SDCL 9-51-25)
- 7) Levy for Principal and Interest on Revenue Bonds Issued for Parking Facilities Prior to Issuing the Bonds. Before the governing body issues revenue bonds for parking facilities, it may direct the county auditor to levy a tax sufficient to pay all the annual interest and principal of the bonds when they become due. (SDCL 9-51-26)

### 12.160 Special Assessments

A special kind of tax which can be used as a revenue source to finance improvements is the special assessment. The State Constitution provides that the Legislature may vest the corporate authority of municipalities with the power to make local improvements by special taxation of continuous property or otherwise. For all corporate purposes, all municipal corporations may be vested with authority to assess and collect taxes; but such tax shall be uniform in respect to persons and property within the jurisdiction of the body levying the tax. (Cn. XI, Sec. 10)

Special assessments may be used for local improvements, which are defined as: “The process of building, altering, repairing, improving, or demolishing any local infrastructure facility, including any structure, building, or other improvement of any kind to real property...” (SDCL 9-43-75)

Special assessments may be used to assess the amount equal to the special benefit received by property specially benefitting from the local improvements after an investigation by the governing body to determine the amount of benefit from construction of the local improvement to the lots and tracts fronting or abutting the improvement (SDCL 9-43-78 and 9-43-79).

Assessments may be used in combination (for example, assessing for the costs associated with the water and sewer facilities, along with the overlying street). Municipalities may create a delayed special assessment for land outside of city limits. Collection of the assessment cannot occur until after annexation occurs. (SDCL 9-43-78) Special assessments may be used alone to finance a project, or in combination with general funds, bonds, or other financing mechanisms. (SDCL 9-43-77)

A municipality may make the determination that the improvement is necessary, or landowners may petition for local improvements. (SDCL 9-43-76)

#### **Special Assessment Districts**

The governing body of any municipality may establish one or more districts for the construction and maintenance of local improvements. The governing body may establish or modify the boundary of the district, construct improvements or portions of improvements, and assess the amount of the special benefit of the improvement to the property within the district. See the provisions of SDCL 9-43-127 through 9-43-133 for more information on using special assessment districts.

If any lot is subject to assessment both as fronting and abutting property, and as property within the district or area benefited by the local improvement, the governing body may use the sum of both assessments in the assessment roll against each such lot. (SDCL 9-43-133)

The total benefit of an improvement may equal the total cost of the improvement, including the contract price and all the engineering, inspection, publication, fiscal, legal, and other expenses associated with the improvement, but the amount of the assessment must be for the special benefit received. (SDCL 9-43-80)

#### **Proposed Resolution of Necessity**

The governing body shall cause a draft resolution of necessity to be prepared. The proposed resolution of necessity must include:

- The general nature of the proposed improvement
- The material to be used or materials from which a choice may be made;
- An estimate of the total cost or cost per linear foot;
- A description of the classes of lots to be assessed and of the method of apportioning the benefits to the lots;
- A statement that the details, plans, and specifications may be reviewed at the finance office during regular office hours.

The proposed resolution of necessity may include:

- A provision that the municipality will assume and pay any portion of the cost of the improvement (this may also be provided by a subsequent resolution)
- A provision that the municipality will pay any definite, specified portion or all of the cost of the improvements in street and alley intersections;
- A provision that the municipality will pay any definite, specified portion or all of the cost of improvement fronting or abutting the side of a corner lot; or that that portion of the cost may be spread as an area tax on the properties benefitting from the improvement;
- A provision stating whether the assessments and installments are payable under Plan One or Plan Two (see pages 7-8). (this step MUST be done before any contracts are let, (SDCL 9-43-102) but may be done by separate resolution or ordinance.) This step may also provide for the assessment to be divided into any number of annual installments, not exceeding forty.

Multiple improvements may be included in one resolution of necessity if the general nature of each improvement is stated. (SDCL 9-43-82)

#### **Notice of Hearing – Proposed Resolution of Necessity**

Notice of hearing on the proposed resolution of necessity is published once in the official newspaper, not less than ten nor more than twenty days prior to the hearing. The notice of hearing shall include the time and place of the hearing and a statement that the governing body will consider any objections to the proposed resolution of necessity by owners of the property liable to be assessed. (SDCL 9-43-83)

#### **Mailing to Property Owners – Proposed Resolution of Necessity**

The Governing body must mail a copy of the notice of hearing and the proposed resolution of necessity to each person owning property liable to be assessed. This mailing must be not less than ten nor more than twenty days before the hearing on the adoption of the proposed resolution of necessity and is sent by either first class or certified mail. (SDCL 9-43-84)

#### **Hearing - Proposed Resolution of Necessity**

A hearing is held where the governing body considers objections to the proposed resolution of necessity, and may adopt the resolution, with or without amendment. No amendment may be made affecting property of any class not included in the original proposed resolution unless the owner of the property has been given the same notice and opportunity for hearing as were the classes originally included. (SDCL 9-43-85) If the resolution of necessity is adopted and is not referred to a vote or suspended by written petition by owners of more than 55% of the property to be assessed, it becomes effective twenty days after publication of the adopted resolution. Upon a two-thirds vote of the governing body, a protest petition may be denied, and the governing body may cause the local improvement to be made. (SDCL 9-43-86)

Once the resolution of necessity is effective, the governing body may contract for the improvement and levy the assessments. (SDCL 9-43-86)

#### **Plans and Specifications**

Once a municipality determines improvements are necessary and will be financed in whole or in part by special assessments, plans and specifications must be developed by the city engineer or another competent person. The plans and specs are filed in the office of the finance officer, and must show the location, arrangement, form, size, and materials to be used in the construction. The plans and specifications are to be filed in the office of the finance officer and must be available for inspection by any interested person. (SDCL 9-43-81)

#### **Bid Project; Award Contract; Construct Project**

Follow all bid and procedures before awarding the contract.

**Bonding**

The governing body may provide for the issuance of negotiable bonds without a vote of the public in an amount not to exceed the entire cost of the local improvement. The bonds shall be issued and sold in accordance with state law, except that all bonds shall mature not later than one year after the maturity of the last assessment installment. A single issue may be sold to finance several improvements. See the provisions of Chapters 9-43 and 6-8B and consult your city attorney for more information on bonding with special assessments.

The interest rate to be charged on the special assessment is set by the governing body in a separate resolution and usually done after the bonds are issued. (SDCL 9-43-114 through 9-43-119)

**Filing of the Special Assessment Roll with the Finance Officer**

Although the special assessment roll does not need to be created until construction is complete and all construction change orders are determined, at any time after the contracts are signed, the governing body may file the special assessment roll with the finance officer. The special assessment roll must show:

- The name of the owner of each lot to be assessed;
- The legal description of each parcel of land to be assessed; and
- The amount assessed against each lot. (SDCL 9-43-87)

**If the special assessment is payable in installments, the special assessment roll shall specify:**

- The number of installments;
- The rate of interest that deferred installments will bear;
- A statement that the whole assessment or any installment may be paid at any time; and
- A statement that all installments paid before their respective due dates are deemed paid in inverse order of their due dates. (SDCL 9-43-89)

**Notice of Hearing – Special Assessment Roll**

After filing the special assessment roll with the finance officer, the governing body shall set a time and place for hearing on the special assessment roll.

Notice of hearing on the special assessment roll is published once, not less than 10 nor more than 20 days prior to the hearing, and must include:

- A general description of the improvement for which the special assessment is being levied;
- The time and place of the hearing;
- A statement that the special assessment roll will be open for public inspection at the office of the finance officer; and
- A statement that refers to the special assessment roll for further particulars. (SDCL 9-43-90)

**Mailing to Property Owners – Special Assessment Roll**

A copy of the notice of hearing on the special assessment roll and a copy of the special assessment roll must be mailed to the property owners to be assessed for the improvement. This mailing shall be made not less than 10 nor more than 20 days prior to the hearing. (SDCL 9-43-90)

**Hearing – Special Assessment Roll**

A hearing is held, and the governing body may approve, equalize, amend, or reject the assessment roll. (SDCL 9-43-91)

**If the special assessment roll is rejected**, the governing body may file a new one, and notice and hearing provisions are repeated as with the original. (SDCL 9-43-92)

**If the special assessment roll is equalized or amended**, a list of all items of assessment changed or amended shall be published and notice and hearing shall be held as with the original special assessment roll. (SDCL 9-43-93)

**If the special assessment roll is approved, or after any corrections have been made,** the governing body must adopt a resolution to approve and levy the assessment. This resolution must include:

- An amount and type of the assessment;
- A description of the local improvement;
- The date of the official approval of the special assessment roll;
- A statement specifying under which plan the assessment and installments shall be paid – Plan One (collection by the county treasurer) or Plan Two (collection by the municipal finance officer). **THIS DECISION MUST BE MADE BEFORE CONTRACTS ARE LET.** (SDCL 9-43-95)

The resolution adopting the special assessment roll is published, and becomes effective 20 days after publication, unless suspended by appeal to circuit court. Within twenty days of the publication of the resolution adopting the special assessment roll, that resolution may be appealed to circuit court. (SDCL 9-43-96)

**Preparing the Special Record**

Once effective, the assessment roll is recorded by the finance officer in a special record, and notice is mailed to each affected landowner. (SDCL 9-43-99)

The finance office must number each item of assessment consecutively, without regard to date, character of improvement, or description of property. No number may be duplicated. (SDCL 9-43-98)

The special record shall contain:

- A record of all special assessments;
- The consecutive number of the item;
- The date the assessment is due;
- The name of the property owner;
- The legal description of the property;
- The amount assessed against each lot;
- The character of the improvement for which the assessment is made;
- The date of payment of each assessment or installment that is made to the municipality; and
- A suitable index to the real property against which special assessments have been levied. (SDCL 9-43-98)

**Mailing to Property Owners – Notice of Special Assessment**

The finance officer shall mail to the owners of each lot, parcel, or piece of land as shown by the special assessment roll, a notice specifying:

- The amount of the assessment;
- The number of installments;
- The date of the approval of the assessment roll; and
- A statement that any number of the installments may be paid without interest at the office of the finance officer within thirty days from the date of the approval of the roll, after which the unpaid balance will draw interest at the rate fixed by the governing body from the date of the approval of the assessment roll. (SDCL 9-43-99)

**Collection of the Assessments**

Special assessments may be collected under Plan One (collection by the county treasurer) or Plan Two (collection by the municipal finance officer). (SDCL 9-43-102)

<b>Plan One - Collection by County</b>	<b>Plan Two - Collection by Municipality</b>
--	--

Any assessment or installment may be paid without interest to the municipal finance officer at any time within thirty days after the approval of the assessment roll. Thereafter, and before the due date of the first installment, the entire assessment remaining, or any number of installments, plus interest from the approval date of to the date of payment may be paid to the municipal finance officer. (SDCL 9-43-104)

Installments are due and payable on January 1<sup>st</sup> of each year until the entire assessment is paid.

<b>Plan One - Collection by County</b>	<b>Plan Two - Collection by Municipality</b>
--	--

The first payment is due on January 1<sup>st</sup> following the date of approval of the assessment roll. (SDCL 9-43-103)

After the due date of the first installment, if the installments that are due, together with the interest have been paid, any of the remaining installments not yet due may be paid without additional interest to the municipal finance officer. (SDCL 9-43-104)

All installments paid before their respective due dates shall be paid in inverse order of their due dates. (SDCL 9-43-104)

The assessment roll shall be delivered no later than November 1 following the date of approval of the special assessment roll, or at the expiration of the thirty-day period for prepayment without interest, whichever is later. (SDCL 9-43-105)

Before delivering the assessment roll to the county auditor, the finance officer shall cancel in inverse order of their due dates all installments of any assessment previously paid. (SDCL 9-43-105)

No installment may be paid to the municipal finance officer on or after January 1 after certification to the county auditor. (SDCL 9-43-107)

The county auditor shall include each installment, including interest upon that installment and all subsequent unpaid installments, in the taxes collectible in the year in which the installment is due. (SDCL 9-43-108)

No later than November 1, the finance officer shall deliver to the county auditor all special assessments remaining unpaid that have become delinquent on or before October 1. The county auditor shall include the delinquent installment and accrued interest in the following year at the time the real property tax is paid, and shall certify the installment and interest, together with the general taxes, to the county treasurer for collection. (SDCL 9-43-106)

After delivery of the assessment role to the county auditor, the finance officer shall promptly notify the county auditor of all delinquent installments of assessments paid to the finance officer prior to January first and the auditor shall cancel the delinquent installment. (SDCL 9-43-106)

The first installment shall include interest from the date of approval of the special assessment roll to May 1 of the year in which the first installment is due. Each subsequent installment shall include one year's interest. Each installment, including interest, becomes delinquent on May 1 of the year in which it becomes due, and shall have interest and penalty added each month at the same rate as provided for delinquent real estate taxes. (SDCL 9-43-109)

All proceeds of special assessments shall be paid to the finance officer of the municipality with the proceeds of other taxes. (SDCL 9-43-111)

If the combined taxes and special assessment installments under Plan One, or delinquent assessments under Plan Two are not paid, the parcel may be sold for all such taxes and assessments in the manner for delinquent real estate taxes. (SDCL 9-43-112)

**Maintenance Fees**

The governing body may annually, by resolution, levy a special maintenance fee for the purpose of maintaining or repairing any public improvements within the municipality, which are maintained by the municipality. The governing body may designate the lot or portion of lots against which a maintenance fee is to be assessed. The maintenance fee may be directly billed by the municipality to the property owners or may be collected by the county with real estate tax assessments. Lots with a tax freeze under SDCL Chapter 10-6A (dwellings of disabled and senior citizens) or classified as agricultural may be exempted from this fee. (SDCL 9-43-138)

**12.170 Property Tax Reform Act of 1995**

Beginning with taxes payable in 1997 and thereafter, increases in property taxes payable are limited to the lesser of three percent or the rate of inflation. After applying the index factor, a municipality may increase the revenue payable from taxes on real property by the percentage increase of value resulting from:

1. Any improvements or change in use of real property, annexation, or minor boundary changes, or
2. Any adjustments in taxation of property separately classified and subject to statutory adjustments and reduction under chapters 10-4, 10-6, 10-6A, and 10-6B only if assessed the same as property of equal value. For taxes payable in 2027-2031, an increase in revenue payable to the municipality allowed under this paragraph may not exceed three percent. (except 10-6-113). (SDCL 10-13-35)

A municipality may also increase the revenue it receives from taxes on real property to pay the principal, interest, and redemption charges on any bonds issued after January 1, 1997, which are subject to referendum, scheduled payment increases on bonds and for a levy directed by the order of a court for the purpose of paying a judgment against the municipality. For the purposes of this section, an increase in value resulting from an improvement made to owner-occupied, single-family dwellings does not include additions, improvements to existing structures that result in a value increase of 40% or less. (SDCL 10-13-35)

A taxing district may also increase property tax revenues with a corresponding reduction in revenue in another taxing district for the purpose of consolidating services. The taxing districts must enter into an agreement prescribing the amount of taxing authority to be transferred. (SDCL 10-13-35.1)

The governing body of the municipality may impose an excess tax levy with an affirmative two-thirds vote of the governing body on or before July fifteenth of the year prior to the year the taxes are payable. The decision to increase taxes must be published within 10 days of the decision, must specify the year or number of years the excess tax levy will apply, and may be referred upon resolution of the governing body of the municipality or by a petition signed by at least five percent of the registered voters in the municipality and filed within twenty days of the decision. The referendum election shall be held on or before October first preceding the year the taxes are payable. Specific publication requirements must also be followed. (SDCL 10-13-36)

**12.200 COLLECTION AND TRANSFER: PROPERTY TAXES AND SPECIAL ASSESSMENTS**

Each county treasurer shall mail or transmit electronically a written tax bill to each taxpayer against whom a property tax has been assessed. The tax bills shall show a tax total for each taxing district and shall separately state the amount of any taxes due as a result of a local decision to opt out of the tax limits. (SDCL 10-21-1.1)

The county treasurer is responsible for collecting all taxes which are on the tax list and all delinquent taxes. Once collected, the money is credited to the proper fund. (SDCL 10-21-1) The county treasurer is required to pay over to the municipal treasurer all money belonging to the municipality which was raised by taxes levied and collected. (SDCL 10-21-27)

The county auditor shall, by the twentieth day of the month, transfer all money received during the prior month on behalf of the municipality. Any county failing to distribute the receipts within the time prescribed is subject to an interest charge of one percent per month. (SDCL 9-21-29)

Collection of delinquent special assessment taxes under Plan One and Two provide for the sale of the property for taxes. Municipal officials should refer to this Handbook Section 14.110 for information relating to sale of property for delinquent taxes.

