REPORT OF THE
ATTORNEY GENERAL
OF THE
STATE OF SOUTH DAKOTA
2013-2016

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2013-2016

MARTY JACKLEY
ATTORNEY GENERAL

2013-2016
REPORT OF THE ATTORNEY GENERAL

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January 1, 2013 - December 31, 2016

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2013-2016
REPORT OF THE ATTORNEY GENERAL

February 8, 2013

Bob Wilcox
South Dakota Association of County Commissioners
222 East Capitol Avenue, Suite 1
Pierre, SD 57501

OFFICIAL OPINION NO. 13-01

RE: Power of a County to Regulate Use of Fireworks During Statutory Period

Dear Mr. Wilcox:

You have requested an official opinion from this Office:

QUESTION:

Do counties have authority under SDCL 7-8-20(18) to restrict the use and discharge of fireworks for a period beyond July 2, notwithstanding SDCL 34-37-19?

ANSWER:

Not under existing statutory law. Under the rules of statutory construction, the more specific provisions of SDCL 34-37-19 provide the extent of county authority to regulate the discharge of fireworks. By the limits established in this statute, county commissions have authority to regulate the discharge of fireworks only during the periods from June 20 to July 2, inclusive, and from December 28 to January 1, inclusive.

FACTS:

You have provided the following factual statement:

> As is often the case in South Dakota, dry summer conditions result in drought situations thereby increasing the potential for fire danger. In particular, this last summer of 2012, severe and extreme drought conditions were prevalent throughout South Dakota. County commissioners around the state were concerned about fire danger resulting from the discharge of fireworks and the immediate preservation of the public health and safety of their constituents.
>
> County commissioners acknowledge their statutory authority under SDCL 34-37-19 to prohibit or regulate the use of fireworks outside the boundaries of any

> municipality during the period from June 20 to July 2, inclusive, and from December 28 to January 1, inclusive. As was the case this last summer, the fire danger extended beyond July 2. Fireworks used or discharged July 3 through July 5 were of grave concern to many of the county commissioners.

IN RE QUESTION:

The sale and discharge of fireworks is regulated through the provisions in SDCL ch. 34-37. SDCL 34-37-16.1 permits the discharge of fireworks from June 27 through July 5 and from December 28 through January 1. SDCL 34-37-19 specifically addresses county regulation of fireworks and provides as follows:

> Any county may, by resolution, regulate or prohibit the use of fireworks outside the boundaries of any municipality in those areas where the fire danger, as determined by use of the South Dakota grassland fire danger index published by the National Weather Service, has reached the extreme category in that county during the period from June twentieth to July second, inclusive, and during the period from December twenty-eighth to January first, inclusive. During any such period, the county's action is suspended if the grassland fire danger index falls below the very high category and

> again becomes effective if the grassland fire danger index reaches the extreme category.

SDCL 7-8-20 addresses "open burning":

> In addition to others specified by law, the board of county commissioners shall have power:
>
> . . .
>
> (18) To prohibit or restrict open burning, after consultation with local fire officials and law enforcement officials, in order to protect the public health and safety.

The Legislature has not defined "open burning" in this context. Whether the term encompasses the discharge of fireworks, however, does not need to be addressed in this opinion.[1] The application of rules of statutory construction are determinative of the issue at hand.

The rules of statutory construction state:

> The purpose of statutory construction is to discover the

[1] It is worth noting that SDCL 7-8-20(18), enacted in 2001, does not reference fireworks. This is so, even though the Legislature had previously included fireworks in similar legislation granting authority to municipalities. *See* SDCL 9-33-1.

true intention of the law which is to be ascertained primarily from the language expressed in the statute. The intent of the 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 of 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 related to the same subject. But, in construing statutes together it is presumed that the legislature did not intend an absurd or unreasonable result. *When the question is which of two enactments the legislature intended to apply to a particular situation, terms of a statute relating to a particular subject will prevail over general terms of another statute.* Moreover, it is presumed the legislature does not intend to insert surplusage in its enactments. And, where possible,

> the law must be construed to give effect to all of its provisions.

U.S. West Communications, Inc. v. Public Utilities Commission, 505 N.W.2d 115, 123 (S.D. 1993) (internal citations omitted) (emphasis added); *also see Martinmaas v. Engelmann*, 2000 S.D. 85, ¶ 49, 612 N.W.2d 600, 611.

SDCL 7-8-20(18) is a very general statute granting a county the power to regulate open burning. It does not contain date restrictions on the county's authority. On the other hand, SDCL 34-37-19 is part of a chapter expressly regulating the sale and discharge of fireworks. This statute provides a county with a specific grant of authority to regulate fireworks in particular, under certain conditions and within certain time periods.[2] The rules of statutory construction provide that "when the question is which of two enactments the legislature intended to apply to a situation, terms of a statute relating to a particular subject will prevail over general terms of another statute." *U.S. West Communications*, 505 N.W.2d at 123. Thus, the terms of

[2] The statute was originally enacted in 1989 to permit county regulation of fireworks when certain fire danger conditions existed between June 20 and June 27. It was amended in 2003 to expand the time frame to include the period from June 20 to July 2 inclusive, and again amended in 2011 to provide additional authority to regulate the use of fireworks in conjunction with the added sale and discharge provisions for New Year's festivities.

34-37-19, which govern the regulation of fireworks in particular, prevail over the general terms of SDCL 7-8-20(18).

Moreover, "[w]e presume that the Legislature meant something when it included" the fire danger and date limitations in its grant of authority to counties in SDCL 34-37-19. *Wheeler v. Farmers Mutual Insurance Company*, 2012 S.D. 83, ¶¶ 21-23, 824 N.W.2d 102, 109. A conclusion that a county may regulate fireworks under SDCL 7-8-20(18) ignores the express yet limited grant of authority found in SDCL 34-37-19, and renders those limitations superfluous. This reading of the statutes is unacceptable.

Finally, had the Legislature intended to allow a county to regulate or prohibit the use of fireworks beyond July 2, it easily could have done so. *Wheeler*, 2012 S.D. 83, ¶ 24, 824 N.W.2d at 109. It is telling that in both 2003 and 2011, the Legislature specifically amended the date restrictions in SDCL 34-37-19, yet did not include the period from July 3 through July 5. The lack of express regulatory authority over fireworks for this time period, given the specificity of the dates included in the statutes, is clearly intentional.

If county commissioners desire to regulate fireworks over the July Fourth

festivities, legislative authority must be obtained.

Very truly yours,

Marty J. Jackley
Attorney General

MJJ/CME

October 28, 2013

Cris Palmer
Counsel - Rapid City School District 51-4
P.O. Box 8045
Rapid City, SD 57709-8045

OFFICIAL OPINION NO. 13-02

RE: School Day Defined for Calculating Length of Suspension from Extracurricular Activities

Dear Mr. Palmer:

You have requested an official opinion from this Office:

QUESTION:

Do days held during a special summer school term constitute a "school day" for purposes of calculating the sixty-day suspension from extracurricular activities under SDCL 13-32-9?

ANSWER:

Yes. A "school day," for purposes of SDCL 13-32-9, is a day during any school

term, including a special summer school term, established by the local school board where instruction is being provided at the school the student is enrolled.

FACTS:

You have provided the following factual statement:

> A high school student was convicted of marijuana possession on May 1, 2013. He is ineligible to participate in any extracurricular activity for one calendar year from the date of conviction, pursuant to SDCL 13-32-9. However, he opts to participate in an assessment with a certified chemical dependency counselor, thus allowing the one-year suspension to be reduced to sixty school days. See SDCL 13-32-9. The student enrolls in summer school. Does his enrollment in summer school count towards the 60 "school days" suspension from extracurricular activities under SDCL 13-32-9?

IN RE QUESTION:

SDCL 13-32-9 governs student ineligibility from participation in extracurricular activities for drug related violations. SDCL 13-32-9 provides:

> Any person adjudicated, convicted, the subject of an informal

adjustment or court-approved diversion program, or the subject of a suspended imposition of sentence or suspended adjudication of delinquency for possession, use, or distribution of controlled drugs or substances or marijuana as defined in chapter 22-42, or for ingesting, inhaling, or otherwise taking into the body any substances as prohibited by § 22-42-15, is ineligible to participate in any extracurricular activity at any secondary school accredited by the Department of Education for one calendar year from the date of adjudication, conviction, diversion, or suspended imposition of sentence. **The one-year suspension may be reduced to sixty school days if the person participates in an assessment with a certified chemical dependency counselor or completes an accredited intensive prevention or treatment program.** If the assessment indicates the need for a higher level of care, the student is required to complete the prescribed program before becoming eligible to participate in extracurricular activities. Upon a subsequent adjudication, conviction, diversion, or suspended imposition of sentence for possession, use, or distribution of controlled drugs or substances or marijuana as defined in chapter 22-42, or for ingesting, inhaling,

or otherwise taking into the body any substances as prohibited by § 22-42-15, by a court of competent jurisdiction, that person is ineligible to participate in any extracurricular activity at any secondary school accredited by the Department of Education. Upon such a determination in any juvenile court proceeding the Unified Judicial System shall give notice of that determination to the South Dakota High School Activities Association and the chief administrator of the school in which the person is participating in any extracurricular activity. The Unified Judicial System shall give notice to the chief administrators of secondary schools accredited by the Department of Education for any such determination in a court proceeding for any person eighteen to twenty-one years of age without regard to current status in school or involvement in extracurricular activities. The notice shall include name, date of birth, city of residence, and offense. The chief administrator shall give notice to the South Dakota High School Activities Association if any such person is participating in extracurricular activities.

