

IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

Appeal No. 28649

ABBY OLSON, BEN BLAKE and
JODI L. MASSIE
Appellants

vs.

BUTTE COUNTY COMMISSION
Appellee

And

CHRIS KLING
Intervenor/Appellee

APPEAL FROM THE CIRCUIT COURT
FOURTH JUDICIAL CIRCUIT
BUTTE COUNTY, SOUTH DAKOTA

HONORABLE MICHELLE COMER,
CIRCUIT COURT JUDGE

APPELLANTS' BRIEF

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NOTICE OF APPEAL WAS FILED JUNE 26, 2018

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CASES CITED:

<i>Martinmaas v. Engelmann</i> , 2000 SD 85, ¶48, 612 NW2d 600, 611	2, 5, 6
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OTHER AUTHORITY:

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REFERENCES

Appellants, Abby Olson, Ben Blake, and Jodi L. Massie, shall be referred to as “Olson” or “Appellants.” Appellee Butte County shall be referred to as “Butte County” or “Appellee.” Appellee, Chris Kling, shall be referred to as “Kling” or “Appellee” or collectively with Butte County as “Appellees.”

Reference to the Settled Record as set forth in the Clerk’s Register of Actions Index shall be by the initials “SR” followed by the assigned number(s). Reference to the trial transcript shall be by the initials “TT” followed by the pertinent page number(s) and line number(s).

JURISDICTIONAL STATEMENT

Appellants appeal the May 22, 2018, letter ruling and the May 30, 2018 Order Granting Motion to Dismiss that was executed and filed by the Honorable Michelle K. Comer, Circuit Court Judge, Fourth Judicial Circuit, Butte County, South Dakota on May 22, 2018, and May 30, 2018, respectively. (SR 101, 125, & 136.) The Notice of Entry of Order Granting Motion to Dismiss was entered on May 31, 2018. (SR 129 & 136.) A Motion for Reconsideration was filed by Appellants on June 7, 2018. (SR 136.) The Court entered its Order Denying Appellants’ Motion for Reconsideration on June 22, 2018. (SR 153.) The Order sought to be reviewed herein is appealable pursuant to SDCL 15-26A-3(2).

LEGAL ISSUE

I. Whether the circuit court erred in determining that the effective date of the Butte County Commissioners’ decision was the last date of publication, rather than thirty

days after the last date of publication, resulting in the circuit court dismissing Appellant's Notice of Appeal claiming it was served one day after the appeal deadline.

The circuit court erred in determining that the effective date of the Butte County Commissioners' decision was the last date of publication, rather than thirty days following the last date of publication, and therefore, Appellants' Notice of Appeal should not have been dismissed.

Most Relevant case law and statutory authority:

SDCL §31-3-34

Martinmaas v. Engelmann, 2000 SD 85, ¶48, 612 NW2d 600, 611

Wheeler v. Farmers Mut. Ins. Co. of Nebraska, 2012 SD 83, 824 NW2d 102, 21

STATEMENT OF FACTS

A Petition to Vacate County Road and Section Line was filed with the Butte County Auditor on November 20, 2017. (SR 8 & 60.) The Butte County Commission held a public hearing on the Petition to Vacate County Road and Section Line on January 11, 2018. (SR 8 & 60.) Thereafter, on January 17, 2018, a letter was received requesting that the county road only be vacated from where the road leaves the section line to Highway 34, leaving the section line and highway between Sections 14, 15, and 23 open. (SR 8 & 60.) The county road, or portion of which was proposed to be vacated, is commonly referred to as Kling Road. (SR 8.)

The Butte County Commission addressed the Petition to Vacate County Road and Section Line at its February 6, 2018 meeting. (SR 8, 60, & 80.) At that meeting, the Butte County Commission approved the Petition to Vacate County Road and Section Line. (SR 8 & 60.) The County Commission's Resolution to that effect was published on February 16, 2018, and February 23, 2018. (SR 8, 60, & 80.)

Appellants served a Notice of Appeal upon Butte County Commissioner Stan Harms on March 27, 2018. (SR 1, 8, 60, & 80.) Appellee and Intervenor, Chris Kling, filed a Motion to Dismiss Appellants' Notice of Appeal contending that it was not timely served. (SR 8 & 60.) More specifically, Appellee and Intervenor contended Appellants had to file their appeal within thirty days of the last day of publication in order to effectuate a timely appeal. (SR 103; TT 3:20-25.) Thus, Appellee and Intervenor contend that the Notice of Appeal was served one (1) day after the thirty day time period in which they could serve the Notice of Appeal. (SR 103; TT 3:20-25.)

Appellants, however, contend that they had thirty days after the effective date of the Butte County Commission's decision to serve the Notice of Appeal and that the effective date of the Butte County Commission's decision was thirty days after the last date of publication. (SR 3; TT 10:12-18.) Thus, Appellants contend that they served the Notice of Appeal on the first day after the Butte County Commission's decision became effective. (SR 103; TT 11:8-12.) Considering SDCL §31-3-34 provides that an appeal may be taken "within thirty days after the date on which the decision of the board has become effective," Appellants contend their service of the Notice of Appeal the first day following the effective date of the decision was well within the thirty day deadline set by statute. SDCL §31-3-34. (SR 103; TT 13:21-24.)

The circuit court granted Appellee's and Intervenor's Motion to Dismiss concluding that the Butte County Commission's "decision is effective after two consecutive weeks of publication" and that "[a]n appeal must be taken within 30 days of the last date of publication." (SR 125 and 101). The circuit court also denied Appellant's

Motion for Reconsideration. (SR 153.) Appellants appeal from the circuit court's dismissal of their Notice of Appeal.

STANDARD OF REVIEW

This appeal involves the construction and interpretation of statutes contained in SDCL Ch. 31-3 related to the vacation of county highways as well as SDCL §17-18A-8 regarding the effective date of resolutions. Issues of statutory construction and interpretation are questions of law. *Block v. Drake*, 2004 SD 72, ¶ 8, 681 N.W.2d 460, 463 (citing *Steinberg v. State Dep't of Military Affairs*, 2000 SD 36, ¶ 6, 607 N.W.2d 596, 599). Questions of law are reviewed under the de novo standard with no deference afforded to the circuit court's decision. *Id.* (citing *City of Deadwood v. Summit, Inc.* 2000 SD 29, ¶ 9, 607 N.W.2d 22, 25).

ARGUMENTS AND AUTHORTIES

The South Dakota Supreme Court has, on numerous occasions, set forth the rules of statutory construction in this state.

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. The intent of a 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 in a statute is clear, certain and unambiguous, there is no reason for construction, and the Court's only function is to declare the meaning of the statute as clearly expressed. Since statutes must be construed according to their intent, the intent must be determined from the statute as a whole, as well as enactments relating 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 the general terms of another statute.

Martinmaas v. Engelmann, 2000 SD 85, ¶48, 612 NW2d 600, 611(quoting *Moss v. Guttormson*, 1996, SD 76, ¶10, 551 NW2d 14, 17 (citing *US West Communications, Inc. v. Public Util. Comm’n*, 505 NW2d 115, 122-23 (SD 1993) (citations omitted))).

Additionally, when applying the rules of statutory construction,

A statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant, . . . No clause, sentence or word shall be construed as superfluous, void or insignificant if the construction can be found which will give force to and preserve all the words of the statute. *While every word of a statute must be presumed to have been used for a purpose, it is also the case that every word excluded from a statute must be presumed to have been excluded for a purpose.*

Wheeler v. Farmers Mut. Ins. Co. of Nebraska, 2012 SD 83, 824 NW2d 102, 21

(emphasis in original).

SDCL §31-3-34 sets forth the deadline by which an aggrieved landowner or resident may appeal from the decision of the Butte County Commission. SDCL §31-3-34 states, in full:

Any person who is a resident or landowner of such county or of land lying within ten miles of the boundaries of such county and who feels aggrieved by the final decision of the board in awarding or refusing to award damages in locating, vacating, or changing any public highway under the provisions of this chapter, or, notwithstanding the provisions of § 31-3-14, any person who is a resident or landowner of such county or of land lying within ten miles of the boundaries of such county and who feels aggrieved by the final decision of the board in locating, vacating, or changing any public highway under the provisions of this chapter, *may appeal from such decision to the circuit court for the county **within** thirty days **after** the date on which the decision of the board has become effective* by serving a written notice of appeal describing the decision from which appeal is being taken upon one of the members of the board by one of the methods prescribed in § 15-6-4. The appeal so taken shall be docketed as other causes pending in such court, and the same shall be heard and determined de novo.