**12.250 MISCELLANEOUS SOURCES OF INCOME**

- 12.255 Income from Other Agencies
- 12.260 Municipal Sales Tax
- 12.270 Municipal Excise Tax
- 12.280 Municipal Motor Vehicle Fuel Tax

**12.255 Income from Other Agencies**

Municipalities have a revenue source in the taxes and fees levied by other governmental units. This can range from revenue sharing to the liquor license reversions. Rather than examine the statutory regulations in each of these areas, a list of the major taxes and fees shared with the municipality will follow:

- 1) County General Road Levy. An amount equal to the average road levy distributed to the municipalities within the county for calendar years 1984, 1985 and 1986 shall be paid by the county to the municipality for bridge and street purposes within the municipality. (SDCL 10-12-9(4))
- 2) County Highway and Bridge Reserve Fund. Twenty-five percent of the funds collected from within the municipalities of the county by the county from the special levy for the county highway and bridge reserve fund is returned to the municipalities for the purposes of matching federal aid grants. The reserve fund is earmarked for bridge and street purposes. A discretionary amount may be imposed by the board of county commissioners. (SDCL 10-12-13, 10-12-14)
- 3) Fire Insurance Taxation. Each fire department having not less than fifteen members and a pumper housed in a heated building and having filed the proper forms with the state department of Public Safety, is eligible to receive funds from the fire insurance premiums tax. The funds are transmitted from the state auditor to the county commissioners, who pro rate the funds according to population and assessed valuation to all fire departments servicing the county. No department shall receive funds at an amount less than that received on July 1, 1989. (SDCL 10-44-9.1) The money is sent directly to the fire department, not to the municipality.
- 4) Franchise Tax on Banks. The franchise tax on banks is based upon the net income of the corporation and measured by the net income assignable to South Dakota. The Secretary of Revenue shall retain 26 2/3 percent in the state general fund. The remainder is distributed to the respective county treasurers where the financial institutions are located which paid the tax, on or before February 1 of each year. The county treasurers apportion and distribute the funds among the taxing subdivisions, including the county, in the same proportion as the average of personal property taxes assessed in each taxing subdivision for calendar years 1972-76. Banks commonly called "Credit Card Banks" have the same tax rate as all other banks. However, 95 percent of the taxes paid by them is retained by the state. Five percent of the taxes paid by "Credit Card Banks" is remitted, on or before February first to the county treasurer and are distributed in the same manner as other bank franchise taxes. (SDCL 10-43-4; 10-43-76; 10-43-77)
- 5) Liquor Tax and Licenses. Twenty-five percent of all the revenues deposited in the liquor beverage fund shall revert to the municipalities. The share is paid to municipalities on a population ratio basis no later than the first of February, May, August, and November. (SDCL 35-5-22; See Hdbk., sec. 11.600)
- 6) Motor Vehicle License Fees. Five percent of the funds collected by the county for motor vehicle licenses are given the municipalities in proportion to the total street mileage of each municipality as it bears to the total street mileage of all municipalities within the county. (SDCL 32-11-4.1) In addition, fifty-four percent of all funds collected for motor vehicle licenses in each county shall be transmitted to the local government highway and bridge fund. Each county, municipality, and township will receive a portion of the fund for the purpose of constructing and maintaining highways, streets, and bridges on their highway and street systems. The money will be appropriated to the local government highway and bridge fund by the fifteenth of each January, May, July, and October. (SDCL 32-11-4.1; 32-11-32 through 32-11-35)
- 7) Wheel Tax. Counties have the authority to impose by ordinance a wheel tax on all motor vehicles. (SDCL 32-5A-1) County wheel tax must be distributed among the county, the municipalities, and the townships within the county. (SDCL 32-5A-2)
- 8) Video Lottery Machines. Municipalities may impose a fee for the privilege of locating video lottery machines on certain licensed premises. If a person holds an alcoholic beverage license and is issued a video lottery establishment license, the municipality issuing the alcohol license may charge a fee not to exceed \$50 per year per video lottery machine. The proceeds from the fee are to be deposited in the general fund. The fee is in addition to any alcoholic beverage licensing fee or video lottery establishment license fee. The municipality may not impose this additional fee on more than one license per location. (SDCL 35-4-103)

### 12.260 Municipal Sales Tax

Any incorporated municipality in the state can impose any non ad valorem tax in accordance with the provisions of Chapter 10-52 and 10-52A of the SDCL. This tax can be enacted by ordinance. (SDCL 10-52-2) Because the tax is adopted by an ordinance of the governing body, it is subject to the referendum. (SDCL 10-52-3) More specific referendum provisions can be found in SDCL 10-52-3.

Municipalities are only allowed to impose or amend a municipal tax ordinance twice a year. The effective date must fall on either January first or July first of the calendar year. The municipality must notify the Department of Revenue of the ordinance at least ninety days prior to the effective date. If a municipal tax ordinance is referred, the effective date cannot be less than ninety days following voter approval. (SDCL 10-52-9; 10-52A-13)

Any tax imposed under the provisions of Chapter 10-52 is administered by the State Department of Revenue. (SDCL 10-52-4) The monies received and collected on behalf of a particular municipality by the Department of Revenue are credited to a special municipal non-ad valorem tax fund. Disbursements from this fund must be made to the municipality within thirty days after collection. The amount of the disbursements is to equal the total amount collected minus the amount of refunds made, the amounts necessary to defray the cost of collecting the tax, and the incidental administrative expenses. (SDCL 10-52-5)

Any municipality may impose an additional one percent sales tax on the gross receipts of all leases or rentals of hotel, motel, campsites, or other lodging for periods of less than 28 days, sales of alcoholic beverages; establishments where the public is invited to eat, dine or purchase carry out prepared food and ticket sales on admissions to places of amusement, athletic and cultural events or any combination thereof. The money raised by this special sales tax can only be used for land acquisition, architectural fees, construction costs, payments for civic center, auditorium, or athletic facility buildings, including the maintenance, staffing and operation of such facilities and the promotion and advertising of the municipality. (SDCL 10-52A-2) (for more information on promotion of the municipality see Hdbk., sec. 3.287)

Any incorporated municipality may impose a sales tax at a municipally owned airport outside the municipality's corporate limits by ordinance enacted by its local governing board. The municipality shall levy a rate of taxation and apply the tax in the same manner that the municipality applies the tax within the municipal corporate limits. (SDCL 10-52-2.11)

### 12.270 Municipal Excise Tax

Any municipality which has not enacted a municipal sales tax may impose an excise tax on contractors gross receipts at a rate not to exceed one-half percent. (SDCL 10-46A-11; 10-46B-9)

### 12.280 Municipal Motor Vehicle Fuel Tax

A second or third class municipality may levy a tax on the sale or use of motor and special fuel by motor vehicles operated upon public streets and highways. This tax may not exceed the rate of one percent per gallon. (SDCL 10-52-2.2)

A municipality may not impose both a municipal non-ad valorem tax and a tax on motor fuel. (SDCL 10-52-2.3)

**12.300 MUNICIPAL BONDS**

12.305 Municipal Bonds in General  
 12.310 Refunding Public Bonds  
 12.315 General Obligation Bonds  
 12.320 Special Assessment Bonds  
 12.325 Revenue Bonds

12.330 Revenue Bonds for Economic Development  
 Projects  
 12.340 Sales Tax Bonds  
 12.345 Business Improvement Districts

**12.305 Municipal Bonds in General**

A bond is any obligation for the repayment of a specified sum of money at a specified future date due to the borrowing of money. This is very broad and includes revenue, special assessment and general obligation bonds, as well as promissory notes, loans, financing agreements, and many leases. (SDCL 6-8B-1(1))

Unless otherwise provided, no bonds may be issued either for general or special purposes by any public body without approval of sixty percent of the voters. The election shall be held in the manner described by law for other elections of the public body. (SDCL 6-8B-2)

If it is determined by the governing body to be necessary to issue bonds, the governing body may by resolution or ordinance declare the necessity of the bonds and submit the question to the voters. The resolution or ordinance must include the purpose for which the bonds are to be issued and the maximum amount of the bonds. The resolution or ordinance may also include the maximum interest rate and the maximum time within which the bonds shall become due and payable or other matters the governing body determines relevant. (SDCL 6-8B-3)

The notice of election shall be published once each week for two consecutive weeks. The second notice must be published not less than four nor more than ten days before the election. The notice shall state the maximum amount of the bonds, the purpose of the bonds and other matters the governing body determines necessary. (SDCL 6-8B-4) The ballot form is described in SDCL 6-8B-5.

If the bond issue is approved by the voters, the governing body may issue bonds without further action. (SDCL 6-8B-8) Bonds may be issued in one or more series may bear the date or dates and mature at the time or times and in amounts determined by the governing body except that no bond may mature more than fifty years from the date of issue. The governing body also determines the interest rates and conditions of redemption. (SDCL 6-8B-9) Federal law now requires that bonds be issued in registered form.

The governing body may sell its bonds at public or private sale. If the governing body determines to sell bonds at public sale, the sale must be advertised once a week for at least two consecutive weeks. The first publication must be at least ten days before the sale. The notice of sale must describe the bond issue, the time and place of sale, the method of competitive bidding and the place where bids will be received. (SDCL 6-8B-10)

Bonds separately voted for two or more purposes may be sold and delivered as a single issue if the governing body so determines. (SDCL 6-8B-11)

The proceeds derived from the sale of any bonds shall be kept as a special fund apart from the other funds of the municipality and can only be used for the purpose for which the bonds were issued. (SDCL 6-8B-13) However, the municipality may transfer funds raised for the purpose of paying the principal and interest on bond indebtedness if enough money is retained in the fund to retire all outstanding bonds and to pay any interest which will accrue on the bonds. (SDCL 9-21-27)

Every public body issuing any general obligation, revenue, improvements, industrial revenue, special assessment, or other bonds of any type, shall file with the secretary of state the following information concerning each issue of bonds:

- 1) Name of issuer;
- 2) Designation of issue;
- 3) Date of issue;
- 4) Purpose of issue;
- 5) Type of bond;
- 6) Principal amount and denomination of bond;
- 7) Paying dates of principal and interest;
- 8) Amortization schedule;
- 9) Interest rate or rates, including total aggregate interest cost. (SDCL 6-8B-19)

The question of the issuance of bonds for the purchase or the construction of any building, facility, or improvement may be treated and submitted as a single proposition. The authorization of bonds for the purchase or construction of any building, facility, or improvement, is to be interpreted as including the authorization to expend the proceeds for any equipment and furnishings, the purchase of land, and the payment of all fees and expenses reasonably necessary for the intended purpose. Expenditures for the above purposes do not need to be included in the annual appropriation ordinance. (SDCL 6-8B-6)

All bonds are to be executed as contracts (SDCL 9-25-2; See Hdbk., sec. 13.150), and the finance officer must keep a list of outstanding municipal bonds showing to whom the bonds were issued, for what purpose, and rate of interest which they respectively bear. (SDCL 9-22-22; See Hdbk., sec. 12.055, 12.070, 12.075) However, the governing body may appoint a registrar, transfer, authenticating, and paying agent to perform these functions. (SDCL 6-8B-16) The ownership records are not open for public inspection or copying and the information shall not be disclosed. (SDCL 6-8B-18) Facsimile signatures are authorized for the execution of the bonds. (SDCL 6-8B-17)

Every bond must be countersigned by a duly licensed attorney residing in the State of South Dakota. (SDCL 6-8B-21)

Except for taxes imposed upon financial institutions pursuant to Chapter 10-43, the public bonds issued under Chapter 6-8B, their transfer, and the income derived from these bonds, are at all times free from taxation within the state of South Dakota. (SDCL 6-8B-25)

### 12.310 Refunding Public Bonds

Any bond may be refunded whether the bonds have matured or are then subject to redemption, without an election except as provided in SDCL 6-8B-40, but subject to the provisions concerning their payment and to any other contractual limitations authorized in their issuance. (SDCL 6-8B-30)

The bonds can be refunded for any of the following purposes:

- 1) For the purpose of extending the maturity date of all or any part of any outstanding bonds for which payment is in arrears, or for which there is not, or it is certain that there will not be, sufficient money to pay the principal or interest on the outstanding bonds as they respectively become due;
- 2) For the purpose of reducing debt service costs or affecting other economies;
- 3) For the purpose of reorganizing all or any part of the outstanding bonds of a public body in relation to the resources available for their payment; or
- 4) To relieve the public body of restrictions imposed by covenants with respect to the bonds being refunded.

No refunding bond may cause a public body's aggregate amount of indebtedness to exceed the maximum allowable constitutional or statutory provisions. (SDCL 6-8B-36) Bonds for which monies are held in escrow (ie. refunded bonds) are not included in determining the aggregate indebtedness of the municipality after sufficient money are placed with the paying agent. (SDCL 6-8B-37)

Municipalities may combine outstanding issues to refund one or more or any part of one or more or all issues of its public securities. This is provided that the issues are payable from the same fund or source unless the question is approved by the voters of the public body in accordance with SDCL 6-8B-2 to 6-8B-8 and provided that no two issues be combined where more than one constitutional or statutory debt limitation is applicable to such combination. All refunding bonds shall be issued and sold in accordance with the provisions of SDCL Chapter 6-8B. (SDCL 6-8B-38 to 6-8B-42)

The principal amount of the refunding bonds may not exceed the amount necessary to retire the refunded bonds with interest, pursuant to SDCL 6-8B-46, plus any costs or expenses associated with the refunding. (SDCL 6-8B-35)

Refunding public bonds may be sold publicly or privately in accordance with SDCL 6-8B-10. (SDCL 6-8B-45) The proceeds from such sale may either be immediately applied to the retirement of the bonds to be refunded or the proceeds may be placed in escrow to be applied to the payment upon presentation of the bonds being refunded. (SDCL 6-8B-46)

The 1987 Legislature authorized public bodies to issue crossover refunding bonds without regard to the limitations in SDCL 6-8B-46 and 6-8B-48. The procedures for issuing crossover bonds are outlined in SDCL 6-8B-53 and 6-8B-54.

### 12.315 General Obligation Bonds

All bonds which are a general obligation of the municipality must be authorized, issued, and sold as provided in Chapter 6-8B and always require a 60 per cent voter approval. (SDCL 9-26-1; See Hdbk., sec. 12.305)

At the time the general obligation bonds are issued, the governing body by ordinance shall levy an annual tax upon the taxable property within the municipality in an amount which will provide a sum sufficient to pay the annual interest and the principal of the bonds when they reach maturity. All taxes collected from this levy are placed in a special sinking fund and can only be used for the payment of the principal and interest on the bond. (SDCL 9-26-25; 9-26-26; See Hdbk., sec. 12.155)

General obligation bonds may be used for most municipal purposes including very specialized purposes, for example, to finance construction related to sewers (SDCL 9-48-6), urban renewal (SDCL 11-8-37), and airports (SDCL 50-7-8). (See Hdbk., sec. 9.050, 10.050, 10.200 to 10.450, 10.550, 10.600, 12.400 and 14.200)

### 12.320 Special Assessment Bonds

Special assessment bonds can be issued for various projects such as streets, curb and gutter, sidewalks, water, sewer, and parking facilities. (SDCL 9-43-114) The bonds can be issued for any project which may be paid for the levy of special assessments. They do not require an election and do not constitute debt.

Municipal improvement bonds may be issued under the provisions of SDCL chapter 9-44. Municipal improvement bonds shall be authorized, issued, and sold as provided in Chapter 6-8B except that all bonds shall mature within one year after the due date of the last installment. (SDCL 9-44-2) The bonds may be issued in an amount equal to the cost of the improvement or improvements. (SDCL 9-44-3)

### 12.325 Revenue Bonds

To aid the municipality in meeting the cost of constructing facilities for utilities, revenue bonds may be issued by the municipality as provided by SDCL chapter 6-8B. (See Hdbk., sec. 12.305) Utilities include electricity, gas, light, heat, power, water, sewage, and flood and drainage control generally within the municipality and within 10 miles. (defined in SDCL 9-40-1) Except in the rare case where the bonds are issued for the construction of a new utility enterprise, if the revenues of the entire enterprise fund is pledged to repayment of the bonds an election with 60 per cent voter approval is required. (SDCL 6-8B-2)

In the case of utility revenue bonds, the municipality may, in the resolution or ordinance authorizing the bonds, provide that all or any portion of the new revenue or income from the utility to be constructed, or otherwise acquired, extended, or improved, be segregated from the other revenue or income of the utility, and that only the segregated portion of revenue or income so segregated be used for the payment of such bonds. The municipality may for this purpose establish a special charge or surcharge for the services of the new facilities financed by the bonds. This generally means the funds which were being generated by the utility prior to the new bonds can not be used to pay for the new bonds without an election. If the bonds are made payable solely from such segregated income, or if the bonds are issued in connection with a financing agreement described in SDCL 46A-1-49, then no election is required to authorize the issuance of the bonds unless required by Article XIII, section 4 of the Constitution. (SDCL 9-40-15; 9-40-15.1) Similar provisions apply to telephone. (SDCL 9-41-2)

A city can issue revenue bonds for swimming pools, provided only the revenues from the pools constructed with the bonds are pledged. However, no exception from the 60 percent election requirement is provided. (SDCL 9-38-61 thru 75) SDCL 9-38-76 and 77 provides for the issuance of bonds with a majority election approval in first and second class municipalities for a public gymnasium or public community house.

