STATE OF SOUTH DAKOTA

OFFICE OF ATTORNEY GENERAL

1302 East Highway 14, Suite 1
Pierre, South Dakota 57501-8501
Phone (605) 773-3215
Fax (605) 773-4106
http://atg.sd.gov/

JASON R. RAVNSBORG
ATTORNEY GENERAL

CHARLES D. McGUIGAN
CHIEF DEPUTY ATTORNEY GENERAL

May 4, 2022

Hon. Janet Brekke
Councilmember, City of Sioux Falls
235 W. 10th Street
P.O Box 7402
Sioux Falls, SD 57117

OFFICIAL OPINION No. 22-01

Re: Adoption of Ranked Choice or Approval Voting by Home-Rule-Chartered
      Municipality

Dear Councilmember Brekke,

In your capacity as a member of the Sioux Falls City Council you have
requested an official opinion from the Attorney General's Office on the following
question:

QUESTION:

   May a home-rule-chartered municipality adopt ranked choice voting or
   approval voting for municipal elections?

ANSWERS:

   A home-rule-chartered municipality may adopt approval voting for
   municipal elections. However, ranked choice voting is determined to
   conflict with state law and may not be adopted by home-rule-chartered
   municipalities.

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FACTS:

The South Dakota Constitution authorizes cities and counties to adopt a home rule charter that allows the local government unit to pass ordinances that do not conflict with its charter, the state Constitution, or the laws of the state. S.D. Const. Art. IX, § 2.

The City of Sioux Falls has adopted a home rule charter to govern the executive, legislative, and administrative functions of the City. Sioux Falls, S.D., Home Rule Charter Resolution (September 13, 1994). Consistent with the provisions of its Charter, Sioux Falls has adopted election ordinances that require "[t]he provisions of the general election laws ... of the State...shall apply to all municipal elections unless specifically provided by city charter or city ordinance." Sioux Falls, S.D., Code of Ordinances § 38.001. Sioux Falls requires that all elections for municipal office be decided by a majority of the votes cast. Sioux Falls, S.D., Code of Ordinances § 38.010. If no candidate in a race between three or more candidates receives a majority of the votes cast, then a runoff election must be held between the two highest vote getters. *Id*.

In your request, you relate that ranked choice voting and approval voting are accepted methods of electing public officials. You indicate that adopting either method may save taxpayer dollars. You note, however, that there is uncertainty, and conflicting legal opinions, concerning the ability of a home-rule-chartered municipality to adopt ranked choice voting or approval voting.

IN RE QUESTION:

You have asked whether a home-rule-chartered municipality may adopt ranked choice voting or approval voting for municipal elections.

As noted above, the S.D. Constitution provides to municipalities the authority to adopt a home rule charter. Article IX, § 2 of the state Constitution provides in part:

> A chartered governmental unit 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 shall be of superior authority to statute, provided that the legislative body so established be chosen by popular election and that the administrative proceedings be subject to judicial review.
>
> Powers and functions of home rule units shall be construed liberally.

Our state Supreme Court has reviewed home rule charter provisions and held that "[a]lthough the power granted to home rule cities may be great, it is not absolute." *Bozied v. City of Brookings*, 2001 S.D. 150, ¶ 11, 638 N.W.2d 264, 269. While "[municipalities] may exercise any power or perform any function not prohibited by our constitution and laws[,]... [the Court has] repeatedly noted that municipal corporations possess only those powers given to them by the Legislature." *Law v. City of Sioux Falls*, 2011 S.D. 63, ¶ 9, 804 N.W.2d 428, 431-32 [citations omitted]. Consequently, home rule authority allows "state and local governments [to] regulate in the same area [only] if the local rule does not conflict with state law." *Rantapaa v. Black Hills Chair Lift Co.*, 2001 S.D. 111, ¶ 21, 633 N.W.2d 196, 203.

State law has established how the victor in municipal elections must be determined.

> In any municipality, the person having the highest number of votes for any office shall be declared elected. However, the governing board of any municipality may, on or before the first of October in the year preceding, approve an ordinance requiring a runoff election to be conducted pursuant to [SDCL] 9-13-26.1 and 9-13-27.1.