(Emphasis added.) The plain language of SDCL §31-3-34 makes it clear that the Appellants could appeal the Butte County Commission's decision to vacate the county road to the circuit court by serving a Notice of Appeal within thirty days after the date that the Butte County Commission's decision became effective. Thus, the question simply becomes what was the effective date of the Butte County Commission's decision.

In accordance with the rules of statutory construction, this Court must first attempt to discover the true intention of the statute based upon the express language of the statute by giving the words and phrases in the statute their plain meaning and effect. Here, the primary words that need to be construed are "effective date." Neither SDCL Ch. 31-3 nor SDCL Title 31 provides a definition for "effective date."

Black's Law Dictionary, however, sets forth the plain and ordinary meaning of the phrase. Black's Law Dictionary, defines "effective date" as "[t]he date on which a statute, contract, insurance policy, or other such instrument *becomes enforceable or otherwise takes effect*, which sometimes differs from the date on which it was enacted or signed." Black's Law Dictionary 554 (8th ed. 2004) (emphasis added). Thus, it is clear that the effective date of the Butte County Commission's decision is the date that the decision becomes enforceable or otherwise takes effect.

Thus, in accordance with the rules of statutory construction, this Court must read the statutes as a whole in determining the "effective date" of the Butte County Commission's decision, *i.e.*, the date the Butte County Commission's decision "becomes enforceable or otherwise takes effect." *Martinmaas*, 2000 SD 85, ¶48, 612 NW2d at 611, Black's Law Dictionary 554 (8th ed. 2004). When examining the statutes in SDCL Ch. 31-3 regarding the vacation of highways and sections lines, SDCL §§ 31-3-6 through

31-3-10 are significant in determining the effective date of the County Commission's decision. First, SDCL §31-3-6 grants township supervisors and county commissioners the ability to vacate highways upon receiving a valid petition seeking the vacation of the same. Next, SDCL §31-3-7 sets forth the public hearing and publication procedures that must be followed for the board to conduct a hearing at which point the board makes the decision of whether to vacate the highway in question. Thereafter, SDCL §31-3-8 identifies the requisite contents of the resolution, which is the document that sets forth the board's decision to vacate the highway in question, and mandates that "[t]he county auditor shall, within thirty days of the resolution and order provided for in §31-3-7, make those changes to the map as necessary to reveal the course and location of any county highway vacated, changed or located."

Of the utmost importance, however, are SDCL §31-3-9 and SDCL §31-3-10.

SDCL §31-3-9 states, in full:

Such resolution and order shall be printed in the minutes of the meeting of the board and the resolution *shall be published in the official newspaper of said township, if any, otherwise in the nearest legal newspaper to said highway, once each week for at least two consecutive weeks, and such highway shall be, after a lapse of thirty days, vacated, changed, or located*, without further proceedings unless appeal as provided for in this chapter.

(Emphasis added.) Furthermore, SDCL §31-3-10 states in full:

Upon the discontinuance and vacation of a highway pursuant to §§ 31-3-6 to 31-3-9, inclusive, the title to the land embodied therein shall revert to the original owners or their grantees or successors in interest, and any removable guardrails, culverts, or other public improvements upon such vacated highway may be removed and returned to the political subdivision by which the same were made or supplied.

(Emphasis added.)

First, the express language of SDCL §31-3-9 makes it clear that it is thirty days after the two consecutive weeks of publication of resolution that the Butte County Commission's decision becomes effective, as the Legislature expressly stated that it is at such time that the highway "shall be . . . vacated, changed, or located." To ensure there is no misunderstanding, the Legislature expressly provided that it was after the lapse of thirty days from publication of the resolution setting forth the board's decision to vacate the section line that such decision would become enforceable or would otherwise take effect as it is only at such time that the section line "shall be" "vacated."

Moreover, the Legislature clearly provides in SDCL §31-3-10 that it is only after the requirements of SDCL §§ 31-3-6 – 31-3-9 are satisfied, which requirements include the lapse of thirty days from the date of publication at which time the highway *shall be* vacated pursuant to SDCL §31-3-9, that title of the vacated land shall revert to the original owners or their grantees or successors. Thus, reading the statutes as a whole, it is clear that it is only after thirty days from the last date of publication that the Butte County Commission's decision to vacate the highway becomes effective or otherwise enforceable, as it is only after such lapse of thirty days from the date of publication that the highway shall be vacated pursuant to SDCL §31-3-9 and that the title to the property can possibly revert to the original owner or their grantees or successors pursuant to SDCL §31-3-10.

The effective date of the Butte County Commission's decision being thirty days after the last date of publication is also consistent with SDCL §7-18A-8, which is entitled **"Effective date of ordinances and resolutions – Exceptions."**

SDCL §7-18A-8 states in full:

Except such resolutions or ordinances as may be necessary for the immediate preservation of the public peace, health, or safety, or support of the county government and its existing public institutions; which provide for an election or hearing on an improvement or assessment; or which call for bids which take effect upon the passage and publication thereof, ***every resolution or ordinance passed by a board shall take effect on the twentieth day after its completed publication unless suspended by operation of a referendum.***

(Emphasis added.) Thus, the South Dakota Legislature has made it abundantly clear that the effective date of the Butte County Commission's decision is not the last date of publication. Rather, consistent with the express language utilized by the South Dakota Legislature, the Butte County Commission's decision becomes effective only after a specified time following the last date of publication.

Not only do SDCL §§ 31-3-6 – 31-3-10 as well as SDCL §7-18A-8 clearly establish that the effective date of the Butte County Commission's decision is thirty days after the last date of publication, but a review of the language utilized in other statutes in SDCL Ch. 31-3 makes it clear that the legislature did not intend to require an appeal pursuant to SDCL §31-3-34 to be served within thirty days from the last date of publication. More specifically, SDCL §31-3-14 provides, in full:

Appeal from township board to vote of voters. Six or more voters of the township, aggrieved by the action of the board of supervisors in vacating, changing, or locating a highway *may file with the township clerk a notice in writing **within** thirty days from the date of the first publication* pursuant to § 31-3-9, that they appeal the decision on whether the highway shall be vacated, changed, or located to be submitted to a vote of the voters of the township.

(Emphasis added.) Thus, the South Dakota Legislature expressly stated in SDCL §31-3-14 that an aggrieved voter of an action of the township board of supervisors may appeal the vacation, change, or location of a highway by filing a written notice with the

township clerk “*within thirty days from the date of the first publication*” and have the decision submitted to a vote of the township. (Emphasis added.) Thus, the South Dakota Legislature clearly knew how to make the due date for filing or serving a notice of appeal within a certain period of time from the publication date as it did so in SDCL §31-3-14.

Significantly, however, the South Dakota Legislature did not state that an appeal in SDCL §31-3-34 needed to be served within thirty days of the last date of publication; rather, in SDCL §31-3-34, the South Dakota Legislature clearly stated that the Notice of Appeal must be served “***within** thirty days **after** the date on which the decision of the board has become effective.*” The fact that the South Dakota Legislature knew how to require a notice of appeal to be filed or served within a certain number of days from publication as it expressly did so in SDCL §31-3-14 but did not use such language in SDCL §31-3-34, pursuant to the rules of statutory construction as set forth by the South Dakota Supreme Court, it must be presumed that the Legislature excluded such language for a purpose. The only purpose for the exclusion of such language is that the Legislature intended the deadline for filing or serving a notice of appeal to be thirty days from the effective date of the board’s decision as it expressly stated in SDCL §31-3-34 as opposed to thirty days from the date of publication. After all, if the Legislature had intended to require an appeal pursuant to SDCL §31-3-34 to be served within thirty days of the completion of publication, it would have expressly stated such in the statute as the Legislature clearly knew how to do so considering the language it utilized in SDCL §31-3-14.