Parking revenue bonds with 60 percent voter approval can pledge the gross revenues from existing lots and meters as well its general credit of the municipality to the repayment of the bonds. (SDCL 9-51-5 and see 9-51-22 through 9-51-27) SDCL 9-51-13 through 21 provide for the issuance of parking bonds without an election if payable from a special fund and only the net revenues of the parking system are pledged. A parking district may also be created, and special assessment bonds may be issued without an election. (SDCL 9-51-35; 9-51-36; SDCL Chapter 9-43)

In addition to issuing revenue bonds for defraying the original costs of constructing facilities, revenue bonds may be issued for the extension or improvement of utilities, or when the original bond was insufficient to meet the costs of construction additional revenue bonds may be issued to accomplish the original purpose. However, the additional issue creates a priority of issues. This means that such additional issue or issues of bonds shall be junior to all prior issues unless provision shall have been made in the contract and covenants of the municipality with the holders of the prior bonds that such additional issues be on a parity with the original bonds. (SDCL 9-40-6 to 9-40-9)

The governing body of each municipality issuing bonds shall establish and collect equitable rates, charges or rentals for all services and benefits furnished by such sewerage and water facility system or systems or drainage basin utility districts. Generally, for all utility bonds rates, charges or rentals need to be sufficient to produce net revenues adequate to pay the principal of and interest on the bonds and to create and maintain reasonable reserves. (SDCL 9-40-15.1)

As one might expect, the proceeds from the sale of revenue bonds must be kept in a separate fund. (SDCL 9-40-16)

Taxing powers cannot be used for the payment of either the principal or interest on the bonds, nor can any other monies or revenues of the municipality be used to pay either the principal or interest on the bonds, except where otherwise provided by law. (SDCL 9-40-18)

It is important to note that by issuing revenue bonds for a municipal utility, a statutory lien in the form of a mortgage on the utility and its extensions is created and held by the holders of the revenue bonds or their coupons. (SDCL 9-40-25)

The procedure for refunding revenue bonds is outlined in Chapter 6-8B of SDCL. (See Hdbk., sec. 12.310)

In addition, revenue bonds are authorized for airports (see SDCL Chapter 50-8) and auditoriums under the provisions of SDCL 9-52-3 to 9-52-15. It should be noted that neither of these typically generate sufficient revenues to issue bonds.

### 12.330 Revenue Bonds for Economic Development Projects

In order to 1) stimulate and develop the general economic welfare and prosperity of the state; 2) encourage and assist in the location of new business and industry in the state and to expand existing industry; 3) promote the economic stability of the state by providing greater employment opportunities and diversification of industry; 4) to assist in post-secondary vocational-technical education for those institutions in operation on July 1, 1981; 5) recreational development; 6) and the reduction of water and air pollution resulting from such developments; or 7) nonprofit hospitals, nursing homes, other health care facilities housing for the elderly and handicapped, wellness centers, or primary, secondary or post secondary schools; revenue bonds may be issued by any municipality in the state. (SDCL 9-54-1) The facilities can either be inside the municipality or its environs without limitation as to distance if the municipality declares that the project would promote the welfare of the municipality. (SDCL 9-54-2.1)

The proceeds of these revenue bonds can be used only to purchase, construct, reconstruct, acquire sites for, enlarge, improve, or remodel buildings, structures, or equipment, and to enter in revenue agreements as defined in SDCL 9-54-3.1. (SDCL 9-54-2) A municipality may issue revenue bonds to pay any outstanding indebtedness of a nonprofit corporation incurred in the purchase, construction, reconstruction, acquisition of sites for, enlargement, improvement or remodeling of hospitals, nursing homes, other health care facilities, housing for the elderly, housing for the handicapped, wellness centers, or primary, secondary, or post-secondary schools. (SDCL 9-54-2.1)

Revenue bonds which are issued for economic development projects are subject to the same provisions as revenue bonds in general, (See Hdbk., sec. 12.305 and 12.325) which is to say that they can only be paid from the revenues derived from the project. (SDCL 9-54-3) They shall be authorized, issued and sold in accordance with Chapter 6-8B and SDCL 9-5-12, except that no election is required. (SDCL 9-54-4; See Hdbk., 12.305) Since these bonds are payable solely from revenues from third parties, they do not constitute an obligation of the municipality. (SDCL 9-54-6)

Economic Development Bonds are private activity bonds and must have a public hearing prior to issue, according to Federal Law as of July 1, 1983. Very special federal tax rules apply and if compliance is not met, these bonds will lose their tax-exempt status for Federal income tax purposes. Generally, if a for-profit entity is the user of the facilities, bonds can only be used to finance core manufacturing facilities and certain housing projects in order to have the interest on the bonds exempt from federal income tax.

### 12.340 Sales Tax Bonds

SDCL 10-52-2.10 authorizes any municipality imposing a municipal sales tax to issue municipal non-ad valorem tax revenue bonds and pledge the sales tax. The municipality must guarantee to continue to impose and collect the sales tax so long as the bonds are outstanding. The bonds are issued and sold as other bonds, but no election is required to authorize the issuance of municipal non-ad valorem tax revenue bonds. If the bonds are payable from the sales tax as authorized in SDCL 10-52A-2 (on lodging, alcoholic beverages, prepared food and admissions) then the proceeds can only be used for the purposes outlined in SDCL 10-52A-2. (SDCL 10-52A-14)

### 12.345 Business Improvement Districts

SDCL 9-55 provides for the creation of business improvement districts. Any municipality may levy special assessments or a business occupational tax. (SDCL 9-55-2) Bonds payable from special assessments or from a business occupational tax may only be issued upon a petition by a majority of the owners subject to the special assessments or the occupational tax. (SDCL 9-55-18.1) A business improvement district must have been created and the bond proceeds can only be used for the purposes stated in the statute. (SDCL 9-55-3) A Guide to Business Improvement Districts is available to members of the SD Municipal League.

### **12.350 INVESTMENT OF MUNICIPAL FUNDS**

In South Dakota, the statutory authority for investments offers a range of opportunity as a revenue source for municipal corporations. Investment of public funds shall be made only after the adoption of a proper resolution by the governing board of the municipality. (SDCL 4-5-8)

Statute authorizes any public funds, which will not be needed for current operating expenses, may be invested in (a) securities of the United States and securities guaranteed by the United States government either directly or indirectly including, without limitation, United States treasury bills, notes, bonds and other obligations issued or directly or indirectly guaranteed by the United States government, or other otherwise directly or indirectly backed by the full faith and credit of the United States government; provided that, for other than permanent, trust, retirement, building and depreciation reserve funds, such securities shall either mature within eighteen months from the date of purchase or be redeemable at the option of the holder within eighteen months from the date of purchase; or (b) repurchase agreements fully collateralized by securities described in (a) and meeting the requirements of SDCL 4-5-9, if the repurchase agreements are entered into only with those primary reporting dealers that report to the federal reserve bank of New York and with the one hundred largest United States commercial banks, as measured by domestic deposits; or (c) in shares of an open-end, no-load fund administered by an investment company registered under the Federal Investment Company Act of 1940, whose shares are registered under the Federal Securities Act of 1933 and whose only investments are in securities described in (a) and repurchase agreements described in (b). (SDCL 4-5-6)

In addition, any public funds which are not needed for current operating expenses may be invested in direct obligations of any county, municipality, or school district in the state and bonds issued by the South Dakota Housing Development Authority, the South Dakota Health and Educational Facilities Authority, or the South Dakota Building Authority. (SDCL 4-5-6.2)

It is legal for municipalities to deposit funds in "Now" or "Super Now" (interest bearing checking accounts) (PL 97-320) The interest earned from investments shall be credited to the respective fund or the general fund. (SDCL 4-5-9)

Municipalities, school districts, and counties, through the joint exercise of powers, may agree to jointly invest public funds. (AGR Opinion 92-08; SDCL 1-24; 4-5; 47-14)

### **12.400 OPTIONS FOR MUNICIPAL FINANCING**

12.405 Revolving Fund

12.410 Tax Increment Financing

12.415 Sale-Lease Back

12.420 Lease-Purchase

12.425 Refunding

12.430 Bond Anticipation Notes

#### **12.405 Revolving Funds**

While the previous sections of this chapter of the Handbook, when considered with the relevant portions of Chapters 10 and 11, have presented several options for financing municipal improvements, there are other options which have not yet been considered. The first option is to establish a revolving fund for financing improvements for which assessments are levied.

Statute authorizes the governing body to create and maintain a revolving fund for financing improvements either by ordinance or resolution. The governing body may provide monies for such funds in the annual appropriation ordinance or by transfer of unused balances from other funds in accordance with the provisions of Chapter 9-21, or it may provide for the issuance of general obligation bonds for the purpose of creating and maintaining any such accounts after authorization by the electors. (SDCL 9-43-120)

The monies in revolving funds may be used only to pay, in whole or in part, the cost of the improvements for which the fund was created, or the monies may be used to pay the portion of the cost of the improvements which is assumed by the municipality and to advance the portion of the cost which is ultimately to be paid from collection of assessments. (SDCL 9-43-121)

Special assessment bonds may be transferred to the special assessment accounts in accordance with the provisions of SDCL 9-43-116 and transfers of surplus monies can be made out of the revolving fund to any sinking fund for outstanding general obligation bonds which were issued to create the revolving fund. (SDCL 9-43-122 and 9-43-123) Statute provides, however, that when general obligation bonds are issued to create the revolving fund, no monies shall be transferred from that revolving fund to any other fund of the municipality until all general obligation bonds issued to create or maintain the revolving fund have been fully paid with interest. (SDCL 9-43-124)

#### 12.410 Tax Increment Financing

Another option for funding community redevelopment projects is the creation of tax incremental districts. Chapter 11-9 of the SDCL outlines municipal powers to create tax increment districts, prepare and implement project plans, issue tax incremental bonds and notes, deposit money in a special fund, and enter into contracts and agreements.

Prior to establishing a TIF district, municipal boards should consider the affects on funding and state aid for the local school district. (SDCL 10-12-44; 13-13-10.2)

At least twenty-five percent of the area of the real property must qualify as a blighted area or not less than 50%, by area, of the real property within the district will stimulate and develop the general economic welfare and prosperity of the state through the promotion and advancement of industrial, commercial, manufacturing, agricultural or natural resources, and the improvement must significantly enhance the value of substantially all the other realty in the district. (SDCL 11-9-8)

In a tax increment district, the additional property tax revenue generated by the new development is used to finance the activities that facilitated the development. After the project expenses have been paid, the new tax is used as all other property tax. (Meierhenry v. City of Huron, 354 N.W. 2d 171, S.D. 1984)

No change in state laws affecting property taxation may result in a lowered assessed value of the property and the assessment value of the tax incremental base so long as the tax incremental district is in force and until bonds issued pursuant to this chapter are retired. (SDCL 11-9-24)

Any municipality that has created a tax increment financing district must provide any information requested by the department of revenue so that the department may publish an annual report of tax increment financing districts. (SDCL 11-9-48)

#### 12.415 Sale-Lease Back

In 1984 the legislature gave the governing body of a municipality the authority to exercise all the powers conferred on the S.D. Building Authority and the Governor pursuant to the acquisition, lease, sale, and lease back of land, improvements and capital equipment for the municipality's auditorium or convention center and all related facilities. (SDCL 9-52-29)

In 1985 the legislature expanded the municipal authority for sale, lease-back to include land, improvements and equipment comprising all or a portion of a system of waterworks for the purpose of providing water and water supply for municipal, industrial, and domestic purposes, and any system or part of system for the collection, treatment, and disposal of sewage or other wastes. (SDCL 9-40-37) The conditions of such sale are included in SDCL 9-40-38 through 9-40-40.

These statutes, which include lease- purchase of these facilities and improvements, by exempting from any other statutory requirements thereby, provide an exemption from the election requirements of SDCL 6-8B-2.

### 12.420 Lease and Lease-Purchase

Another possible option for financing of municipal improvements is leasing. A lease agreement may be entered into by the municipality for the lease of real or personal property. (SDCL 9-12-1(2)) Except as authorized by SDCL 9-21-18.1, multi-year lease agreements are only legal if they do not bind a future governing body. They can be used if they include a fiscal funding out clause. (AG Opinion 85-12; AG Memo 85-05); See Handbook sec. 3.260) This includes the right of the city to own the facility at the end of the agreement no election is required, and they do not constitute debt. (Millar v. Barnett (1974) 88 SD 460, 221 NW 2d 8)

Municipalities are authorized to enter into lease-purchase agreements for real or personal property for a term not exceeding ten years for equipment and twenty years for an improvement to real property. Any term exceeding one year requires the approval of more than sixty percent of the members-elect of the governing body of the municipality. (SDCL 9-21-18.1)

### 12.425 Refunding

The authority and purposes for the refunding of municipal bonds is covered in Chapter 12.310 of this handbook. While refunding previous issues may not directly get the municipality "new" money for financing new improvements it may be possible to reduce the burden of the old bond(s) so that it becomes feasible to issue new bonds. This may be done, for example, by having the annual payments on the refunding bonds be lower than the total annual payments on the refunded bonds. Another example would be if the municipality is at its maximum bonded indebtedness, it may be possible to refund the existing bonds and have the total amount of the refunding bonds be less than the total amount of the refunded bonds.

### 12.430 Bond Anticipation Notes

A municipality may issue bond anticipation notes with a maturity not greater than three years. All conditions precedent to the offering of the bonds must have been satisfied. The principal amount of the bond anticipation notes may not exceed the principal amount of the bonds in anticipation of which the notes are issued. (SDCL 6-8B-26 to 6-8B-29) No separate election is required since only the provisions of SDCL 6-8B-9 to 6-8B-24 apply to the issuance. (SDCL 6-8B-29)

### **12.450 PROMISSORY NOTES**

Municipalities have the power to borrow money under SDCL 9-25-12, which provides that a governing body may borrow money from any source willing to lend it by issuing a promissory note.

The notes shall be authorized, issued, and sold in accordance with Chapter 6-8B. However, no election is required, and the notes may not be issued for a term in excess of five years, unless the note is issued for loans authorized by the United States Department of Agriculture, in which case the term may not exceed ten years. The notes must state the rate of interest and must be signed by the chief executive officer and the finance officer. (SDCL 9-25-12; See Hdbk., sec. 12.305)

The money borrowed cannot exceed ninety-five percent of the amount of uncollected taxes levied by the municipality for the current year, plus other receivables of such fund. (SDCL 9-25-13) Uncollected taxes levied and receivables do not include such items as future sales tax or utility receipts. The amount of any registered warrants or promissory notes outstanding must be deducted from the amount to be borrowed. (SDCL 9-25-14) If a note is issued and not paid in full within the term provided, then no cash receipts may be expended for any purpose except the retirement of the principal and interest of the notes outstanding against the fund until the notes are retired. (SDCL 9-25-16)

The 1981 Legislature also passed legislation allowing municipalities to borrow up to ninety-five percent of the amount of anticipated special assessment bond proceeds. (SDCL 9-25-13) This statute also allows the borrowing of funds on state and federal grant moneys earned by the municipality or committed by the state or federal government. Because the notes are limited to current receipts they do not fall within the constitutional limitations of indebtedness of the municipality. (SDCL 9-25-12)

Any loan authorized by the US Department of Agriculture may be issued for a term not to exceed ten years and an unsecured promissory note under the municipal debt limit may be issued for a term of not more than twenty years. (SDCL 9-25-12)

#### **12.460 MUNICIPAL DEBT LIMIT**

The definition of debt does not include special assessment bonds or leases subject to annual appropriation or which contain funding out clauses. Debt generally does include sales tax bonds, tax increment bonds, lease-purchases, multi-year leases, financing agreements (i.e., State Revolving Fund Loans), as well as general obligation bonds. If revenue bonds or financing agreements (i.e., SRF Loans) are not payable from the entire specific enterprise fund but only from segregated revenues from the new improvements constructed with the proceeds they do not constitute debt. Also, economic development bonds issued under SDCL 9-54 are not debt because the city has no obligation on the bonds and is only a "conduit" for the borrowing by other entities. Although refunding bonds may be debt, the refunded bonds are not debt.

The debt of any municipality shall never exceed five per cent upon the assessed valuation of taxable property in the municipality for the year preceding that in which said indebtedness is incurred.

If at least a majority of the electors of the municipality vote to approve the indebtedness, the municipality may incur an additional indebtedness, not to exceed ten per cent of the assessed valuation for the purposes of providing water and sewer, for irrigation, domestic uses, and other purposes. (Cn. XIII, Sec.4) Also with at least a majority vote, municipalities over 8,000 in population the municipality may incur indebtedness not to exceed eight per cent of the assessed valuation for the purpose of constructing street railways, electric lights, or other lighting plants.

#### **12.500 ACCUMULATION OF FUNDS**

Municipalities may by resolution authorize the accumulation of funds for period longer than one year for capital outlay purposes. "Capital outlay purposes" means purposes which result in the acquisition of or additions to plant, or equipment, including expenditures for land, existing facilities, improvement of grounds, construction of facilities, additions to facilities, remodeling of facilities, or for the purchase of equipment. The governing body shall establish a maximum amount allowed to be accumulated in the fund. (SDCL 9-21-14.1)

For the total amount allowed for accumulation for water improvement, see Handbook Sec. 10.250. For sewer improvements, see Handbook Sec. 10.300.

