



OFFICE OF ATTORNEY GENERAL

1302 East Highway 14, Suite 1
Pierre, South Dakota 57501-8501
Phone (605) 773-3215
Fax (605) 773-4106
TTY (605) 773-6585
<http://atg.sd.gov/>

JASON R. RAVNSBORG
ATTORNEY GENERAL

CHARLES D. McGUIGAN
CHIEF DEPUTY ATTORNEY GENERAL

September 3, 2019

Mark A. Vargo
Pennington County State's Attorney
130 Kansas City Street, Suite 300
Rapid City, SD 57701

Official Opinion No. 19-03

Re: **Requests for a Variance from County Subdivision Ordinances**

Dear Mr. Vargo,

In your capacity as the Pennington County State's Attorney, you have requested an official opinion from the Attorney General's Office on the following question:

QUESTION:

Does SDCL 11-2-49 require that a request for a variance from the Pennington County Subdivision Ordinance be heard and decided by the County's Board of Adjustment or does SDCL 11-2-17.1 exempt county subdivision ordinances from the procedural requirements of SDCL ch. 11-2?

ANSWER:

The plain language of SDCL 11-2-17.1 indicates that it is not applicable to Pennington County. Requests for variances from a county subdivision ordinance must be heard by the county's board of adjustment.

FACTS:

Pennington County intends a comprehensive review and re-write of its land use ordinances. Several years ago, Pennington County adopted a comprehensive plan. Pennington County has also adopted a Subdivision Ordinance and Zoning Ordinance. Both the Subdivision Ordinance and the Zoning Ordinance were adopted by Pennington County under the authority granted by SDCL ch.11-2. Currently, the Pennington County Subdivision Ordinance authorizes the Board of County Commissioners to hear and decide requests for variances from the Subdivision Ordinance. The Pennington County Board of Adjustment only considers requests for variances from the Pennington County Zoning Ordinance.

IN RE QUESTION:

You have asked whether requests for variances to the Pennington County Subdivision Ordinance must be heard by the county Board of Adjustment under SDCL 11-2-49, or whether the Subdivision Ordinance variance requests may be heard by the County Commission under SDCL 11-2-17.1?

SDCL 11-2-49 provides:

Except as otherwise provided by § 11-2-60, the board shall provide for the appointment of a board of adjustment, or for the planning and zoning commission to act as a board of adjustment, and in the regulations and restrictions adopted pursuant to the authority of this chapter, shall provide that the board of adjustment may, in appropriate cases and subject to appropriate conditions and safeguards, grant variances to the terms of the ordinance.

In reviewing a statute, “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, ¶ 5, 636 N.W.2d 675, 681).

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. 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 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, 806-07 (citations omitted).

“Board” is defined in SDCL ch. 11-2 as “the board of county commissioners[.]” SDCL 11-2-1(1). “[T]he ordinance” is not otherwise defined in SDCL ch. 11-2. Based upon a review of the remaining statutes in the chapter, I conclude that the use of the phrase “the ordinance” in SDCL 11-2-49 was intended by the Legislature to refer to whichever ordinance a board of adjustment has under review when considering a specific variance request.

You indicate in your opinion request that some counties interpret SDCL 11-2-17.1 as carving out an exception for county subdivision ordinances from the procedural requirements of SDCL ch. 11-2, including the requirement that variance requests be heard by the county board of adjustment.

SDCL 11-2-17.1 states:

The board may enact permanent subdivision ordinances as defined in subdivision 11-2-1(7). The board need not follow the procedures provided in this chapter pursuant to the comprehensive plan in implementing this section. This section does not apply to any county that has adopted a comprehensive plan. Before adoption of its subdivision ordinance or any amendment thereto, the commission shall hold at least one public hearing. Notice of the time and place of the hearing shall be given once at least ten days in advance by publication in a legal newspaper of the county. Any interested person shall be given a full, fair, and complete opportunity to be heard at the hearing, and the governing body may refuse or adopt the ordinance, with or without amendment.

The statute clearly provides that its terms are not applicable to “any county that has adopted a comprehensive plan.” Pennington County has adopted a comprehensive plan, and therefore the terms of SDCL 11-2-17.1 are not applicable to Pennington County.

Pennington County’s Subdivision Ordinance was enacted pursuant to the authority granted to the County by SDCL ch. 11-2. SDCL 11-2-49 requires the Pennington County Board of Adjustment to consider requests for variances from the county Subdivision Ordinance. SDCL 11-2-59 and -60 require a two-thirds vote of the members of that board to approve any such variance request.

While not necessary to resolve your inquiry, I also conclude that SDCL 11-2-17.1 does not create an exception from the requirements of SDCL 11-2-49 for variances of those subdivision ordinances enacted in counties that have not also enacted a comprehensive plan.

SDCL 11-2-17 requires that “subdivision ordinance[s] ... shall be made in accordance with the comprehensive plan.” SDCL 11-2-17.1 indicates that a board of county commissioners does not “need to follow the procedures provided in [SDCL ch. 11-2] pursuant to the comprehensive plan in implementing this section.” As noted above, SDCL 11-2-17.1 unambiguously indicates that it does not apply to those counties that have adopted comprehensive plans.

In reading the two statutes together, I conclude the most reasonable interpretation of their terms leads to the conclusion that SDCL 11-2-17.1 authorizes counties that have not adopted comprehensive plans to also enact subdivision ordinances and authorizes these counties to do so without otherwise following the procedural provisions of SDCL ch. 11-2. However, the language of SDCL 11-2-17.1 limits this exception only to the implementation of that statute. SDCL 11-2-17.1 contains language requiring notice and a hearing before adoption of a subdivision ordinance “or any amendment thereto.” Based upon the terms of the statute, the implementation of SDCL 11-2-17.1 then includes the enactment of a subdivision ordinance or the consideration of any amendment thereto. A variance, however, is not the enactment of an ordinance or an amendment to the terms of an ordinance. A variance is the granting of permission to a property owner to depart in some manner from the strict application of the terms of an ordinance. 3 Rathkopf’s The Law of Zoning and Planning § 58:1 (4th Ed.).

SDCL 11-2-49 specifically indicates its provisions are applicable to the “regulations and restrictions adopted pursuant to [SDCL ch. 11-2].” I conclude that while SDCL 11-2-17.1 creates an exception for the enactment or amendment of subdivision ordinances in those counties that have not adopted comprehensive plans, SDCL 11-2-49 still controls the consideration of variance requests in those counties and these requests must be heard by the county board of adjustment.

CONCLUSION

I conclude that consideration of requests for variances from the Pennington County Subdivision Ordinance must be heard by the County’s Board of Adjustment. SDCL 11-2-49 applies to requests for variances of all regulations

adopted pursuant to SDCL ch. 11-2. SDCL 11-2-59 requires a two-thirds vote of the members of the board of adjustment to grant a variance. SDCL 11-2-17.1 does not except subdivision ordinance variance requests from consideration by a county's board of adjustment.

Sincerely,

A handwritten signature in cursive script, appearing to read "Jason R. Ravensborg".

Jason R. Ravensborg
ATTORNEY GENERAL

JRR/SRB/lde