To be clear, the South Dakota Supreme Court in *Wheeler v. Farmers Mut. Ins. Co. of Nebraska*, expressly stated that “[w]hile every word of a statute must be presumed

to have been used for a purpose, it is also the case that every word excluded from a statute must be presumed to have been excluded for a purpose.” *Wheeler v. Farmers Mut. Ins. Co. of Nebraska*, 2012 SD 83, 824 NW2d 102. Thus, it must be presumed that the South Dakota Legislature excluded the language “within thirty days from the date of [last] publication” from SDCL §31-3-34, despite the fact that such language was expressly used in SDCL §31-3-14, for a purpose. Again, the purpose for which the South Dakota Legislature excluded such language from SDCL §31-3-34 despite the fact that it included such language in SDCL §31-3-14, is because the Legislature did not intend for the deadline to be thirty days from the last date of publication as Appellee and Intervenor contend, or the Legislature would have simply stated such as it clearly knew how to do so.

Therefore, when the application of the rules of statutory construction are applied and followed, it is clear that the effective date of the Butte County Commission’s decision was thirty days after the date of publication, which would have been March 25, 2018. However, with the March 25, 2018, falling on a Sunday, the effective date of the Butte County Commission’s decision becomes the following day, Monday, March 26, 2018. The Notice of Appeal was served on County Commissioner Stan Harms on Tuesday, March 27, 2018. Thus, the Notice of Appeal was served one day after the effective date of the Butte County Commission’s decision. Considering SDCL §31-3-34 requires that the Notice of Appeal be served within thirty days of the effective date of the Butte County Commission’s decision, the Appellants’ service of the Notice of Appeal one day after the effective date of the Butte County Commission’s decision was filed well within the thirty days required by statute.

Not only does a detailed legal analysis of the application of the rules of statutory construction lead to the conclusion that the effective date of the Butte County Commission's decision would be thirty days after the date of publication, but such a conclusion is obtained from a simple reading of the statutes as evidenced by Butte County Auditor Elaine Jensen. More specifically, on February 21, 2018, Appellants' attorney John Frederickson inquired of Ms. Jensen as to the date the Butte County Commission's decision would be effective. In response, Ms. Jensen sent an email to Mr. Frederickson dated Wednesday, February 21, 2018. (SR 80, Ex. 1.) In the email, the Butte County Auditor explained that the Resolution was published on Friday, February 16th, and that "[i]t will be published again this Friday," *i.e.*, February 23, 2018. Ms. Jensen continued in her email stating "It is my understanding that the Resolution will go into effect 30 days after the final publication. Therefore the Resolution would go into effect on March 23rd," but considering February only has twenty-eight days, it would be March 25, 2018. Thus, the Legislative intent that the effective date of the Butte County Commission's decision is thirty days after the date of publication is readily apparent without a detailed recitation and application of the rules of statutory construction.

Considering the Notice of Appeal was served one day after the Butte County Commission's decision became effective, and considering SDCL §31-3-34 requires that the Notice of Appeal be served within thirty days of the effective date of the Butte County Commission's decision, Appellants' service of the Notice of Appeal was timely. This matter should be remanded to Circuit Court for further proceedings.

Alternatively, as referenced above, SDCL §7-18A-8 expressly provides, in pertinent part, that "every resolution or ordinance passed by a board shall take effect on

the twentieth day after its completed publication unless suspended by operation of a referendum.” Thus, while Appellants believe that the application of the rules of statutory construction to SDCL Ch. 31-3 make it clear that the effective date of the Butte County Commission’s decision is thirty days after the last date of publication, SDCL §7-18A-8 makes it clear that the effective date of the Butte County Commissioners’ decision is at least twenty days after the last date of publication. Thus, even applying SDCL §7-18A-8, the effective date of the Butte County Commission’s decision was twenty days after the last date of publication of Friday, February, 23, 2018, which makes the effective date Thursday, March 15, 2018. Considering SDCL §31-3-34 expressly provides that a Notice of Appeal must be served “*within thirty days after the date on which the decision of the board has become effective,*” Appellants would have had until Saturday, April 14, 2018, to serve their Notice of Appeal. Again, the Notice of Appeal was served on March 27, 2018, which was eighteen days before April 14, 2018, *i.e.*, well within the appeal deadline. Thus, pursuant to SDCL §7-18A-8, Appellant’s’ service of the Notice of Appeal was timely, and this matter should be remanded to the circuit court for further proceedings.

CONCLUSION

SDCL §31-3-34 expressly provides that a Notice of Appeal may be served within thirty days after the effective date of the board’s decision. The effective date is the date that the decision becomes enforceable or otherwise takes effect. SDCL §31-3-9 provides that the highway shall be vacated thirty days after publication of the resolution, *i.e.*, the board’s decision to vacate a highway will take effect thirty days after publication. Moreover SDCL §31-3-10 provides that after the requirements SDCL §§31-3-6 – 31-3-9

have been satisfied, then the title to the vacated property is transferred back to the landowners, *i.e.*, the board's decision becomes enforceable and effective. Thus, considering the last date of publication of the Resolution was February 23, 2018, the effective date of the decision is March 25, 2018, *i.e.*, thirty days later. Considering Appellants served their Notice of Appeal the first day after the Butte County Commission's decision became effective, their appeal was well within the thirty day period following the effective date that is provided by statute.

Alternatively, SDCL §7-18A-8 expressly states that every resolution takes effect on the twentieth day after publication is completed. Again, with the publication of the Resolution being completed on February 23, 2018, the effective date of the Butte County Commission's decision would have been March 15, 2018, *i.e.*, twenty days later. Considering SDCL §31-3-34 provides Appellants thirty days following the effective date, *i.e.*, April 14, 2018, to serve the Notice of Appeal, and considering Appellants served the Notice of Appeal on March 27, 2018, their appeal was well within the thirty day period provided by statute.

Appellant's Notice of Appeal was served within the thirty day period following the effective date of the Butte County Commission's decision, and as such the circuit court's dismissal of Appellants' appeal should be reversed, and the action should be remanded to the circuit court for further proceedings.

REQUEST FOR ORAL ARGUMENT

Appellants request oral argument in this appeal.

Dated this 9th day of August, 2018.

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CERTIFICATE OF COMPLIANCE

Pursuant to SDCL 15-26A-66(b)(4), I certify that Appellants' Brief complies with the type volume limitation provided for in the South Dakota Codified Laws. This Brief is 18 pages in length and contains 4,648 words and 29,025 characters. It is typed in proportionally spaced typeface Times New Roman font 12 point. I have relied on the word and character count of our word procession system used to prepare this Brief. The original Appellants' Brief and all copies are in compliance with this rule.

Dated this 9th day of August, 2018.

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CERTIFICATE OF SERVICE AND MAILING

The undersigned hereby certifies that he served by email a copy of APPELLANTS' BRIEF upon the following persons herein next designated, all on the date shown below, to-wit:

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The undersigned also certifies that he filed the APPELLANTS' BRIEF by email SCClerkBriefs@uj.s.state.sd.us and by mailing the original and two copies of APPELLANTS'S BRIEF by delivering them to Shirley Jameson-Fergel, the Clerk of the South Dakota Supreme Court, 500 East Capitol Avenue, Pierre, South Dakota 57501-5070, on the date shown below, by first-class mail.

Dated this 16th day of August, 2018.

/s/ John R. Frederickson
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APPENDIX

TAB

Judgment	1
Order Granting Motions to Dismiss	2



Fourth Judicial Circuit Court

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Sandra Semerad
Court Reporter

May 22, 2018

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RE: 09CIV18-52

Dear Counsel:

The Court having fully read and reviewed the briefs of Counsel, heard the arguments of Counsel and being familiar with the file and issues, grants the Motion to Dismiss. The Court reads the applicable statutes SDCL 31-3-9 and 31-3-34 to be consistent with one another. The Court finds that the board decision is effective after two consecutive weeks of publication. An appeal must be taken within 30 days of the last date of publication. Ms. Wendt or Mr. Willert please submit findings of fact and conclusions of law consistent with the Court's decision unless all parties agree to waive the same.

FILED

MAY 22 2018

SOUTH DAKOTA UNIFIED JUDICIAL SYSTEM
4TH CIRCUIT CLERK OF COURT

By _____

Sincerely,

Michelle Comer

Judge Michelle Comer
4th Circuit Judge

FILED

MAY 22-2018

SOUTH DAKOTA UNIFIED JUDICIAL SYSTEM
4TH CIRCUIT CLERK OF COURT

By _____

STATE OF SOUTH DAKOTA)
)ss.
COUNTY OF BUTTE)

IN CIRCUIT COURT
FOURTH JUDICIAL CIRCUIT

ABBY OLSON, BEN BLAKE, and
JODI L. MASSIE,

Appellants,

vs.

