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August 10, 2017

Rexford A. Hagg
Box Elder City Attorney
P.O. Box 8008
Rapid City, SD 57709

OFFICIAL OPINION No. 17-05

Re: **The Formulation of Business Improvement Districts and Assessment Methods**

Dear Mr. Hagg,

In your role as city attorney for the City of Box Elder, you have requested an official opinion from the Attorney General's Office based on the following questions:

QUESTIONS:

1. Whether a second Business Improvement District may overlay an existing District when the second district includes a combination of property from the first business improvement district and property not currently included in the existing district?
2. If an overlay is allowed, whether each district requires a separate board, or can the existing board for the first business improvement district be retained and used as the board for the second district?
3. May the hotel properties to be included in both the first business improvement district, as well as the second newly created district, charge their

guests an amount (appearing as a separate line item on the guest receipt) based on a percentage of the room rate to pay for the real property “special assessment” assessed against the hotel properties under the second business improvement district?

ANSWERS:

1. Yes, a second Business Improvement District may overlay a pre-existing Business Improvement District.

2. The answer to your question turns on whether the composition of the already appointed board continues to meet the requirements of state law.

3. Your third question falls outside the official duties of the City of Box Elder and as such, I am unable to offer an opinion. Attorney General Opinions are limited to those questions related to the official duties of the entity requesting the opinion.

FACTS:

The City of Box Elder is considering a proposal for the bonding and building of an event center in Box Elder. The proposal seeks to finance the event center through the creation of a second business improvement district (BID), and the levy of special assessments against four hotel properties and some non-contiguous undeveloped property. All of the hotel properties share the same owner. The non-contiguous undeveloped property is owned by a sister-entity. The owner of the hotels has petitioned the City to approve a second BID. The proposal is for a \$20 million dollar bond, and includes both construction of the event center as well as some infrastructure development to the non-contiguous property – all of which would be within the boundaries of BID #2.

All of the hotels are currently in an existing BID and are collecting an occupancy tax of \$2 per occupied room. The same hotel owners are requesting to overlay BID #1 with the second BID. The proposal for BID #2 includes a special assessment and lien on the hotel properties. The special assessment will be payable by the hotel owners on a semi-annual or annual basis. The hotel owners have advised the City that they would intend to add a line item charge on guest receipts to raise some or all of the revenue necessary to pay their respective special assessments.

IN RE QUESTION 1:

“[M]unicipalities possess only those powers conferred upon them by the Legislature ... [but] a grant of authority includes those incidental or implied powers that are necessary to enable a municipality to perform the function authorized.” *Olesen v. Town of Hurley*, 2004 S.D. 136, ¶ 15, 691 N.W.2d 324, 328 (quoting *City of Rapid City v. Rensch*, 90 N.W.2d 380, 383 (S.D. 1958)). To determine what statutory power the municipality is granted by the Legislature, one looks to the “plain, ordinary and popular meaning of statutory language.” *Fall River County v. South Dakota Dept. of Revenue*, 1996 S.D. 106, ¶ 13, 552 N.W.2d 620, 624. “Words and phrases in a statute must be given their plain meaning and effect.” *In re Taliaferro*, 2014 S.D. 82, ¶ 6, 856 N.W.2d 805, 806-07 (citations omitted).

SDCL 9-55-5 authorizes municipal governments to create business improvement districts and states as follows:

The mayor shall, with the approval of the governing body, appoint a business improvement board consisting of property owners, residents, business operators or users of space within the business area to be improved. The governing body shall, by resolution, designate the boundaries of the business area prior to the time of the appointment of the board. The board shall make recommendations to the governing body for the establishment of a plan or plans for improvements in the business area. If the improvements to be included in one business area offer benefits that cannot be equitably assessed together under this chapter, more than one business improvement district as part of the same development plan for that business area may be proposed. The board may make recommendations to the municipality as to the use of any revenue collected pursuant to § 9-55-2.

The statute specifically states that the business improvement board is authorized to make recommendations for the establishment of a “plan *or plans* for improvements in the business area.” SDCL 9-55-5. Further, in enacting this statute, the Legislature has specifically allowed for the creation of “*more than one* business improvement district as part of the same development plan” when the improvements to be included in one business area offer benefits that cannot be equitably assessed together. *Id.* (emphasis added). Moreover, in

SDCL 9-55-7 the Legislature has also stated that “the governing body may create *one or more business improvement districts* by adopting a resolution of intent to establish a district *or districts*.” SDCL 9-55-7 (emphasis added).

