

Official Opinion 06-01, Water Project District Elections

January 24, 2006

Mr. Gary Anderson  
President, TLC Water Project District  
111 Railway  
Centerville, SD 57014

Re: Official Opinion 06-01

Water Project District Elections

Dear Mr. Anderson:

You have requested an opinion from this Office concerning the following factual situation:

FACTS:

Turner/Lincoln/McCook Water Project District (the "District") is a political subdivision of the State of South Dakota formed pursuant to SDCL Chapter 46A-18. The District is granted statutory authority to fund projects out of its general operating income or through special assessments as found in SDCL 46A-18-32(5) and (6). As a condition precedent to the exercise of the authority granted by SDCL 46A-18-32, the District must comply with SDCL 46A-18-45. As the District interprets this statute, the use of special assessments and bonding beyond the current fiscal year would require an election to approve the particular financing methodology to be employed.

SDCL 46A-18-47 indicates that approval of bonds or multi-year special assessments would require approval of the voters. The first sentence of that statute states that "registered voters are eligible to vote." The second sentence says that if "special assessments are proposed, only those landowners subject to such assessments may vote", but does not indicate that those landowners have to be registered voters. The statute does not appear to restrict this voting right to registered voters who own land within the District or who reside and are registered voters in the district. In the case of absentee landowners, while they may be registered voters, they may in fact be landowners residing outside the District boundaries or the State of South Dakota.

Based on these facts you have asked the following questions.

QUESTION:

For projects which require multi-year repayment by levy of taxes or special assessments, does SDCL 46A-18-47 require that "registered voters" have to be landowners in order to vote, and do such registered voters or landowners have to maintain their voting residence within the boundaries of the District?

IN RE QUESTION:

A water project district is a special purpose district devoted to the prudent management of water resources. It is a political subdivision which has only those powers specifically granted by the Legislature, together with those powers necessarily implied to carry out the express authority. Sioux Falls Employees v. Sioux Falls, 233 N.W.2d 306 (S.D. 1975); AGR 87-33. A water project district has the authority to borrow money to construct projects by issuing bonds. Those bonds may be secured by a tax levy, by special assessments, or by a combination of both. SDCL 46A-18-42. If the district tax levies or special assessments are obligated for longer than the current fiscal year, the financing has to be approved by a 60% favorable vote in an election of the district's voters. SDCL 46A-18-45.

The essence of the question you pose is who may vote in such an election. SDCL 46A-18-47 provides:

In the election provided in § 46A-18-45, registered voters are eligible to vote. If special assessments are proposed, only those landowners subject to such assessments may vote. If the financing proposal provides for both general tax levies and special assessments, the votes applicable to the general tax and the votes applicable to the special assessments shall be counted separately and accepted separately for purposes of determining the outcome of the election.

You ask whether the phrase "registered voters" as used in this statute means that such voters must also be landowners, and further whether such registered voters or landowners have to maintain a voting residence within the boundaries of the water project district. The question is one of legislative intent.

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. The intent of a statute is determined from what the legislature said, rather than what the courts think it should have said, and the court must confine itself to the language used. Words and phrases in a statute must be given their plain meaning and effect. When the language in a statute is clear, certain and unambiguous, there is no reason for construction, and the Court's only function is to declare the meaning of the statute as clearly expressed. Since statutes must be construed according to their intent, the intent must be determined from the statute as a whole, as well as enactments relating to the same subject.

Martinmaas v. Engelmann, 2000 S.D. 85, ¶49, 612 N.W.2d 600, 611.

To understand the intent of the statute it is necessary to examine the history of the right to vote in water project district elections. When the creation of these political subdivisions was first authorized in 1984, the Legislature defined the "qualified voters" of the district as either registered voters, owners of real property listed on the county tax rolls, or both. The organizers of the district were allowed to select in the organizing petition for the district which of those three options would apply in that district. SDCL 46A-18-4(6) (repealed 1998).

The rationale for the differing options lay with the variety of purposes for which these districts could be formed. Some were created around lakes and consisted largely of nonresident landowners with summer homes. Others undertook water projects that benefited more typical housing areas, and consisted of largely resident landowners. Some projects were in rural areas consisting largely of farmers and ranchers. At the time the prevailing philosophy in the Legislature was that those who benefited from these projects should pay, and those who paid should be the ones entitled to vote.

Thus originally there was some flexibility provided as to who constituted the "qualified voters" of a particular district to allow the organizers to choose the best fit in terms of those paying the bills. Those districts consisting of mostly resident landowners chose "registered voters" as their qualified voters. Those districts consisting mostly of nonresident landowners chose "owners of real property listed on the county tax rolls". Some undoubtedly chose the "both" option which meant that only registered voters who were owners real property listed on the county tax roles could vote.

