

STATE OF SOUTH DAKOTA
OFFICE OF
THE ATTORNEY GENERAL

January 8, 2014

Yvonne Taylor
Executive Director
South Dakota Municipal League
208 Island Drive
Ft. Pierre, SD 57532

OFFICIAL OPINION NO. 14-01

RE: Absentee voting period for municipal elections.

Dear Ms. Taylor:

You have requested an official opinion from this Office:

QUESTION:

Whether the forty-six day absentee voting period provided in SDCL 12-19-1.2, or the lesser periods found in SDCL 9-13-21, applies to municipal elections.

ANSWER:

The lesser periods set forth in SDCL 9-13-21 control and require a minimum of fifteen days for absentee voting in municipal elections with a seven day period for secondary elections if required by municipal ordinance. Chapter 12-19 continues to otherwise govern the method and manner of "conducting" absentee voting.

IN RE QUESTION:

The periods of absentee voting at issue appear in SDCL Chapter 9-13, entitled "Municipal Elections," and SDCL Chapter 12-19, entitled "Absentee Voting." Specifically, SDCL 12-19-1.2, enacted in 2013, provides in pertinent part, "Absentee voting shall begin neither earlier nor later than forty-six days prior to the election..." SDCL 9-13-21, however, provides in relevant part, "The ballots for municipal elections shall be available for absentee voting no later than

fifteen days prior to election day... Absentee voting shall be conducted pursuant to chapter 12-19." If, after the municipal election, no candidate receives a majority of the votes, local ordinance may allow for a secondary election for which at least seven days of absentee voting would be required. SDCL §§ 9-13-21, 9-13-25.

Facially, these statutes appear to conflict. With SDCL 12-19-1.2 being the latest legislative pronouncement, it could be argued that forty-six days of absentee voting is required in all circumstances. See *Peterson v. Burns*, 2001 S.D. 126, ¶ 29, 635 N.W.2d 556, 567. Statutes, however, must be read as a whole and in conformance with well-established principles of statutory construction. *State v. I-90 Truck Haven Service, Inc.*, 2003 S.D. 51, ¶ 8, 662 N.W.2d 288, 291. The application of SDCL 12-1-2 and the well-recognized rule that "...statutory construction dictate[s] that 'statutes of specific application take precedence over statutes of general application'" lead to the conclusion that the provisions of SDCL 9-13-21 supersede the requirements found in SDCL 12-19-1.2. *Estate of Hamilton*, 2012 S.D. 34, ¶ 12, 814 N.W.2d 141, 144 (citations omitted). Given this construction, municipalities must provide at least fifteen days of absentee voting for municipal elections with the possibility of another seven day minimum where secondary elections are required.

The general election provisions are found in SDCL Title 12. Through the promulgation of SDCL 12-1-2, however, the Legislature has clearly expressed its intent to yield the general provisions of Title 12 to statutes specifically governing local elections. SDCL 12-1-2 provides, "The provisions of this title [Title 12] apply to township, *municipal*, school, and other subdivision elections *unless otherwise provided by statutes specifically governing their elections or this title.*" (emphasis added). Municipal elections are covered in Chapter 9-13. Within that chapter, SDCL 9-13-21 requires a minimum of fifteen days of absentee voting in municipal elections with the possibility of at least another seven days for a secondary election. Because SDCL 9-13-21 is specific to municipal elections, the application of SDCL 12-1-2, and the rules of statutory construction, compel the conclusion that SDCL 9-13-21 controls and provides municipalities with the ability to limit absentee voting.

Furthermore, when enacting SDCL 12-19-1.2, the Legislature is presumed to have been aware that SDCL 9-13-21 existed and that it fell within the exemption found in SDCL 12-1-2. See *Simpson v. Tobin*, 367 N.W.2d 757, 764 (S.D. 1985). If the Legislature intended forty-six day absentee voting period found in SDCL 12-19-2.1 to now control for municipal elections, it could have specifically eliminated SDCL 9-13-21 from that exception. It did not. *State v. Young*, 2001 S.D. 76, ¶ 12, 630 N.W.2d 85, 89 (explaining that the Legislature "knows how to exempt or include items in its statutes"). Because the Legislature did not expressly restrict or repeal the fifteen day voting period found in SDCL 9-13-21, it is presumed to remain effective and applicable to municipal elections, as written. Any other interpretation "cannot be reconciled

with the cardinal rule of statutory construction: repeal by implication is strongly disfavored.” *Faircloth v. Raven Industries*, 2000 S.D. 158, ¶ 10, 620 N.W.2d 198, 202.