BUTTE COUNTY COMMISSION,

Appellee,

And

CHRIS KLING,

Intervenor.

09CIV18-52

ORDER
GRANTING
MOTIONS TO DISMISS

The Motions to Dismiss filed by the Butte County Commission, Appellee, and Chris Kling, Intervenor, came on regularly to be heard before the Court on May 21, 2018 in the Butte County Courthouse in Belle Fourche, South Dakota. John Frederickson and Dylan Wilde appeared on behalf of Appellants Abby Olson, Ben Blake, and Jodi L. Massie. Cassie Wendt appeared on behalf of the Appellee, the Butte County Commission. Kellen B. Willert appeared on behalf of the Intervenor, Chris Kling. The Court having considered the pleadings and papers on file herein and the arguments of counsel, and good cause appearing therefore,

IT IS ORDERED, ADJUDGED and DECREED that Appellee's Motion to Dismiss as well as the Intervenor's Motion to Dismiss are granted and this matter is dismissed.

Attest:
Brill, Kimberly
Clerk/Deputy



BY THE COURT

Signed: 5/30/2018 1:13:49 PM

Michelle Comer

Michelle K. Comer
Circuit Court Judge

**IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA**

Appeal No. 28649

ABBY OLSON, BEN BLAKE, and
JODI L. MASSIE ,

Appellants,

vs.

BUTTE COUNTY COMMISSION,

Appellee,

And

CHRIS KLING

Intervenor and Appellee.

APPEAL FROM THE CIRCUIT COURT
FOURTH JUDICIAL CIRCUIT
BUTTE COUNTY, SOUTH DAKOTA

**

HONORABLE MICHELLE K. COMER
Circuit Court Judge

INTERVENOR AND APPELLEE CHRIS KLING'S BRIEF

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THE NOTICE OF APPEAL WAS FILED JUNE 26, 2018.

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PRELIMINARY STATEMENT

Appellants Abby Olson, Ben Blake, and Jodi L. Massie are collectively referred to as “Appellants”. Appellee Butte County Commission is referred to as “Commission”. Appellee and Intervenor Chris Kling is referred to as “Kling”. The Circuit Court in Butte County, South Dakota, Judge Michelle K. Comer Presiding, is referred to as “trial court”.

References to the Clerk of Court’s certified record are prefaced with “CR”. References to specific pages in the Appendix to this brief are prefaced with “A”.

JURISDICTIONAL STATEMENT

Appellants appeal from the trial court’s May 30, 2018 Order Granting Motions to Dismiss. CR 135, 158-163; A 1.¹ The Notice of Entry of Order Granting Motion to Dismiss was served and filed on May 31, 2018. CR 132-135. Appellants’ Notice of Appeal was served and filed on June 26, 2018. CR 158 and 170-171.

STATEMENT OF LEGAL ISSUES

Issue 1. Did the trial court properly grant the Motions to Dismiss?

Trial Court: The trial court found “the board decision is effective after two consecutive weeks of publication. An appeal must be taken within 30 days of the last date of publication.” CR 101-102; A 2-3. Because Appellants failed to satisfy the jurisdictional prerequisite of appealing the decision of the Commission within 30 days of the last

¹ Appellants did not appeal the May 22, 2018 Letter Ruling. CR 158.

date of publication, the trial court entered its Order Granting Motions to Dismiss. CR 125; A 1.

Relevant Authorities:

SDCL § 31-3-9

SDCL § 31-3-34

Upell v. Dewey Cty. Comm'n, 2016 S.D. 42, 880 N.W.2d 69.

STATEMENT OF THE CASE AND FACTS

Case History

This appeal relates to Appellants' challenge of the Commission's February 6, 2018 Resolution and Order Vacating County Road ("Resolution") by appealing the Resolution to the Circuit Court pursuant to SDCL § 31-3-34. CR 1; A 4. The Resolution was published in the Black Hills Pioneer on February 16 and 23, 2018. CR 75 and 161.

Appellants served their Notice of Appeal (to the trial court) on Stanley Harms, a member of the Commission, on March 27, 2018. CR 29; A 5.

The trial court determined that an appeal of the Resolution must be taken within 30 days of the last date of publication. CR 101-102; A 2-3. Because Appellants did not appeal the Resolution until 32 days after the last date of publication, the trial court lacked subject matter jurisdiction and filed its Order Granting Motions to Dismiss on May 30, 2018. CR 125; A 1.

Statement of Facts

At the Commission's February 6, 2018 meeting, it unanimously adopted the Resolution vacating a portion of Kling Road which was published in the Black Hills Pioneer on February 16 and 23, 2018. CR 75 and 161.

Appellants served their Notice of Appeal (to the trial court) on March 27, 2018. CR 29; A5.

STANDARD OF REVIEW

The standard of review on a dismissal for lack of subject matter jurisdiction is as follows:

[This Court] review[s] a dismissal for lack of jurisdiction as a question of law under the de novo standard of review....This is in keeping with the principle that [it] review[s] issues of jurisdiction de novo because they are questions of law.

Upell v. Dewey Cty. Comm'n, 2016 S.D. 42, ¶ 9, 880 N.W.2d 69, 72 (internal citations omitted).

ARGUMENT

The trial court properly granted the Motions to Dismiss for lack of subject matter jurisdiction due to Appellants' failure to comply with the jurisdictional prerequisites to appeal the Resolution.

"[L]ack of subject matter jurisdiction may be asserted at any time." *Id.*, at ¶ 8. "[A]n appellate court acquires no jurisdiction unless the appellant has satisfied the requirements for appellate jurisdiction, including a notice of appeal filed within the prescribed time." *Id.*, at ¶ 17 (internal citation omitted). Dismissal is

appropriate when a party fails to comply with the jurisdictional prerequisites. *Id.*, at

¶ 20

Failure to comply with the relevant statute for appealing a local government's decision creates a jurisdictional defect, and dismissal for lack of subject matter jurisdiction is appropriate. *Id.*, at ¶¶ 14 and 16²

The statutory scheme establishing the jurisdictional prerequisites to appeal the Resolution are found in SDCL §§ 31-3-9 (hereinafter referred to as “§ 9”) and 31-3-34 (hereinafter referred to as “§ 34”).

Section 9 states:

Resolution and order--Entry in minutes--Publication. Such resolution and order shall be printed in the minutes of the meeting of the board and the resolution shall be published in the official newspaper of said township, if any, otherwise in the nearest legal newspaper to said highway, once each week for at least two consecutive weeks, and such highway shall be, after a lapse of thirty days, vacated, changed, or located, without further proceedings unless appeal as provided for in this chapter.

² The appellant in *Upell* attempted to appeal the decision of the Dewey County Commission pursuant to SDCL 7-8-29, which states:

Such appeal shall be taken within twenty days after the publication of the decision of the board by serving a written notice *on one of the members of the board*, when the appeal is taken by any person aggrieved by the decision of the board.

Upell, at ¶ 3. In *Upell*, the appellant failed to serve a member of the board with a notice of appeal within the required 20 days, and the South Dakota Supreme Court affirmed the learned Circuit Court's dismissal for lack of subject matter jurisdiction.

SDCL § 31-3-9.

Section 34 states:

Appeal to circuit court--Time allowed. Any person who is a resident or landowner of such county or of land lying within ten miles of the boundaries of such county and who feels aggrieved by the final decision of the board in awarding or refusing to award damages in locating, vacating, or changing any public highway under the provisions of this chapter, or, notwithstanding the provisions of § 31-3-14, any person who is a resident or landowner of such county or of land lying within ten miles of the boundaries of such county and who feels aggrieved by the final decision of the board in locating, vacating, or changing any public highway under the provisions of this chapter, *may appeal from such decision to the circuit court for the county within thirty days after the date on which the decision of the board has become effective by serving a written notice of appeal describing the decision from which appeal is being taken upon one of the members of the board by one of the methods prescribed in § 15-6-4.* The appeal so taken shall be docketed as other causes pending in such court, and the same shall be heard and determined de novo.

SDCL § 31-3-34 (emphasis added).

The Resolution was adopted by the Commission on February 6, 2018, was printed in the minutes for the meeting, and was published in the Black Hills Pioneer on February 16 and 23, 2018. CR 75 and 161.

