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December 29, 2015

Rexford A. Hagg
Whiting Hagg Hagg Dorsey & Hagg LLP
601 West Boulevard
Rapid City, South Dakota 57701

Official Opinion No. 15-03

Re: Filling City Council Vacancy pursuant to SDCL 9-13-14.1

Dear Mr. Hagg,

The Attorney General received a request for an official opinion from you in your position as Box Elder City Attorney.

Question:

Pursuant to SDCL 9-13-14.1, does an appointed councilperson seeking to retain their seat need to run at an annual municipal election in 2016 or at the next regularly scheduled municipal election in 2017?

Answer:

State law requires the appointed councilperson to run for the seat at the next annual election in 2016.

Facts:

A Box Elder City councilperson was elected to serve a three-year term. The Councilperson resigned during the second year of his term. The City Council has taken steps to appoint a new member to fill the vacancy. SDCL 9-13-14.1 provides that the appointed councilperson is "to serve until the next annual municipal election[.]" Because Box Elder has staggered terms for its councilpersons it does not, at present, have an annual municipal election

scheduled for 2016. Box Elder's next regularly scheduled municipal election is in 2017. Accordingly, there is a question as to whether the appointed councilperson would need to run to retain the seat at an annual municipal election in 2016 or at the next regularly scheduled municipal election in 2017.

In re Question:

The plain language of SDCL 9-13-14.1 requires the appointed council person to run at the 2016 annual municipal election. SDCL 9-13-14.1 provides:

> If 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 § 9-13-14.2. In the aldermanic form of municipal government, the appointment shall 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 § 9-13-6.

When facing a vacancy, SDCL 9-13-14.1 presents the City Council with two options: (1) "appoint a replacement to serve until the next annual municipal election" or (2) elect, by special election, a replacement to serve out the remaining term of the vacant position. According to the facts you presented, the Box Elder City Council has chosen option one. As such, if the appointed councilperson seeks to remain in office, he or she must run in the 2016 annual municipal election.

"'The purpose of statutory construction is to discover the true intention of the law, which is to be ascertained primarily from the language expressed in the statute.'" *Puetz Corp. v. SD Dept. of Revenue*, 2015 SD 82, ¶ 16, ___ N.W. 2d ___ (quoting *State v. Clark*, 2011 S.D. 20, ¶ 10, 798 N.W.2d 160, 164). Allowing the appointed councilperson to hold the position until 2017 would require a determination that "next annual municipal election" actually means "next *regularly scheduled* municipal election[.]" SDCL 9-13-14.1 (italicized text added). Such an interpretation is contrary to the basic rules of statutory construction. *City of Deadwood v. M.R. Gustafson Family Trust*, 2010 S.D. 5, ¶ 9, 777 N.W.2d 628, 629 ("A court is not at liberty to read into the statute provisions which the Legislature did not incorporate.").

The fact that Box Elder does not presently have an election scheduled for 2016 makes no difference. SDCL 9-13-1 provides that "[i]n each municipality an annual election of officers shall be held on the second Tuesday of April of each year[.]" An annual municipal election need not be held, however, "if there is no

question to be submitted to the voters." SDCL 9-13-5. The resignation of Box Elder's councilperson has potentially created a question for the voters. A 2016 annual municipal election provides the opportunity for a challenger to run against the recently appointed councilperson for the remainder of the vacant term. Of course, if "there are no opposing candidates" for the vacancy, Box Elder would not be required to hold the election pursuant to SDCL 9-13-5.

Further, "[i]t is the general policy of the law to fill vacancies in elective offices at an election as soon as practicable after the vacancy occurs." *State v. Board of Comm'rs of Lyman Cnty.*, 34 S.D. 256, 145 N.W. 548, 549 (1914) (concluding that a vacancy in the office of county commissioner could lawfully be filled at the next general election); *see also Noel v. Cunningham*, 68 S.D. 606, 609, 5 N.W.2d 402, 403 (1942). This long-standing policy provides further support that state law requires Box Elder to hold an annual municipal election in 2016 as set forth above.

It is also important to recognize that the 2016 municipal election would present a contest for the remainder of the vacant term, not a full three-year term. *See* AGO 79-7; AGO 72-34.

Sincerely,

Marty J. Jackley
ATTORNEY GENERAL

MJJ/EB/lde