Here, it is possible to harmonize SDCL 9-13-21 with absentee voting provisions found in Chapter 12-19. While SDCL 9-13-21 states that “The ballots for municipal elections shall be available for absentee voting no later than fifteen days prior to election day...,” it also provides that “[a]bsentee voting shall be conducted pursuant to chapter 12-19.” Because statutes cannot be construed in a manner that “renders parts to be...surplusage” we must give effect, where possible, to both clauses. *Heumiller v. Heumiller*, 2012 S.D. 68, ¶ 25, 821 N.W.2d at 853-54. As described above, in municipal elections, the application of SDCL 12-1-2 allows SDCL 9-13-21 to control the minimum number of days allowed for absentee voting. At the same time, SDCL 9-13-21 permits Chapter 12-19 to otherwise govern the method and manner of “conducting” absentee voting. For instance, unless otherwise stated, Chapter 12-19 would still control the process for distributing and counting absentee ballots.

Interpretations to the contrary would force SDCL 12-19-1.2 to be applied to municipal elections and run afoul of the principle that statutes must not be construed in a manner that leads to absurd or unreasonable results. *Martinmaas v. Engelmann*, 2000 S.D. 85, ¶ 49, 612 N.W.2d 600, 611 (citations omitted) (emphasis added). Municipal elections may be held: on the second Tuesday of April (SDCL 9-13-1); in conjunction with school district elections (SDCL 9-13-1.1); in conjunction with the statewide June primary elections (SDCL 9-13-37); or on the first Tuesday after the first Monday in June (SDCL 9-13-40). When the remainder of the municipal election code is applied to these provisions, the application of SDCL 12-19-1.2 has the potential to cause conflicts with the joint school district election held pursuant to SDCL 9-13-1.1, and clearly causes conflicts with the election procedures surrounding the April election date for municipal elections set by SDCL 9-13-1.

The conflicts with SDCL 9-13-1 are illustrated by applying the requirements to the 2014 election year. In order to be placed on the ballot, a candidate for elective municipal office must first collect the requisite number of valid signatures and then file their nominating petition with the finance officer. SDCL 9-13-7 requires those petitions to be filed no later than the “last Friday in February preceding the day of election.” In 2014, that day is February 28. Elections held pursuant to SDCL 9-13-1 will occur on Tuesday, April 8. If the forty-six day absentee voting period from SDCL 12-19-1.2 were applied, absentee voting would begin on February 21, seven days *before* candidates are required to file their nominating petitions.

Likewise, similar problems arise if the forty-six day absentee voting period is applied to a municipal election held jointly with a school board election. Under SDCL §§ 9-13-1.1 and 13-7-10, such an election could take place as early as

April 8, 2014, leading to the same conflict identified above regarding the nominating petition deadline and commencement of absentee voting. In order to conduct an election, the finance officer must first assemble and print ballots which include the names of candidates. The application of SDCL 12-19-1.2 to municipal elections, therefore, causes an absurd result because, in some instances, it requires absentee voting to begin even before those candidates are nominated.

A review of the legislative amendments supports my conclusions. In 2013, Senate Bill 130 carved the absentee voting language from SDCL 12-16-1 and placed it in a new statute later designated as SDCL 12-19-1.2. Before the 2013 amendment, SDCL 12-16-1 read in pertinent part,

The county auditor shall provide printed ballots for each election in which the voters of the entire county participate... The sample ballots and official ballots shall be printed and in the possession of the county auditor not later than forty-eight days prior to the primary or general election. Absentee voting shall begin no earlier and no later than forty-six days prior to the election.

(emphasis added). The placement of the absentee voting provision within SDCL 12-16-1 made it clear that the obligation to provide forty-six days of absentee voting was that of the county auditor and only for elections in which the "entire county participate[d]." When the absentee voting period was moved from SDCL 12-16-1 to a new section within Chapter 12-19, however, it was stripped of this context. Nonetheless, as discussed above, when Chapter 9-13 and Title 12 are considered together, nothing in SB 130 demonstrates an intent to restrict the application of SDCL 12-1-2 or to repeal the municipal absentee voting provisions found in SDCL 9-13-21. Accordingly, the provisions for absentee voting found within SDCL 9-13-21 continue to control for municipal elections.

In conclusion, based on the specific exception in SDCL 12-1-2, as well as the principles of statutory construction, it is my opinion that SDCL 9-13-21 provides the minimum time periods in which absentee voting must be allowed in municipal elections, rather than the forty-six day period found in SDCL 12-19-1.2.

Sincerely,



Marty J. Jackley
ATTORNEY GENERAL

MJJ/RMW/jkp