Upon placement of the person in an informal adjustment or court-approved diversion program,

> the state's attorney who placed the person in that program shall give notice of that placement to the South Dakota High School Activities Association and chief administrator of the school in which the person is participating in any extracurricular activity.
>
> As used in this section, the term, extracurricular activity, means any activity sanctioned by the South Dakota High School Activities Association. (emphasis added).

In 2006, the Legislature amended SDCL 13-32-9 to allow a student the opportunity to reduce the period of one-year ineligibility to a term of sixty school days if the student satisfied certain prescribed criteria. The intent of the amendment was to provide the student an added incentive to participate in chemical dependency prevention and treatment programs. In setting forth the reduced length of ineligibility, however, the Legislature did not define what constitutes a "school day." Further, there is no other statute, Department of Education rule, or South Dakota High School Athletics Association provision that defines what constitutes a school day in the context of extracurricular activity ineligibility.

Where a term is not defined, this Office follows the rules of statutory construction utilized by our courts. Under these standards, the intent of a

statute is determined from what the Legislature said, rather than what a court thinks the Legislature should have said. This determination of intent is generally confined to the application of the plain, ordinary meaning of the statutory language. *Clark County v. Sioux Equipment Corporation,* 2008 S.D. 60, ¶ 28, 753 N.W.2d 406, 417. The provisions in SDCL 13-26-1 and 13-26-2 provide guidance in interpreting the plain, ordinary meaning of a "school day."

SDCL 13-26-1 provides:

> The school fiscal year shall begin July first and end June thirtieth. Each local school board shall set the number of days in a school term, the length of a school day, and the number of school days in a school week. The local school board or governing body shall establish the number of hours in the school term for kindergarten programs, which may not be less than four hundred thirty-seven and one-half hours. The Board of Education shall promulgate rules pursuant to chapter 1-26 setting the minimum number of hours in the school term for grades one through three. The number of hours in the school term for grades four through twelve may not be less than nine hundred sixty-two and one-half hours, exclusive of intermissions.

An intermission is the time when pupils are at recess or lunch.

SDCL 13-26-2 provides:

The school board or governing body shall operate kindergarten through grade twelve in its schools. The school board shall operate grades one through twelve for at least a nine-month regular term in any one school year, and the number of hours in a school term for kindergarten shall be set pursuant to § 13-26-1. The regular school term may be conducted on a year-round basis and shall begin on a date established by the school board. The Board of Education shall promulgate rules pursuant to chapter 1-26 governing the operation and scheduling of year-round schools. Any school board or governing body may release graduating high school seniors from school before the end of the regular term. A school is not required to make up time for school closing because of weather, disease, or emergency once it has reached the minimum number of hours in the school term as required by state law. Graduating seniors are excused from make up time if the make up time occurs after the students have graduated or after graduation exercises have been held. If classes have been convened and then are dismissed, or if

> classes convene at a time later in the day than normal, because of inclement weather, that day constitutes a school day in session equal to the number of hours planned for that day as established in the local school district calendar for the year.
>
> School boards are encouraged to provide time within the regular school term for curriculum and staff development which shall be in addition to the time required in this section. Each school board shall determine the appropriate amount of time for this activity and how best to use the time based on local needs for program development, increased parent participation, student contact, teachers' preparation, or other needs of the schools in the district. School is in session only when classes are held and as provided in §§ 13-26-4 and 13-26-4.1. A school board may operate a special term during the summer months.

Under SDCL 13-26-1 and 13-26-2, it is the local school board that establishes a school term or terms, the number of days in a school term, the length of a school day and the number of school days in a school week. Under these statutes, a local school board is authorized to establish a regular school term at least nine months long. Additionally, a school

board may establish and operate a special school term during the summer months. Under these provisions, a school day is a day a school board determines instruction is to be provided during an established school term. Depending upon the school term established by a school board, a school day could occur during a regular term or during a special summer term.

Absent any clarifying language in SDCL 13-32-9, the term "sixty school days" must be construed consistent with the plain ordinary meaning of a school day set forth above. For purposes of computing the length of the 60-day period of ineligibility under SDCL 13-32-9, it is my opinion that the phrase "school day" means any day that instruction is provided at the school the ineligible student is enrolled. This is the case, regardless of whether the school day occurs during a regular term or a special summer term established by the local school board. If the Legislature had intended that the ineligibility period only applies to a regular school term, it could have done so consistent with the language and intent the Legislature displayed when it enacted SDCL 13-26-1 and 13-26-2.

It is, therefore, my opinion that where a school district has established and operates a special summer school term and the affected student is enrolled in summer school, the number of days that instruction is provided during the special summer school term is counted as

a school day when computing the length of the student's 60-school day period of ineligibility under SDCL 13-32-9.

Very truly yours,

Marty J. Jackley
Attorney General

MJJ/JPH/rar

January 8, 2014

Yvonne Taylor
Executive Director
South Dakota Municipal League
208 Island Drive
Ft. Pierre, SD 57532

OFFICIAL OPINION NO. 14-01

RE: **Absentee voting period for municipal elections.**

Dear Ms. Taylor:

You have requested an official opinion from this Office:

QUESTION:

Whether the forty-six day absentee voting period provided in SDCL 12-19-1.2, or the lesser periods found in SDCL 9-13-21, applies to municipal elections.

ANSWER:

The lesser periods set forth in SDCL 9-13-21 control and require a minimum of fifteen days for absentee voting in

municipal elections with a seven day period for secondary elections if required by municipal ordinance. Chapter 12-19 continues to otherwise govern the method and manner of "conducting" absentee voting.

IN RE QUESTION:

The periods of absentee voting at issue appear in SDCL Chapter 9-13, entitled "Municipal Elections," and SDCL Chapter 12-19, entitled "Absentee Voting." Specifically, SDCL 12-19-1.2, enacted in 2013, provides in pertinent part, "Absentee voting shall begin neither earlier nor later than forty-six days prior to the election…" SDCL 9-13-21, however, provides in relevant part, "The ballots for municipal elections shall be available for absentee voting no later than fifteen days prior to election day… Absentee voting shall be conducted pursuant to chapter 12-19." If, after the municipal election, no candidate receives a majority of the votes, local ordinance may allow for a secondary election for which at least seven days of absentee voting would be required. SDCL §§ 9-13-21, 9-13-25.

Facially, these statutes appear to conflict. With SDCL 12-19-1.2 being the latest legislative pronouncement, it could be argued that forty-six days of absentee voting is required in all circumstances. *See Peterson v. Burns*, 2001 S.D. 126, ¶ 29, 635 N.W.2d 556, 567. Statutes, however, must be read as a

whole and in conformance with well-established principles of statutory construction. *State v. I-90 Truck Haven Service, Inc.*, 2003 S.D. 51, ¶ 8, 662 N.W.2d 288, 291. The application of SDCL 12-1-2 and the well-recognized rule that "…statutory construction dictate[s] that 'statutes of specific application take precedence over statutes of general application'" lead to the conclusion that the provisions of SDCL 9-13-21 supersede the requirements found in SDCL 12-19-1.2. *Estate of Hamilton*, 2012 S.D. 34, ¶ 12, 814 N.W.2d 141, 144 (citations omitted). Given this construction, municipalities must provide at least fifteen days of absentee voting for municipal elections with the possibility of another seven day minimum where secondary elections are required.

The general election provisions are found in SDCL Title 12. Through the promulgation of SDCL 12-1-2, however, the Legislature has clearly expressed its intent to yield the general provisions of Title 12 to statutes specifically governing local elections. SDCL 12-1-2 provides, "The provisions of this title [Title 12] apply to township, *municipal*, school, and other subdivision elections *unless otherwise provided by statutes specifically governing their elections or this title.*" (emphasis added). Municipal elections are covered in Chapter 9-13. Within that chapter, SDCL 9-13-21 requires a minimum of fifteen days of absentee voting in municipal elections with the possibility of at

least another seven days for a secondary election. Because SDCL 9-13-21 is specific to municipal elections, the application of SDCL 12-1-2, and the rules of statutory construction, compel the conclusion that SDCL 9-13-21 controls and provides municipalities with the ability to limit absentee voting.