#### **12.600 MUNICIPAL TAX EXEMPTIONS**

Municipalities are required by state law to pay a contractor's excise tax on all realty improvements. (SDCL 10-46A-1) The excise tax is based on the gross receipts of all prime contracts at the rate of two percent.

Realty improvements performed for municipal telephone systems subject to chapters 9-41 may be taxed under the provisions of the alternative contractors' excise tax. (SDCL 10-46B-1)

Municipalities are required by state law to pay state motor fuel (gasoline and gasohol) tax on all motor fuel they purchase. (SDCL 10-47B-3) Municipalities may seek a refund of the tax paid on motor fuel used entirely off of public roads. Examples of this type of fuel usage include lawn mowing or golf course or road maintenance. (SDCL 10-47B-13) The municipality must obtain a permit from the Secretary of Revenue in order to be reimbursed for the tax paid on motor fuel used off of the public roads.

Municipalities are required by state law to pay state special fuel (diesel) tax on all special fuel they purchase. (SDCL 10-47B-3) This tax does not apply to diesel fuel used by the municipality in motor vehicles or equipment owned by the municipality solely for off road purposes or street construction, reconstruction, or maintenance. (SDCL 10-47B-13) Contractors hired by a municipality are responsible for paying all fuel taxes imposed under SDCL 10-47B-13 before the municipality makes the final payment on the street project or contract. (SDCL 10-47B-31)

Municipalities are exempt from the federal gasoline tax. You must furnish your gas dealer with your federal exemption number. This number may be obtained from the Internal Revenue Service on form number 637.

Non-profit corporations created for the purpose of fire protection that are controlled by a political subdivision are exempt from sales and use taxes. (SDCL 10-45-112)

Municipalities are exempted from the state sales tax laws (SDCL 10-45-10; 10-46-7) If it becomes necessary, the Department of Revenue will issue a sales tax exemption number to your municipality, however it should be sufficient to cite SDCL 10-45-10.

Municipalities are also exempt from all property taxes. (Cn. XI, Sec. 5; See Hdbk. Sec. 12.100)

## CHAPTER 13

### BIDS AND CONTRACTS

13.000 Introduction

13.200 Bidding Procedures

13.100 Public Contracts in General

13.400 Prompt Payment Act

#### **13.000 INTRODUCTION**

Several sections of the Handbook have noted the authorization and use of bids and contracts to provide municipal improvements and services. This chapter will deal specifically with the statutes regulating the use of bids and contracts for these purposes.

It is important to note that several services which are provided by municipalities, including such things as solid waste disposal, hospitals, water and sewer facilities, and electrical generation plants, can be jointly operated with other governmental entities. For information concerning joint exercise of governmental powers, see this Handbook, section 3.400 and SDCL 1-24.

#### **13.100 PUBLIC CONTRACTS IN GENERAL**

13.105 Municipal Contracts

13.125 Officials Interest in Contracts

##### **13.105 Municipal Contracts**

All contracts must be in writing showing all terms and conditions and be signed by the appropriate entity officials. Multiple year contracts must include a "non-appropriation" or "funding out" clause. This clause provides that in the event funds are not appropriated for the subsequent year of a multiple year contract, the contract will terminate on the last day of the current fiscal year. For sample wording of this clause see Sec. 3.260 of this Handbook.

The Attorney General has ruled that "exclusivity" clauses are illegal. An "exclusivity" clause, sometimes found in multiple year contracts, prevents an entity from leasing or purchasing any other "similar" equipment during the duration of the contract. (AGR Opinion 85-12)

For public improvement contracts it is recommended that the municipality require all contractors and subcontractors to provide proof of insurance for workers compensation, automobile coverage, and all types of liability coverage.

The municipality must verify with the Department of Revenue that the contractor has a contractors' excise tax license. (SDCL 5-18B-17)

##### **13.125 Officials Interest in Contracts**

No contract is valid unless it has been authorized by a vote of the governing body at an official meeting. The contract is executed in the name of the municipality by the mayor or president of the board of trustees and must be countersigned by the finance officer and have the corporate seal attached. However, the governing body of a municipality may, by ordinance or resolution, delegate to any employee of the municipality the authority to enter into a contract on behalf of the municipality and to execute the contract and any other instrument necessary or convenient for the performance of the contract subject to the limitations delegated by the governing body. (SDCL 9-1-5)

In Section 5.415 of this Handbook, it was noted that any public officer who becomes interested in a contract, either directly or indirectly, is guilty of a Class 2 misdemeanor unless the act is exempted by law. (SDCL 3-16-7; See Hdbk., sec. 5.415)

The subject of interest in public contracts is outlined in several sections of the Codified Laws. The statutes which serve as the basis of determining interest are contained in SDCL 6-1-1 through 6-1-4. These statutes state that it is unlawful for any public officer or his agent to be interested in any contract which is entered into by the municipality. This applies to elected and appointed officials and their agents. (SDCL 6-1-6) There are some exceptions to this, which are given in SDCL 6-1-2:

- 1) Any contract involving five thousand dollars or less regardless of whether other sources of supply or services are available within the county, municipality, township, or school district, provided that the consideration therefore is reasonable and just.
- 2) Any contract involving more than five thousand dollars but less than the amount for which competitive bidding is required, and there is no other source of supply or services available within the county, municipality, township, or school district provided that the consideration therefore is reasonable and just and further provided that the accumulated total of such contracts paid during any given fiscal year shall not exceed the amount specified in SDCL 5-18A-14.
- 3) Any contract with any firm, association, corporation, or cooperative association for which competitive bidding is not required and where other sources of supply and services are available within the county, municipality, township, or school district, and the consideration therefore is reasonable and just, unless the majority of the governing body are members or stockholders who collectively have controlling interest, or any one of them is an officer or manager of any such firm, association, corporation, or cooperative association then any such contract shall be null and void;
- 4) Any contract with any firm, association, corporation, or cooperative association for which competitive bidding procedures are followed pursuant to SDCL 5-18A and 5-18B, and where more than one such competitive bid is submitted.
- 5) Any contract for professional services with any individual, firm, association, corporation or cooperative, if the individual or any member of the firm, association, corporation, or cooperative is an elected or appointed officer of a county, municipality, township, or school district, whether or not other sources of such services are available within the county, municipality, township or school district, provided the consideration therefore is reasonable and just.
- 6) Any contract for commodities, materials, supplies, or equipment found in the state price list established pursuant to SDCL 5-18A-28, at the price there established or below.
- 7) Any contract or agreement between a governmental entity specified in SDCL 6-1-1 and a public post secondary educational institution when an employee of the Board of Regents serves as an elected or appointed officer for the governmental entity, provided that the employee does not receive direct compensation or payment as a result of the contract or agreement.
- 8) Any contract with any firm, association, corporation, individual, or cooperative association for which competitive bidding procedures are followed pursuant to chapter 5-18A, and where only one such competitive bid is submitted, provided the procedures established in SDCL 6-1-2.1 are followed.

All the conditions in each subsection must be met fully in order for the contract to be valid. (SDCL 6-1-2)

Another statute allows a bank to be the official depository of funds notwithstanding that an officer, director, stockholder, or employee of a bank is an elected or appointed officer or treasurer of such county, municipality, township, or school district. (SDCL 6-1-3)

Finally, if competitive bidding procedures have been followed pursuant to chapter 5-18A, and the bid notice has been placed on the central bid exchange pursuant to SDCL 5-18A-13 for two weeks prior to the opening of bids, a bid from an officer of the governing body may be opened and accepted provided the consideration is reasonable and just as determined by the governing body or a disinterested governmental entity. (SDCL 6-1-2.1)

No county, municipal, or school official may participate in discussing or vote on any issue in which the official has a conflict of interest. Each official shall decide if any potential conflict of interest requires such official to be is qualified from participating in discussion or voting. However, no such official may participate in discussing or vote on an issue if the following circumstances apply:

- (1) The official has a direct pecuniary interest in the matter before the governing body; or
- (2) At least two-thirds of the governing body votes that an official has an identifiable conflict of interest that should prohibit such official from voting on a specific matter.

If an official with a direct pecuniary interest participates in discussion or votes on a matter before the governing body, the legal sole remedy is to invalidate that official's vote. (SDCL 6-1-17)

### **13.200 BIDDING**

13.205 Competitive Basis for Contracts	13.245 Residential Preference
13.215 Exemptions from Bidding	13.255 Handicapped Preference
13.217 Auctions	13.260 "Sliding Scale" Bidding
13.225 Emergency Purchases	13.270 Joint Purchasing Programs
13.235 Negotiations of Contract	13.280 Reverse Auction Bidding
13.240 Design-Build Procurement	

#### **13.205 Competitive Basis for Contracts**

All contracts for the construction of public improvements which involve the expenditure of one hundred thousand dollars (**\$100,000**), and any other contracts for the purchase of supplies or services which involve the expenditure of fifty thousand dollars (**\$50,000**) must be advertised for bid and let to the lowest responsible bidder. (SDCL 5-18A-5; 5-18A-14)

Municipalities may spend up to five thousand dollars for supplies and equipment at businesses owned by members of a governing body. (SDCL 6-1-2)

Terms used in bidding statutes include:

**Prohibited entity:** an entity which is ultimately owned or controlled by certain countries deemed dangerous or unfriendly to the United States.

**Purchasing agencies:** any governmental body or officer authorized by law, administrative rule, or delegated authority to enter into contracts.

**Public improvement:** the process of building, altering, repairing, improving, or demolishing any public infrastructure facility, including any utility infrastructure, structure, building, or other improvements of any kind to real property, the cost of which is payable from taxes or other funds under the control of the purchasing agency and includes any local improvement for which a special assessment is to be levied.

**Construction:** in addition to its ordinary meaning, includes repair, demolition, and alteration.

**Contract:** any type of agreement, regardless of what the agreement may be called, for the procurement of supplies, services, or construction.

**Services:** the furnishing of labor, time, or effort by a contractor not involving the delivery of a specific end product other than reports which are merely incidental to the required performance.

**Supplies:** any property, including equipment, materials, and printing. (SDCL 5-18A-1)

Any owner, operator, or person responsible for bidding any project shall, as part of the bid document, specify whether the project does or does not involve asbestos-containing materials. A violation of this section is a Class 1 misdemeanor. (SDCL 34-44-8)

### **Advertisement for Bids**

When a contract is in excess of the bid limits (SDCL 5-18A-14) is to be entered into, the governing body must advertise for bids in the official newspaper. (SDCL 5-18A-5) They must advertise at least twice with the first publication at least ten days prior to the opening of bids or deadline for submission of proposals. The first publication shall be in the official newspaper of the purchasing agency and the second publication may be in any legal newspaper in the state. The advertisement must state the time and place where the bids will be opened or the deadline for submission of proposals. The advertisement must also state that the governing board has the right to reject any or all bids. (SDCL 5-18A-14)

### **Bid Specifications**

For construction of a public improvement, the required advertisement must state where the plans and specifications may be examined. A set of these plans and specifications must remain on file in the office of the purchasing agency at all times from the beginning of the publication of the advertisement for bids until the project is completed. The purchasing agency shall, upon request, furnish at least one copy of the plans and specifications, without charge, to each South Dakota contractor who intends, in good faith, to bid on the public improvement. One copy must be available at the date of the first publication of the advertisement for bids. The purchasing agency may require the return of the copy at the time of the opening of the bids. (SDCL 5-18B-1)

Whenever any local improvement, except a sidewalk or bulkhead, is ordered by the governing body, the governing body must prepare plans and specifications and file them in the office of the finance officer or clerk. They shall designate a time, not less than two weeks from the date of the filing, at which sealed bids for the improvement will be received. Public notice of the proposed improvement must be given according to the provisions of SDCL 5-18A-14 and 5-18B. (SDCL 9-42-4)

SDCL 36-18A specifies circumstances when a licensed professional engineer, architect, or land surveyor must be used. (SDCL 5-18B-45)

There are occasions when a public corporation supplies tangible personal property to a contractor which is to be used in performance of the contract. When this is the case, the specifications or notice to bidders must state the purchase price or fair market value of the property, depending on which is greater. This is then used for computation of the contractor's tax liability under the provisions of SDCL 10-46-5. (SDCL 5-18B-7)

### **Bonds**

When purchasing supplies or services a purchasing agency may require a bond or an approved security to be submitted with any bid or proposal as a guarantee that the bidder will enter into a contract with the purchasing agency. No offeror or bidder may be required to leave the bond or security posted for longer than allowed by SDCL 5-18A-5 if the bid or proposal is not accepted. The bond or approved security of the successful offeror or bidder shall be returned upon signing of the contract. (SDCL 5-18A-35)

A certified or cashier's check in an amount equal to five percent of the bid or a bid bond equal to ten percent of the bid is required to accompany each bid submitted for a public improvement contract. The purpose of the deposit or bid is to act as a guarantee that the bidder will enter into a contract with the governing body if the bidder is awarded the contract. (SDCL 5-18B-2) However, this requirement may be waived by the governing body if the bid submitted does not exceed the bid limit for a public improvement. (SDCL 5-18B-3; 5-18A-14)

After the opening of the bids and a contract is awarded, the checks of the unsuccessful bidders are returned, and the bid bonds of unsuccessful bidders are immediately destroyed. The deposit of the successful bidder is returned upon execution of the contract. (SDCL 5-18B-9)

Whenever any contract for the construction of a public improvement is entered into, the contractor is required to furnish surety in an amount not less than the contract price. The purpose of the surety is to ensure the faithful performance of the contract, with an additional obligation that the contractor will promptly pay all persons supplying him with labor or material. (SDCL 5-21-1) The performance bond may be waived when the bid submitted does not exceed fifty thousand dollars. (SDCL 5-21-1.1)

If a public corporation fails to require the surety provided in SDCL 5-21-1, the public corporation is liable to pay any person who performed labor or supplied material during the construction if the contractor fails to do so. (SDCL 5-21-2)

In addition to the faithful performance provisions as mentioned above, the surety also obligates the contractor to promptly pay taxes which may rise under Chapter 10-46. (SDCL 5-21-3) The remaining sections of Chapter 5-21 outline the procedures for action against the contractor, the surety's liability and provisions governing the pro-rated distribution to subcontractors. (SDCL 5-21-4 to 5-21-8)

### **Lowest Responsible Bid**

Unless all bids are rejected, the lowest responsible bid must be accepted. In case the lower bidder is not responsible, or the bid is not made in conformance to the solicitation or the lower bid is withdrawn in accordance with law, the bid of the next lowest responsible and responsive bidder may be accepted. (SDCL 5-18A-5)

If the lowest responsive and responsible bid for a public improvement exceeds the final estimated project cost, the purchasing agency may negotiate with that low bidder for the construction of a public improvement at the most advantageous price. (SDCL 5-18B-5)

#### 13.215 Exemptions from Bidding

The provisions in SDCL 5-18A-4 do not apply to:

- 1) Highway construction contracts entered into by the SD Department of Transportation.
- 2) Contracts for the purchase of supplies from the United States or its agencies.
- 3) Any purchase of supplies or services, other than professional services, by purchasing agencies from any active contract that has been awarded by any government entity by competitive sealed bids or competitive sealed proposals or from any contract that was competitively solicited and awarded within the previous twelve months.
- 4) Equipment repair contracts.
- 5) Procurement of electric power, water, or natural gas; chemical and biological products.
- 6) Supplies, services, and professional services required for certain research projects under the control of the Board of Regents;
- 7) Property or liability insurance or performance bonds.
- 8) Supplies needed by the Department of Human Services or Department of Social Services or prison industries for the manufacturing of products.
- 9) Printing involving student activities conducted by student organizations and paid for out of student fees at institutions under control of the Board of Regents.
- 10) Purchase of surplus property from another purchasing agency.
- 11) Animals
- 12) Purchases by a school district of perishable food, raw materials used in construction or manufacture of products for resale, or for transportation of students.
- 13) Certain State Authorities.
- 14) Seeds, fertilizers, and other products used in the operation of farms under control of the Board of Regents.
- 15) Supplies for any utility owned or operated by a municipality if the purchase does not exceed the limits found in SDCL 5-18A-14.
- 16) For political subdivisions, any contract for asbestos removal in emergency response actions.
- 17) Supplies or services from a contract established through a Midwestern Higher Education Compact group by competitive sealed bid or a competitive sealed proposal.

