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November 28, 2022

Cody J. Miller
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108 N. Egan
P.O Box 45
Madison, SD 57042-0045

OFFICIAL OPINION No. 22-02

Re: Official Opinion Concerning Calculation of Petition Signatures under SDCL 34A-5-42, and Tolling of the Statute of Limitations under SDCL 34A-5-44

Dear Mr. Miller,

In your capacity as a counsel for the Spring Creek Cow Creek Sanitary District you have requested an official opinion from the Attorney General's Office on the following question:

QUESTION:

- 1.) How should SDCL 34A-5-42 be interpreted in calculating the number of petition signatures required to exclude territory from a sanitary district?

ANSWER:

- 1.) SDCL 34A-5-42 should be interpreted to require a number of signatures from resident voters of the sanitary district equal to at least 20% of the votes cast for the member of the board of trustees who received the highest number of votes at the last annual election.

FACTS:

The Spring Creek Cow Creek Sanitary District (District) was organized in 2020. The District serves residential users, recreational vehicle lots, and other commercial and recreational facilities in Hughes County and Sully County in central South Dakota.

In February, a petition for a resolution of exclusion of real property from the District was presented to the District's Board of Trustees. The Petition had been signed by 10 people. Following presentation of the Petition, the Board set the matter for public hearing. In March, the proposed Resolution was presented to the Sully County Commission who approved the Resolution as required by SDCL 34A-5-43. Subsequent to Sully County's approval, the District's Board of Trustees tabled the Resolution for further review of the issues surrounding potential exclusion of property from the District.

The question identified above arose in reviewing the issues raised by the Petition and Resolution.

IN RE QUESTION:

State law establishes the threshold number of signatures required on a petition to exclude territory from a sanitary district. SDCL 34A-5-42. The statute requires petition signatures from:

[N]ot less than twenty percent of the legal voters residing within the district, as shown by the vote for the member of the board of trustees receiving the highest vote at large at the last preceding annual election in the district.

SDCL 34A-5-42.

You have asked for my interpretation of SDCL 34A-5-42 in order to correctly calculate the number of petition signatures required by the statute.

When interpreting a statute to determine its meaning, "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." *In re Wintersteen Revocable Trust Agreement*, 2018 S.D. 12, ¶ 12, 907 N.W.2d 785, 789 (internal citations omitted). When the intent of the statutory language is unclear, "the intent of the legislature is derived from the plain, ordinary and popular meaning of the statutory language." *Id.*

Upon initial review of the statute, it is clear that at least 20% of the legal voters residing in a district must sign a petition to exclude territory from the district. SDCL 34A-5-42. However, the statute then limits or qualifies that calculation by stating “as shown by the vote for the member of the board of trustees receiving the highest vote at large at the last preceding annual election in the district.” *Id.* This qualifying language gives pause when interpreting the statute.

Assume for illustrative purposes that a sanitary district was formed this year and held its first election.¹ One hundred votes were cast at that election for three candidates: Candidate A received 40 votes, Candidate B received 35 votes, and Candidate C received 25 votes. In this hypothetical district, a petition to exclude territory from the district is filed in early 2023, before the district’s next annual election. Does that petition need signatures in an amount equal to 20% of the total resident voters in the district? Does the petition need 20 signatures – equal to 20% of the total votes cast in the last election where the member of the board of trustees receiving the highest vote at large was elected? Or, does the petition need 8 signatures – equal to 20% of the vote received by Candidate A in the last annual election where Candidate A was the trustee receiving the highest number of votes?

It is my opinion that SDCL 34A-5-42 requires a petition to exclude territory from a sanitary district to be signed by legal voters that are residents of the district in a number equal to at least 20% of the votes cast for the member of the board of trustees receiving the highest number of votes at the last annual election. Referencing the hypothetical described above, I conclude the petition there would require at least 8 signatures – a number equal to 20% of the vote received by Candidate A in the last annual election in that district.

I cannot conclude that SDCL 34A-5-42 requires petition signatures equal to 20% of voters residing in the district. To do so is to give no effect to the qualifying language identified above. *Steinberg v. South Dakota Dep’t of Military and Veterans Affairs*, 2000 S.D. 36, ¶ 12, 607 N.W.2d 596, 601 (citation omitted)(“[t]he Legislature does not intend to insert surplusage into its enactments”).

