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September 22, 2023

Tracey L. Kelley
Custer County State's Attorney's Office
420 Mt. Rushmore Rd
Custer, SD 57730

OFFICIAL OPINION No. 23-03

Re: Official Opinion Concerning Voting in Road District Elections

Dear State's Attorney Kelley,

In your capacity as the State's Attorney for Custer County you have requested an official opinion from the Attorney General's Office on the following questions:

QUESTIONS:

- 1.) If a landowner owns more than one lot, tract, or parcel of land within a road district, is that landowner entitled to only one vote in road district elections?
- 2.) Is absentee voting allowed in road district elections?

ANSWERS:

- 1.) An owner of land within a road district is entitled to only one vote in road district elections regardless of the number of parcels of land owned within the district.

2.) Absentee voting is available in road district formation elections, initial board of trustee elections in road districts with more than one thousand eligible voters, and in road district referendum elections. Absentee voting is not available in initial board of trustee elections in road districts with less than one thousand eligible voters, and in annual trustee elections in road districts of any size.

FACTS:

In your role as Custer County State's Attorney, you are asked to provide guidance to road districts concerning their statutory requirements and the operations and procedures derived therefrom. Questions have arisen concerning the interpretation of SDCL § 31-12A-1.2 and whether a landowner who owns multiple lots, or parcels of land, within a road district is entitled to only one vote at road district elections. Questions have also been asked concerning the ability to vote absentee in road district elections.

IN RE QUESTION 1:

State law authorizes the formation of county road districts, in any area outside the boundary of a municipality, for the purposes of constructing and maintaining roads within the district. SDCL § 31-12A-1. A proposed road district must be approved by a majority vote of the eligible voters within the district. SDCL §§ 31-12A-6 & -10. Each road district is managed by a board of trustees. SDCL §§ 31-12A-1.1, 31-12A-21 & -22. A road district with more than three landowners is required to hold an annual election to select the members of its board of trustees. SDCL §§ 31-12A-1.1, 31-12A-15.

Some landowners own more than one lot, or parcel of land, within a road district. You have asked whether those landowners are limited to only one vote in road district elections?

The eligible voters of a road district are defined in SDCL § 31-12A-1.2. The statute reads in part:

As used in this chapter, the term, eligible voter, has the meaning specified in this section. Only persons or public corporations that are landowners of land located within the proposed or existing road district are eligible to vote in the formation election or any subsequent election of a road district, except as provided in this chapter. An eligible voter may reside within or outside the district.

Any firm, partnership, limited liability company, association, estate, or corporation that holds title to land located within the proposed or existing road district is entitled to one vote and may designate an officer or agent to vote on its behalf by presenting a written instrument to that effect to the election officials. The vote of any eligible voter who is a minor or a protected person as defined by § 29A-5-102, may be cast by the parent, conservator, or legal representative of the minor or protected person. However, if more than one person holds an interest in a lot, tract, or parcel of land, no more than one vote may be cast in any election with respect to any one lot, tract, or parcel of land, as the owners may among themselves determine.

SDCL § 31-12A-1.2. Landowner is also defined as “any owner of land other than a governmental entity, as evidenced by records in the offices of the register of deeds and the clerk of courts in the county containing a proposed or existing road district.” *Id.*

When interpreting a statute to determine its meaning, “the language expressed in the statute is the paramount consideration.” *Olson v. Butte County Comm’n*, 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. . . . When we must, however, resort to statutory construction, the intent of the legislature is derived from the plain, ordinary and popular meaning of the statutory language.” *In re Wintersteen Revocable Trust Agreement*, 2018 S.D. 12, ¶ 12, 907 N.W.2d 785, 789 (citations omitted).

The plain language of SDCL § 31-12A-1.2 clearly defines the eligible voters of a road district to be those who own land within the district (except government entities). In crafting this definition, the Legislature chose to use the more general term “land” rather than define voter eligibility in relation to ownership of specific parcels of land. SDCL § 31-12A-1.2. The statute contains no language tying the number of votes a voter may cast in a road district election to the specific number of parcels the voter owns within the district. If the Legislature intended that an owner of multiple parcels of land in a road district was to receive multiple votes in district elections, it could have defined eligible voters in that way. I must “assume that statutes mean what they say and that legislators have said what they meant.” *Reck v. S.D. Bd. of Pardons & Paroles*, 2019 S.D. 42, ¶ 14, 932 N.W.2d 135, 140 (cleaned up).

I conclude, based upon the language used in SDCL § 31-12A-1.2, that the Legislature intended to give one vote in road district elections to each landowner that owns land in the district regardless of the number of parcels or lots owned by that landowner within the district.

The above conclusion is supported by the remaining language found in SDCL § 31-12A-1.2. The statute's language limits any corporation or partnership that owns a parcel of land within a road district to one vote in district elections. SDCL § 31-12A-1.2. Similarly, the statute limits multiple individuals who collectively own a parcel of land to one vote in district elections. *Id.* These provisions evince legislative intent that only one vote is to be cast in a road district election by an eligible voter of the district.