- 18) Any contract concerning the custody, management, purchase, sale, and exchange of fund investments research by the State Investment Council or Division of Investment; or

Any amendment or change order to an existing construction, reconstruction, or remodeling of a public improvement need not be bid if:

- 1) The contract contains unit prices for the same type or class of work;
- 2) The change or extra work is necessitated by circumstances related to soils, utilities, or unknown conditions directly affecting the performance of the work that were not reasonably foreseeable at the time the underlying contract was let and the change or extra work is necessary to the completion of the public improvement; or
- 3) The sum of the proposed amendment or change order plus the sum of all other prior unbid amendments or change orders, exclusive of change orders issued under subdivisions (1) and (2) does not exceed the following:
  - (a) For contracts not more than five hundred thousand dollars, the greater of twenty-five thousand dollars or fifteen percent of the base contract;
  - (b) For contracts exceeding five hundred thousand dollars but not more than two million five hundred thousand dollars, the greater of seventy-five thousand dollars or ten percent of the base contract; and
  - (c) For contracts exceeding two million five hundred thousand dollars, the greater of two hundred fifty thousand dollars or five percent of the base contract. (SDCL 5-18B-19)

A contract may be awarded for supplies or services without competitive bids if the purchasing agency determines in writing that the supplies or services are of such a unique nature that the contractor selected is clearly and justifiably the only practicable source to provide the supplies or services. The determination that the contractor selected is justifiably the sole source shall be based on either the uniqueness of the supplies or services or the sole availability at the location required. The purchasing agency shall conduct negotiations, including price, delivery, and quantity to obtain the most advantageous price. Written verification of the sole source must be included in the contract file. This "sole source bid" provision does not apply to construction services or construction equipment. (SDCL 5-18A-8)

The purchasing agency shall maintain a record listing each contract made under sole source procurement and emergency procurement for a minimum of five years. The record shall contain each contractor's name; the amount and type of each contract; and a listing of the supplies, services, and public improvements procured under each contract. (SDCL 5-18A-10)

Any local government may purchase, without advertising for bids, from a willing vendor, any supplies contained in the state price list, or from any willing vendor at a price at or below that shown on the state price list. A governing body must show in its minutes that items were purchased via the state price list or through a vendor at a lesser price. (SDCL 5-18C-8) The Bureau of Administration shall establish a state contract list of supplies or services which are in contracts executed by the Bureau. The Bureau shall make the contract list available to other purchasing agencies. (SDCL 5-18D-6)

The bid requirements do not apply to the purchase of fuel. A municipality may negotiate a contract at the most advantageous price. The municipality must contact and attempt to obtain three competitive quotations. A record of the names of the suppliers, the quotations received, and the procurement procedures used in purchasing shall be documented, noted in the minutes, and retained on file by the governing body. The contract may include a procedure for adjusting prices to meet changing market conditions not within the control of the vendor. (SDCL 5-18C-6)

If a municipality requires a developer to install water and sanitary sewer trunk lines or mains, sewer collection systems, or streets at the expense of the developer and the municipality requires the size of the trunk line or main, sewer collection systems, or streets to be larger than the developer's requirements, the price difference paid by the municipality and as determined by a licensed engineer's estimate is exempt from the provisions of the bid laws. If a developer installs a regional storm sewer detention pond ahead of a municipality's schedule at the expense of the developer, the price of the pond construction paid by the municipality and based on certified quantities provided by a licensed engineer is exempt from the provisions of this chapter and chapters 5-18A, 5-18B, and 5-18D. (SDCL 5-18C-4)

### 13.217 Auctions

The governing board of a unit of local government is exempted from the bid laws if it can purchase supplies at a substantial savings at a public sale or auction. Any performance bond required by SDCL 5-21-1 may be waived on items purchased for less than ten thousand dollars (\$10,000) at a public sale or auction. (SDCL 5-18C-3)

### 13.225 Emergency Purchases

A purchasing agency may make or authorize others to make an emergency purchase without advertising if rentals are not practicable and there exists a threat to public health, welfare, or safety or for other urgent and compelling reasons. Failure to abide by the bid provisions in a timely manner is not an emergency. An emergency procurement shall be made with such competition as is practicable under the circumstances. A written determination of the basis for the emergency and for the selection of the particular contractor shall be included in the contract file. (SDCL 5-18A-9)

### 13.235 Negotiations of Contract When No Firm Bids Are Received

If after advertising for bids no firm bids are received, the governing board may negotiate a contract for the purchase of supplies, services, or public improvement projects at the most advantageous price if the specifications of the original bid are met. (SDCL 5-18A-5)

### 13.240 Design Build Procurement (Best Value Process)

SDCL 5-18B-20 to 5-18B-38 allows an alternative to the usual bid process when a municipality is entering into contracts for public improvements.

A municipality may enter into a Design-Build Contract, which is a contract between a public corporation and a design-builder to furnish the architecture, engineering, and related services as required, and the labor, materials, and other construction services for a public improvement. A design-build contract may be conditioned upon future refinements in scope and price and may permit the public corporation to make changes in the scope of the project without invalidating the design-build contract. (SDCL 5-18A-1; SDCL 5-18B-20)

The Design-Build Procurement Act sets out conditions which must be met to enter into these contracts, as well as spelling out the processes which must be followed in order to award a design-build contract. These procedures can be found in SDCL Chapter 5-18B.

### 13.245 Residential Preference

A South Dakota resident bidder shall be allowed a preference on a contract against the bid of a bidder from any other state or province of any foreign country which enforces or has a preference for resident bidders. The amount of the preference given to the resident bidder shall be equal to the preference in the other state or province. (SDCL 5-18A-26) The bureau of administration shall maintain a current list of all states that have a resident preference and the amount or percent of the preference. (SDCL 5-18A-27)

Before execution of a public improvement contract, the successful bidder must certify that no more than twenty percent of the cost of labor included in the contract is being provided by non-resident contractors, or that more than twenty percent of the cost of labor included in the contract is being provided by nonresident subcontractors because resident contractors are not available at competitive prices. (SDCL 5-18B-6)

#### 13.255 Handicapped Preference

A purchasing agency must give preference to qualified agencies when awarding contracts for the purchase of goods and services when the price, quality and service are substantially equal. (SDCL 5-18A-25) A qualified agency is any public or private non-profit corporation located within South Dakota and certified by the Department of Human Services as providing programs for persons with disabilities. (SDCL 5-18A-1)

#### 13.260 “Sliding Scale” Bidding

For contracts entered into pursuant to SDCL 9-32-11 (garbage hauling) or for any supply contract, municipalities may include a procedure for adjusting prices to meet changing market conditions not within the control of the vendor. The adjustment may not result in additional profit for the vendor and shall be supported by written justification filed with the purchasing agent of the municipality. (SDCL 5-18C-7)

#### 13.270 “Joint Purchasing” Programs

Any purchasing agency may enter into agreements with purchasing agents in this or any other state under which any of the parties may agree to participate in, administer, sponsor, or conduct purchasing transactions under a joint agreement or contract for the purchase of supplies or contractual services. A purchasing agency may cooperate with purchasing agencies and other interested parties in any other state to develop uniform purchasing specifications on a regional or national level to facilitate cooperative interstate purchasing transactions. (SDCL 5-18A-37)

The South Dakota Municipal League provides a joint purchasing program called U.S. Communities, which is a joint effort of several national local government associations, including the National League of Cities.

#### 13.280 Reverse Auction Bidding

A purchasing agency may conduct an online reverse auction for the procurement of supplies or nonprofessional services if the purchasing agency determines in writing that a reverse auction is appropriate for the specific procurement. No reverse auction may be used to establish contracts for public improvements, professional services, or indefinite quantity supply purchases. (SDCL 5-18A-1(26A); 5-18A-39; 5-18A-40; 5-18A-41)

#### 13.290 Prohibited Foreign Contracts

A purchasing agency may not execute a contract with a prohibited entity. A purchasing agency may rely on a contractor’s certification, made pursuant to § 5-18A-51, without conducting any further investigative research or inquiry. (SDCL 5-18A-50)

**13.400 PROMPT PAYMENT ACT**

The 1988 Legislature extended the Prompt Payment Act in South Dakota to include counties, municipalities, school districts and other boards or commissions. The Act requires an agency, including municipalities, which acquire property or services pursuant to a contract with a business to pay for each complete delivered item of property or service on the date required on the contract or within forty-five days after the receipt if no date is specified. (SDCL 5-26-2)

Invoices not paid within forty-five days shall accrue interest beginning on the thirtieth day after receipt of property or service. Interest shall accrue at the Category B rate as established in SDCL 54-3-16 unless another rate is specified by contract. (SDCL 5-26-3) No agency is required to pay interest due because of late payment if the interest is less than five dollars. (SDCL 5-26-3.1)

If there is a dispute between the agency and the business over the amount due or over compliance with the contract, the agency is required within thirty days of the receipt of property or services and receipt of invoices to give written notice to the business. The notice shall include the reasons for and other pertinent details of the dispute. A copy of the notice shall also be filed with the agency. (SDCL 5-26-5)

## CHAPTER 14

### LAND-USE AND ZONING

14.000 Introduction	14.100 Changes in Ownership of Property
14.050 Platting the Land	14.150 Changes in Municipal Boundaries
14.055 Vacation of Plats	14.200 Planning and Zoning
14.060 Vacation of Streets and Alleys	

#### **14.000 INTRODUCTION**

The purpose of land-use and zoning laws is "to protect the public health, safety, morals and welfare." The way land is used or misused has a direct effect upon such things as the tax base, police and fire protection, and the general growth and development of the community in terms of both economic and social development. Accordingly, the use of the land and planning for its development are two of the "hottest" areas receiving considerable attention at the federal and state levels. The impact of their decisions will be felt, of course, largely at the local level.

This chapter of the Handbook will attempt to acquaint the municipal official with the current statutes relating to the land and its use in general. Some of the topics to be considered will include platting the land, acquisition and disposition of real estate, eminent domain, exchanges of property between governmental units, municipal annexation procedures, municipal planning, and urban renewal.

#### **14.050 PLATTING THE LAND**

Whenever a townsite or subdivision is to be laid out, a survey and plat of the townsite or subdivision must be made. The plat must describe and set forth all streets, commons, and public grounds as well as all blocks, lots, parcels, or tracts within the subdivision and give the names, widths, courses, boundaries, and extent of all streets. (SDCL 11-3-1)

Additions to or subdivisions within a municipality must be approved by the governing body. The governing body can give its approval of the plat or the addition or subdivision only after it is satisfied that the system of streets and alleys conforms to the existing streets and alleys of the municipality and that all taxes and special assessments upon the tract or subdivision have been paid. The finance officer must endorse on the face of the plat a copy of the resolution approving the plat and certify it. No plat so situated shall be entitled to record or be recorded unless it bears a copy on its face of the resolution and certificate of the finance officer. (SDCL 11-3-6) The county director of equalization must receive a copy of the plat before it can be recorded. (SDCL 11-3-9)

All recorded plats must be of uniform size, which is either fifteen by twenty-six inches, eleven by seventeen inches, or eight and one-half by fourteen inches. The plats must be drawn on drafting linen, matte film, or Mylar, with waterproof black ink and all signatures shall be made with permanent ink. No other plats may be recorded. (SDCL 11-3-10)

#### **14.055 VACATION OF PLATS**

The procedure for vacating plats is found in statute. (SDCL 11-3-20) If a plat lies within the platting jurisdiction of a municipality which has in existence a statutory planning commission, the procedure to be followed is as follows:

- 1) The new plat shall specifically describe all previous plats sought to be vacated including the book and chapter number of all existing prior plats in the register of deeds office. The new plat must also specifically state that all previous plats so listed are to be vacated in whole or in part. (SDCL 11-3-20.2)

- 2) When the planning commission receives the new plat, it must require the person seeking the vacation and replat to provide the following information:
  - a) The names and addresses of the record owner of the plat or part which is to be vacated;
  - b) The legal description of the same;
  - c) The names of the legal voters, if any, who reside upon the same;
  - d) The character and use of the same;
  - e) A description of any public highway located therein; and
  - f) Any other facts pertinent to the application, including but not limited to any other facts necessary by municipal ordinance for the recordation of any plat. (SDCL 11-3-20.3)
- 3) Upon approval of the final plat by the municipality, the plat shall be filed in the office of the register of deeds of the county in which the property is located. The register of deeds is then directed by statute to record the final plat and to vacate all previous plats in the same manner as prescribed by SDCL 11-3-18. (SDCL 11-3-20.4)

The Register of Deeds shall notify the affected municipality of vacation within ten days of filing for the vacation of the plat. (SDCL 11-3-16)

All the lots that are included in blocks, as well as the blocks, must be numbered consecutively and their exact length and width along with the subdivision boundary lines shall be stated on the plat. All lots not included in blocks and all parcels and tracts shall be surveyed, numbered, and platted in the same way together with any streets that divide or border them. The plat must include the length, central angle, and other data necessary to survey any curve on the plat. (SDCL 11-3-3)

Every plat must be certified by the surveyor as being true and correct. The proprietor or his agent must also certify that he is the absolute and unqualified owner of the land and that the land is free from any encumbrances. (SDCL 11-3-4)

The law also reads that development of the land shall conform to all existing applicable zoning, subdivision and erosion and sediment control regulations. The certificate of ownership must be acknowledged before any officer authorized to take the acknowledgment of deeds. The certificate shall be endorsed on or attached to the plat and recorded at the County Register of Deeds.

No governing body shall be required to open, improve, or maintain any such street or alley solely by virtue of having approved a plat. (SDCL 11-3-12)

#### **14.060 VACATION OF STREETS AND ALLEYS**

Municipalities may vacate a street, alley or public ground or part thereof only upon petition and consent in writing of all the owners of the property adjoining the part of the street, alley, or public ground to be vacated. (SDCL 9-45-7)

Upon the filing of the petition, if the governing body deems it expedient to proceed, the finance officer shall file the petition and shall publish notice once each week for two successive weeks to the effect that such petition has been filed and stating in brief its objective, and that such petition will be heard and considered by the governing body, or a committee appointed by it for that purpose, on a day specified not less than ten days following the last publication. (SDCL 9-45-8)

The governing body, after the hearing or upon the favorable recommendation of the committee appointed to hear the petition may declare by resolution passed by a two-thirds vote of all the members the street, alley, or public ground vacated. (SDCL 9-45-9) This resolution must be published and filed with the county register of deeds. It is subject to referendum. (SDCL 9-45-12)

Provisions for vacating a platted street or alley not in use for twenty years are found in SDCL 9-45-10 and 9-45-11.

A municipal governing body may vacate a street within its extraterritorial jurisdiction, as defined in SDCL 11-6-10, upon approval of the board of county commissioners. (SDCL 9-45-13.1)

**14.100 CHANGES IN OWNERSHIP OF PROPERTY**

- |  |  |
|--|--|
| 14.105 Acquisition of Real Estate              | 14.125 Exchange of Property Between Governmental Units |
| 14.110 Eminent Domain                          | 14.130 Exchange of Property with Private Owner         |
| 14.115 Disposal of Surplus Government Property | 14.135 Disposition of Unclaimed Property               |
| 14.120 Lease of Municipal Property             |  |

**14.105 Acquisition of Real Property**

The governing body of any municipality is authorized to acquire by lease, purchase, gift, condemnation or other lawful means, real and personal property, easements, and rights of way within or without its corporate limits for all authorized purposes. (SDCL 9-12-1(2))

**14.110 Eminent Domain**

The Constitution of the State of South Dakota in Article VI Section 13 prohibits the taking of private property for public use without just compensation. This is the basis for exercising the power of eminent domain. The power of eminent domain is an inherent right which is vested in a sovereign state. (Darnell v. State, 79 SD 59, 108 NW 2d 201)

Various sections of this Handbook have noted the statutory authority to condemn property for public use according to the provisions of eminent domain. For example, the municipal park board (SDCL 9-38-31), the municipal recreation board (SDCL 9-38-99), the redevelopment commission (SDCL 11-7-22), and the urban renewal commission (SDCL 11-8-50) all have the authority to exercise the power of eminent domain. In addition, the municipality itself is authorized to condemn land under the power of eminent domain in SDCL 9-36-16 relating to flood control projects and in SDCL 9-36-9 relating to stream improvements.