Furthermore, when enacting SDCL 12-19-1.2, the Legislature is presumed to have been aware that SDCL 9-13-21 existed and that it fell within the exemption found in SDCL 12-1-2. *See Simpson v. Tobin*, 367 N.W.2d 757, 764 (S.D. 1985). If the Legislature intended forty-six day absentee voting period found in SDCL 12-19-2.1 to now control for municipal elections, it could have specifically eliminated SDCL 9-13-21 from that exception. It did not. *State v. Young*, 2001 S.D. 76, ¶ 12, 630 N.W.2d 85, 89 (explaining that the Legislature "knows how to exempt or include items in its statutes"). Because the Legislature did not expressly restrict or repeal the fifteen day voting period found in SDCL 9-13-21, it is presumed to remain effective and applicable to municipal elections, as written. Any other interpretation "cannot be reconciled with the cardinal rule of statutory construction: repeal by implication is strongly disfavored." *Faircloth v. Raven Industries*, 2000 S.D. 158, ¶ 10, 620 N.W.2d 198, 202.

Here, it is possible to harmonize SDCL 9-13-21 with absentee voting provisions

found in Chapter 12-19. While SDCL 9-13-21 states that "The ballots for municipal elections shall be available for absentee voting no later than fifteen days prior to election day…," it also provides that "[a]bsentee voting shall be conducted pursuant to chapter 12-19." Because statutes cannot be construed in a manner that "renders parts to be…surplusage" we must give effect, where possible, to both clauses. *Heumiller v. Heumiller*, 2012 S.D. 68, ¶ 25, 821 N.W.2d at 853-54. As described above, in municipal elections, the application of SDCL 12-1-2 allows SDCL 9-13-21 to control the minimum number of days allowed for absentee voting. At the same time, SDCL 9-13-21 permits Chapter 12-19 to otherwise govern the method and manner of "conducting" absentee voting. For instance, unless otherwise stated, Chapter 12-19 would still control the process for distributing and counting absentee ballots.

Interpretations to the contrary would force SDCL 12-19-1.2 to be applied to municipal elections and run afoul of the principle that statutes must not be construed in a manner that leads to absurd or unreasonable results. *Martinmaas v. Engelmann,* 2000 S.D. 85, ¶ 49, 612 N.W.2d 600, 611 (citations omitted) (emphasis added). Municipal elections may be held: on the second Tuesday of April (SDCL 9-13-1); in conjunction with school district elections (SDCL 9-13-1.1); in conjunction with the statewide June primary elections

(SDCL 9-13-37); or on the first Tuesday after the first Monday in June (SDCL 9-13-40). When the remainder of the municipal election code is applied to these provisions, the application of SDCL 12-19-1.2 has the potential to cause conflicts with the joint school district election held pursuant to SDCL 9-13-1.1, and clearly causes conflicts with the election procedures surrounding the April election date for municipal elections set by SDCL 9-13-1.

The conflicts with SDCL 9-13-1 are illustrated by applying the requirements to the 2014 election year. In order to be placed on the ballot, a candidate for elective municipal office must first collect the requisite number of valid signatures and then file their nominating petition with the finance officer. SDCL 9-13-7 requires those petitions to be filed no later than the "last Friday in February preceding the day of election." In 2014, that day is February 28. Elections held pursuant to SDCL 9-13-1 will occur on Tuesday, April 8. If the forty-six day absentee voting period from SDCL 12-19-1.2 were applied, absentee voting would begin on February 21, seven days *before* candidates are required to file their nominating petitions.

Likewise, similar problems arise if the forty-six day absentee voting period is applied to a municipal election held jointly with a school board election. Under SDCL §§ 9-13-1.1 and 13-7-10, such an election could take place as early as

April 8, 2014, leading to the same conflict identified above regarding the nominating petition deadline and commencement of absentee voting. In order to conduct an election, the finance officer must first assemble and print ballots which include the names of candidates. The application of SDCL 12-19-1.2 to municipal elections, therefore, causes an absurd result because, in some instances, it requires absentee voting to begin even before those candidates are nominated.

A review of the legislative amendments supports my conclusions. In 2013, Senate Bill 130 carved the absentee voting language from SDCL 12-16-1 and placed it in a new statute later designated as SDCL 12-19-1.2. Before the 2013 amendment, SDCL 12-16-1 read in pertinent part,

> The *county auditor* shall provide printed ballots for each *election in which the voters of the entire county participate*… The sample ballots and official ballots shall be printed and in the possession of the county auditor not later than forty-eight days prior to the primary or general election. *Absentee voting shall begin no earlier and no later than forty-six days prior to the election*.

(emphasis added). The placement of the absentee voting provision within SDCL 12-16-1 made it clear that the obligation to provide forty-six days of absentee

voting was that of the county auditor and only for elections in which the "entire county participate[d]." When the absentee voting period was moved from SDCL 12-16-1 to a new section within Chapter 12-19, however, it was stripped of this context. Nonetheless, as discussed above, when Chapter 9-13 and Title 12 are considered together, nothing in SB 130 demonstrates an intent to restrict the application of SDCL 12-1-2 or to repeal the municipal absentee voting provisions found in SDCL 9-13-21. Accordingly, the provisions for absentee voting found within SDCL 9-13-21 continue to control for municipal elections.

In conclusion, based on the specific exception in SDCL 12-1-2, as well as the principles of statutory construction, it is my opinion that SDCL 9-13-21 provides the minimum time periods in which absentee voting must be allowed in municipal elections, rather than the forty-six day period found in SDCL 12-19-1.2.

Sincerely,

Marty J. Jackley
ATTORNEY GENERAL

MJJ/RMW/jkp

May 5, 2014

Steven M. Pirner PE, Secretary
Department of Environment and Natural Resources
523 E. Capitol
Pierre, SD 57501-3182

Official Opinion No. 14-02

RE: **Regarding Use of Road Right-of-Ways by the Geological Survey Program**

Dear Secretary Pirner,

You have requested an official opinion from this office:

QUESTION:

Whether permission of the adjacent landowner or unit of government is required for DENR's Geological Survey Program to conduct drilling and other related work as provided in SDCL 45-2-4.2 within legal rights-of-way of township, county, state, and federal roads.

ANSWER:

Additional permission is not required because SDCL 1-1-10 provides statutory authority for DENR and the State Geologist to conduct the geological survey authorized by SDCL 45-2-4.2.

FACTS:

You have provided the following factual statement:

> The Geological Survey Program, DENR, has a long standing record of performing drilling activities, relating to the investigation of subsurface geology and ground water resources, in the right-of-way along the roads in South Dakota. By using the public rights-of-way, the Geological Survey Program is able to access needed areas throughout the state without impacting productive private property or otherwise inconveniencing private property owners. When relevant, the Geological Survey Program works with the adjacent land owners to avoid negative impact that might be caused in blocking approaches, field entrances, etc. While the program is sensitive to the adjacent landowner's obvious interest, based on SDCL 1-1-10, and as further described in an informal Attorney General's Office opinion dated May 9, 1978, the Program

> routinely proceeds without permission of the adjacent landowner - in fact, due to absentee owners and other factors, obtaining permission is often impractical and contrary to the efficient pursuit of our work. Similarly, obtaining permission from other units of government, such as counties or townships, is often impractical, as field work schedules must be flexible given the uncertainties that can arise in geological drilling and related work.

IN RE: QUESTION:

As you noted, on May 9, 1978, Attorney General Janklow issued an attorney letter opinion on this same issue. That informal opinion indicated that DENR had the authority to conduct drilling activities within the right-of-way under the authority of SDCL 1-1-10, coupled with the authority to conduct a geological survey provided by SDCL 45-2-1 and a groundwater survey authorized by SDCL 46-3-2. Other than some changes in the statutory authority to conduct the actual surveys, nothing in the legal basis of the 1978 informal opinion has changed, and I agree with the conclusion reached by Attorney General Janklow's 1978 informal opinion.

SDCL 1-1-10 provides:

> For the purpose of making surveys required by or essential to the effect of any acts of the United States Congress or of the Legislature of this state or for the determination of boundaries of real estate, any of the duly authorized officers or agents of the United States or of this state, or any engineer or land surveyor duly qualified or registered under the laws of this state, and the persons necessarily and lawfully employed in making any such survey may enter upon lands within the boundaries of this state for such purposes, but this section shall not be construed as authorizing any unnecessary interference with private rights. Nothing in this section shall be construed to permit any person to enter any shaft, tunnel, stope, or underground workings of any individual person engaged in mining for precious metals without consent of the owner or person in possession of such shaft, tunnel, stope, or underground working.

(Emphasis added).

A plain reading of the underlined portion of this statute clearly authorizes the state geologist to enter private property without permission in order to conduct statutorily authorized surveys. This would include rights-of-way overlying private property.

Although the survey statutes relied upon in 1978 have been repealed by the Legislature, SDCL 45-2-4.2 continues to exist and provides "the state geologist shall continue the making of the actual geological survey of the lands, and earth, and the area beneath the surface of the lands of this state as provided by this chapter."

Therefore, it is my opinion that SDCL 1-1-10 and SDCL 45-2-4.2 authorize the state geologist to utilize the rights-of-way without permission for the purposes of the making of the geological survey.