SDCL 9-13-25. State law also requires runoff elections, in races involving three or more candidates, to be held between those candidates that finished in first or second place in the initial voting. SDCL 9-13-26.1. Runoff elections are required to be held three weeks from the date of the first election with proper notice of the runoff election published by the municipal finance officer. *Id. See also* SDCL 9-13-27.1.

As noted above, a home-rule-chartered municipality may pass election ordinances, but those ordinances may not conflict with the requirements of SDCL 9-13-25 through 9-13-27.1. *Rantapaa*, 2001 S.D. 111, ¶ 21. The Court has recognized "[t]here are several ways in which a local ordinance may conflict with state law." *Id.*, ¶ 23. First, a municipal ordinance may duplicate state law. *Id.* Second, an ordinance may prohibit what state law allows, or conversely may allow that which state law prohibits. *Id.* Finally, an ordinance may conflict where state law has "[occupied] a particular field to the exclusion of all local regulation." *Id.* Where the local ordinance conflicts, "state law preempts or abrogates the conflicting local law." *Id.*

To answer whether a municipal ordinance adopting either ranked choice voting or approval voting may conflict with the provisions of SDCL 9-13-25 through 9-13-27.1, I must compare the definitions of both electoral systems to the statutory provisions.

Ranked choice voting refers to voting methods that use a ballot on which each voter ranks the available candidates in order of the voter's preference. *Ranked Choice Voting*, BALLOTPEDIA, https://ballotpedia.org/ranked-choice_ voting_(RCV) (last accessed May 3, 2022). Any candidate that obtains a majority of first-preference votes wins that election. *Id.* In the event no candidate wins a majority upon first tabulation, the last-place candidate is eliminated and their votes are transferred to other remaining candidates in accord with the voter's preference rankings. *Id.* The votes transferred to another candidate are treated as first-preference votes for that candidate. *Id.* This elimination of candidates and transfer of votes is carried out until one candidate receives a majority of the votes cast. *Id.* In essence, ranked choice voting simulates sequential runoffs until a candidate is elected with a majority of the vote. Ranked choice voting is often referred to as "instant runoff voting." *Id.*

Approval voting is an election system whereby voters may vote for – or mark approval of – any number of candidates appearing on the ballot for a given race. *Approval Voting*, BALLOTPEDIA, https://ballotpedia.org/approval_voting (last accessed May 3, 2022). For example, if the election ballot for a particular race listed three candidates, each voter could vote once for as many of those three candidates the voter approved. *Id.* Thus, in a municipality of 1000 voting residents, there would be 3000 potential votes for that race. By voting for a candidate, the voter signals they would be satisfied with any of the candidates they have voted for being declared the winner. Under approval voting, then, the candidate who receives the most approval votes is declared the winner of that election. *Id.*

The first sentence of SDCL 9-13-25 requires the municipal candidate receiving the highest number of "votes" to win the election. The statute clearly contemplates a plurality system of municipal elections whereby the candidate with the highest number of votes – albeit potentially not a majority of the votes cast – wins the election. The question naturally then arises whether the definition of "votes" causes either of the electoral systems put forth by your inquiry to conflict with the language of SDCL 9-13-25.

When interpreting a statute to determine its meaning, "'the language expressed in the statute is the paramount consideration.'" *Olson v. Butte County Commission*, 2019 S.D. 13, ¶ 5, 925 N.W.2d 463, 464 (quoting *Goetz v. State*, 2001 S.D. 138, ¶ 15, 636 N.W.2d 675, 681). "When the language in a statute is clear, certain and unambiguous, there is no reason for construction[.]" *In re Wintersteen Revocable Trust Agreement*, 2018 S.D. 12, ¶ 12, 907 N.W.2d 785, 789 (internal citations omitted). When the intent of the statutory language is unclear, "the intent of the legislature is derived from the plain, ordinary and popular meaning of the statutory language." *Id.*

What constitutes a "vote" is not defined in our state code. One generally accepted definition of "vote" is "[t]he expression of one's preference or opinion in a meeting or election by ballot, show of hands, or other type of communication." *Vote*, Black's Law Dictionary (10th ed. 2014). Another common definition is the "formal expression of opinion or will in response to a proposed decision; [especially] one given as an indication of approval or disapproval of a proposal, motion, or candidate for office[.]" *Vote*, Merriam-Webster's Collegiate Dictionary (11th ed. 2014).