That changed in 1998. As part of an effort to standardize the creation procedures for a variety of special purpose districts, the Legislature adopted what is now SDCL chapter 6-16. That chapter adopts a one size fits all approach for a variety of special purpose political subdivisions as it applies to elections for the creation of such districts and the initial election of the governing board of such districts. This chapter applies to county road, ambulance, rural fire protection, sanitary, irrigation, watershed, and water project districts. SDCL 6-16-1. The decision was made that only "registered voters" could vote in these formation elections. (There were exceptions for irrigation districts and certain road districts. SDCL 6-16-6.)

As it applies to water project districts, the problems arise not so much from the new statutes in SDCL chapter 6-16 governing those initial elections, but from the statutes in SDCL chapter 46A-18 that were repealed to accomplish that uniform creation procedure, and from statutes that were not changed and continue to use phrases or refer to statutes that were repealed in 1998.

SDCL 46A-18-5, which defined a qualified voter in a water project district, was repealed in 1998. This meant that, as it applied to the election of directors, the statutes were silent as to who was eligible to vote. SDCL 46A-18-23 simply said that voters could vote at annual elections.

SDCL 46A-18-47, however, continued to state that, for bond elections held in accordance with 46A-18-45, eligibility to vote was governed by SDCL 46A-18-5. The original intent of SDCL 46A-18-47 was that whomever the district organizers had originally selected to be qualified voters would be eligible to vote in a bond election. If they chose registered voters, that is who would vote. If they chose owners of real property listed in the county tax rolls, that is who would vote. With the repeal of the definition of qualified voter in 1998 it became very difficult to determine who was eligible to vote in bond elections.

The Legislature acted in 2002 to correct this problem by amending SDCL 46A-18-23 to provide that registered voters voted in annual elections. The Legislature also amended SDCL 46A-18-47 to eliminate the reference to the repealed SDCL 46A-18-5, and replace it with language that says "registered voters are eligible to vote" in bond elections.

The balance of SDCL 46A-18-47, however, has remained unchanged from its original 1984 form. The statute has consistently provided that if the project is being financed by special assessments "only those landowners subject to such assessments may vote." Thus, as it

applies to projects funded by special assessment, I see no legislative intent to change that basic original philosophy that those who benefited from these projects should pay, and those who paid should be the ones entitled to vote.

It is against this backdrop that your questions must be examined. Accordingly it is my opinion that, if as a result of decisions made under SDCL 46A-18-45, the water project district has determined that the project will be funded by tax levies, and proposes to issue bonds secured by those tax levies, registered voters are entitled to vote in the bond election under SDCL 46A-18-47. In my opinion, those registered voters must be residents of the water project district, but I find no indication of legislative intent that these registered voters also have to be landowners.

If as a result of decisions made under SDCL 46A-18-45, the water project district has determined that the project will be funded by special assessments, and proposes to issue bonds secured by those special assessments, only those landowners subject to the special assessments are entitled to vote in the bond election under SDCL 46A-18-47. There is no legislative intent reflected in these statutory provisions as amended that indicates that the landowners subject to special assessment who are eligible to vote an election under SDCL 46A-18-47 need to be registered voters, or even resident landowners.

If both tax levies and special assessments are pledged to repay the bonds, "the votes applicable to the general tax and the votes applicable to the special assessments shall be counted separately and accepted separately for purposes of determining the outcome of the election." That means that 60% of the registered voters voting would have to approve the bonds, as well as 60% of the landowners subject to the special assessment in order for the bonds to be approved.

While that answers the question you raised, as it relates to water project districts, there are other questions arising from these legislative changes. I note that now only registered voters may vote in an annual election, even if the district was formed to be governed by owners of real property listed on the county tax roles, many of whom may have been nonresident landowners. This creates a situation which may disenfranchise a majority of those whose property is taxed to pay the bills and who, more than 10 years ago, were given the power to govern in their district when originally formed.

Second, SDCL 46A-18-4(5), which defines who may serve as a director, still provides that a director must be a "qualified voter" of the district. SDCL 46A-18-25, which deals with the

signing of nominating petitions for directors, also still requires the signature of “qualified voters” to nominate a candidate. Director divisions in these water project districts were also drawn to insure equal representation based on the number of “qualified voters” in each area. SDCL 46A-18-8. “Qualified voter” is a term that is no longer defined in statute.

Certainly it could be argued that the Legislature simply intended to make the term “qualified voter” mean “registered voter”. It is equally as plausible that the Legislature intended that original delineation of eligibility to vote that was set forth in the initiating petition would continue to govern those water projects districts formed prior to 1998. Those districts were formed under an initiating petition that, in accordance with the governing statutes at the time, specified eligibility to vote in a water project district election, and thus eligibility to run for office. See SDCL 46A-18-4(6) (repealed 1998). It is simply not clear whether those original designations of eligibility to vote or serve as a director or sign a nominating petition continue to govern those particular districts, or whether the Legislature intended to fundamentally alter the way these existing political subdivisions govern themselves.

I raise these matters because they identify serious concerns about people’s continued right to vote and eligibility to serve as directors in these pre 1998 districts, as well as concerns about the whether director divisions continue to provide for equality of representation. I strongly suggest these matters be addressed legislatively.

Respectfully submitted,

LARRY LONG  
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