Attorney General Tellinghuisen previously reached the same conclusion when reviewing SDCL § 31-12A-6. AGO 83-17. The Legislature has, in the interim, amended SDCL Ch. 31-12A, and consequently some of the conclusions reached in the prior opinion may no longer be valid. I believe, however, that Attorney General Tellinghuisen's conclusion as to this issue remains accurate.

It is my opinion that an owner of land within a road district is entitled to only one vote in road district elections regardless of the number of lots or parcels of land owned within the district.

IN RE QUESTION 2:

You have also asked whether absentee voting is available in road district elections?

A road district's formation election is to be carried out according to the provisions of SDCL §§ 6-16-4 to 6-16-6. SDCL § 31-12A-6. These statutes establish the general requirements for the formation elections and initial trustee elections held in special local government districts. SDCL Ch. 6-16.

As noted above, the language of a statute is the paramount consideration when interpreting the statute. *Olson*, 2019 S.D. 13, ¶ 5 (quoting *Goetz*, 2001 S.D. 138, ¶ 15). When the language used in a statute is unambiguous there is no need for further construction. *Wintersteen Revocable Trust*, 2018 S.D. 12, ¶ 12 (citations omitted). The intent of a statute "must be determined from the statute as a whole, as well as enactments relating to the same subject." *In re Taliaferro*, 2014 S.D. 82, ¶ 6, 856 N.W.2d 805, 807 (citations omitted).

In the formation election of a road district with less than one thousand eligible voters, “[a]bsentee voting is allowed pursuant to chapter 12-19 for the election on the question of formation of the special district or any other question to be voted on by the eligible voters of the district.” SDCL § 6-16-6. In those road districts with more than one thousand eligible voters, State law similarly requires the formation election to “be conducted pursuant to Title 12.” SDCL § 6-16-5.1. SDCL § 12-1-2 provides that “[t]he provisions of [Title 12] apply to township, municipal, school, and other subdivision elections unless otherwise provided by statutes specifically governing their elections or this title.” Absentee voting is required by SDCL § 12-19-1.2 to begin “neither earlier nor later than forty-six days prior to the election[.]” The plain language of these statutes leads me to conclude that forty-six days of absentee voting is to be provided to voters in road district formation elections.

In those road districts with less than one thousand eligible voters, SDCL § 6-16-5 states that “[i]f a majority ... of the votes cast on the question of formation is in favor, an election shall be *conducted by those present at the same meeting* to elect the initial board of ... trustees.” (emphasis added). SDCL § 31-12A-17 also requires that “[i]f the initial trustees are elected at the meeting at which the incorporation election is held as provided in § 6-16-5, the trustees shall be *nominated by the eligible voters in attendance at the meeting.*” (emphasis added). The language used in these two statutes evinces legislative intent that nominations for the initial board of trustees in road districts with less than one thousand eligible voters occur at the meeting where the formation election is held.

SDCL § 6-16-6, referenced above, indicates that in a road district with less than one thousand eligible voters absentee voting is to be available for the formation election and “any other question to be voted on by the eligible voters[.]” However, I interpret “any other question to be voted on” to mean something other than voting on the initial board of trustees. The language of both SDCL § 6-16-5 and SDCL § 31-12A-17 is clear and unambiguous and must be given full effect. I cannot construe the “any other question” language of SDCL § 6-16-6 to authorize absentee voting for the initial board of trustees in road districts with less than one thousand voters. To do so would be to render the operative language of SDCL §§ 6-16-5 and 31-12A-17 to be surplusage. *Ibrahim v. Dep’t of Pub. Safety*, 2021 S.D. 17, ¶ 13, 956 N.W.2d 799, 803 (presumption that the Legislature does not insert surplusage into its enactments and statutes must not be construed to render parts surplusage). To interpret SDCL § 6-16-6 as authorizing absentee voting for the initial board of trustees also works an illogical or unreasonable result. As SDCL §§ 6-16-5 and 31-12A-17 establish, the candidates for the initial board of trustees are not

nominated until the meeting held to vote on the question of formation of the district. It would be impossible to absentee vote for candidates that have not yet been nominated. Interpreting SDCL §§ 6-16-5, 6-16-6, and 31-12A-17 together to provide for absentee voting renders an illogical or unreasonable result. *Ibrahim*, 2021 S.D. 17, ¶ 13 (statutes are construed so as not to arrive at an illogical conclusion); *Argus Leader Media v. Hogstad*, 2017 S.D. 57, ¶ 9, 902 N.W.2d 778, 782 (presumption that the Legislature did not intend an absurd or unreasonable result).

Based on the above analysis, it is my opinion that SDCL §§ 6-16-5 and 31-12A-17 prevent absentee voting for the initial trustees elected in road districts with less than one thousand eligible voters.