You have asked whether a second BID may be overlaid on top of an existing BID. The governing body of a municipality is expressly authorized to create multiple BID’s. While no specific statute expressly authorizes the a municipality to overlay a second BID on top of the first, I conclude that the language of the statutes implies that a municipality may overlay districts.

The plain language of the statues clearly contemplates the creation of more than one BID by a municipality. As noted, SDCL 9-55-5 specifically allows for the creation of multiple BID’s where the improvements to be included cannot be equitably assessed together. It is reasonable to assume that a single entity can benefit from two different business improvement plans, and thereby could be included within the boundaries of two different districts. I conclude the municipality is by implication allowed to include an entity within the boundaries of two different BID’s.

The answer to your first question is yes, a second BID may overlay a pre-existing district.

IN RE QUESTION 2:

SDCL 9-55-5 requires that “a business improvement board consisting of property owners, residents, business operators, or users of the space within the business area to be improved” be appointed by the mayor of a municipality with approval by the municipality’s governing body. This board is to make recommendations to the municipality regarding plans for improvements in the business area the board is appointed for. *Id.* These plans for improvements may include the creation of one or more BID in the business area.

The purpose of statutory construction is to discover a statute’s intent through an analysis of its language. *In re Estate of Ricard*, 2014 S.D. 54, ¶ 8, 851 N.W.2d 753, 755-56 (citations omitted). As stated above, “[w]ords and phrases in a statute must be given their plain meaning and effect.” *Taliaferro*, 2014 S.D. 82, ¶ 6 (citations omitted). A statute that has clear, certain, and unambiguous language does not need interpretation; rather, a court need only declare the Legislature’s clearly expressed intentions. *Id.*

According to the plain language of the statute, if the board established for BID #1 includes owners, residents, operators, or users of the space within BID #2 then the existing Board may be used. In that instance, the requirements of SDCL 9-55-5 would be met. If the board appointed for BID #1, however, does not meet these terms then a new board will need to be appointed. For example, if the current board for BID #1 does not include a property owner, resident, business operator, or user of the non-contiguous space that would be developed in BID #2, the board would not meet the requirements of SDCL 9-55-5.

I conclude that whether a new board needs to be appointed for BID #2 is determined by the membership of the current board. If the membership of the current board does not meet the requirements of SDCL 9-55-5, as applied to BID #2, a new board must be appointed.

IN RE QUESTION 3:

Your third question has essentially asked whether the hotel properties to be included in BID #2 may add a line item charge to their guests' bills (based on a percentage of the room rate) to pay for the special assessment levied against the hotel property by the municipality for BID #2. I decline to issue an opinion as to your third question.

SDCL 9-55-13 authorizes a municipality to levy a special assessment "against real property located in a [BID]..." The amount of the special assessment is to be determined by the municipality, and must be levied according to the method proposed in the ordinance creating the BID. *Id.* "All special assessments levied under [SDCL ch. 9-55] constitute liens on the property and shall be ... collected in such manner as the governing body determines in the ordinance." *Id.* You have indicated in your request that the special assessment will be payable by the hotel property owners on a semi-annual or annual basis.

The levy and collection of the special assessment under SDCL 9-55-13 creates an obligation owed to the municipality by each property owner within the BID. In this instance, how that obligation is to be collected by the municipality from hotel properties within BID #2 is to be determined by the ordinance that creates the BID. Outside of this obligation exists the relationship between the hotel properties and their guests. How a hotel property chooses to pay for the obligation owed to the municipality, and what impact that choice has on how each hotel property bills its guests, is an issue that, in my opinion, falls outside

the official duties of the City. Official Opinions of the Attorney General are limited to those issues directly related to the official duties of the entity requesting the opinion. For this reason I am unable to issue an opinion on the legality of a hotel property adding a line item to their bills to pay for the special assessment levied against them.

CONCLUSION

Based on the above analysis, it is my opinion that a second BID may overlay an already existing BID. I also conclude that the membership of the current board appointed for BID #1 is determinative as to whether that board meets the requirements of state law as applied to BID #2. Finally, I am unable to issue an opinion as to your third question.

Sincerely,



Marty J. Jackley
ATTORNEY GENERAL

MJJ/SRB/ZAM/lde