Upon consideration of the above definitions of the term "vote," I opine that neither ranked choice voting nor approval voting conflicts with the requirement of SDCL 9-13-25 that the candidate with the highest number of votes be declared the winner of the election. Both electoral systems provide the opportunity for individual voters to express their preference or approval regarding the candidates presented through the voting method designated by the particular system. Certainly, the marking of a ballot by ranking the candidates, as done with ranked choice voting, is an expression of the voter's opinion or preference as to those candidates. Likewise, the marking of a ballot indicating all candidates that an individual approves of is clearly an indication of the voter's approval as to those candidates. In reviewing the common and generally accepted definitions of the term "vote," I can find no deficiency with either system – each system allows a voter to express preference or approval of more than one candidate in multi-candidate electoral races.

Turning again to the statutory provisions in SDCL 9-13-25 through 9-13-27.1, I conclude that the remainder of these requirements are clear and unambiguous. In races involving three or more candidates, if a municipality is not satisfied declaring an election winner based on a mere plurality of the votes cast, the municipality may provide for a runoff election. SDCL 9-13-25 & 9-13-26.1. The run-off election must be conducted between those candidates finishing first or second in the initial election. SDCL 9-13-26.1. State law has also established certain notice and timing requirements for the runoff election. SDCL 9-13-27.1.

Considering these statutory requirements, I can only conclude that ranked choice voting conflicts with the requirements of state law. Ranked choice voting carries out instant sequential runoffs among all candidates appearing on the ballot for that race until one candidate is determined to have garnered a majority of the votes cast. This method conflicts with SDCL 9-13-26.1 which requires any runoff in a municipal election to be confined to only those candidates that finished in first or second place on the initial ballot. Further, state law establishes certain notice and timing requirements for the runoff election. SDCL 9-13-27.1. Conducting an instant runoff through ranked choice voting does not comply with those notice and timing requirements and conflicts with the provisions of SDCL 9-13-27.1.

For these reasons I conclude that a home-rule-chartered municipality may not implement ranked choice voting for municipal elections. If public interest is in favor of ranked choice voting in municipal elections, then the Legislature must make changes to the controlling state law.

Unlike ranked choice voting, however, I find no conflict between approval voting and the provisions of SDCL 9-13-25 through 9-13-27.1. Approval voting, as described above, theoretically could lead to plurality results with no majority winner as initially contemplated by SDCL 9-13-25. In such a case, the election would proceed to a runoff election conducted according to the requirements of SDCL 9-13-26.1 & 9-13-27.1. I conclude that an approval voting system, as described above, does not conflict with state law and a home-rule-chartered municipality may implement approval voting for municipal elections.

CONCLUSION

In your response to your inquiry, I find that both ranked choice voting and approval voting present electoral systems that lead to the candidate with the highest number of votes – as cast according to the voting requirements of each system – declared the winner of the election. This is in accord with the provisions of SDCL 9-13-25. Further, I have determined that approval voting, as described in this opinion, does not conflict with state law concerning municipal elections found in SDCL 9-13-25 through 9-13-27.1. A home-rule-chartered municipality may adopt approval voting for its municipal elections. However, it is my opinion that ranked choice voting conflicts with the statutory requirements concerning runoff elections found in SDCL 9-13-26.1 and 9-13-27.1. I conclude that home-rule-chartered municipalities may not adopt ranked choice voting in that it conflicts with state law.

Sincerely,

Charles D. McGuigan
CHIEF DEPUTY ATTORNEY GENERAL

Jason R. Ravnsborg
ATTORNEY GENERAL

CDM/SRB/dd

Cc: Stacey Kooistra, City Attorney – City of Sioux Falls