Very truly yours,

Marty J. Jackley
ATTORNEY GENERAL

MJJ/lde

March 17, 2015

Phil Jensen
State Senator
South Dakota Legislature
10215 Pioneer Ave.
Rapid City, S.D. 57702

OFFICIAL OPINION NO. 15-01

RE: SDCL 13-3-48.1 Limitations on Science Standards adopted by the State Board of Education

Dear Senator Jensen;

The Attorney General has received a request for an official opinion from you which is supported by 35 state legislators.

QUESTION:

Do the State Board of Education's currently proposed Science Standards, which incorporate a significant number of items and formatting from the "Next

Generation Science Standards," violate SDCL 13-3-48.1 if adopted?[3]

ANSWER:

No. I cannot conclude as a matter of law that the State Board of Education's adoption of the Proposed Science Standards under the facts set forth herein would violate SDCL 13-3-48.1.

FACTS:

SDCL 13-3-48 requires the Secretary of the Department of Education ("DOE") to prepare and submit academic content standards for kindergarten through twelfth grade to the State Board of Education ("BOE") for approval. According to the DOE's published material,[4] academic content standards establish expectations "for what students should know and be able to do by the end of each grade."

The DOE has prepared a proposed set of Science Standards. These Proposed Science Standards were, according to the DOE's material, developed by a work group. The DOE's Science Standards Work Group Overview[5] states:

[3] Your question has been revised to reflect the facts disclosed in your opinion request.
[4] http://doe.sd.gov/contentstandards/.
[5] http://doe.sd.gov/contentstandards/; link under Science Standards section to "Workgroup Overview."

> The work group goal is to evaluate the existing State of South Dakota Science Standards and to determine the next steps for revision. All work will be framed on the current vision for science education in South Dakota as indicated by existing State of South Dakota Science Standards. Any changes to the existing standards will reflect the most current research in science education to help ensure that the standards meet the needs of all South Dakota students.

This Overview lists the name, occupation, and employer of the persons involved in the Work Group. The persons in the Work Group appear to be South Dakota residents. A vast majority of the Work Group participants are teachers at various secondary and post-secondary schools throughout the State. The Work Group participants also include other South Dakota professionals.

The "Standards Revision Meeting Schedule"[6] for Science Standards Revision Meetings indicates that four public hearings have been held by the BOE on the Proposed Science Standards (in Rapid City, Pierre (two hearings), and Sioux Falls), and that one more public hearing is scheduled in Aberdeen on May 18, 2015. The DOE apparently anticipates that the Proposed

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[6] http://doe.sd.gov/contentstandards/meetingschedule.aspx.

Science Standards will be ready for BOE final action in the summer of 2015.[7]

The October 24, 2014, letter to legislators from Dr. Melody Schopp, Secretary of Education, which you attached and referenced in your opinion request, describes the Proposed Science Standards and their preparation as follows:

> While the science standards now before the Board of Education incorporate standards from the multi-state consortium called the Next Generation Science Standards, or NGSS, they are not an exact replica. Rather, they are standards developed by a work group of South Dakota science teachers, higher education representatives and members of the business community - using the best resources available to them, including their own experience and expertise.
>
> … The proposed science standards do contain a significant number of items and formatting directly from the [Next Generation Science Standards.] However, the [work group preparing the proposed standards] was diligent about vetting each standard to ensure its

[7] South Dakota Standards Revision and Adoption Timeline, adopted by the BOE on November 17, 2014.

> appropriateness and relevance for South Dakota students.
>
> … [T]he work group completed a thorough review of each and every standard contained in the proposed science standards now before the Board of Education. To do this work, group members drew on their own expertise and experience in the field of science education. They studied resources representing the very latest research on how students best learn science. They examined science standards from states such as Massachusetts and South Carolina, the Framework for K-12 Science Education, and the Next Generation Science Standards. The group also studied South Dakota's current set of science standards.
>
> From these resources, the work group developed a set of standards that these professionals believe provide a framework to engross South Dakota students in scientific discovery, prompt them to ask questions and define problems, plan and carry out investigations, and analyze and interpret data.

The "Next Generation Science Standards" are academic content standards for science (kindergarten through grade twelve). The Next Generation Science Standards were developed by a group of states in conjunction with the National

Research Council, which is associated with the National Academy of Sciences; the National Science Teachers Association; the American Association for the Advancement of Science, a non-profit organization dedicated to advancing science around the world; and Achieve, a non-profit education reform organization.[8] South Dakota, through the Department of Education, participated with 26 other states as a "lead state partner" in development of the Next Generation Science Standards.[9] The "lead state partners" developing these Standards committed to "give serious consideration to adopting the resulting [Next Generation Science Standards] as presented."[10]

IN RE QUESTION:

Opinions from the Office of the Attorney General are confined to questions of law relating to actual, not hypothetical, factual situations. Your opinion request presents a mixed question of law and fact. In order to opine on your legal question, I must accept as true the facts presented in your opinion request, the letter from Secretary Schopp attached to your opinion request, and the publicly available information on the DOE's

[8] Next Generation Science Standards website at www.nextgenscience.org.
[9] Next Generation Science Standards website at www.nextgenscience.org.
[10] Next Generation Science Standards website at www.nextgenscience.org, description of "Lead State Partners."

website regarding the development of the Proposed Science Standards. Further factual inquiry is beyond the scope of a legal opinion issued by the Office of the Attorney General.

SDCL 13-3-48.1 was adopted by the South Dakota Legislature in 2014. This statute states:

> Prior to July 1, 2016, the Board of Education may not, pursuant to § 13-3-48, adopt any uniform content standards drafted by a multistate consortium which are intended for adoption in two or more states. However, this section does not apply to content standards whose adoption by the Board of Education was completed and finalized prior to July 1, 2014. However, nothing in this section prohibits the board from adopting standards drafted by South Dakota educators and professionals which reference uniform content standards, provided that the board has conducted at least four public hearings in regard to those standards.

SDCL 13-3-48.1.

The South Dakota Supreme Court has established certain rules to be followed in ascertaining the meaning of statutes. In general, a statute:

> … must be construed according to its manifest intent as derived from

> the statute as a whole, as well as other enactments relating to the same subject. Words used by the legislature are presumed to convey their ordinary, popular meaning, unless the context or the legislature's apparent intention justifies a departure. Where conflicting statutes appear, …reasonable construction [must be given] to both, and …effect [must be given], if possible, to all provisions under consideration, construing them together to make them harmonious and workable. However, terms of a statute relating to a particular subject will prevail over general terms of another statute. Finally, we must assume that the legislature, in enacting a provision, had in mind previously enacted statutes relating to the same subject.

Meyerink v. Northwestern Public Service Company, 391 N.W.2d 180, 183-84 (S.D. 1986) (citations omitted). *See also Martinmass v. Englemann,* 2000 S.D. 85, ¶ 49, 612 N.W.2d 600, 611.

Statutory interpretation begins "with the plain language and structure of the statute." *State Department of Transportation v. Clark,* 2011 S.D. 20, ¶ 10, 798 N.W.2d 160, 164 (quoting *State v. Miranda,* 2009 S.D. 105, ¶ 24, 776 N.W.2d 77, 84). It is presumed that the Legislature "never intends to use surplusage in its enactments, so where

possible the law must be construed to give effect to all its provisions." *Clark,* 2011 S.D. 20 at ¶ 10 (quoting *Wiersma v. Maple Leaf Farms,* 1996 S.D. 16, ¶ 5, 543 N.W.2d 787 (quoting *US West Communications v. Public Utilities Commission,* 505 N.W.2d 115, 123 (S.D. 1993)).

Words used in statutes "are to be understood in their ordinary sense." SDCL 2-14-1; *Graceland College Center for Professional Development and Lifelong Learning, Inc. v. South Dakota Department of Revenue,* 2002 S.D. 145, ¶ 8, 654 N.W.2d 779 (words used by Legislature are presumed to convey ordinary, popular meaning unless the context or the Legislature's apparent intention justifies departure from this rule); *Rowley v. South Dakota Board of Pardons & Paroles,* 2013 S.D. 6, ¶ 7, 826 N.W.2d 360 (words and phrases in a statute must be given their plain meaning and effect); *Wheeler v. Farmers Mutual Insurance Co. of Nebraska,* 2012 S.D. 83, ¶ 20, 824 N.W.2d 102 (words and phrases in a statute must be given their plain meaning and effect; if they have plain meaning and effect, courts should simply declare their meaning and not resort to a statutory construction). In ascertaining the ordinary, popular meaning of words used by the Legislature, dictionary definitions are helpful, although not necessarily controlling. *Matter of Estate of Gossman,* 1996 S.D. 124, ¶ 10, 555 N.W.2d 102; *Schlim v. Gau,* 80 S.D. 403, 125 N.W.2d 174 (1963).

