OFFICIAL OPINION NO. 77-64, Petition to place county comprehensive plans or adjuncts thereto on ballot (SDCL 11-2-22)

July 28, 1977

Mr. Clyde R. Calhoon
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Official Opinion No. 77-64

Petition to place county comprehensive plans or adjuncts thereto on ballot (SDCL 11-2-22)

Dear Mr. Calhoon:

You have requested an official opinion based on the following facts:

The Brookings County Planning and Zoning Commission recently held a public hearing on the petition of an individual landowner to change the zoning of his property pursuant to SDCL 11-2-28.1. At the hearing several people appeared in opposition to the change in zoning. The County Planning and Zoning Commission, after listening to all persons attending the hearing, voted to recommend to the County Commissioners that the change in zoning be allowed.

The County Commissioners have scheduled the petition for public hearing. The people who appeared at the public hearing held by the County Planning and Zoning Commission in opposition to the petition have indicated that if the County Commissioners vote to allow the change in zoning, then they will petition to place the change in zoning on the ballot pursuant to SDCL 11- 2-22.

The questions presented are:

QUESTIONS:

1. Is a change in zoning of a landowner's property under SDCL 11-2-28.1 an amendment to an “adjunct” to a comprehensive plan such that it is subject to being placed on the ballot

under SDCL 11-2-22?

2. Is there any time limitation within which a petition under SDCL 11- 2-22 must be filed?

3. Do the general referendum provisions of SDCL 9-20 apply to zoning laws, or are the provisions of SDCL 11-2-22 exclusive?

IN RE QUESTION NO. 1:

SDCL 11-2-11 provides in part:

Zoning ordinances, subdivision ordinances, the official zoning map, and other official controls as deemed necessary, shall be included as*adjuncts* to and in accordance with the comprehensive plan. . . . (Emphasis added.)

An "adjunct" to a comprehensive plan has been broadly defined by the Legislature to include "official controls." SDCL 11-2-1(9) defines "official controls" as "any ordinance, regulation, standard, map, or procedure adopted by the board to regulate the development of the territory so as to carry out the comprehensive plan."

Any change in zoning necessarily affects some "ordinance, regulation, standard, map, or procedure" previously adopted by the board, and thus has the effect of amending an adjunct to the comprehensive plan.

A mere variance or conditional use permit does not constitute a change in zoning and therefore does not have the effect of amending an adjunct to the comprehensive plan. When a variance or use permit is granted, a specific exemption is carved out for an individual, but*the comprehensive plan and its adjuncts remain intact*. *Johnston v. Claremont*, 49 Cal. 2d 826, 323 P.2d 71 (1958). The granting of a variance or use permit must be distinguished from the situation where an individual landowner petitions for a zoning change pursuant to SDCL 11-2-28.1. If the County Commissioners ultimately adopt the proposed change requested by a petitioning landowner, a change, redefinition or reclassification of an "ordinance, regulation, standard, map, or procedure" has necessarily resulted. An adjunct to the comprehensive plan has been fundamentally altered.

SDCL 11-2, like the zoning enabling acts of a number of states in the west or midwest, provides for the submission of zoning regulations to a referendum. I Anderson, AMERICAN LAW OF ZONING (1968), § 4.24, p. 198. SDCL 11-2-30 extends the right of referendum to

amendments to the comprehensive plan or adjuncts thereto via the provisions of SDCL 11-2-22. The 1975 amendments to SDCL 11-2-22 (Session Laws 1975, Ch. 113, § 16) inserted the phrase “or adjuncts thereto” following “comprehensive plan.” The amendment is persuasive evidence that the Legislature intended to extend the right of referendum to any enactment which results in a zoning change.

The Legislature apparently realized that a change in any part of an adjunct to the comprehensive plan could potentially have a significant impact on the plan as a whole:

The restrictions relating to any portion of the city are an integral part of an entire scheme, and should be the expression of a definite policy. The people in each zone are interested, not only in having a comprehensive zoning law, but in what that law shall be. A zoning ordinance as amended becomes in effect a different ordinance. Even if it be granted that a reclassification of an area as small as that involved in the instant case cannot be said to effect a new scheme, the same rule must necessarily be followed as would be applied if a larger area had been reclassified, and it may be observed that *a piecemeal rezoning of small areas may result in a plan differing in vital particulars from that originally contemplated*. In view of the substantial interest which the electors of the entire municipality have in its zoning scheme, it cannot be held that, because residents of the particular locality rezoned may be more immediately and apparently affected than are residents of other portions of the city, the broad initiative and referendum provisions of the charter and Constitution do not apply to an amendment to the general zoning law which reclassifies a portion of the city's territory. *Dwyer v. City Council of Berkeley*, 253 P. 932, 935-6 (Cal. 1927). (FN1).

The action of the County Commissioners in enacting a zoning change may be prompted by a petition of thirty per cent of the landowners in a district (SDCL 11-2-28) or by the petition of an individual landowner (SDCL 11-2- 28.1) or by the County Commission sua sponte (SDCL 11-2-28). Regardless of the motivating force behind the commissioners' action, the public is entitled to notice, hearing and the right to referendum on any zoning changes. SDCL 11-2-28.2 and SDCL 11-2-30.

It is therefore my opinion that the right to referendum provided by SDCL 11-2-30, which incorporates by reference the provisions of SDCL 11-2-22, is applicable to a change in zoning of a landowner's property under SDCL 11-2- 28.1.

IN RE QUESTION NO. 2:

Presumably due to legislative oversight, SDCL 11-2-22 does not expressly define any time

limitation within which a petition for referendum must be filed. Failure to define a definite filing period creates considerable uncertainty and ambiguity.