Thirty days after February 23, 2018 (the last publication date), was March 25, 2018. Because March 25, 2018 was a Sunday, the last date to timely serve a Notice of Appeal of the Resolution was Monday, March 26, 2018. *See* SDCL § 15-6-6(a).

Appellants did not serve a member of the Commission until March 27, 2018, which was 32 days after the last publication of the Resolution and was one day too late. CR 29; A 5.

Appellants ask the Court to apply statutory construction, which is not necessary in this matter.

[I]f the words and phrases in the statute have plain meaning and effect, we should simply declare their meaning and not resort to statutory construction.

Dale v. Young, 2015 S.D. 96, ¶ 6, 873 N.W.2d 72, 74 (internal citations omitted).

To resolve this appeal, the Court needs to do no more than look to the plain meaning and effect of the applicable statutes - statutory construction is not necessary.

Plain Meaning and Effect

Statutory construction is not necessary here because the words and phrases in the relevant statutes have plain meaning and effect. Section 9 requires that the resolution “shall be published...once each week for at least two consecutive weeks”, making the resolution effective after the second publication. SDCL § 31-3-9. The “lapse of thirty days” in § 9 is in harmony with § 34 because § 34 requires an appeal be taken “*within* thirty days after the date on which the decision of the board has become effective”. *See Id.*, and SDCL § 31-3-34 (emphasis added).

The words and phrases in both § 9 and § 34 have plain meaning and effect, and this Court should simply declare their meaning as requiring an appeal be taken within 30 days of the last publication; if the Court does this, there is no need for further analysis and the trial court should be affirmed.

Statutory Construction

In the event the Court deems it necessary to engage in statutory construction, Kling counters Appellants' argument here.

When statutory construction is required statutes must be construed according to their intent, and the intent must be determined from the statute as a whole, as well as enactments relating to the same subject. In construing statutes together it is presumed that the legislature did not intend an absurd or unreasonable result.

Dale, 2015 S.D. at ¶ 6 (internal citation omitted).

Appellants' argument for statutory construction relies heavily on their comparison of § 34 with SDCL § 31-3-14 (hereinafter referred to as "§ 14").

Section 14 states:

Appeal from township board to vote of voters. Six or more voters of the township, aggrieved by the action of the board of supervisors in vacating, changing, or locating a highway may file with the township clerk a notice in writing *within thirty days from the date of the first publication pursuant to § 31-3-9*, that they appeal the decision on whether the highway shall be vacated, changed, or located *to be submitted to a vote of the voters of the township*.

SDCL § 31-3-14 (emphasis added).

Section 14 only applies to townships and is not an appeal to the Circuit Court, but is instead an appeal to the township voters (expressly allowing what is

essentially a referendum); there is no similar statute for a road vacation done by a County Commission. Section 14 does not apply to appeals of road vacations to Circuit Court under § 34, because § 34 expressly authorizes such appeals “notwithstanding the provisions of § 31-3-14”. SDCL § 31-3-34.

Appellants’ comparison of § 14 with § 34 actually supports Kling’s argument, because to base the time for making an appeal off publication dates in § 14, but not base the time for making an appeal off publication dates in § 34 would create an “absurd and unreasonable result” when construing § 9, § 14, and § 34 together. *See Dale*, 2015 S.D. at ¶ 6.

Appellants’ argument effectively amends both § 9 and § 34 by granting an aggrieved party 60 days to serve a notice of appeal (30 days after publication, plus 30 days after expiration of the first 30 days) as opposed to the expressly stated 30 days; such an interpretation likewise creates an absurd and unreasonable result by giving 30 days to appeal under § 14, and a whopping 60 days to appeal under § 34. *Dale*, 2015 S.D. at ¶ 9.

Kling anticipates Appellants will attempt to argue that the language in § 14 and § 34 exists to show a legislative intent that the two be treated differently in terms of when the 30 days starts. Kling insists that the different language is non-substantive, and due to the fact that § 14 was last amended in 2014 while § 34 was last amended 29 years earlier in 1985. Further, if the legislature wanted the resolution to be ‘effective’ after a lapse of thirty days it would have said so; the

legislature could have legislated that the “*resolution* shall be, after a lapse of thirty days...”, but instead it legislated that the “*highway* shall be, after a lapse of thirty days....” See SDCL § 31-3-9 (emphasis added). Suspending the vacation by 30 days from the date of last publication allows an appeal within the same time period under § 34.

The Supreme Court has previously read statutes together to declare their meaning, and has expressly done so when the statutes “are in the same chapter, they relate to the same thing, and they have the same purpose or object”....and when the statutes were “*enacted at the same time, in the same bill....*” Dale, 2015 S.D. at, at ¶ 9 (internal citations omitted)(emphasis added). § 9 and § 34 are in the same chapter, relate to the same thing, have the same purpose or object, and were both last amended by SL 1985, ch 233. § 9 and § 34 are harmonized with each other when interpreted as Kling contends and as the learned trial court held.

In their alternative argument, Appellants attempt to apply SDCL § 7-18A-8 to the circumstances in this file, even though SDCL § 7-18A-8 does not apply under these circumstances.³

³SDCL § 7-18A-8 relates to a *referendum*, not an appeal to the Circuit Court as found in §34; if SDCL § 7-18A-8 applied to this matter, Appellants would have no recourse in Circuit Court because the only recourse under that body of law is a referendum. Somewhat ironically, even under SDCL § 7-18A, a petition to refer a Commission’s action must be filed “*within twenty days after its publication.*” SDCL § 7-18A-16. (emphasis added). This requirement supports Kling’s contention that the time period to serve a notice of appeal under § 34 begins to

Using SDCL § 7-18A-8, Appellants argue the “effective date of the Butte County Commission’s decision is not the last date of publication.” Appellants’ Brief, p. 9. However, whether a resolution is “effective” (as found in § 34) is substantively different than when its provisions “take effect” (as found in SDCL § 7-18A-8). SDCL § 7-18A-8’s comparable statute in the road vacation statutory scheme is § 9:

SDCL § 7-18A-8: “shall take effect on the twentieth day after its completed publication....”

Section 9: “highway shall be, after a lapse of thirty days, vacated, changed, or located”

Similarly, the comparable statute to SDCL § 7-18A-16 (for timely filing a petition to refer) for a road vacation is § 34:

SDCL § 7-18A-16: “A petition to refer an ordinance or resolution subject to referendum may be filed with the auditor within twenty days after its publication....”

accrue after publication is complete; to find otherwise would create an absurd and unreasonable result.

The general statute to appeal a commission decision to the circuit court is SDCL § 7-8-29, which states “*appeal shall be taken within twenty days after the publication*” SDCL § 7-8-29 (emphasis added). SDCL Ch. 7-8 applies, as evidenced by Appellants’ Bond for Costs “pursuant to SDCL § 7-8-27”. CR 2. “[T]erms of a statute relating to a particular subject will prevail over the general terms of another statute.” *In re Wintersteen Revocable Tr. Agreement*, 2018 S.D. 12, ¶ 12, 907 N.W.2d 785, 789 (internal citations omitted). Because § 34 relates to the particular subject of vacating a road, it prevails over the general terms of SDCL § 7-8-29.

Section 34: “may appeal from such decision to the circuit court for the county within thirty days after the date on which the decision of the board has become effective....”

Statutory history also supports Kling’s contention. Section 34 applies to the particular situation in this matter and prevails over the general terms of SDCL § 7-8-29. However, prior to its amendment in 1985, § 34 (as it was previously codified) stated that an appeal may be taken “in the manner and within the time prescribed for other appeals from decisions of boards of county commissioners.” SDC 1939, § 28.0608. A 6. Prior to the 1985 amendment, the general provision applied and “*appeal shall be taken within twenty days after the publication*” SDCL § 7-8-29 (emphasis added).

All § 34 does as it applies to this particular situation is extend the time for appeal from twenty days to thirty days. The only way to avoid an unreasonable and absurd result and make § 34 and § 9 harmonized and workable is for the thirty day appeal period to begin upon completion of publication.

CONCLUSION

Statutory construction is not necessary in this matter because the plain meaning and effect of § 9 and § 34 require an appeal to be taken within thirty days after completion of publication of the Resolution. If the Court finds statutory construction is warranted, adoption of Kling’s interpretation is the only way to avoid an absurd and unreasonable result and harmonize the statutory scheme to make it workable.