Further, all parts of a statute and all words in a statute must be given effect. *Wheeler,* 2012 SD 83 at ¶ 21 (a statute should be construed so that effect is given to all its provisions, so that no part of it will be inoperative or superfluous, void or insignificant); *People ex. Rel. South Dakota Dept. of Social Services,* 2011 S.D. 26, ¶ 18, 799 N.W.2d 408. It is presumed "statutes mean what they say and that legislators have said what they meant." *Sauder v. Parkview Care Center,* 2007 S.D. 103, ¶ 20, 740 N.W.2d 878 (quoting *Crescent Electric Supply Co. v. Nerison,* 89 S.D. 203, 210, 232 N.W.2d 76, 80 (1975)).

The first sentence of SDCL 13-3-48.1 prohibits the BOE from adopting any uniform content standards drafted by a multistate consortium which are intended for adoption in two or more states. The "Next Generation Science Standards" are, based on the facts cited above, a set of uniform content standards that would appear to be prohibited by the first sentence of SDCL 13-3-48.1.

However, the rules of statutory construction require that the other provisions in SDCL 13-3-48.1 also be given effect as well. The last sentence of SDCL 13-3-48.1 states: "However, nothing in this section prohibits the board from adopting standards drafted by South Dakota educators and professionals which reference uniform content standards, provided that the board has

conducted at least four public hearings in regard to those standards." Therefore, both sentence one and the last sentence of SDCL 13-3-48.1 must be read together in a manner that gives effect to both.

In doing so, we must first determine the ordinary popular meaning of several of the words used in the last sentence of SDCL 13-3-48.1.

The term "however," the first word in the last sentence of the statute, is a conjunction and means "in whatever manner or way," "to whatever degree or extent," or "in spite of that." *Merriam-Webster's Collegiate Dictionary,* Tenth Edition, p. 563. The second[11] and third sentences of SDCL 13-3-48.1 both start with "however." Therefore both of these sentences refer back to sentence one and establish limitations on sentence one: "In spite of" the first sentence, or "in whatever degree or extent or manner or way that" sentence one is effectuated, the requirements of sentence three also apply. This construction gives the ordinary popular meaning and effect to the "however" in the third sentence.

The ordinary popular meaning of two other words used in the last sentence of SDCL 13-3-48.1 also informs the construction of the statute. The term "draft" means,

[11] The second sentence refers to standards adopted previously by the BOE and is not relevant to this opinion request.

with reference to a writing, "a preliminary sketch, outline or version or plan of," "compose, prepare". *Merriam-Webster's Collegiate Dictionary,* Tenth Edition, p. 350. The term "reference" means "something that refers: as a: allusion, mention; b: something (as a sign or indication) that refers a reader or consulter to another source of information" or "c: consultation of sources of information". *Merriam-Webster's Collegiate Dictionary,* Tenth Edition, p. 982.

Applying these terms to SDCL 13-3-48.1, it is apparent that the prohibition which the Legislature placed on the adoption of uniform content standards in sentence one was limited and qualified by sentence three. Sentence three of SDCL 13-3-48.1 specifically authorizes the BOE to adopt a written set of standards prepared by South Dakota educators and professionals that is based upon reference to, and consultation of, uniform content standards from other sources.

Based on the facts described above, and in construing both the first and last sentences of SDCL 13-3-48.1 together in a manner that gives effect to each and does not make one or the other inoperative, I cannot legally conclude that the BOE's adoption of the Proposed Science Standards would violate SDCL 13-3-48.1. Certainly, the BOE cannot, under the first sentence of SDCL 13-3-48.1, merely adopt uniform content standards such as the "Next Generation Science Standards".

However, the BOE may, provided it has conducted at least four public hearings concerning the proposed standards, adopt standards drafted by South Dakota educators and professionals which reference uniform content standards, as provided by the last sentence of SDCL 13-3-48.1.

Questions of fact as to whether the Proposed Science Standards are standards prepared by South Dakota educators and professionals that result from reference to uniform standards from other sources would need to be determined by a court. Further limitations on the adoption of Science Standards would need to be addressed by our Legislature.

Sincerely,

Marty J. Jackley
Attorney General

MJJ/lde

November 18, 2015

Rodney Freeman, Jr.
Churchill, Manolis, Freeman,
Kludt, Shelton & Burns LLP.
Farmer's and Merchant's Bank Building
333 Dak. Ave. S. 2nd Floor
P.O. Box 176
Huron, S.D. 57350

OFFICIAL OPINION NO. 15-02

RE: **SDCL 13-28-51: Partial enrollment of a student receiving alternative instruction**

Dear Mr. Freeman;

The Attorney General received a request for an official opinion from you on behalf of the Britton-Hecla School District Board of Education.

QUESTION:

Does SDCL 13-28-51 provide a school district with the discretion to require that a student excused from attendance, by means of receiving alternative instruction pursuant to SDCL 13-27-2 and

SDCL 13-27-3, first attend on a full-time basis before the school district considers allowing the student to attend on a partial basis?

ANSWER:

No. Pursuant to SDCL 13-28-51, if requested by a parent who is a resident of the school district, partial enrollment of a child excused from attendance by SDCL 13-27-2 must be allowed.

FACTS:

A parent who is a resident of the Britton-Hecla School District requests their child be allowed to attend public school on a partial basis. The child is receiving alternative instruction and was previously excused from full-time attendance by means of SDCL 13-27-2 and SDCL 13-27-3. The School District has interpreted SDCL 13-28-51 to initially require full-time enrollment to the public school subject to the discretion of the School District to allow partial enrollment at a later date.

IN RE QUESTION:

Pursuant to SDCL 13-27-2 and 13-27-3, a child may be excused from school attendance if that child is provided with alternative instruction for a period of time equal to that of a child attending public school. Children excused from attendance by SDCL 13-27-2, however, may

again be admitted to a public school by operation of SDCL 13-28-51 which provides:

> The resident school district of a child excused from school attendance pursuant to § 13-27-2 shall admit that child to a public school in the district upon request from the child's parent or legal guardian. A child enrolled in a school district pursuant to this section may be enrolled in a school of the school district on only a partial basis and shall continue to also receive alternative instruction pursuant to § 13-27-3. (emphasis added).

As a matter of statutory construction, "…the term, shall, manifests a mandatory directive and does not confer any discretion in carrying out the action so directed." SDCL 2-14-2.1; *Discover Bank v. Stanley*, 2008 S.D. 111, ¶ 21, 757 N.W.2d 756, 762-63 ("[w]hen 'shall' is the operative verb in a statute, it is given 'obligatory or mandatory' meaning.") (citations omitted). Additionally, "Words and phrases in a statute must be given their plain meaning and effect." *Pete Lien & Sons, Inc. v. Zellmer*, 2015 S.D. 30, ¶ 35, 865 N.W.2d 451, 463 (citations omitted). When the language is "clear, certain and unambiguous", the statute must be applied as clearly expressed. *Id.*

Here, SDCL 13-28-51 is not ambiguous and must be applied as written. By the use of the word "shall" in the first sentence of SDCL 13-28-51, the Legislature determined admittance is not discretionary. SDCL 13-28-51 plainly requires that children previously excused from attendance pursuant to SDCL 13-27-2 shall be admitted to the public school. Accordingly, a child previously excused from attendance pursuant to SDCL 13-27-2 is guaranteed admittance to a public school within the district in which they reside.

The second sentence of SDCL 13-28-51, however, provides "[a] child admitted pursuant to this section may be enrolled…on only a partial basis" provided the child continues to receive alternative instruction in accordance with SDCL 13-27-3. "A statute must be read as a whole and effect must be given to all its provisions. The Legislature does not intend to insert surplusage in its enactments." *Nat'l Farmers Union Prop. & Cas. Co. v. Universal Underwriters Ins. Co.*, 534 N.W.2d 63, 65 (S.D. 1995) (citations omitted). Pursuant to the first sentence of SDCL 13-28-51, the admission of the child is mandatory and unconditional. The statute is likewise clear that such enrollment may be on a partial basis. Both the mandatory and permissive portions of SDCL 12-13-51 must be given effect. Had the Legislature intended to provide the school district with discretion to condition admittance on full-time

enrollment, it would not have used the term "shall" to require the school district to admit a child. *State v. Young*, 2001 S.D. 76, ¶ 12, 630 N.W.2d 85, 89 (The Legislature "knows how to exempt or include items in its statutes"). Instead, partial enrollment was provided as an option with admittance being guaranteed. The School District cannot, therefore, condition admittance on full-time enrollment.

In conformance with the canons of statutory construction, both provisions of SDCL 13-28-51 are given effect by requiring admission of the child and providing the parents with the choice of enrollment on a full-time or partial basis.

Sincerely,

Marty J. Jackley
Attorney General

MJJ/RW/lde

December 29, 2015

Rexford A. Hagg
Whiting Hagg Hagg Dorsey & Hagg LLP
601 West Boulevard
Rapid City, South Dakota 57701

Official Opinion No. 15-03

Re: Filling City Council Vacancy pursuant to SDCL 9-13-14.1

Dear Mr. Hagg,

The Attorney General's Office received a request for an official opinion from you in your position as Box Elder City Attorney.