¹ According to state law, all members of the sanitary district board of trustees are elected at large. SDCL 34A-5-14.1 & -16. Three trustees are elected to staggered terms at the first election after a district has been formed. SDCL 34A-5-16. The trustee receiving the highest number of votes at this election serves a 3 year term, the trustee receiving the second highest number of votes serves a 2 year term, and the trustee receiving the third highest number of votes serves a 1 year term. *Id.* Thereafter, one trustee is elected annually for a term of 3 years. *Id.*

When interpreting a statute, I am bound by the terms used in the statute and not what I think the Legislature could have said or should have said. *Holborn v. Deuel County Board of Adjustment*, 2021 S.D. 6, ¶ 35, 955 N.W.2d 363, 378 (citing *Martinmass v. Engelmann*, 2000 S.D. 85, ¶ 49, 612 N.W.2d. 600, 611). The plain language of the statute requires use of “the vote for” the trustee “receiving the highest vote ... at the last preceding election” in determining the petition signature requirement. SDCL 34A-5-42. To reach the conclusion that the statute requires petition signatures based on 20% of the total vote cast in the last trustee election would be to read into the statute language that does not exist. If the Legislature wanted the total vote cast to control the petition signature requirement it could have drafted SDCL 34A-5-2 to require as much.² The Legislature did not, and I cannot now add that language through my interpretation. *Holborn*, 2021 S.D. 6, ¶ 35; and *Olson*, 2019 S.D. 13, ¶ 10.

CONCLUSION

I conclude that SDCL 34A-5-42 should be interpreted to require a number of signatures from resident voters of the sanitary district equal to at least 20% of the votes cast for the member of the board of trustees who received the highest number of votes at the last annual election.

Sincerely,



Mark A. Vargo
ATTORNEY GENERAL

MAV/SRB/dd

² See SDCL 2-1-5 (petition signatures required for initiative or referendum must be based on “total number of votes cast for Governor at the last preceding gubernatorial election...”); or SDCL 12-5-1 (a new political party may be organized by submitting “a written declaration signed by at least one percent of the voters of the state as shown by the total vote cast for Governor at the last preceding gubernatorial election...”).

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DEBBIE A. REUTER

March 16, 2022

Jason R. Ravensborg
South Dakota Attorney General
1302 E. Hwy. 14, Suite 1
Pierre, SD 57501

Dear Mr. Ravensborg:

Re: Request for Official Opinion of SDCL 34A-5-42 and SDCL 34A-5-44
As Applied to Factual Scenario

I am an attorney in Madison, South Dakota, and I am legal counsel for Spring Creek Cow Creek Sanitary District, which is located in Hughes and Sully Counties in South Dakota. The general subject matter to be addressed in this request is the petition requirements pursuant to SDCL 34A-5-42, and when the time limits provided for in SDCL 34A-5-44 begin tolling.

The specific factual situation involved is as follows:

Spring Creek Cow Creek Sanitary District was organized in 2020, and the first election of trustees was held in June of 2020 where a total of 108 votes were cast at said election, and the person receiving the most votes receiving 28 of those 108 votes. Spring Creek Cow Creek Sanitary District serves 229 residential users, 600 RV lots, and several other commercial and recreational facilities in both Hughes County and Sully County in central South Dakota.

On February 16, 2022, a petition for a resolution of exclusion of real property from the Spring Creek Cow Creek Sanitary District signed by ten people was presented to the board of trustees of the Spring Creek Cow Creek Sanitary District. Following presentment of the petition, the board set the matter for a public hearing to be held on March 9, 2022, and provided for the proper notices as required by SDCL 34A-5-42 and

34A-5-43. On March 1, 2022, the proposed resolution was presented to the Sully County Commissioners at their monthly meeting, and the proposed resolution was approved by the Commissioners as required by SDCL 34A-5-43.

On March 9, 2022, at the time and place set for the hearing on public comment regarding the proposed resolution to exclude certain real property from the Spring Creek Cow Creek Sanitary District, the board of trustees of the district tabled the resolution to provide for more time to review the issues surrounding potential exclusion of the property.