Because the Notice of Appeal to Circuit Court was not served within the time period as required by § 34, the trial court lacked subject matter jurisdiction to hear the appeal and dismissal was appropriate. *Upell*, 2016 S.D., at ¶ 20. Kling respectfully requests this Court affirm the trial court's Order Granting the Motions to Dismiss.

WAIVER OF ORAL ARGUMENT

Appellee Chris Kling hereby waives oral argument.

Dated this 28th day of September, 2018.

Respectfully submitted,

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Attorneys for Intervenor and Appellee, Chris Kling

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Telephone (605) 892-2011

AND

By: /s/Max Main
Max Main
618 State Street
Belle Fourche, SD 57717
Telephone (605) 892-2011

CERTIFICATE OF COMPLIANCE

COMES NOW, Appellee Chris Kling, by and through his attorneys of record, Max Main and Kellen B. Willert of Bennett Main Gubbrud & Willert, P.C., Belle Fourche, South Dakota, and pursuant to SDCL 15-26A-66(4), hereby certify that he has complied with the type volume limitation of SDCL 15-26A-66(4) in that Appellee's Brief is double-spaced and proportionately spaced in Times New Roman typeface, 13-point, with a total word count of 3,115 and a total character count (with spaces) of 18,217. The original Appellee's Brief and all copies are in compliance with this rule.

Dated this 28th day of September, 2018.

BENNETT MAIN GUBBRUD & WILLERT, P.C.
Attorneys for Intervenor and Appellee Chris Kling

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AND

By: /s/Max Main
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Belle Fourche, SD 57717
Telephone (605) 892-2011

CERTIFICATE OF SERVICE AND FILING

I, Kellen B. Willert, one of the attorneys for Intervenor and Appellee Chris Kling, do hereby certify that on the 28th day of September, 2018, I caused a full, true and complete copy of APPELLEE'S BRIEF to be served *electronically*, by email as set forth below, upon:

CASSIE J. WENDT
Attorney for Appellee
Butte County State's Attorney
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DYLAN A. WILDE
Attorney for Appellants
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dylanwilde@wildelaw.com

I further certify that on the same day I caused the APPELLEE'S BRIEF to be filed *electronically* and the original and two (2) full, true and complete copies of the APPELLEE'S BRIEF to be filed by U.S. Mail with:

Shirley Jameson-Fergel
Clerk of the Supreme Court
State of South Dakota
500 East Capitol Avenue
Pierre, SD 57501-5070
Email SCClerkBriefs@ujs.state.sd.us

by depositing said copies in an envelope securely sealed with first class postage thereon fully prepaid in the United States Mail in the City of Belle Fourche, South Dakota, and addressed as shown above.

Dated this 28th day of September, 2018.

BENNETT MAIN GUBBRUD & WILLERT, P.C.

Attorneys for Intervenor and Appellee Chris Kling

By: /s/Kellen B. Willert

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AND

By: /s/Max Main

Max Main

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APPENDIX

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STATE OF SOUTH DAKOTA)
)ss.
COUNTY OF BUTTE)

IN CIRCUIT COURT
FOURTH JUDICIAL CIRCUIT

ABBY OLSON, BEN BLAKE, and
JODI L. MASSIE,

09CIV18-52

Appellants,

vs.

BUTTE COUNTY COMMISSION,

Appellee,

And

CHRIS KLING,

Intervenor.

ORDER
GRANTING
MOTIONS TO DISMISS

The Motions to Dismiss filed by the Butte County Commission, Appellee, and Chris Kling, Intervenor, came on regularly to be heard before the Court on May 21, 2018 in the Butte County Courthouse in Belle Fourche, South Dakota. John Frederickson and Dylan Wilde appeared on behalf of Appellants Abby Olson, Ben Blake, and Jodi L. Massie. Cassie Wendt appeared on behalf of the Appellee, the Butte County Commission. Kellen B. Willert appeared on behalf of the Intervenor, Chris Kling. The Court having considered the pleadings and papers on file herein and the arguments of counsel, and good cause appearing therefore,

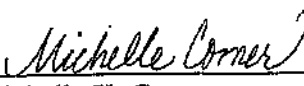
IT IS ORDERED, ADJUDGED and DECREED that Appellee's Motion to Dismiss as well as the Intervenor's Motion to Dismiss are granted and this matter is dismissed.

Attest:
Brill, Kimberly
Clerk/Deputy



BY THE COURT:

Signed: 5/30/2018 1:13:49 PM


Michelle K. Comer
Circuit Court Judge



Fourth Judicial Circuit Court

Michelle K. Palmer Percy
Circuit Court Judge

P.O. Box 626
Deadwood, SD 57732
Phone: 605-578-2044
Fax: 605-578-3613

Sandra Semerad
Court Reporter

May 22, 2018

Ms. Cassie Wendt
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Mr. Max Main
Mr. Kellen Willert
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618 State Street
Belle Fourche, SD 57717

RE: 09CIV18-52

Dear Counsel:

The Court having fully read and reviewed the briefs of Counsel, heard the arguments of Counsel and being familiar with the file and issues, grants the Motion to Dismiss. The Court reads the applicable statutes SDCL 31-3-9 and 31-3-34 to be consistent with one another. The Court finds that the board decision is effective after two consecutive weeks of publication. An appeal must be taken within 30 days of the last date of publication. Ms. Wendt or Mr. Willert please submit findings of fact and conclusions of law consistent with the Court's decision unless all parties agree to waive the same.

FILED

MAY 22 2018

SOUTH DAKOTA UNIFIED JUDICIAL SYSTEM
4TH CIRCUIT CLERK OF COURT

By _____

Sincerely,



Judge Michelle Comer
4th Circuit Judge

FILED

MAY 22 2018

SOUTH DAKOTA UNIFIED JUDICIAL SYSTEM
4TH CIRCUIT CLERK OF COURT

By _____

STATE OF SOUTH DAKOTA)
COUNTY OF BUTTE)SS.

IN CIRCUIT COURT
FOURTH JUDICIAL CIRCUIT

ABBY OLSON, BEN BLAKE, and
JODI L. MASSIE,

Appellants,

vs.

BUTTE COUNTY COMMISSION,

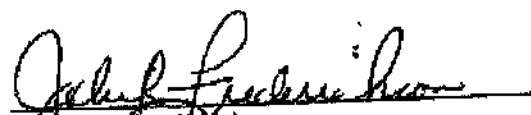
Appellees.

NOTICE OF APPEAL

TO: STAN HARMS, Butte County Commission Chairman, ELAINE JENSEN, Butte County Auditor, CASSIE WENDT, Attorney for Butte County Commission, MAX MAIN, Attorney for Chris Kling, Petitioner

You are hereby notified that pursuant to SDCL 31-3-34, the undersigned, John R. Frederickson, Frederickson Law Office, Deadwood, South Dakota, on behalf of Appellants, Abby Olson, Ben Blake, and Jodi L. Massie, appeals the February 6, 2018, decision of the Butte County Commission to vacate a portion of the Kling Road located in Butte County, South Dakota from the point commencing where Kling Road leaves the section line north of the Kling Family Homestead and goes easterly and southerly to South Dakota Highway 34 and the north-south section line between Sections 14 and 15, T8N, R1E, B.H.M., and the north-south section line between the N1/2 of Sections 2 and 23, T8N, R1E, B.H.M., being a minimum maintenance road.

Dated this 27th day of March, 2018.


