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CITY ATTORNEY'S REPORT ON PETITION TO CHANGE MUNICIPAL GOVERNMENT IN THE MUNICIPALITY OF STURGIS

On December 16, 2021, a Petition for Election to Change Municipal Government in the Municipality of Sturgis was delivery to the City Finance Officer. The Mayor and City Finance Officer asked me to render a legal opinion as expressly allowed by SDCL §9-14-22 on the propriety of the question presented in the Petition presented to her office.

EXECUTIVE SUMMARY

1. The City Finance Officer should not schedule an election on the question presented in the Petition because the question posed is improper.
2. The City Council should authorize an action for declaratory judgment in circuit court to determine whether the power to employ a city manager is a form of government.
3. There is reason to believe criminal conduct occurred in connection with the circulation of the Petition and City Council should refer the matter to appropriate authorities for further investigation.

THE PROPRIETY OF THE QUESTION PRESENTED

"Generally, 'municipal corporations possess only those powers given to them by the Legislature.'" *City of Rapid City v. Schaub*, 2020 S.D. 50, ¶ 13, n. 8, 948 N.W.2d 870, 874 n. 8 citing *Ericksen v. City of Sioux Falls*, 70 S.D. 40, 53, 14 N.W.2d 89, 95 (1944) ("A municipal corporation is a creature of the Constitution and statutes of the state. It possesses only such powers, great or small, as these laws give to it.")

South Dakota law recognizes two forms of municipal government. SDCL ch. 9-8 authorizes the aldermanic form of government and SDCL ch. 9-9 authorizes the commissioner form of government. SDCL ch. 9-12 identifies the general powers of municipalities and does not include the power to employ a city manager. A municipality under either form of government may employ a



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city manager, if authorized by a vote approving a proposition to do so. SDCL § 9-10-1. "The vote upon the question of employing a city manager shall be by ballot which conforms to a ballot for statewide question except that the statement required to be printed on the ballot shall be prepared by the municipal attorney." *Id.* Thus, while municipalities have the power to employ a city manager if authorized by the voters, nothing in state law recognizes the concept of a city manager as a separate form of municipal government.

Once authorized by the voters, the governing body, and not the voters, has the sole power to remove a city manager. SDCL § 9-10-11 provides in relevant part "[t]he manager shall be appointed for an indefinite term but may be removed by majority vote of the members of the governing body."

Once employed a city manager has a property interest in his or her employment and has a right of due process before the city manager can be removed from office. SDCL § 9-10-11 further provides:

At least thirty days before such removal may become effective, the manager shall be furnished with a formal statement in the form of a resolution passed by a majority vote of such governing body stating the intention of such governing body to remove him, and the reasons therefor. He may reply in writing to such resolution. If so requested by the manager, the governing body shall fix a time for a public hearing upon the question of his removal, and the final resolution removing him shall not be adopted until such public hearing has been had.

Upon passage of a resolution stating the governing body's intention to remove the manager, such governing body may suspend him from duty, but his pay shall continue until his removal shall become effective as herein provided. The action of the governing body in removing the manager shall be final.

After a city manager has been removed from office, the governing body is authorized to designate a qualified administrative officer to perform the duties of his or her office. SDCL § 9-10-12. In a first- or second-class municipality the designated administrative officer is authorized to "perform the duties of the manager". *Id.*

South Dakota law authorizes to petition for a "change in form of municipal government". As noted above, the employment of a city manager is not a "form of government" but is instead a special power granted to a municipality.

The procedure for changing the form of government is different than the procedure to authorize the employment of a city manager. For example, on a petition for employment of a city manager, "the statement required to be



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printed on the ballot shall be prepared by the municipal attorney.” SDCL § 9-10-1. There is no such requirement petition for change of form of government. See SDCL § 9-11-7 (“The vote upon such questions shall be by ballot in the form and be case in the manner provided by chapter 9-13.”)

A city manager is entitled to due process before he or she may be removed from office. SDCL § 9-10-11. There is no similar right of due process for a city manager when there is a change of form of government. Instead, “[a]ny ordinance, resolution, contract, obligation, right or liability of the municipality shall continue in force and effect the same as though no change of government has occurred.” SDCL § 9-11-10. Thus, it is fair to suggest that a change in form of government does not contemplate the removal of a city manage.

Finally, when a city manager is removed from office by the governing body pursuant to SDCL §9-10-11 there is no provision for any election. That is not the case where the form of government is changed. SDCL § 9-11-9 provides:

If an election changes the form of government or number of commissioners, wards or trustee is approved, at the next annual municipal election or a special election call by the governing board and held pursuant to § 9-13-14, officers shall be chosen under the changed form of government.