The statute granting the power to acquire and condemn private property within the state for public purposes uses the word "condemn" to mean the taking or damaging of private property under the right of eminent domain. The authority to condemn land by taking or damaging it necessarily means a condemnation with just compensation; otherwise, the statute conferring such authority would be in conflict with Art. VI, Sec. 13 of the Constitution. The authority to condemn necessarily carries with it everything incidental to the exercise of such power, including not only the physical appropriation of property, but also the power to cause incidental damages to any person whose property, though not taken, may be damaged thereby. (State v. Sayer, 43 SD 45, 177 NW 807)

Whenever any governing body exercises its power of eminent domain, it can do so only by a resolution which must be passed by a two-thirds majority. The property appropriated can be either within or outside of the corporate limits. The resolution must state the purpose and extent of the appropriation or condemnation of property. (SDCL 9-27-1)

The statutory proceedings for condemnation under the power of eminent domain are found in SDCL 21-35. Statute requires in all cases where any person, group or corporation, public or private who are invested with the privilege of taking or damaging private property for public use shall determine to exercise such privilege, it shall file a petition in the circuit court of the county in which the property to be taken or damaged is situated, praying that the just compensation to be made for such property may be ascertained by a jury. (SDCL 21-35-1)

A petition filed in accordance with this statute must name the person, group or corporation desiring to take or damage the private property as plaintiff and all persons having interest in or liens upon the property as defendants. The petition must also contain a description of the property to be taken and the purpose for which the property is to be used. (SDCL 21-35-2)

Statute also requires that in all cases where resolution, ordinance or other proceeding of any corporation is required by law before taking private property, a copy of the resolution or ordinance or proceeding must be attached to the petition. (SDCL 21-35-5)

These petitions are subject to amendment under the provisions of SDCL 21-35-3. After filing the petition with the circuit court, the plaintiff may issue a summons to the defendants which must, among other requirements, contain a notice to the effect that if the defendants do not appear in the proceeding within thirty days from the service of the notice, the plaintiff will apply to the court for an order to impanel a jury to ascertain the just and reasonable compensation for the property. (SDCL 21-35-9)

The plaintiff at the time of service of the summons may also serve upon the defendant an offer in writing as notice that the plaintiff will deposit a sum of money with the clerk of courts to be paid to the defendant as compensation for all the property taken or damaged. (SDCL 21-35-11) If the plaintiff fails to accept the offer within ten days, the deposit is returned and an eighteen member jury is to be summoned in order to determine the amount of compensation to be paid for the property. (SDCL 21-35-11; 21-35-12; and 21-35-15)

The parties may by agreement refer a dispute for resolution by mediation using the services of a mediator selected by the parties. (SDCL 21-35-11.1)

In all cases of taking or damaging private property by a municipal corporation, the jury is required to take into consideration the benefits which may accrue to the owner thereof as the result of the proposed improvement. (SDCL 21-35-17)

The damage caused to the property of a person whose land was not taken is compensable if the consequential injury is peculiar to the owner's land and not of a kind suffered by the public as a whole. (State Highway Com. v. Bloom, 77 SD 452, 93 NW 2d 572)

A party whose land has been condemned (and property which has been damaged incidental to the condemned property as has been demonstrated above) is entitled to recover, not only the value of the land actually taken, but also damage the remaining land sustains by reason of such taking. The measure of damages for the land remaining is the difference between the value of the property before and after the taking. (Chicago M&ST. P. Ry. Co. v. Brink, 16 SD 644, 94 NW 422)

This is important to municipalities because a municipality is liable to landowners for the obstruction of natural drainage which is caused by the municipality's grading of streets. (Reinartz v. Town of Ethan, 50 SD 42, 208 NW 174)

Another court decision determined that, since this constitutional provision extends to the damaging of private property for public use without just compensation, municipalities are liable for consequential damage arising from their construction of improvements even though no negligence is proven, and thus a landowner who sought recovery from the municipality for pollution of a stream with sewage was not required to show negligence in the construction of the sewer system. (Gellert v. City of Madison, 50 SD 559, 210 NW 978)

The impact of eminent domain is felt not only in grading and natural drainage or public improvements like sewer systems but also in such things as special assessments. The statute which authorizes the city council to cause new sidewalks to be built by property owners within the municipal limits is as unconstitutional as taking private property for public use without just compensation and denying due process insofar as a special assessment against abutting property was made the personal obligation of the owner. (City of Brookings v. Natwick, 22 SD 322, 117 NW 376, 18 LRA (NS)1259, 133 Am.St. Rep. 927, 17 Ann Cass 1254)

Any municipality may accept the deed to any real estate within its boundaries in cases where the municipality has a lien on the real estate either for general taxes or special assessments. The governing body cannot, however, accept the deed to any property that is not free from the lien of any mortgage, mechanics lien, judgment or other lien or encumbrance. This does not apply to liens of other taxing governmental subdivisions. (SDCL 9-27-2)

#### 14.115 Disposal of Surplus Government Property

The governing board of a political subdivision may sell, trade, loan, or otherwise dispose of any land, structures, supplies, equipment or other property which such governing board has, by appropriate motion, determined is no longer necessary, useful or suitable for the purpose for which it was acquired. No motion is required for disposal of consumable supplies, printed text, zoo animals, or subscriptions. (SDCL 6-13-1) A two-thirds vote of the governing board is required for the sale of municipal real estate in the commissioner form of government (SDCL 9-9-16) and the aldermanic form of government. (SDCL 9-8-10)

After the governing board has determined property to be surplus, three real property owners of the political subdivision (governing board members are eligible provided they are real property owners within the municipality) are appointed to appraise the value of the property. The governing board may employ a person or persons licensed by the state to do fee appraisals in lieu of the property owners conducting the appraisal. The appraisers file a report on their appraisal with the finance officer. (SDCL 6-13-2) No appraiser nor any governing board member nor any officer of a municipality who has been elected or appointed may buy the property except at public auction. (SDCL 6-13-7)

Any improvements on land shall be appraised separately from the land. Equipment or supplies which are to be traded for other property, property which is to be destroyed, property which is to be transferred to another political subdivision pursuant to SDCL 6-5-1, property being sold which was created as a result of an educational program in a school and property which is to be sold at public auction need not be appraised. (SDCL 6-13-3) Property to be transferred to another political subdivision pursuant to SDCL 6-5-1 need not be advertised. (SDCL 6-13-4)

Any surplus property appraised pursuant to SDCL 6-13-2 at two thousand five hundred dollars (\$2,500) or less may be sold by the governing board at a private or public sale without notice. The governing board shall give notice of the sale of all other surplus property by publishing a notice of such sale in the official newspaper at least once each week for at least two consecutive weeks. The first such publication may not be less than ten days prior to the date of the sale. Such notice shall describe the property to be sold and the time when bids will be opened. The governing board may open the bids or may designate an official and a witness to open all bids prior to the meeting of the governing board and shall state such in the notice of sale. (SDCL 6-13-4)

Sealed bids received on the surplus property shall be filed with the finance officer and shall be opened at a meeting of the governing board at the time specified in the notice. The governing board may reject any and all bids. However, if the governing board accepts a bid, it shall be the bid of the highest bidder. If no bids are received, the governing board may have the surplus property reappraised, or may, within 12 months thereafter, sell the property at private sale for not less than 90% of the appraised value without further publication or appraisal. (SDCL 6-13-5)

Property that was conveyed to the municipality by a railroad may be sold to the lessee of the property or, if there is no lessee, to the owner of property abutting the property to be sold for not less than its appraised value. (SDCL 6-13-5.1)

In lieu of sealed bids, the governing board may sell surplus property at public auction or by listing the property with one or more licensed real estate brokers. The governing body may accept any offer for purchase of real property. The governing board shall give notice of sale of the real property, including the appraised value, by auction or by broker as required in SDCL 6-13-4. (SDCL 6-13-5.2) Surplus property may be sold to the highest bidder at the auction. (SDCL 6-13-6)

If the municipality is unable to sell real property in excess of two hundred fifty dollars by either sealed bids or auction sale, the municipality may sell the property under an installment contract with terms and conditions to be determined by the governing board. The property may not be sold for less than ninety percent of the appraised value. (SDCL 6-13-9)

No governing board member, appointed municipal official, or any real property owner acting as an appraiser may purchase such surplus property except at public auction. (SDCL 6-13-7)

All revenue accruing from the sale of surplus property shall be paid into the treasury of such political subdivision and credited, at the discretion of the governing board, to the general fund or to the fund in which such property was inventoried. (SDCL 6-13-8)

Real property which was selected and obtained for parks, parkways, boulevards, public libraries, museums, and art galleries may not be sold or used for a different purpose unless it is authorized by an affirmative majority vote of the voters of the municipality at a regular or special municipal election. (SDCL 9-38-34)

The governing body of a first- or second-class municipality may by ordinance authorize a change in the use of municipal parkland as long as it is still utilized for public purpose. Notice of the proposed ordinance must be published in the municipality's official newspaper once a week for two successive weeks. The final publication notice must occur at least fourteen days before the meeting at which the first reading of the ordinance is scheduled. (SDCL 9-38-34.1)

#### 14.120 Lease of Municipal Property

Every municipality may lease its property. If such lease is for more than one hundred twenty days and for an amount exceeding two thousand five hundred dollars annual value, the governing body must adopt a resolution of intent to enter into such lease and fix a time and place for public hearing on the adoption of such resolution. Notice of the hearing shall be published in the official newspaper once, at least ten days prior to the hearing. Following the hearing, the governing body may authorize the lease upon the terms and conditions it determines. (SDCL 9-12-5.2)

No lease or grant of any municipal lot for a longer period than ninety-nine years, in which shall be reserved any rent or service of any kind, shall be valid. (SDCL 43-32-2)

#### 14.125 Exchanges of Property Between Governmental Units

Municipalities can exchange property with other governments. Statute provides that all counties, municipalities, sanitary districts, townships, and school districts of this state are authorized and empowered to exchange with each other and to transfer and convey from one another any land or property belonging to them. This exchange also extends to work to be performed and can be upon such terms as determined by the respective governing bodies. (SDCL 6-5-1) In addition, every municipality or other entity authorized to levy taxes may lease, sell or give and convey any personal or real property or money, work or services, to the state or any nonprofit corporation for an authorized public, charitable, or humanitarian purpose. Such sale, lease, gift, conveyance or performance of work shall be done on the terms provided by resolution of the governing body. Such transfer can be made without offering the property for sale and without requiring the recipient subdivision to pay for the property. (SDCL 6-5-2) No money may be transferred from any sinking or interest fund unless sufficient money remains to pay all interest on outstanding bonds. (SDCL 6-5-5)

SDCL chapter 9-27 contains provisions for transfer of real property between governmental units. Specifically, in SDCL 9-27-29 and 9-27-30 municipalities can convey land to school districts in the same manner as provided in SDCL chapter 6-5.

Municipalities are also authorized to sell, convey, or lease property to and from the U.S. government. This exchange can be made upon such terms as the governing bodies determine. (SDCL 9-27-33; 9-27-34)

#### 14.130 Exchanges of Property with Private Owner

A municipality may also exchange real property with a private owner after appraising the land, publishing a notice of hearing and conducting a public hearing. (SDCL 6-5-4; 9-27-34.1)

#### 14.135 Disposition of Unclaimed Property

There are times when a municipality becomes interested in unclaimed property. However, because of the relative infrequency of municipal proceedings in this area, no attempt will be made to outline these procedures in this

Handbook. If your community has any problems in this area, your municipal attorney should be consulted.

The procedure handling abandoned motor vehicles is outlined in SDCL chapters 32-30 and 32-36.

### **14.150 CHANGES IN MUNICIPAL BOUNDARIES**

14.155 Annexation by Petition  
14.160 Annexation by Resolution  
14.165 Petition for Exclusion

14.170 Annexation of Contiguous Municipality  
14.171 Notification of Utilities  
14.172 Notification to the Department of Revenue

#### 14.155 Annexation by Petition

This Handbook has already noted in the requirements for incorporation that a survey of the territory to be incorporated must be made and the boundaries of the municipality must be shown on the plat of the townsite. (See Hdbk. sec. 2.250 and 14.050) These boundaries are subject to change under the provisions of SDCL chapters 9-4 and 9-5.

One method by which the boundaries can change is annexation by petition. Statute provides that upon receipt of a written petition describing the boundaries of any territory contiguous to that municipality sought to be annexed to that municipality, the governing body may by resolution include such territory or any part within such municipality if the petition is signed by not less than three-fourths of the registered voters and by the owners of not less than three-fourths of the value of the territory sought to be annexed to the municipality. The term "contiguous" as used in this section, includes territory separated from the municipality by reason of intervening ownership of land used as a golf course, railroad, or any land owned by the state of South Dakota or any subdivision. (SDCL 9-4-1)

A municipality may enter into an agreement with any landowner specifying the conditions under which the landowner's property may be annexed (pursuant to SDCL 9-4-1) or developed (SDCL 9-4-1.1).

#### 14.160 Annexation by Resolution

A second method of annexing territory is by resolution of the governing body.

According to SDCL 9-4-4.1, before a municipality may extend its boundaries, (without petition) they must conduct a study to determine the need for the annexation and to identify the resources necessary to extend the boundaries. Based on this study, the governing body may adopt a resolution of intent to extend its boundaries. The resolution in municipalities with a population of one thousand or more shall contain at least the following:

1. Description and boundaries of the territory to be annexed;
2. Assurance that ample and suitable resources exist to accommodate the growth;
3. Assurance that utilities and street networks are considered in the annexation and that there is a definite timetable upon which services will be extended into the new territory;
4. The approximate cost of the extended service;
5. The estimated difference in tax assessment rate for the residents in the annexed territory;
6. Assurance that exclusions and irregularities in boundary lines are not the result of arbitrariness;
7. Assurance that there is a reasonable present or demonstrable future need for the annexation; and
8. Assurance that population and census data indicate that the municipality has or may experience growth or development beyond its present boundaries. (SDCL 9-4-4.2)

The resolution in municipalities with a population of less than one thousand shall contain at least the following: (SDCL 9-4-4.11)

1. Description and boundaries of the territory to be annexed;
2. Assurance that ample and suitable resources exist to accommodate the growth;
3. The estimated difference in tax assessment rate for the residents in the annexed territory;
4. Assurance that exclusions and irregularities in boundary lines are not the result of arbitrariness;
5. Assurance that there is a reasonable present or demonstrable future need for the annexation; and
6. Assurance that population and census data indicate that the municipality has or may experience growth or development beyond its present boundaries. (SDCL 9-4-4.2)

Prior to adoption, copies of the resolution of intent, with a notice of time and place of hearing must be sent by certified mail to the county auditor and affected landowners not less than ten nor more than twenty days before the hearing. After the public hearing, the resolution of intent is adopted. (SDCL 9-4-4.3)

Within sixty days of the adoption of the resolution of intent, the governing body must hold a public hearing to consider the resolution of annexation. Prior to the public hearing, copies of the resolution, with the time and place of the hearing must be sent by certified mail to the county auditors and affected landowners not less than ten nor more than twenty days before the hearing. Within one hundred and twenty days of the public hearing the governing body may adopt a resolution of annexation. This resolution is handled in the same manner as any other resolution. The governing body shall consider any objections to the resolution of annexation and the adopted resolution of intent and may adopt the annexation resolution with or without amendments. No amendment may be made affecting any property not described in the original resolution. (SDCL 9-4-4.4)

If the resolution includes unplatted property, it may not be adopted until it has been approved by the board of county commissioners in the county in which the unplatted territory is located. For the purposes of this section, unplatted territory is any land which has not been platted by a duly recorded plat or any agricultural land as defined in SDCL 10-6-110. (SDCL 9-4-5) This resolution is subject to the constitutional right of referendum. The power to extend the boundaries of a municipal corporation is inherent in the Legislature and may be exercised by a municipality only in the manner and to the extent described by law. (State ex rel. Lindstrom v. Goetz, 73 SD 633, 47 NW 2d 566)

If a petition signed by at least five percent of the registered voters residing in the combined area of the municipality and the special annexation precinct is filed within twenty days after the publication of the annexation resolution, the question of annexation is submitted to a vote of the voters of the combined area of the municipality and area to be annexed. (SDCL 9-4-4.6) The county commissioners shall, upon request of the municipal finance officer, establish a special election precinct comprising all of the registered voters residing in the area to be annexed. The county commission shall also submit the necessary registration lists to the municipality at least one day prior to the election. (SDCL 9-4-4.8)

This special election shall be on a Tuesday not less than thirty nor more than fifty days from the date of the order of the governing body. If a petition is filed on or after January first prior to the annual municipal election and within sufficient time to comply with the provisions of SDCL 9-13-14, the question shall be submitted at that annual municipal election. (SDCL 9-4-4.7)

#### 14.165 Petition for Exclusion

Upon a two-thirds vote of the governing body, or upon petition of three-fourths of the voters and three-fourths in value of the property in any territory bordering the corporate limits of the municipality but still within the boundaries of the municipality, the governing body may by resolution exclude the territory from the municipality. (SDCL 9-4-6)

Final action may not be taken on the petition for exclusion until notice of the presentation of such petition to the governing body has been published at least once a week for two successive weeks. (SDCL 9-4-7)

If the governing body fails to grant the request presented in the petition, the petitioners can within thirty days of the last publication of notice or upon refusal of the governing body, present their petition to the circuit court by filing the petition with the clerk of courts. (SDCL 9-4-8) The petitioners must notify the mayor or president of the board of trustees, that the petition has been filed with the circuit court. They must also include a notice of the time and place when and where a hearing on the petition will be held. The hearing may be conducted by the court at a regular or special term or while on vacation. (SDCL 9-4-9)

This statute is not unconstitutional as conferring legislative power upon the courts. (Wickhem v. City of Alexandria, 23 SD 556, 122 NW 597) The scope of the court review, however, is limited in that the council's refusal of a petition to exclude territory should not be overruled by the circuit court unless it is clearly shown that injustice would be done to the remaining portion of the municipality. (Quoley v. City of Brookings, 18 SD 581, 101 NW 713) Another court case determined that neither the municipal board nor the court has the authority to grant a petition for exclusion where the result of exclusion would be to divide the municipality into two distinct tracts of land, one noncontiguous with the other. (Cole v. City of Watertown, 34 SD 69, 147 NW 91)

Statute does not provide any guidelines for granting or refusing a petition for exclusion. In the case of Zajicek v. City of Wessington, the court ruled that the petition should be denied if the land is reasonably needed for residential users or sanitary or police purposes, if a number of persons are residing in close proximity to the main business or residential section of the municipality, if schools, water mains, streets and sidewalks have been installed with a special view to serving the land, if the proposed limits of the municipality would be extremely irregular upon exclusion, if the residents on the land are not primarily engaged in agriculture and have use of the municipal water mains, sewers, electric lights, sidewalks, or if other facts show that such an exclusion would work injustice to the inhabitants of the municipality. The petition should be granted if the only prospective use of the land is agricultural and the only reason the municipality desires to retain the land is to secure revenues. (Zajicek v. City of Wessington, 53 SD 315, 220 NW 913)

A final area concerning the acceptance or rejection of a petition for exclusion is to note that statute confers no right either upon the municipal board or upon the court to grant a petition for exclusion as to certain parts of land involved and to deny a petition as to other parts. When the court determined that part of a territory sought to be excluded should not be disconnected from the municipality, it necessarily concluded that the request of the petitioners should be denied. (Cole v. City of Watertown, 34 SD 69, 147 NW 91)

#### 14.170 Annexation of Contiguous Municipality

The fourth way municipalities may annex territory outside of its corporate limits is by annexing a contiguous municipality. For the consolidation of contiguous municipalities to be considered, a petition containing at least fifteen percent of the registered voters who are property owners in the municipality desiring to be annexed must file a petition requesting consolidation with the finance officer of said municipality. (SDCL 9-5-1)

Upon filing of such petition, the governing bodies of each respective municipality must meet and fix the terms upon which the consolidation will be made. If the governing bodies reach agreement on the terms of consolidation, they must pass identical resolutions declaring the terms. (SDCL 9-5-1) The resolution, once adopted and published, takes effect in the same manner as other resolutions. However, the proposed plan of consolidation may not become effective unless approved by the voters of each municipality as provided in Chapter 9-5.