John R. Frederickson
Attorney for Appellants
PO Box 583
Deadwood, SD 57732
(605) 578-1903
john@deadwoodlawyer.com

RECEIVED
APR 03 2018

CIRCUIT COURT

Return # 12461
Process # C18-00485
Docket #
Reference #

STATE OF SOUTH DAKOTA
COUNTY OF BUTTE

ABBY ANN OLSON; BENJAMIN GABRIEL
BLAKE; JODI LEE MASSIE

Appellants,

- vs -

BUTTE COUNTY COMMISSION

Appellee

SHERIFF'S RETURN OF PERSONAL SERVICE

I hereby certify that on the 27th day of March, 2018, a Letter; Notice of Appeal; Cost Bond; Admission of Service; Certificate of Service, in the above entitled action, came into my hand for service. That on the 27th day of March, 2018 at 7:37 PM, in said county, I did serve the documents on BUTTE COUNTY COMMISSION. By then and there delivering to and leaving with: HARMS, STANLEY JAMES (CHAIRMAN OF THE BUTTE COUNTY COMMISSION) at 1809 8TH AVE, BELLE FOURCHE, SD 57717


Item	Amount Owed	Amount Paid
Civil Papers - Sheriff's Fee	\$50.00	\$0.00
Mileage Fee	\$1.00	\$0.00
	Total Owed	\$51.00
	Total Paid	\$0.00
	Uncollectible	\$0.00
	Remaining	\$51.00

Invoice # 18-02894
FREDERICKSON LAW OFFICES PC
PO BOX 583, DEADWOOD, SD 57732

Comments

Date Returned 3/27/18

Signed


Fred Lamphere
Butte County Sheriff
By: Deputy Miles Burhenn
839 5th Ave
Belle Fourche, SD 57717
Phone: (605) 892-3324

the highway proposed to be located, changed, or vacated, the board of county commissioners shall appoint from the members thereof a committee to examine such proposed location, and the board, if necessary, shall designate a time when and a place where such committee will meet upon such route.

Source: § 8538 Rev. Code 1919, revised in form only.

28.0604 Examination of proposed road. At the time and place designated such committee shall meet and proceed to examine the highway proposed to be located, changed, or vacated, and in such examination may employ a licensed surveyor.

Source: § 8539 Rev. Code 1919.

28.0605 Report by committee. After such committee shall have completed its examination it shall make a report of its proceedings, setting forth the highway proposed to be located, changed, or vacated by course and distance, and recommending therein, according to the opinion of the majority, either that the prayer of the petitioners be granted or rejected, a copy of which report shall be returned to the board of county commissioners at its next meeting thereafter.

Source: § 8540 Rev. Code 1919.

28.0606 Determination of petition. At the next meeting of the board of county commissioners, it shall proceed to determine the prayer of such petition and such board shall declare it granted if a majority of the board shall agree, and shall thereupon make an order declaring that such highway is located, changed, or vacated, and such order shall contain an accurate description of the highway so located, changed, or vacated, and if deemed necessary such board may cause a survey thereof, and upon the making and filing of such order with the county auditor, such highway shall be located, changed, or vacated, as the case may be. All damages sustained by reason of the locating, changing, or vacating of any highway shall be assessed by the county commissioners as provided in this chapter and paid by the county.

Source: § 8541 Rev. Code 1919, revised in form only.

28.0607 Objection; damage; action. If at the meeting of the board of county commissioners at which the report of the committee appointed to examine such highway is presented, any person over whose land such highway passes shall remonstrate against granting the prayer of the petition, setting forth in writing that he is damaged by the location, change, or vacation of such highway in a stated sum, to the truth of which he takes and subscribes an oath, such board shall determine from the face of the report and the evidence before it the amount of damages sustained and whether the damages so assessed are greater than the utility of the proposed highway or change, and if it deems the highway of sufficient advantage to the public to warrant the paying of the damages assessed, the board shall declare such highway located, changed, or vacated and all damages declared assessed shall be paid by the county; but if it shall determine that the damages assessed are greater than the advantages of the proposed location, change, or vacation, it shall order the petition dismissed.

Source: § 8542 Rev. Code 1919.

28.0608 Appeals. Any person who shall have remonstrated against granting the prayer of the petition as provided in section 28.0607 and who feels himself aggrieved by the final decision of the board of county commissioners in awarding or refusing to award damages in locating, vacating, or changing any public highway under the provisions of this chapter, may appeal from such decision to the Circuit Court of the county in the manner and within the time prescribed for other appeals from decisions of boards of county commissioners, and the appeal so taken shall be docketed as other causes pending in such Court, and the same shall be heard and determined de novo.

Source: § 8543 Rev. Code 1919, revised in form only.

IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

Appeal No. 28649

ABBY OLSON, BEN BLAKE and
JODI L. MASSIE
Appellants,

vs.

BUTTE COUNTY COMMISSION
Appellee

AND

CHRIS KLING
Intervenor/Appellee

APPEAL FROM THE CIRCUIT COURT
FOURTH JUDICIAL CIRCUIT
BUTTE COUNTY, SOUTH DAKOTA

HONORABLE MICHELLE COMER,
CIRCUIT COURT JUDGE

APPELLEE'S BRIEF

NOTICE OF APPEAL WAS FILED JUNE 26, 2018

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REFERENCES

Appellants, Abby Olson, Ben Blake and Jodi L. Massie shall be referred to as “Appellants”. Appellee Butte County Board of County Commissioners shall be referred to as “Butte County”. Intervenor Chris Kling shall be referred to as “Kling”, or collectively with Butte County as “Appellees”.

JURISDICTIONAL STATEMENT

Appellants appeal the May 22, 2018 letter ruling and the May 30, 2018 Order Granting Motion to Dismiss that was executed and filed by the Honorable Michelle K. Comer, Circuit Court Judge, Fourth Judicial Circuit, Butte County, South Dakota. (SR 101 and 125). A Notice of Entry of Order Granting Motion to Dismiss was entered on May 31, 2018. (SR 136.) A Motion for Reconsideration was filed on June 7, 2018. (SR 136). The Court entered an Order Denying Appellants’ Motion for Reconsideration on June 22, 2018. (SR 153). A notice of appeal was filed on June 26, 2018. (SR 158).

LEGAL ISSUE

- I. Whether the Circuit Court erred in determining the deadline for the appeal of a final decision of the Board of County Commissioners?

STATEMENT OF FACTS

A petition to Vacate County Road and Section line was received by the Butte County Auditor on November 20, 2017. (SR 8). Notice of a public hearing was published in the newspaper on December 29, 2017 and January 5, 2018. (SR 8). A public hearing was then held on January 11, 2018 at 2:00 p.m. (SR 8). On January 17, 2018, a letter was received requesting that the stretch of road (hereinafter “Kling Road”) be vacated only from where it leaves the section line north of the home of Chris Kling

and goes easterly and southerly to the highway, leaving the section line and highway between Sections 14, 15, 22, and 23 open. (SR 8). On February 6, 2018, Butte County Commission Chairman Frank Walton signed Board of Butte County Commissioners Resolution and Order Vacating County Road (the “Resolution”). (SR 8). The Resolution was then printed in the minutes of the February 6, 2018 meeting. (SR 8). Finally, the Resolution was published in the official newspaper pursuant to SDCL 31-3-9 on February 16, 2018 and February 23, 2018. (SR 8). Notice of Appeal was served by the Butte County Sheriff’s Office upon Stan Harms, Butte County Commissioner, on March 27, 2018 at 7:37 p.m. (SR 8). Appellee and Intervenor filed a Motion to Dismiss Appellants’ Notice of Appeal as it was not timely served. (SR 8 & 39, respectively). The circuit court granted Appellee’s and Intervenor’s Motion to Dismiss, holding that Appellants’ Notice of Appeal was filed after the time period in which a Notice of Appeal should have been filed. (SR 8). Appellants filed a Motion for Reconsideration on June 6, 2018. (SR 136). The circuit court denied Appellants’ Motion for Reconsideration. (SR 153). Appellants appeal from the circuit court’s dismissal of their Notice of Appeal.

STANDARD OF REVIEW

“Issues of statutory and constitutional interpretation are questions of law.” *In re Expungement of Oliver*, 2012 S.D. 9, ¶ 5, 810 N.W.2d 350, 351-52 (citing *Gray v. Gienapp*, 2007 S.D. 12, ¶ 15, 727 N.W.2d 808, 812). “We review the interpretation and application of each de novo.” *In re Expungement of Oliver*, 2012 S.D. 9, ¶ 5, 810 N.W.2d 350, 351-52 (*See also State v. Goulding*, 2011 S.D. 25, ¶ 5, 799 N.W.2d 412, 414 (“Statutory interpretation and application are questions of law that we review do novo.”); *Kraft v. Meade Cnty. ex rel. Bd. of Cnty. Comm’rs*, 2006 S.D. 113, ¶ 2, 726

N.W.2d 237, 239 ("Constitutional interpretation is a question of law reviewable de novo.").