"In construing an uncertain or ambiguous statute resort may be had to the general or public policy of the state, and statute should be construed, if possible, to harmonize with the general policy of the state, unless the intent of the Legislature is clearly to depart from that policy." 82 C.J.S. *Statutes*, § 352. The policy of the state in regard to zoning is set forth in SDCL 11-2-12:

The comprehensive plan shall be for the purpose of protecting and guiding the physical, social, economic, and environmental development of the county. . . .

This stated policy would be defeated by an interpretation of SDCL 11-2-22 which allowed referendum petitions to befiled at any time in the indefinite future. The intent of the Legislature could not have been to put the county's comprehensive plan in a perpetual state of limbo. Therefore, if there is any reasonable construction which would promote the stated purpose of the zoning laws, it should be followed.

It is my opinion that a twenty-day time limitation may be read into SDCL 11-2-22 by implication.

SDCL 11-2-30 states that an amendment, supplement, change, modification or repeal of the comprehensive county plan or adjuncts thereto, adopted by resolution or ordinance, shall "take effect on the twentieth day after its publication." If a referendum petition is filed before the twenty-day period has run, the "referendum stays the effect of the action of the law-making body until the electroate has had an opportunity to approve or reject it." Yokley, I ZONING LAW AND PRACTICE, § 7-1 (Supp. 1974). However, if the zoning change has already gone into effect, a referendum petition could not retroactively repeal the action of the County Commissioners.

The general rule is that "a referendum petition, to be effective, must be filed before the law sought to be referred takes effect." 42 Am.Jur. 2d, *Initiative and Referendum*, § 34. If this rule is read in conjunction with SDCL 11-2-30, it is my opinion that petitioners for a referendum on a zoning change have only twenty days in which to file the referendum petition.

IN RE QUESTION NO. 3:

The general referendum provisions of state constitutions, state statutes, and local charters, have been held applicable to zoning enactments in a number of jurisdictions whose zoning enabling acts do not contain separate referendum provisions. (FN2). However, where a specific referendum provision is contained within the zoning enabling act, and the general initiative and referendum statutes contain no specific reference to zoning, the specific provisions of the enabling act are controlling. *Smith v. Township of Livingston*, 106 N.J. Super. 444, 256 A.2d 85, aff'd., 54 N.J. 525, 257 A.2d 698 (1969); *Dewey v. Doxey-Layton Realty Co.*, 3 Utah 2d 1, 277 P.2d 805 (1954), citing *Hurst v. City of Burlingame*, 207 Cal. 134, 277 P. 308 (1929).

The South Dakota Supreme Court has recognized the rule that "(t)he terms of a statute relating to a particular subject will prevail over the general terms of another statute" unless it appears that the Legislature intended to make the general act controlling. *Clem v. City of Yankton*, 83 S.D. 386, 160 N.W.2d 125, 134 (1968). The above rule is a fortiori when the special act is later in point of time." 82 C.J.S. *Statutes*, § 369.

It thus appears that wherever the general provisions of SDCL 9-20 are in conflict with the specific provisions of SDCL 11-2-22, the latter will be controlling.

This opinion does not attempt to resolve the question of whether one may resort to SDCL 9-20 to fill the several gaps in the referendum provisions of the Zoning Enabling Act. That question can best be resolved by our Legislature.

Respectfully submitted,

William J. Janklow
Attorney General

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(FN1). *Dwyer* is one of the majority of cases extending general referendum provisions of city charters or state constitutions to zoning enactments, even where no referendum provisions is included as part of the zoning enabling legislation. *Denney v. Duluth*, 295 Minn. 22, 202 N.W.2d 892 (1972); *Fort Collins v. Dooney*, 496 P.2d 316 (Colo. 1972); *Hilltop Realty, Inc. v. South Euclid*, 110 Ohio App. 535, 164 N.E.2d 180 (1960); *Johnston v. City of Claremont*, 49 Cal.2d 826, 323 P.2d 71 (1958); *Meridian Development Corp. v. Edison Township*, 91 N.J. Super. 3100, 220 A.2d 121 (1966); *State ex rel. Hunzicker v. Pelliam*, 168 Okl. 632, 37 P.2d 417, 96 A.L.R. 1294 (1934). *Contra, Bird*

v. Sorenson, 16 Utah 2d 1, 2, 394 P.2d 808 (1964); *Forman v. Eagle Thrifty Drugs and Markets, Inc.*, 89 Nev. 533, 516 P.2d 1234 (1973); *Fleming v. Tacoma*, 81 Wash. 2d 292, 298-299, 502 P.2d 327, 331 (1972); *Kelley v. John*, 162 Neb. 319, 75 N.W.2d 713, 714-715 (1956); *West v. City of Portage*, 392 Mich. 458, 221 N.W.2d 303 (1974). *See generally*, Annotation, Adoption of Zoning Ordinance or Amendment Thereto as Subject of Referendum, 72 A.L.R.3d 1030 (1976).

(FN2). See cases cited in Footnote 1, *supra*.

ADDENDUM TO OFFICIAL OPINION NO. 77-64

Please substitute "SDCL 7-18A," which relates to *county* ordinances and resolutions, for "SDCL 9-20," which relates to*municipal* ordinances and resolutions, each time a citation to "SDCL 9-20" appears in Official Opinion No. 77-64.

The changes will affect Question No. 3, at page 2 of the opinion, and the last two paragraphs of page 6.

The changes in statutory citations do not change the rationale of the opinion. The specific referendum provisions of SDCL 11-2-22 control the general county referendum provisions of SDCL 7-18A. Whether one may resort to SDCL 7-18A to fill the gaps in the referendum provisions of the Zoning Enabling Act is a question which remains to be resolved by our Legislature.

William J. Janklow

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