If a majority of the voters in the municipality reject the consolidation, another election on the same question cannot be held within three years after the resolution has taken effect. (SDCL 9-5-4) If the majority of the electors voting on the question are in favor of the annexation, the governing bodies must declare so by resolution, whereupon the governing body of the annexing municipality must hold an election on the question of consolidation. The election held by the annexing municipality is governed by the same procedures as the election in the municipality desiring to be annexed. (SDCL 9-5-7)

When copies of the resolutions and election proceedings are filed with the Secretary of State and the register of deeds, the annexation is effective and complete. (SDCL 9-5-9)

The remaining sections of Chapter 9-5 delineate the procedures for transfer of title to municipal property (SDCL 9-5-11), assumption of municipal debts and obligations (SDCL 9-5-12), and consolidation of and effect on school districts (SDCL 9-5-16 to 9-5-19). Bonded indebtedness is not transferred, and all ordinances, contracts and rights and liabilities of the municipalities are continued in force until they are changed or modified. (SDCL 9-5-14 to 9-5-20)

Legislation was passed that relates to municipal annexation of territory which results in school district boundary changes. It is mentioned here because the effect of this bill is felt in all four methods of annexing territory. Statute now provides that the territory to be annexed shall remain a part of the school district in which it was located before the annexation. (SDCL 13-6-30)

#### 14.171 Notification to Utilities

A municipality should, 90 days prior to the effective date of any municipal annexation or boundary change, provide utilities operating within the municipality with:

1. Each site address, as recorded on assessment or tax rolls, to be annexed within or excluded from the municipal boundary;
2. A legal description and map of the proposed boundary change; and
3. A copy of the resolution or ordinance approving annexation or boundary change.

#### 14.172 Notification to the Department of Revenue

Any new resolution or amendment enacted by a municipality which changes the boundaries of the municipality must be reported to the Department of Revenue. The municipality shall provide written notification of the enactment or approval of the resolution or amendment, along with a copy of the resolution or amendment by registered or certified mail or by any electronic means to the secretary of revenue. The municipality shall also provide any changes or additions to streets and addresses. (SDCL 10-52-13) The Department of Revenue will not begin collecting sales taxes in the new area on behalf of the municipality until 90 days after such notification.

### **14.200 PLANNING AND ZONING**

- |  |   |
|--|---|
| 14.205 County Planning                     | 12.226 Adult Oriented Businesses            |
| 14.210 Municipal Planning and Zoning       | 14.230 Flood Control and Stream Improvement |
| 14.215 Municipal Housing and Redevelopment | 14.235 Drainage Rights                      |
| 14.220 Urban Renewal                       | 14.240 Conditional Use Permits              |
| 14.225 Airport Zoning                      |   |

#### 14.205 County Planning

The impact of county-wide planning also affects municipal government. The purposes of a comprehensive county plan are to protect and guide the physical development of the county; to protect the tax base; to encourage a distribution of population or mode of land utilization that will facilitate the economical and adequate provisions of transportation, roads, water supply, drainage, sanitation, education, recreation, or other public requirements; to lessen governmental expenditures; and to conserve and develop natural resources. (SDCL 11-2-12)

The governing body may contract with the county board of commissioners for planning and zoning services. (SDCL 11-2-7) The municipal governing body may authorize the county planning and zoning commission, on behalf of the municipality, to exercise any of the powers otherwise granted to municipal planning and zoning commissions under Chapter 11-4 and 11-6. This contract may provide for joint county-municipal planning activities among other things. (SDCL 11-2-8) However, this does not apply to townships. In an attorney general's opinion based on SDCL 8-2-9 and 8-2-10, a township does not have and can't be given zoning authority. (AG Opinion 74-40)

The comprehensive plan for the county may include district zoning ordinances and building regulations (SDCL 11-2-14), and may also include land development and subdivision regulations. (SDCL 11-2-17) The plan may also include those municipalities within the county which are either unincorporated or which have requested by resolution to be included. (SDCL 11-2-11)

However, statute also provides that nothing in Chapter 11-2 shall be construed to prevent or modify the powers of an incorporated municipality, with a duly authorized planning commission, from exercising planning and zoning jurisdiction within the corporate limits and from exercising jointly with the county planning commission the planning and zoning authority within six miles of the corporate limits. (SDCL 11-2-32)

#### 14.210 Municipal Planning and Zoning

Because of the number of statutes relating to municipal planning and zoning, this section of the Handbook will examine five areas. Those being: An Overview of Municipal Planning and Zoning; the Planning Commission; Territorial Jurisdiction of Planning and Zoning Powers; Preparation of the Comprehensive Plan; and Enforcement of the Comprehensive Plan.

##### **An Overview of Municipal Planning and Zoning**

Municipalities are granted certain regulatory powers under SDCL 11-4-1. These include the power to regulate and restrict the height, number of stories, and size of buildings and other structures, the percentage of a lot that may be occupied, the size of the yards, courts, and other open spaces, the density of population, and location and use of buildings, structures, and land for trade, industry, residence, flood plain, or other purposes. It is from this authorization that municipalities can exercise planning and zoning powers.

To carry out this authority, the governing body may divide the municipality into districts. The districts may be of such number, shape, and area as may be deemed best suited to carry out the provisions of Chapter 11-4. Within each district the governing body can regulate and restrict the erection, construction, reconstruction, alteration, repair, or use of buildings, structures, or land. The regulations must be uniform for each class or kind of building within each district but may vary between districts. (SDCL 11-4-2)

A municipality may enter into an agreement with any landowner specifying the conditions under which the landowner's property may be developed. (SDCL 11-4-1)

##### **The Planning Commission**

Every municipality must create a municipal planning and zoning commission to develop and implement both a comprehensive plan and the zoning regulations. (SDCL 11-6-2) The municipality may contract with other entities for planning and zoning purposes. (SDCL 11-6-3) If a municipality does not adopt a comprehensive plan, all zoning laws will be declared invalid. Pennington County v Moore, 525 NW 2d 257

Each municipality shall provide by ordinance for a planning and zoning commission, including the appropriation of money to a fund for the expenditures of such commission and to provide by ordinance the qualifications of the members, mode of appointment, tenure of office, compensation, powers, duties of and rules governing such board. (SDCL 11-6-2)

Subsequent sections of Chapter 11-6 of the SDCL outline requirements for employment of personnel (SDCL 11-6-7) and expenditures of funds by the planning commission. (SDCL 11-6-9) All public officials must upon request, furnish to the planning commission such available information as it may require for its work. (SDCL 11-6-8)

Provisions for subdivisions located outside of municipal limits are found in SDCL 11-6-26.

##### **Territorial Jurisdiction of Planning and Zoning Powers**

The governing body of a municipality can exercise the planning and zoning powers granted in Chapter 11-6 not only within its corporate limits, but also within an area of up to six miles in all directions of its corporate limits. This is provided, however, that the territory located outside the municipality is not contained in another municipality. (SDCL 11-6-10)

The procedures by which municipalities and counties work together in the joint jurisdictional area are spelled out in SDCL 11-6-10 through 11-6-12.1 (SDCL 11-6-10; 11-6-11; 11-6-12; 11-6-12.1)

### **Preparation of the Comprehensive Plan**

The statutory purposes of the comprehensive plan are to lessen congestion in the streets; to secure safety from fire, panic, and other dangers; to promote health and general welfare; to provide adequate light and air; to prevent the overcrowding of land; to avoid undue concentration of population; to facilitate the adequate provision of transportation, water, sewage, schools, parks, and other public requirements. (SDCL 11-4-3)

The governing body may adopt a zoning ordinance. Before adoption or renewal of the ordinance, the council shall hold at least one public hearing. Notice of the time and place of the hearing shall be given once at least ten days in advance by publication in a legal newspaper of the municipality. Any interested person shall be given a full, fair, and complete opportunity to be heard at the hearing, and the governing body may refuse or adopt the ordinance, with or without amendment. (SDCL 11-4-4; see Hdbk. sec. 4.050)

If a zoning ordinance is adopted, it is subject to the provisions of SDCL 9-19-7 as a comprehensive regulation and will go into effect as other ordinances unless the referendum is invoked or unless a protest is filed with the finance officer. The written protest must be signed by at least forty percent of the owners of equity in the lots included in such proposed district and the lands within 250 feet from any part of the proposed district. If a protest is filed, the ordinance does not become effective unless the ordinance is approved by two-thirds of the governing body of the municipality. The protest provisions do not apply to any ordinance regulating or establishing flood plain areas. (SDCL 11-4-5)

The regulations, restrictions and boundaries adopted by the governing body may be amended, supplemented, changed, modified, or repealed. The proposed changes must be adopted in the same manner as the original ordinance. However, amendments or additions to a planning or zoning ordinance may be published without republishing the full ordinance if the section or subsection of the ordinance containing the change is published in its entirety. (SDCL 11-4-8) The referendum and right of protest may be invoked against an ordinance making changes in the original zoning ordinance. (SDCL 11-4-10) The planning and zoning commission may propose a comprehensive plan and amendments, extensions, or additions to the plan. Before making recommendations to the city council, the commission must hold at least one public hearing on the proposals to the plan. Notice of hearing shall be given once, ten days in advance by publication in a legal newspaper of the municipality. (SDCL 11-6-17)

### **Enforcement of the Comprehensive Plan**

The city council shall provide for a board of adjustment to modify or vary the regulations in specific cases, in order that unwarranted hardship may be avoided. (SDCL 11-4-13; 11-6-25; 11-6-25.1)

#### 14.215 Municipal Housing and Redevelopment

Any municipality may rebate the municipal property taxes paid on housing that furthers the municipality's housing goals. The municipality shall, by ordinance, develop a program that provides for the type of housing that qualifies for the rebate, the length of time the rebate may apply, and the criteria the housing shall meet to qualify for the rebate. (SDCL 11-7A-8)

The SD Housing Authority manages funds in the SD Housing Infrastructure Fund, which are available for grants and loans for housing infrastructure projects. (SDCL 11-15-1 through 11-15-7)

In addition, when there develops in a municipality an area in which there is a predominance of buildings or improvements which by reason of dilapidation, deterioration, age or obsolescence, injuriously affect the entire area, and are detrimental to the public health, safety, morals, or welfare. This is the definition of a slum as contained in SDCL 11-7-2. There are substantially two statutory methods to deal with these areas. One method is by exercising the authority granted in Chapter 11-7 which relates to municipal housing and redevelopment powers. A second method is urban renewal.

In accordance with the provisions contained in Chapter 11-7, municipalities are authorized to acquire slum or blighted areas including lands, structures, or improvements, the acquisition of which is necessary in order to assure the proper clearance and redevelopment of the entire area and to prevent the spread or recurrence of slum conditions. (SDCL 11-7-5)

Statute also authorizes a commission to be established to carry out the provisions of Chapter 11-7. The commission shall consist of five commissioners who, unless otherwise provided by ordinance, are residents of the area of operation. In municipalities of the first class, no public officer or employee of the municipality or county is eligible to serve as a commissioner. However, if the municipality employs a city manager, the governing body may, by resolution, constitute itself as the commission. In municipalities of the second and third class, the commission may be made up of members of the governing body but may not include employees of the municipality. (SDCL 11-7-11) Due to the infrequent use of housing and redevelopment powers, a detailed explanation of the statutes related to this area isn't presented in this manual. However, there are two additional points of significance to municipalities regarding housing and redevelopment powers.

The first authorizes the commission to provide management services for federal or state subsidized housing projects irrespective of whether tenants in said projects qualify under SDCL 11-7-59(3). (SDCL 11-7-21.1)

The second deals with the South Dakota Housing Development Authority. The Authority was created for the purpose of encouraging the investment of private capital and stimulating the construction and rehabilitation of residential housing to meet housing needs using public financing. The public financing includes public construction, public loans, and public purchase of mortgages. If your municipality is involved with the South Dakota Housing Development Authority, Chapter 11-11 of the SDCL contains the statutory regulations concerning the Authority.

#### 14.220 Urban Renewal

A second way slum and/or blighted areas in a municipality may be dealt with is by urban renewal. Both the significance of and necessity for municipal land-use and zoning, as referred to in the introduction to the Chapter as being a contributory factor to the growth and development of a community, is summarized in the legislative intent of the urban renewal law.

State law says in part that slum and blighted areas constitute a serious and growing menace which are injurious to the public safety, morals and welfare of the residents of the state; that the existence of such areas contributes substantially and increasingly to the spread of disease and crime, constitutes an economic and social liability imposing numerous municipal burdens which decrease the tax base and reduce tax revenues, substantially impairs or arrests the sound growth of municipalities, retards the provision of housing accommodations; and that the prevention and elimination of slums and blight is a matter of state policy and state concern in order that the state and its municipalities shall not continue to be endangered by areas which are focal centers of disease, promote juvenile delinquency, and consume an excessive proportion of its revenues because of the extra services required for police, fire, accident, hospitalization and other forms of public protection, services, and facilities. (SDCL 11-8-7)

There are several statutes relating to urban renewal. These can be arranged, for purposes of clarity, into six sub-categories. They are: General Provisions Governing Urban Renewal; the Master Plan; Powers Authorized for Urban Renewal; the Urban Renewal Agency; Acquisition and Conveyance of Urban Renewal Property; and Finance Options and Bond Requirements.

#### **General Provisions Governing Urban Renewal**

Before a municipality can exercise any authority granted by the provisions of Chapter 11-8, the governing body must adopt a resolution finding that: one or more slum or blighted areas exist in such municipality; and that rehabilitation, conservation, redevelopment, or a combination thereof, of such an area or areas is necessary in the interest of the public health, safety, morals, or welfare of the residents of such municipality. (SDCL 11-8-8)

To carry out the provisions of Chapter 11-8, municipalities must afford maximum opportunity, consistent with the sound needs of the municipality as a whole, to the rehabilitation or redevelopment of the urban renewal area by private enterprise. (SDCL 11-8-10)

### **The Master Plan**

The governing body can not approve an urban renewal plan until a master plan or parts of such a plan in which an urban renewal project would be conducted have been prepared. (SDCL 11-8-12) An urban renewal plan may be prepared by the municipality itself or by any person or a public or private agency. (SDCL 11-8-14)

Before a master plan for urban renewal can be approved by the governing body, it must be submitted to the Planning Commission, if one exists in the municipality, for review and recommendations as to its conformity with the plan for the development of the community as a whole. The Planning Commission then has thirty days to submit its written recommendations to the governing body. (SDCL 11-8-14)

After review by the Planning Commission, the governing body is required to hold a public hearing on the urban renewal plan. Notice of the hearing must be given in the official newspaper at least once each week for two consecutive weeks prior to the public hearing. A special notice must be given by mail to the persons whose names appear on the county treasurer's tax roll as the owner or reputed owner of the property within the area affected by the urban renewal plan. (SDCL 11-8-15)

The guidelines for approving an urban renewal plan are contained in SDCL 11-8-16 and 11-8-17. The plan is in full force and effect upon approval by the governing body. (SDCL 11-8-20) The plan may be modified at any time by the governing body provided that after the lease or sale by the municipality of real property in the urban renewal project area, the modification is approved by the owner, lessee or successor in interest of the property. (SDCL 11-8-19)

### **Powers Authorized for Urban Renewal**

Municipalities have all the powers necessary or convenient to carry out and effectuate the purposes and provisions of Chapter 11-8 including the powers granted by SDCL 11-8-22 to 11-8-33. (SDCL 11-8-21) This includes the power to:

- 1) Undertake and carry out urban renewal projects and related activities, and to make and execute contracts and other instruments, and to disseminate slum clearance and urban renewal information; (SDCL 11-8-22)
- 2) Enter any building or property for the purpose of making inspections, surveys, appraisals, and to acquire by purchase, lease, option, gift, grant, bequest, devise, eminent domain, or otherwise, any real property or personal property for administration purposes; and to improve such property; (SDCL 11-8-23)
- 3) Make surveys and plans necessary to carry out the purposes of Chapter 11-8; this includes plans to carry out a program of repair and rehabilitation of buildings and improvements, plans for the enforcement of state and local laws, codes and regulations relating to land-use and zoning, and appraisals, title searches, surveys, studies, and other work necessary for urban renewal projects and related activities; (SDCL 11-8-24)
- 4) Organize, coordinate, and direct the administration of Chapter 11-8 and to establish offices for these purposes; (SDCL 11-8-32)
- 5) Act as a public body and perform any or all of the actions or things that a public body is authorized to do in SDCL 11-8-34. (SDCL 11-8-35)

This list is by no means exhaustive. Further powers and authorizations will be delineated in the subsequent subsections as they become pertinent.