QUESTION:

Pursuant to SDCL 9-13-14.1, does an appointed councilperson seeking to retain their seat need to run at an annual municipal election in 2016 or at the next regularly scheduled municipal election in 2017?

ANSWER:

State law requires the appointed councilperson to run for the seat at the next annual election in 2016.

FACTS:

A Box Elder City councilperson was elected to serve a three-year term. The Councilperson resigned during the second year of his term. The City Council has taken steps to appoint a new member to fill the vacancy. SDCL 9-13-14.1 provides that the appointed councilperson is "to serve until the next annual municipal election[.]" Because Box Elder has staggered terms for its councilpersons it does not, at present, have an annual municipal election scheduled for 2016. Box Elder's next regularly scheduled municipal election is in 2017. Accordingly, there is a question as to whether the appointed councilperson would need to run to retain the seat at an annual municipal election in 2016 or at the next regularly scheduled municipal election in 2017.

IN RE QUESTION:

The plain language of SDCL 9-13-14.1 requires the appointed council person to run at the 2016 annual municipal election. SDCL 9-13-14.1 provides:

> If a vacancy exists on a municipal governing body, the remaining members shall appoint a replacement

> to serve until the next annual municipal election, or the vacancy may be filled by special election for the remainder of the unexpired term as provided in § 9-13-14.2. In the aldermanic form of municipal government, the appointment shall be a person from the same ward of the municipality. If electing a person to fill the remainder of the unexpired term at an annual municipal election, the vacancy shall have occurred prior to the publication required by § 9-13-6.

When facing a vacancy, SDCL 9-13-14.1 presents the City Council with two options: (1) "appoint a replacement to serve until the next annual municipal election" or (2) elect, by special election, a replacement to serve out the remaining term of the vacant position. According to the facts you presented, the Box Elder City Council has chosen option one. As such, if the appointed councilperson seeks to remain in office, he or she must run in the 2016 annual municipal election.

"'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.'" *Puetz Corp. v. SD Dept. of Revenue*, 2015 SD 82, ¶ 16, ___ N.W. 2d ___ (quoting *State v. Clark*, 2011 S.D. 20, ¶ 10, 798 N.W.2d 160, 164). Allowing the appointed councilperson to hold the position until 2017 would require a

determination that "next annual municipal election" actually means "next *regularly scheduled* municipal election[.]" SDCL 9-13-14.1 (italicized text added). Such an interpretation is contrary to the basic rules of statutory construction. *City of Deadwood v. M.R. Gustafson Family Trust*, 2010 S.D. 5, ¶ 9, 777 N.W.2d 628, 629 ("A court is not at liberty to read into the statute provisions which the Legislature did not incorporate.").

The fact that Box Elder does not presently have an election scheduled for 2016 makes no difference. SDCL 9-13-1 provides that "[i]n each municipality an annual election of officers shall be held on the second Tuesday of April of each year[.]" An annual municipal election need not be held, however, "if there is no question to be submitted to the voters." SDCL 9-13-5. The resignation of Box Elder's councilperson has potentially created a question for the voters. A 2016 annual municipal election provides the opportunity for a challenger to run against the recently appointed councilperson for the remainder of the vacant term. Of course, if "there are no opposing candidates" for the vacancy, Box Elder would not be required to hold the election pursuant to SDCL 9-13-5.

Further, "[i]t is the general policy of the law to fill vacancies in elective offices at an election as soon as practicable after the vacancy occurs." *State v. Board of Comm'rs of Lyman Cnty.*, 34 S.D. 256, 145 N.W. 548, 549 (1914)

(concluding that a vacancy in the office of county commissioner could lawfully be filled at the next general election); *see also Noel v. Cunningham*, 68 S.D. 606, 609, 5 N.W.2d 402, 403 (1942). This long-standing policy provides further support that state law requires Box Elder to hold an annual municipal election in 2016 as set forth above.

It is also important to recognize that the 2016 municipal election would present a contest for the remainder of the vacant term, not a full three-year term. *See* AGO 79-7; AGO 72-34.

Sincerely,

Marty J. Jackley
ATTORNEY GENERAL

MJJ/EB/lde

August 05, 2016

Lonnie Mayer, Supervisor
Hutchinson County Weed & Pest Board
140 Euclid #38
Olivet, South Dakota 57052

Official Opinion No. 16-01

Re: Obligation for Weed Control on or Along Township Roads

Dear Mr. Mayer,

In your position as Supervisor of the Hutchinson County Weed & Pest Board, you have requested an official opinion from the Attorney General's Office on the following questions:

QUESTION(S):

1. Is the township or the adjoining landowner responsible for weed control along township roads?

2. Can a township deviate from the dates established in statute for the removal of weeds?

ANSWER(S):

1. The Legislature has placed the responsibility for controlling and eradicating *noxious weeds* on or along township roads upon the state agency or subdivision that supervises the roads. The responsibility for controlling *all other weeds* on or along township roads has been placed upon the landowner.

2. Yes. Pursuant to SDCL 31-31-3 and 31-31-5, a township's board of supervisors may determine the dates between which all weeds shall be removed along township roads.

FACTS:

Townships within Hutchinson County contend that the responsibility for controlling and eradicating weeds on township roads, or within the road right of way, shall be upon the landowner. Attorney General's Opinion 76-1 interprets state law to require townships to control noxious weeds along township roads. Also, townships within Hutchinson County are adjusting the dates of required weed control to deviate from the dates contained in SDCL 31-31-3 and 31-31-5. Based on these facts, you have asked the two questions identified above.

IN RE QUESTION 1:

Attorney General Janklow issued a formal opinion on this same issue on January 8, 1976. That opinion stated in relevant part:

> [South Dakota] statutes do not authorize a township to require a landowner to control *noxious weeds* in township road ditches adjacent to his property. SDCL 31-31-2 . . . refers to "grass, weeds and brush." SDCL 38-22-22 and 24 . . . specifically refer to "noxious weeds" and it is the responsibility of the township in this instance to control such noxious weeds. SDCL 38-12-2 and 3 contain statutory definitions of what constitutes "noxious weeds."

AGO 76-1.

Since the date of that opinion, SDCL 38-12-2 and 38-12-3 were repealed, and SDCL 38-22-22 and 38-22-24 were amended to remove the term "noxious weeds" from their statutory descriptions. Opinion 76-1 is, therefore, no longer a valid explanation of statutory authority on this issue. It is my opinion, however, that these statutory changes do not affect the underlying obligation of townships to remove noxious weeds on or along township roads.

SDCL 38-22-22 provides in pertinent part that "[t]he responsibility for and the

cost of controlling and eradicating weeds . . . on all lands or highways owned or supervised by a state agency or subdivision shall be upon the state agency or subdivision supervising such lands or highways. . . ." SDCL 31-31-2, however, provides in pertinent part that "[t]he owner or occupant of any land abutting or adjoining upon township roads shall cut, remove, or destroy or cause to be cut, removed, or destroyed, grass, weeds, trees, and brush growing on or in the right-of-way of such roads. . . ." Facially, these statutes appear to conflict; SDCL 38-22-22 indicates that townships are responsible for eradicating weeds on or along township roads, while SDCL 31-31-2 indicates that this responsibility falls upon landowners.

Statutes must be read as a whole and in conformance with well-established principles of statutory construction. *State v. I-90 Truck Haven Service, Inc.*, 2003 S.D. 51, ¶ 8, 662 N.W.2d 288, 291. "'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.'" *Puetz Corp. v. SD Dept. of Revenue*, 2015 S.D. 82, ¶ 16, 871 N.W.2d 632, 637 (quoting *State v. Clark*, 2011 S.D. 20, ¶ 10, 798 N.W.2d 160, 164). "'Words and phrases in a statute must be given their plain meaning and effect.'" *Pete Lien & Sons, Inc. v. Zellmer*, 2015 S.D. 30, ¶ 35, 865 N.W.2d 451, 463 (citations omitted). However, "[w]here conflicting statutes appear, …reasonable

construction [must be given] to both, and …effect [must be given], if possible, to all provisions under consideration, construing them together to make them harmonious and workable." *Meyerink v. Northwestern Public Service Company*, 391 N.W.2d 180, 184 (S.D. 1986) (citations omitted). *See also Martinmass v. Englemann*, 2000 S.D. 85, ¶ 49, 612 N.W.2d 600, 611.

For the purposes of SDCL ch. 38-22 "weed" is defined as "any plant which the [Weed and Pest Commission] has found to be detrimental to the production of crops or livestock or to the welfare of persons residing within the state." SDCL 38-22-1.2(11). Similarly, the Weed and Pest Commission has described a "noxious weed" as "a weed which the commission has designated as sufficiently detrimental to the state to warrant enforcement of control measures." ARSD § 12:62:02:01(5). The Commission has created a list of statewide noxious weeds contained in ARSD § 12:62:03:01.06. A review of these provisions leads to the conclusion that the "weeds" discussed in SDCL 38-22-22 (those that must be detrimental to crops, livestock, and persons) are the same as the "noxious weeds" defined in ARSD § 12:62:02:01(5) (those detrimental to the state) and listed in ARSD § 12:62:03:01.06.