The question posed in the Petition conflates the power to employ a city manager with a change in form of city government. That much is apparent in the way the Petitioner framed the question posed:

The form of government for the municipality of Sturgis should be changed from the current form of municipal government (aldermanic with a city manager form of government) to an aldermanic form of government without a city manager.

The Petition does not call for any change in the form of city government. Indeed, two individuals called me to express concerns about the way the Petition was presented to them and asked to have their signature stricken from the Petition. These individuals told me that the Petition was presented to them as an effort to remove the current City Manager from his job. The Petition calls for the removal of the city manager, a power that the South Dakota legislature as reserved to the City Council. As such, it is improper to set an election on the question posed in the Petition.



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REQUEST TO FILE AN ACTION FOR DECLARATORY JUDGMENT

The question whether hiring a city manager is a special power granted to municipal government or a distinct form of government may be an appropriate subject of an action for declaratory judgment. A declaratory judgment defines the rights of the parties regarding the legal question presented. Declaratory judgments differ from other judgments because they do not order a party to take any action or award any damages for violations of the law. Instead, declaratory judgments state whether the parties may seek or are entitled to relief.

One may apply to circuit court for a declaratory judgment pursuant to SDCL §15-6-57. Or in cases such as this, one may apply to the South Dakota Board of Elections for declaratory relief pursuant to A.R.S.D. 5:02:02. You may expect an initial answer more quickly from the South Dakota Board of Elections, however a decision from the South Dakota Board of Elections may be appealed to circuit court and from circuit court to the South Dakota Supreme Court. Filing an action for declaratory judgment in circuit would probably lead to a final decision more quickly than by initiating the action before the Board of Elections.

The benefit of seeking a declaratory judgment is a final binding decision determining on whether removal of a city manager is a change in the form of government. In an action for declaratory relief, the petition circulators would be the adverse party.

I recommend that the City Council direct me to apply for declaratory relief in the forum that the Council deems more appropriate.

PETITION IRREGULARITIES

On examination by the City Finance Officer, the Petition contained several irregularities. For example, there were ten instances of where the same person signed the petition more than once. This conduct provides no basis from criminal investigation but is nonetheless irregular.

The Petition contained one forged signature. Forgery is a Class 5 felony. SDCL § 22-39-36. One convicted of a Class 5 felony faces a maximum possible punishment of up to five years in the state penitentiary, a fine of up to \$10,000 or a combination of prison and fine.

The City Finance Officer received reports that the Petition had been left unattended in a local business creating the opportunity for someone to sign the Petition without the circulator observing the act of signing. As a result of those reports, the City Finance Officer asked the person submitting the Petitions to



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segregate those which had been signed in the business. Four persons who signed under such circumstances were selected at random and contacted to determine if the Circulator in fact witnessed the signature. Two persons reported that someone other than the circulator observed them sign the Petition while two persons reported that the Circulator observed them sign the Petition.

The City Finance Officer and her staff observed that in many instances the column identifying the date and county of the signature appeared to be in different handwriting than the rest of the entry. These observations suggest many of the signatures may have been gathered outside of the statutory time limit but dated within the time allowed by statute contrary to state law. Additionally, two signature dates were obviously altered to show dates within the 6-month limitation, while it is apparent that the signatures were obtained outside of the time limit. The observations also suggest conduct that may constitute the crime of offering a false or forged instrument for filing, registering, or recording, a violation of SDCL § 22-11-28.1, a Class 6 felony. A Class 6 felony is punishable by up to two years in the state penitentiary, a fine of up to \$4000, or a combination of prison and fine.

Eighty-nine persons who signed the Petition were not registered to vote in Meade County and an additional nine person who signed the Petition do not reside within the city limits of Sturgis. The Petition circulator "attest[ed] to the legality of the signatures and that each signing [the] petition is a resident of and a qualified voter of the municipality of Sturgis." False attestation is also a violation of SDCL § 22-11-28.1.

Allegations of forgery and false attestation in election petitions are serious matters. Most recently, Annette Bosworth was convicted of six counts of offering false or forged instruments in connection with her submission of nominating petitions for election to the United States Senate, and her conviction for that conduct was affirmed on appeal. *State v. Bosworth*, 2017 S.D. 43, 899 N.W.2d 691 (2017). Bosworth, a medical doctor, received a suspended imposition of sentence, placed on probation, and ordered to serve 500 hours of community service as a condition of her probation. Bosworth lost her license to practice medicine, but the license was ultimately restored to her.

Because of the serious nature of the irregularities in the Petition and the way the Petition was signed and attested, I suggest the City Council authorize me to refer the matter to law enforcement for such further investigation or other action as law enforcement deems appropriate.



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