### **The Urban Renewal Agency**

A municipality may itself exercise the urban renewal powers or the governing body may, by resolution, elect to have the powers exercised by the urban renewal agency or by the housing authority. If the governing body decides to use the urban renewal agency or housing authority option, all powers granted to the governing body in Chapter 11 -8, except those outlined in SDCL 11-8-39, are vested in such agency or authority. If the governing body decides not to use the urban renewal agency or the housing authority option, it may exercise its urban renewal powers through a board of commissioners or through such offices as the governing body may determine. (SDCL 11-8-38)

The urban renewal powers retained by a municipality in the event the governing body creates an urban renewal agency or used the housing authority to carry out the provisions of Chapter 11-8 are as follows:

- 1) The power to determine an area to be a slum or blighted area or combination and to designate such area as appropriate for an urban renewal project and to hold any required public hearings;
- 2) The power to approve urban renewal plans and modifications;
- 3) The power to approve general neighborhood renewal plans and community-wide plans or programs for urban renewal;
- 4) The power to approve the acquisition, demolition, removal or disposal of property as provided in SDCL 11-8-25;
- 5) The power to establish a general plan for the locality as a whole;
- 6) The power to formulate a workable program under SDCL 11-8-9;
- 7) The power to make the determination and findings provided for in SDCL 11-8-8, 11-8-16, and 11-8-17;
- 8) The power to issue general obligation bonds under SDCL 11-8-37;
- 9) The power to assume the responsibility to bear loss as provided in SDCL 11-8-25; and
- 10) The power to appropriate funds, levy taxes and assessments, and to exercise other powers provided in SDCL 11-8-29. (SDCL 11-8-39)

If the urban renewal agency is authorized by the governing body, the mayor, with the advice and consent of the governing body appoints a five-member board of commissioners for the urban renewal agency. The term of office for each commissioner is for one year. (SDCL 11-8-41)

Statute provides that a commissioner cannot hold any other public office under the municipality. (SDCL 11-8-42) Statute further provides that the commissioners cannot receive compensation for services but are entitled to the necessary and actual expenses, including traveling expenses, incurred while in the discharge of duties. (SDCL 11-8-43)

The urban renewal agency is required to file on or before March thirty-first of each year a report of its activities with the governing body. The report must include a complete financial statement for the preceding year. (SDCL 11-8-47; see Hdbk. sec. 12.080)

The urban renewal agency must file a similar report with the auditor general on or by the same date. (SDCL 11-8-48; see Hdbk. sec. 12.080)

#### **Acquisition and Conveyance of Urban Renewal Property**

Municipalities can acquire by condemnation any interest in real property which it may deem necessary for or in connection with an urban renewal project and related activities under Chapter 11-8. (SDCL 11-8-50) A municipality can accomplish this by exercising its power of eminent domain. (See Hdbk. sec. 14.105) No property which is already held for public use by the United States, the state, or any political subdivision of the state, may be acquired without the permission of the respective public body. (SDCL 11-8-50)

As mentioned in the section on eminent domain, compensation must be paid for property so acquired. SDCL 11-8-25 states that every municipality shall have the power to acquire real property in an urban renewal area, demolish and remove any structures on the property, and pay all costs related to the acquisition, demolition or removal and to assume the responsibility to bear any loss that may arise as the result of the exercise of authority under this section in the event that the real property is not made part of the urban renewal project.

The municipality can transfer, lease, or sell real property in an urban renewal area under the provisions of SDCL 11-8-54 to 11-8-65.

Also of concern in this area is the statute which empowers municipalities to prepare plans for and assist in the relocation of persons, including individuals, families, business concerns, nonprofit organizations, and others, displaced from an urban renewal area, and to make relocation payments. (SDCL 11-8-26)

### **Finance Options and Bond Requirements**

Municipalities are authorized to appropriate funds and make expenditures which are necessary to exercising the powers granted under urban renewal in SDCL 11-8-29. This statute also authorizes municipalities to levy taxes and assessments for these purposes.

Municipalities are also empowered to borrow money and to apply for and accept advances, loans, grants, contributions, and any other form of financial assistance from the federal government, the state, county or other public body. (SDCL 11-8-30)

Another finance option is tax increment finance. (See Hdbk. sec. 12.410)

#### 14.225 Airport Zoning

Each municipality with an airport layout plan shall take measures for protection of airport approaches and shall adopt, administer, and enforce airport zoning regulations as prescribed by law. (SDCL 50-10-5)

The local zoning ordinances must be consistent with the airport layout plan. (SDCL 50-10-8) Airport zoning regulations cannot be adopted by the governing body until after public hearing and notice thereof. The notice must be given in the official newspaper at least fifteen days prior to the public hearing. (SDCL 50-10-13)

The governing body may delegate the responsibility to administer and enforce zoning regulations to any administrative agency under its jurisdiction. (SDCL 50-10-14)

#### 14.226 Adult Oriented Businesses

Beginning June 30, 2008, no adult-oriented business may be located within one quarter mile of a child welfare agency, a private or public school, a public playground, a public recreation facility, a residence, or a place of worship. Hours of operation are also limited by SDCL 11-12-3. (SDCL 11-12-2) However, any county or municipality may enact and enforce any ordinance regulating the location and operation of adult oriented businesses. (SDCL 11-12-3; 11-12-4)

#### 14.230 Flood Control and Stream Improvement

A final area of importance to municipal officials dealing with land-use and zoning concerns the authorization to establish and define the boundary line of and to improve rivers and streams. (SDCL 9-36-1) This can be done by resolution and is applicable to only those rivers and streams within the corporate limits. (SDCL 9-36-2)

When this power is exercised, the governing body must make a survey of the boundaries of the stream and record the plat thereof in the office of the finance officer. (SDCL 9-36-3) After the plat has been filed, notice of the time and place when the governing body will consider the proposed resolution must be given by publication once each week for at least two consecutive weeks. (SDCL 9-36-4)

Objections to the proposed resolution may be made by any person owning or interested in any property affected by the proposed boundary lines and must be in writing. (SDCL 9-36-6) When the governing body adopts the resolution according to the provisions of SDCL 9-36-7, and if the boundary lines contain land not included within the bed of the river or stream, the municipality may acquire such lands or a perpetual easement therein for public use by purchase or condemnation. (SDCL 9-36-9)

Municipalities can improve the stream through the construction, reconstruction, repair or maintenance of retaining walls, walks and driveways (SDCL 9-36-10) and bulkheads, wharves, levees, or breakwaters as authorized by SDCL 9-36-11. The costs incurred by the construction of the flood control improvements contained in SDCL 9-36-11 may be assessed against adjoining and abutting property.

#### 14.235 Drainage Rights

No county, township or municipality is required to register its natural drainage rights (SDCL 46A-10A-31) or record any highway right-of-way drainage (SDCL 46A-10A-31.2)

#### 14.240 Conditional Use Permits

A conditional use is any use that, owing to certain special characteristics attendant to its operation, may be permitted in a zoning district subject to the evaluation and approval by the approving authority specified in SDCL 11-4-4.1. A conditional use is subject to requirements that are different from the requirements imposed for any use permitted by right in the zoning district. (SDCL 11-4-4.2)

A zoning ordinance that provides for conditional uses of real property may also establish a process for certification of permitted uses. (SDCL 11-4-4.3 through 11-4-4.5)

When a zoning ordinance adopted pursuant to 11-4 authorizes conditional use of real property, the ordinance shall specify the approving authority, each category of conditional use requiring such approval, the zoning districts in which a conditional use is available, and the criteria for evaluating each conditional use, and any procedures for certifying property for approval of certain conditional uses. The approving authority shall consider the stated criteria, the objectives of the comprehensive plan, and the purpose of the zoning ordinance and its relevant zoning districts when making a decision to approve or disapprove a conditional use request. (SDCL 11-4-4.1)

## CHAPTER 15

### LEGALIZING MARIJUANA

15.000 Introduction  
15.050 Definitions

15.075 Patients and Caregivers  
15.100 Municipal Authority  
15.200 Employee Provisions

#### **15.500**      **INTRODUCTION**

In November of 2020, the voters of South Dakota voted to approve medical marijuana. The Department of Health was required to establish the form and content of registration and renewal applications by October 29, 2021, and to be ready to issue registry identification cards to qualifying patients by November 18, 2021. (SDCL 34-20G-29)

#### **15.050**      **DEFINITIONS**

**Medical Cannabis:** All parts of any plant of the genus cannabis, whether growing or not, in its natural and unaltered state, except for drying or curing and crushing or crumbling. The term includes an altered state of marijuana absorbed into the human body. The term does not include fiber produced from the mature stalks of such plant, or oil or cake made from the seeds of such plant. The term does not include the plant *Cannabis sativa* L. and any part of that plant, including the seeds thereof and all derivatives, extracts, cannabinoids, isomers, acids, salts, and salts of isomers, whether growing or not, with a delta-9 tetrahydrocannabinol concentration of not more than three-tenths of one percent on a dry weight basis; (SDCL 22-42-1)

#### **Allowable Amounts of Cannabis:**

- 3 ounces or less of cannabis
- The Department of Health established quantities of products – concentrated cannabis, cannabis extracts, and products that are infused with cannabis or an extract. Includes edible cannabis products, beverages, topical products, ointments, oils, and tinctures
- If the cardholder has a registry identification card allowing cultivation, they are allowed two flowering and two non-flowering plants.
- If the cardholder is allowed to cultivate, they are allowed any amount as long as it is produced from the cardholder's allowable plants and is possessed at the same property as the plants were cultivated. (SDCL 34-20G-1 (1))

**Cardholder:** A qualifying patient or a designated caregiver who has been issued and possesses a valid registry identification card (SDCL 34-20G-1 (6))

**Practitioner:** A physician, physician assistant, or advanced practice nurse who is licensed with the authority to prescribe drugs to humans. (SDCL 34-20G-1 (20))

**Debilitating Medical Condition:** A chronic or debilitating disease or medical condition or its treatment that produces one or more of the following: cachexia or wasting syndrome; severe, debilitating pain; severe nausea, except nausea associated with pregnancy; seizures; or severe and persistent muscle spasms; Acquired immune deficiency syndrome or positive status for human immunodeficiency virus; Amyotrophic lateral sclerosis; Multiple sclerosis; Cancer or its treatment, if associated with severe or chronic pain, nausea or severe vomiting, or cachexia or severe wasting; Crohn's disease; Epilepsy and seizures; or Post-traumatic stress disorder;. (SDCL 34-20G-1 (8))

**Dispensary:** Any entity registered with the department pursuant to this chapter that acquires, possesses, stores, delivers, transfers, transports, sells, supplies, or dispenses cannabis, cannabis products, paraphernalia, or related supplies and educational materials to cardholders. (SDCL34-20G-1 (16))

**Medical Cannabis Establishment:** A cultivation facility, a cannabis testing facility, a cannabis product manufacturing facility, or a dispensary. (SDCL 34-20G-1 (17))

**Non-Resident Cardholders:** Non-residents fall under the provisions of the new laws if they have been diagnosed with a debilitating medical condition and were issued a registry card by another jurisdiction, have submitted any required documentation to the department of health, and have received confirmation of registration. (SDCL 34-20G-1 (20))

**Registry Identification Card:** A document issued by the Department of Health that identifies a person as a patient or designated caregiver. (SDCL 34-20G-1 (23))

**Designated Caregiver:**

- Is at least 21 years old;
- Has agreed to assist with a qualifying patient's medical use of cannabis;
- Has not been convicted of a disqualifying felony; and
- Assists no more than five qualifying patients unless the patients reside in or are admitted to a health care or residential care facility where the caregiver is employed. (SDCL 34-20G-1 (10))

**Written Certification:** A document dated and signed by a practitioner, stating that the patient has a debilitating medical condition or symptoms associated with a debilitation medical condition. (SDCL 34-20G-1 (26))

**5.075 PATIENTS AND CAREGIVERS**

Patients and caregivers have a level of protection from arrest, prosecution, or discipline for use or possession in compliance with the new laws. (SDCL34-20G-2 through SDCL 34-20G-7; SDCL 34-20G-13 through SDCL 34-20G-15; 34-20G-51; 34-20G-53; 34-20G-54)

A cardholder, nonresident cardholder, or the equivalent of a medical cannabis establishment that is registered in another jurisdiction may sell or donate cannabis seeds to a cultivation facility. (SDCL 34-20G-12)

**15.100**      **MUNICIPAL AUTHORITY**

Municipalities may limit the number of medical cannabis establishments but may NOT prohibit a dispensary either expressly or through the enactment of an ordinance that makes the operation of the dispensary impracticable. If the governing body of a municipality has enacted a numerical limit on the number of medical cannabis establishments in the municipality, and a greater number of applicants seek registration, the department shall solicit and consider input from the municipality as to its preference for registration. (SDCL 34-20G-56 and SDCL 34-20G-59)

The governing body of a municipality may enact an ordinance not in conflict with this chapter, regardless of whether it has enacted a zoning ordinance pursuant to title 11, imposing:

- (1) Restrictions on a medical cannabis establishment to govern the time, place, and manner of operation;
- (2) A limit on the number of medical cannabis establishments in the municipality;
- (3) Reasonable setback requirements;
- (4) Limitations on the proximity of a medical cannabis establishment to:
  - (a) Any sensitive land-use area, including a childcare facility, park, public service facility, recreational facility, religious facility, school, and any location frequented by individuals under the age of twenty-one; or
  - (b) Any other medical cannabis establishment;
- (5) Requirements for a medical cannabis establishment to obtain a local license, permit, or registration to operate; or
- (6) Reasonable fees for any local license, permit, or registration.

The governing body of a county may enact an ordinance governing all matters set forth in this section. The county ordinance applies throughout its jurisdiction, except within the boundaries of a municipality that has enacted an ordinance in accordance with this section.

A county or municipality may impose a civil penalty for the violation of an ordinance enacted in accordance with this section. (SDCL 34-20G-58)

**15.200**      **EMPLOYEE PROVISIONS**

Individuals are NOT allowed:

- to do tasks under the influence of cannabis when doing so would constitute negligence or professional malpractice;
- to possess or use cannabis in any correctional facility;
- to smoke or vape cannabis on any form of public transportation or in any public place or any place that is open to the public or if under the age of 21;
- operate motorized vehicles while under the influence of cannabis;
- perform any safety-sensitive job under the influence of cannabis. (SDCL 34-20G-18)

"Safety-sensitive job," is defined as any position with tasks or duties that an employer reasonably believes could cause the illness, injury, or death of an individual; or result in serious property damage. (SDCL 34-20G-1(24))

"Under the influence of cannabis," is defined as any abnormal mental or physical condition that tends to deprive a person of clearness of intellect and control that the person would otherwise possess, as the result of consuming any degree of cannabis or cannabis products. (SDCL 34-20G-1(25))

A registered qualifying patient shall be afforded all the same rights under state and local law, as the person would be afforded if the person were solely prescribed a pharmaceutical medication, as it pertains to:

- any interaction with the person's employer;
- drug testing by a person's employer; or
- drug testing required by any state or local law, agency, or government official.

Nothing in this section prohibits adverse employment action, based solely on a positive test result for cannabis metabolites, if the person is employed in a safety-sensitive job.

Nothing in this section prohibits an employer from refusing to hire a person, based solely on a positive test result for cannabis metabolites, if the person is seeking employment in a safety-sensitive job. (SDCL 34-20G-22)

Some of rights of the cardholder/employee may not apply to the extent that they conflict with an employer's obligations under federal law or regulation, or to the extent that they would disqualify an employer from a monetary or licensing-related benefit under federal law or regulation. (SDCL 34-20G-23)

No employer is required to allow the ingestion, possession, transfer, display, or transportation of cannabis in any workplace or to allow any employee to work while under the influence of cannabis.

No employer is prohibited from establishing and enforcing a drug-free workplace policy, which may include a drug testing program that complies with state and federal law or acting with respect to an applicant or employee under the policy.

No cause of action is created for employment discrimination or wrongful termination arising from an employer's enforcement of a drug-free workplace policy in compliance with this chapter. (SDCL 34-20G-24)

The new laws do not prevent an employer from disciplining an employee for ingesting cannabis in the workplace or for working while under the influence of cannabis. (SDCL 34-20G-28)