Conversely, SDCL 31-31-2 does not have a corresponding definition of the term "weed" in its chapter. I am aware that SDCL 2-14-4 provides that "[w]henever the

meaning of a word or phrase is defined in any statute, such definition is applicable to the same word or phrase wherever it occurs except where a contrary intention plainly appears." However, interpreting the weeds described in both SDCL 31-31-2 and SDCL 38-22-22 as "noxious weeds" would lead to a result that in my opinion the Legislature did not intend.

"'[I]n construing statutes together it is presumed that the legislature did not intend an absurd or unreasonable result.'" *Martinmaas*, 2000 S.D. 85, ¶ 49 (quoting *Moss v. Guttormson*, 1996 S.D. 76, ¶ 10, 551 N.W.2d 14, 17). To interpret both SDCL 38-22-22 and SDCL 31-31-2 as both controlling the same types of weeds would result in making both townships and landowners responsible for controlling noxious weeds, with no entity then responsible for the control of all other weeds. Therefore, it is my conclusion that the Legislature intended the term "weed" in SDCL 31-31-2 to refer to all other weeds beyond those noxious weeds controlled by SDCL 38-22-22. As such, the responsibility for controlling and eradicating *noxious weeds* on or along township roads has been placed upon the township. The responsibility for controlling *all other weeds* on or along township roads has been placed upon the abutting landowner.

IN RE QUESTION 2:

The plain language of SDCL 31-31-3 permits a township's board of supervisors to determine the dates between which weeds shall be removed from township roads.

SDCL 31-31-3 provides:

> Time for weed removal. Grass, weeds, trees or brush referred to in §§ 31-31-1 and 31-31-2 shall be cut, removed, or destroyed between the first day of September and the first day of October of each year, *or between dates annually fixed by the board of supervisors*.

This language is carried over into SDCL 31-31-5 which provides:

> Failure of abutting landowner to remove weeds--Removal by board of supervisors--Compensation for removal. If the owner or occupant of land abutting upon or adjoining township roads does not cut, remove, or destroy, or cause to be cut, removed, or destroyed, the grass, weeds, trees, or brush in the right-of-way of such roads between the first day of September and the first day of October, *or between the dates annually fixed by the board,* the board of supervisors of the township in which the land is located may employ a person or persons to immediately cut and

> remove the grass, weeds, trees, and brush on or in the right-of-way of such township roads with compensation at a rate to be fixed and paid by the board.

The emphasized language makes it clear that the Legislature has given a township's board of supervisors the express authority to establish the dates between which weeds shall be removed along township roads.

Very truly yours,

Marty J. Jackley
ATTORNEY GENERAL

MJJ/JCT/lde

December 5, 2016

Mike Moore
Beadle County State's Attorney
450 3rd St. SW Ste. 108
Huron, SD 57350

OFFICIAL OPINION NO. 16-02

RE: **Release of information and records under Article VI, § 29**

Dear State's Attorney Moore,

You have requested an official opinion from this Office:

QUESTION:

1. Whether state and local government entities may release motor vehicle crash reports to the public without violating Article VI, § 29?

2. Whether state and local government entities can include street addresses where crimes have occurred and the names of victims in crime report logs or

law enforcement radio traffic without violating Article VI, § 29?

ANSWER:

1. State and local government entities may release motor vehicle crash reports to the public without violating Article VI, § 29 under the conditions set forth in this Opinion.

2. State and local government entities may include street addresses where crimes have occurred and the names of victims in crime report logs or law enforcement radio traffic without violating Article VI, § 29 under the conditions set forth in this Opinion.

IN RE QUESTIONS 1 AND 2:

A. Constitutional Interpretation.

"[T]he object of constitutional construction is 'to give effect to the intent of the framers of the organic law and the people adopting it.'" *Davis v. State*, 2011 S.D. 51, ¶ 77, 804 N.W.2d 618, 643 (quoting *Doe v. Nelson*, 2004 S.D. 62, ¶ 12, 680 N.W.2d 302, 307) (Gilbertson, C.J., concurring). To accomplish that task, a "constitutional provision must be read giving full effect to all of its parts." *Breck v. Janklow*, 2001 S.D. 28, ¶ 10, 623 N.W.2d 449, 454

(citing *South Dakota Bd. Of Regents v. Meierhenry*, 351 N.W.2d 450, 452 (S.D. 1984)). When the constitutional provision's language is "quite plain," then it is "construe[d] according to its natural import." *Brendtro v. Nelson*, 2006 S.D. 71, ¶ 16, 720 N.W.2d 670, 675. Secondary sources are used if the constitutional provision's language is ambiguous. *Id.* (citations omitted).

The South Dakota Supreme Court has recognized that "[c]onstitutional amendments are adopted for the purpose of making a change in the existing system and we are 'under the duty to consider the old law, the mischief, and the remedy, and interpret the constitution broadly to accomplish the manifest purpose of the amendment.'" *Doe*, 2004 S.D. 62, ¶ 15, 680 N.W.2d at 308 (quoting *South Dakota Auto. Club, Inc. v. Volk*, 305 N.W.2d 693, 697 (S.D.1981)). Despite that dictate, the Court "will not construe a constitutional provision to arrive at a strained, unpractical[,] or absurd result." *Brendtro*, 2006 S.D. 71, ¶ 30, 720 N.W.2d at 680 (quoting *Breck*, 2001 S.D. 28, ¶ 12, 623 N.W.2d at 455).

The Attorney General is broadly empowered to issue official opinions, including to State's Attorneys regarding the duties of their office. SDCL 1-11-1(5). An Attorney General Opinion has the force and effect of law, providing "guidance on legal issues until those issues are ruled upon by a court or the law is changed by

the Legislature." *See Spink County v. Heinhold Hog Market, Inc.*, 299 N.W.2d 811, 812 (S.D. 1980); *see also State v. Rumpca*, 2002 S.D. 124, ¶ 12, 652 N.W.2d 795, 799 (stating "[w]hile attorney general opinions are not binding on the court, they can be considered."); *Simpson v. Tobin*, 367 N.W.2d 757, 763 (S.D. 1985) (stating "[w]hile we have in the past recognized that Attorney General Opinions should be considered when construing statues, such opinions are not binding on the courts.").

B. Qualified Immunity and Good Faith Reliance on an Attorney General Opinion.

"Qualified immunity is 'an entitlement not to stand trial or face the other burdens of litigation.'" *Mitchell v. Forsyth*, 472 U.S. 511, 526, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985). This "entitlement is *an immunity from suit* rather than a mere defense to liability; and like an absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial." *Id.* (emphasis in original).

It is generally accepted that good faith reliance on an Attorney General Opinion entitles a person to qualified immunity. *See, e.g., Marston's Inc. v. Roman Catholic Church of Phoenix*, 644 P.2d 244, 248 (Ariz. 1982) (stating citizens may rely in good faith on Attorney General Opinions until the courts have spoken on the issue); *State v. Spring City*, 260

P.2d 527, 531 (Utah 1953) (holding city officials were entitled to rely on the advice of the Attorney General and noting "[i]t would be unfair and unjust to require the city officials to guess at their peril" what a court's opinion would be); *State ex rel. Smith v. Leonard*, 95 S.W.2d 86, 88-89 (Ark. 1936) (holding reliance on an Attorney General Opinion shields state officials from personal liability). These cases align with the South Dakota Supreme Court's determination that Attorney General Opinions guide agencies on legal issues until the issues are determined by a court or the Legislature changes the law. *See Heinhold Hog Market, Inc.*, 299 N.W.2d at 812.

C. Applicability of Victim Rights Contained in the Constitutional Amendment.

The Amendment defines victim as "a person who suffers direct or threatened physical, psychological, or financial harm as a result of the commission or attempted commission of a crime or delinquent act or against whom the crime or delinquent act is committed." S.D. Const. art. VI, § 29. A victim "also includes any spouse, parent, grandparent, child, sibling, grandchild, or guardian, and any person with a relationship to the victim that is substantially similar to a listed relationship, and includes a lawful representative of a victim who is deceased, incompetent, a minor, or physically or mentally incapacitated."

Id. Based on a plain reading of this definition, a victim includes both primary and ancillary victims. *See id.* A primary victim is a person who suffers either direct or threatened physical, psychological, or financial harm as a result of a crime or attempted crime. *See id.* An ancillary victim is the spouse, parent, grandparent, child, sibling, grandchild, guardian, or any person with a substantially similar relationship to a primary victim. *See id.* However, the Amendment makes no distinction between the rights afforded to primary and ancillary victims. All rights in the Amendment are applicable to every victim.