The questions the Attorney General is being asked to address are as follows:

- (1) How is the number of required signatures calculated consistent with SDCL 34A-5-42?

The statute states, “. . . on petition in writing signed by not less than 20% of the legal voters residing within the district, as shown by the vote for the member of the board of trustees receiving the highest vote at large at the last preceding annual election in the district,” in the relevant parts as it pertains to calculating number of signatures required.

It appears as though this calculation could come down to three different numbers. One reading of this language could mean that a petition would require 20% of all registered voters residing within the district at the time of the last vote, but this interpretation leaves one wondering how the language regarding “the member of the board of trustees receiving the highest vote” is relevant or applied or why it was included by the legislature.

Another reading could mean that the calculation is 20% of the votes cast for the board of trustees receiving the highest vote at the last preceding election, but this interpretation is not consistent with the beginning of the statute stating that the petition must be signed “by not less than 20% of the legal voters residing within the district.” This interpretation does not include into the whole, which 20% is then taken from, those legal voters who reside within the district but did not cast votes or those legal voters who reside within the district and cast votes for other candidates.

Finally, the third way I see this calculation is 20% of the total number of legal voters that cast votes at the last election where the member of the board of trustees who received the highest vote at large was last elected. This last interpretation still leaves out those legal voters who reside within the district and failed to cast any votes, therefore, not accounting for the plain meaning of the language “by not less than 20% of the legal voters residing within the district.”

(2) When does the statute of limitations begin tolling pursuant to SDCL 34A-5-44?

SDCL 34A-5-44, in relevant part, reads as follows:

“Upon failure of the board of trustees to grant the request contained in the petition of the voters, the petitioners or any party feeling aggrieved thereby may within thirty days after the decision of the board of trustees or county commissioners, or within ninety days after the filing of the petition if no action has been taken on the petition by the board, present their petition or appeal to the circuit court for the county in which the district or the greater portion of the district is situated by filing the petition or appeal with the clerk of courts.”

Consistent with the factual scenarios stated above, has the 30-day statute of limitations began tolling and, if so, when did it begin? Also, the statute provides for 90 days statute of limitations, which would begin after filing the petition “*if no action has been taken on the petition by the board.*” Since the board of trustees in this factual scenario had given notice of the proposed resolution to exclude real property from the Spring Creek Cow Creek Sanitary District and set the matter for a public hearing consistent with SDCL 34A-5-42 and 43, would “the petitioners or any party feeling aggrieved thereby” be permitted to appeal or present the petition to a Circuit Court? Does presenting a notice of proposed resolution and setting the matter for a public hearing constitute taking action under SDCL 34A-5-44?

The above stated statutes are the applicable state statutes that the undersigned is aware of, and the undersigned is not aware of any court decisions on this matter. The Spring Creek Cow Creek Sanitary District, through the board of trustees, contends that

Jason R. Ravensborg
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the number of signatures required by a petition should not be calculated merely by taking 20% of the votes cast in favor of the member of the trustees who received the highest vote. Petitioner contends that that is the number of signatures required. With that calculation, as the petitioner contends ($28 \times .2 = 5.6$), six signatures is all that would be required for a petition to exclude real property from the district. Considering that 25 signatures of qualified voters or 5% of the qualified voters, whichever is less, are required for a petition to be nominated for election to position of trustee (34A-5-21), it seems as though legislators believed that 5% of a district would be roughly 25 voters. A reading of the statute and a calculation consistent with the petitioner's contention, under the current factual scenario, results in a requirement of less than 3% of the residential users in the district.

The question presented is a question of law relating to the official duties of the board of trustees to the Spring Creek Cow Creek Sanitary District, a governmental subdivision of this state and a public body, corporate and politic. The opinion requested to the questions presented involves actual questions that are not theoretical or hypothetical. At the time of this writing, no matter is pending before any court, state administrative agency, or local government agency or body.

Please provide an official opinion to the questions presented.

Respectfully,

LAMMERS, KLEIBACKER & DAWSON, LLP



By: Cody J. Miller

CJM/dr