Elections for the initial trustees in road districts with more than one thousand eligible voters are controlled by SDCL §§ 31-12A-17 and 6-16-5.2. SDCL § 31-12A-17 states that any trustee to be initially elected at a meeting other than the formation meeting is to be nominated as directed in SDCL § 6-16-5.2. There it is established that initial trustee elections are conducted “pursuant to Title 12[.]” SDCL § 6-16-5.2. As described above, absentee voting under SDCL Ch. 12-19 is forty-six days long. SDCL § 12-19-1.2. SDCL § 6-16-5.2, however, requires nominating petitions to be filed thirty days before the election, and absentee ballots to be made available twenty days before the election. Facially, SDCL § 6-16-5.2 and SDCL § 12-19-1.2 appear to conflict.

SDCL § 12-1-2 generally provides that the election provisions of SDCL Title 12 apply to road district elections unless otherwise provided by statutes specific to such districts. Through the promulgation of SDCL § 12-1-2 the Legislature clearly expressed its intent to yield the general provisions of SDCL Title 12, including SDCL § 12-19-1.2, to those statutes specifically governing local elections. According to SDCL § 12-1-2, the requirements of SDCL § 6-16-5.2 (being specific to special district elections) control the length of absentee voting in these road districts. The remainder of SDCL Title 12, unless otherwise specified in State law, would govern the manner of conducting absentee voting and the manner of conducting the trustee elections in road districts with more than one thousand eligible voters. This interpretation of the statutes harmonizes the language used to avoid construing the statutes in a manner that would render any part of the statutes to be surplusage. *Ibrahim*, 2021 S.D. 17, ¶ 13. This construction of the statutes also complies with the well-recognized rule that “statutes of specific application take precedence over statutes of general application.” *Jans v. Dep’t of Pub. Safety*, 2021 S.D. 51, ¶ 18, 964 N.W.2d 749, 755 (cleaned up).

I conclude that absentee ballots must be made available twenty days before the initial election of trustees in road districts with more than one thousand eligible voters.

The annual election of road district trustees in any size district is to “be conducted according to chapter 8-3.” SDCL § 31-12A-15. SDCL Ch. 8-3 governs the meetings and elections of townships. SDCL § 8-3-17.1 states that “if nominating petitions are required pursuant to § 8-3-1.1 then any voter ... may vote by absentee ballot as prescribed in chapter 12-19.” The statute is specific in that it requires absentee voting only “if nominating petitions are required pursuant to § 8-3-1.1.” SDCL § 8-3-17.1. Individuals seeking to be elected road district trustees at an annual election must file a certificate of nomination according to SDCL § 31-12A-17. Road district candidates do not file nominating petitions pursuant to SDCL § 8-3-1.1. Because of this, it is my opinion that the absentee voting provision found in SDCL § 8-3-17.1 is not applicable to annual road district trustee elections.

While SDCL § 12-1-2 generally provides that the election provisions of SDCL Title 12 apply, the Legislature has otherwise directed that road district annual elections proceed under the specific requirements of SDCL Ch. 8-3. Other than SDCL § 8-3-17.1, no provision in SDCL Ch. 8-3 directs that elections governed by that chapter must comply with the election provisions of either SDCL Title 12 or SDCL Ch. 12-19. The specific provisions of SDCL § 8-3-17.1 control absentee voting in road district trustee annual elections.

Because candidates for annual election to road district trustee do not file petitions pursuant to SDCL § 8-3-1.1, I conclude absentee voting is not available in those elections.

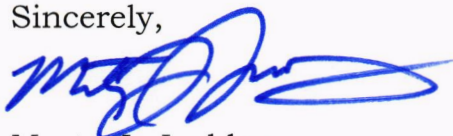
Finally, the ability to vote absentee in road district referendum elections must be reviewed. “Five percent of the eligible voters of the district may petition the board of trustees for referendum of any special assessment or bond issue. ... The referendum shall be governed, to the extent applicable, by chapter 9-20.” SDCL § 31-12A-23. SDCL Ch. 9-20 is the section of State law governing municipal initiatives and referendums. SDCL § 9-20-14 provides that elections carried out under that chapter “shall be governed by the provisions of chapter 9-13 except as to the form of the ballots otherwise specifically provided.” SDCL Ch. 9-13 governs municipal elections, and there SDCL § 9-13-21 provides that “ballots ... 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.”

Similar to my analysis concerning the initial trustee elections in road districts with more than one thousand voters, SDCL § 12-1-2 allows the more specific provisions of SDCL § 9-13-21 to control absentee voting in road district referendum elections. *See also Jans*, 2021 S.D. 51, ¶ 18. It is my opinion that fifteen days of absentee voting is to be provided to eligible voters in road district referendum elections.

CONCLUSION

I conclude that an owner of land within a road district is entitled to only one vote in road district elections regardless of the number of parcels of land owned within the district. I also conclude that absentee voting is not available in every type of road district election. Absentee voting is available in road district formation elections, initial board of trustee elections in road districts with more than one thousand eligible voters, and in road district referendum elections. Absentee voting is not available in initial board of trustee elections in road districts with less than one thousand eligible voters, and in annual trustee elections in road districts of any size.

Sincerely,



Marty J. Jackley
ATTORNEY GENERAL

MJJ/SRB/dd