Nineteen separate rights are enumerated in the Amendment. The following rights are implicated by the questions presented:

- The right to be free from intimidation, harassment and abuse;
- The right to be reasonably protected from the accused and any person acting on behalf of the accused;
- The right to prevent disclosure of information or records that could be used to locate or harass the victim or the victim's family, or which could disclose confidential or privileged information about the victim, and to be notified of any request for such information or records;
- The right to privacy, which includes the right to refuse an interview, deposition or other discovery

request, and to set reasonable conditions on the conduct of any such interaction to which the victim consents;

- The right to be informed of these rights, and to be informed that a victim can seek the advice of an attorney with respect to the victim's rights. This information shall be made available to the general public and provided to each crime victim in what is referred to as a Marsy's Card.

S.D. Const. art. VI, § 29, cl. 2-3; cl. 5-6; cl. 19. These rights, like all rights enumerated in the Amendment, attach "at the time of victimization[.]" S.D. Const. art. VI, § 29.

The Amendment is ambiguous as to the identification, duties, and responsibilities toward victims or potential victims requiring constitutional interpretation. This ambiguity has led to various well-intended interpretations by the Department of Public Safety, State's Attorneys, city and county officials, and other entities. Each entity's interpretation has caused confusion for law enforcement officers and the public alike. Other sources must be consulted to resolve the Amendment's ambiguity. *See Brendtro*, 2006 S.D. 71, ¶ 16, 720 N.W.2d at 675.

By statute, law enforcement investigates alleged crimes and identifies potential

victims of those crimes. SDCL 23-3-27. Once a victim is identified, the Amendment requires that he or she be provided with a Marsy's Card. S.D. Const. art. VI, § 29, cl. 19. A Marsy's Card is attached to this Opinion as an exhibit and incorporated herein by reference.

Rights granted by the Amendment, like all constitutional rights, are subject to reasonable limitations. *See State v. Crawford*, 2007 S.D. 20, ¶ 16, 729. N.W.2d 346, 349 (stating "no right is limitless, and it 'may bow to accommodate other legitimate interests . . . .'") (quoting *Chambers v. Mississippi*, 410 U.S. 284, 295 (1973)). A review of the rights guaranteed by the United States and South Dakota Constitutions, in the criminal and non-criminal contexts, demonstrates that a reasonable limitation on several of the constitutional rights is the requirement that an individual must invoke or exercise his or her constitutional right in order to seek its protection or reap its benefit.

For instance, in the criminal context, this limitation has been applied to rights guaranteed by the Fifth and Sixth Amendment. The Fifth Amendment grants a defendant the right to counsel during a custodial interrogation; however, that right must be unambiguously invoked to receive its protections. *See Edwards v. Arizona*, 451 U.S. 477, 484-85, 101 S.Ct. 1880, 1884-85, 68 L.Ed.2d 378 (1981); *State v. Schuster*, 502 N.W.2d 565, 570

(S.D. 1993) (discussing wavier after invocation of right to counsel) (quoting *Edwards*, 451 U.S. at 484-85, 101 S.Ct. at 1884-85)). The Fifth Amendment also protects a defendant's right to remain silent and a defendant must unambiguously invoke this right. *Berghuis v. Thompkins*, 560 U.S. 370, 380-82, 130 S.Ct. 2250, 2259-60, 176 L.Ed.2d 1098 (2010); *see also State v. Waloke*, 2013 S.D. 55, ¶ 24 835 N.W.2d 105, 112 (observing that questioning by law enforcement would have ceased had defendant unambiguously invoked her right to remain silent) (quoting *Berghuis*, 560 U.S. at 382, 130 S.C.t. at 2260)).

The United States Supreme Court recognized invocation of a constitutional right is separate from a waiver of the same right. The Court stated, "[W]e now hold that when an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by a showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights." *Edwards*, 451 U.S. at 484, 101 S.Ct. at 1884-85.

This distinction is furthered by the Court's analysis in *Berghuis*. There, the Court first analyzed whether the defendant invoked his right to remain silent. *Berghuis*, 560 U.S. at 380-82, 130 S.Ct. at 2259-60. The defendant argued his silence was tantamount to an invocation of his right against self-incrimination. *Id.* at

381, 130 S.Ct. at 2259. The Court found this argument unpersuasive, stating "[t]here is good reason to require an accused who wants to invoke his or her right to remain silent to do so unambiguously." *Id.* at 381, 130 S.Ct. at 2259-60. "A requirement of an unambiguous invocation of *Miranda* rights results in an objective inquiry that avoids difficulties of proof and provides guidance to officers on how to proceed in the face of ambiguity." *Id.* at 381, 130 S.Ct. at 2260 (citation omitted). After defendant failed to unambiguously invoke his right to remain silent, he made incriminating statements to law enforcement. *Id.* at 380-81, 130 S.Ct. at 2259. Only then did the Court engage in a waiver analysis. *Id.* at 382, 130 S.Ct. at 2260.

Similar to the invocation of rights under the Fifth Amendment, the Sixth Amendment guarantees a defendant the right to compulsory process. To reap the benefits of this guarantee, a defendant must invoke such right by complying with the established procedure for obtaining a subpoena. *See* SDCL 23A-14-2, and -3.

The language of the Amendment requires victims, like criminal defendants, to unambiguously invoke or exercise their constitutional rights to receive the protections. The Amendment recognizes this requirement by stating courts shall ensure "victims' rights and interests are protected in a manner no less vigorous than the protections afforded to criminal defendants[.]" S.D. Const. art. VI, § 29.

In the non-criminal context, every citizen that has attained the legal voting age is guaranteed the right to vote in all federal and state elections. U.S. Const. Amend. XXVI, § 1. This right, while guaranteed, is neither unlimited nor automatic. First, an individual must meet the threshold qualifications to vote. SDCL 12-3-1, and -1.1. Second, an individual must register to vote with the appropriate official. SDCL 12-4-1. Finally, an individual must exercise that guaranteed right by casting a vote according to established procedures. SDCL 12-18-1; SDCL 12-18-7.1; SDCL 12-19-1. Victims, like voters, must exercise their rights to reap the guaranteed benefits.

The Amendment recognizes that the rights guaranteed are conditioned upon an invocation. The Amendment provides:

> The victim, the retained attorney of the victim, a lawful representative of the victim, or the attorney for the government, **upon request of the victim, may assert** and seek enforcement of the rights enumerated in this section and any other right afforded to a victim by law in any trial or appellate court, or before any other authority with jurisdiction over the case, as a matter of right. The court or other authority with jurisdiction shall act promptly **on such a request**, affording a remedy by due course of law for the violation of any right

> and ensuring that victims' rights and interests are protected in a manner no less vigorous than the protections afforded to criminal defendants and children accused of delinquency. The reasons for any decision regarding the disposition of a victim's rights shall be clearly stated on the record.

S.D. Const. art. VI, § 29 (emphasis added). Applied to Clause 5, this language requires that a victim must invoke his or her right to prevent disclosure of information or records. S.D. Const. art. VI, § 29, cl.5. Therefore, the government is not automatically prohibited from releasing information or records. This includes motor vehicle crash reports, street addresses, crime report logs, or law enforcement radio traffic. Rather, the government is prohibited from releasing certain information when a victim invokes his or her right to prevent disclosure.

The necessity for a victim to invoke his or her rights under the Amendment is further supported by the rationale identified in *Breck v. Janklow*, 2001 S.D. 28, ¶ 12, 623 N.W.2d 449, 455. There, the Court recognized that adoption of Article XIII, § 10 of the South Dakota Constitution, which created a state-run cement plant, did not mean the State was required to operate the plant into perpetuity at a loss. *Id.* The Court determined such an interpretation would be an absurd result. *Id.* As a result, the

Court held Article XIII, § 10 did not prohibit the State from selling the plant. *Id.* ¶ 13.

Likewise, it is equally absurd to conclude the Amendment automatically prohibits releasing public information. First, an automatic prohibition continuously harms victims by preventing release of information to necessary entities that may be assisting victims, such as insurance providers. Such an interpretation would be counter to the Amendments provisions that it "may not be construed to deny or disparage other rights possessed by victims." S.D. Const. art. VI, § 29. Second, public safety is compromised by such a reading. Indeed, law enforcement and other first responders must be able to communicate freely, without fear of liability, to effectively protect the public. Third, interpreting an automatic prohibition defies other Constitutional protections and the presumption of openness mandated by the Legislature. SDCL 1-27-1, and 1.1; U.S. Const. amend. I. The Legislature specifically determined information "about calls for service revealing the date, time, and general location and general subject matter of the call is not confidential criminal justice information and shall be released to the public" unless otherwise prohibited. SDCL 23-5-11; *see also* SDCL 23-4-3. Releasing non-confidential information empowers residents, instilling a sense of safety and security in their communities or to take action to protect themselves.

CONCLUSION

In conclusion, based on the principles of constitutional construction and the language of the Amendment, it is my opinion that state and local governments may release in the course of their duties motor vehicle crash reports, street addresses where crimes have occurred, the names of victims in crime report logs, and law enforcement radio traffic without violating Article VI, § 29, as set forth in this opinion.

Sincerely,

Marty J. Jackley
ATTORNEY GENERAL

MJJ/lde

2013-2016
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