ARGUMENT AND AUTHORITIES

A highway shall be, after a lapse of thirty days, vacated, without further proceedings unless appeal is taken pursuant to SDCL 31-3. SDCL 31-3-9. The Circuit Court found SDCL 31-3-9 and SDCL 31-3-34 to be consistent with one another, thereby determining the deadline for the appeal of a final decision of the Board of County Commissioners was March 26, 2018, thirty days after the final publication. (SR 101). In conducting statutory interpretation, "[w]e give words their plain meaning and effect, and read statutes as a whole" *In re Expungement of Oliver*, 2012 S.D. 9, ¶ 6, 810 N.W.2d 350, 352 (citing *State v. Miranda*, 2009 S.D. 105, ¶ 14, 776 N.W.2d 77, 81). "The 'terms of a statute relating to a particular subject will prevail over the general terms of another statute.'" *In re Keystone XL Pipeline*, 2018 S.D. 44, ¶¶ 18-19, 914 N.W.2d 550, 557 (citing *In re Wintersteen Revocable Trust Agreement*, 2018 S.D. 12, ¶ 12, 907 N.W.2d 785, 789. South Dakota Codified Laws Title 31 is titled "Highways and Bridges". SDCL 31-3-9 provides that "such highway shall be, after a lapse of thirty days, vacated . . . without further proceedings unless appeal as provided for in this chapter." Additionally, SDCL 31-3-34 provides, in pertinent part, that certain individuals "may appeal from such decision to the circuit court for the county within thirty days after the date on which the decision of the board has become effective by serving a written notice of appeal describing the decision from which the appeal is being taken upon one of the members of the board . . .".

The Notice of Appeal was filed with the Butte County Clerk of Court and is file stamped March 27, 2018 at 3:54 p.m. (SR 1). The Notice was filed one day after the deadline had lapsed. Additionally, the Certificate of Service indicates that State's Attorney Wendt was served by electronic case filing on March 27, 2018. (SR 3). However, State's Attorney Wendt was only served by electronic mail on March 28, 2018. (SR 8, Exhibit G). Additionally, the Certificate of Service, attached hereto as Exhibit H, indicates that the Butte County Auditor was served by "Email" on March 27, 2018. (SR 3). The Butte County Auditor was not served by electronic mail until March 28, 2018. (SR 8, Exhibit G). Finally, the Certificate of Service indicates that Max Main was served by electronic case filing on March 27, 2018. (SR 8, Exhibit H). Again, Mr. Main was served by electronic mail on March 28, 2018. (SR 8, Exhibit H).

Finally, SDCL 31-3-34 provides that a person who feels aggrieved by the final decision of the board "may appeal from such decision to the circuit court for the county within thirty days after the date on which the decision of the board has become effective by serving a written notice of appeal describing the decision from which appeal is being taken upon one of the members of the board by one of the methods prescribed in § 15-6-4." In this case, Appellant chose service by the Butte County Sheriff upon a member of the County Commission. However, this service was required to be completed prior to midnight on March 26, 2018, thirty days from the date of the final publication when the decision to vacate the road became effective. Butte County Commissioner Stan Harms was not served until March 27, 2018 at 7:37 p.m. (SR 8, Exhibit E). Thus, the time for service under SDCL 31-3-34 had lapsed and SDCL 31-3-34 was not strictly followed.

Appellants argue that their time to appeal did not start to run until thirty days after the final publication, or on the date of vacation. However, this argument disregards the plain language of SDCL 31-3-9. Appellant is confusing the date in which the decision of the board became effective with the date in which the road became vacated. SDCL 31-3-9 states that the vacation occurs “unless appeal as provided for in this chapter.” Thus, the effective date of the board’s decision occurred on the date of the second publication, or February 23, 2018. (SR 8, Exhibit D). Vacation does not occur until thirty days after the date in which the decision of the board became effective. The statutory construction indicates that the appeal must occur within the thirty days after the second publication. Appellants are attempting to prolong the appeal period to allow sixty days, however, that would put the appeal after the vacation date and return of the land to its original owners.

Contrary to Appellants’ argument, the statutory language establishes the “effective date” of the decision of the Board of County Commissioners as February 23, 2018, the date of the final publication. There is a distinct difference between the “effective date” and the date of vacation. Pursuant to SDCL 31-3-9, the “vacation date” is thirty days after the effective date, unless appeal is taken. Appellants had thirty days prior to the vacation date to file an appeal. They failed to do so. Appellees and the Circuit Court found the deadline for the appeal and service upon a member of the County Commission to be prior to midnight on March 26, 2018. Appellants argue that, pursuant to SDCL 31-3-10, upon vacation of a highway, the land embodied therein shall revert to the original owners. Appellee’s do not disagree. However, the public policy behind handling a road closure versus any other ordinance or resolution is that the appeal be

settled prior to the return and distribution of the land to the original owners. Thus, it is necessary to handle the appeal prior to vacation.

Appellants' argument is also contrary to the principles of strict statutory construction. Appellants also argue that, to make its decision, the court must rely on SDCL 7-18A-8. However, case law provides that "[t]he 'terms of a statute relating to a particular subject will prevail over the general terms of another statute.'" *In re Keystone XL Pipeline*, 2018 S.D. 44, ¶¶ 18-19, 914 N.W.2d 550, 557 (citing *In re Wintersteen Revocable Trust Agreement*, 2018 S.D. 12, ¶ 12, 907 N.W.2d 785, 789). SDCL 31-3-9 and 31-3-34 specifically address appeals from final decisions rendered by the Commission relating to road closures, while SDCL chapter 7-18A generally governs ordinances and resolutions. More specifically SDCL 7-18A-8 provides for effective dates of ordinances and resolutions where no specific effective date is provided by statute. As such, SDCL 31-3-9 and 31-3-34 are the more specific statutes relating to road closure and, as such, their terms prevail over the provisions of SDCL chapter 7-18A.

It is clear by the plain meaning of the statute that the Legislature intended the closure of roads to be handled in a manner different than general ordinances and statutes. As such, the Legislature laid out the specific way road closures should be handled within SDCL 31-3 and, specifically; the Legislature set out in SDCL 31-3-9 that "such highway shall be, after a lapse of thirty days, vacated . . . without further proceedings unless appeal as provided for in this chapter."

This Court has also said that "the more recent statute supersedes an older statute." *Peterson, ex rel. Peterson v. Burns*, 2001 S.D. 126, ¶ 29, 635 N.W.2d 556, 567. The Legislature enacted SDCL 31-3-9 in 1985 and SDCL 7-18A-8 in 1975. We must

presume the 1985 Legislature knew that SDCL chapter 7-18A broadly provided for an “effective date” for ordinances and resolutions when it specifically provided its procedures contained in SDCL 31-3-9 and 31-3-34 for appeals to circuit court regarding road closures.

In *Upell v. Dewey County Commissioners*, 2016 SD 42, 12, the Supreme Court reviewed a similar issue. In *Upell*, an appeal to the circuit court was made without fulfilling the requirement of service upon one of the members of the board. *Id.* at ¶12. The Supreme Court in *Upell* found the failure to strictly follow statute to be a jurisdictional defect, found lack of subject matter jurisdiction and dismissed the appeal. *Id.* The requirement set out in *Schrank* also provides that “strict compliance with the service provisions of SDCL 7-8-29 and its recognition that lack of strict compliance deprives the circuit court of subject matter jurisdiction.” See *Schrank v. Pennington County Board of Commissioners*, 1998 SD 105, 108, 584 N.W.2d 680, 681. “Absent jurisdiction, no other course remained for the court but to dismiss the appeal.” *Id.* See also *Woods v. Unified Gov’t of WYCO/KCK*, 294 Kan. 292, 275 P.3d 46, 51 (Kan. 2012) (holding “the district court had no other choice but to dismiss the untimely-filed appeal.”); *In re Int. of B.M.H.*, 233 Neb. 524, 446 N.W.2d 222, 224 (Neb. 1989) (noting in dismissing an appeal that “[a]n appellate court acquires no jurisdiction unless the appellant has satisfied the requirements for appellate jurisdiction, including a notice of appeal filed within the prescribed time.”).

In this case, SDCL 31-3-34 describes the requirements for service on a member of the board, the time frame in which service shall occur, and the method of service which is required. Here, service was not made on “one of the members of the board by one of the

methods prescribed in § 15-6-4” within thirty days after the date on which the decision of the board has become effective as required by SDCL 31-3-34. Thus, the court should dismiss the appeal under *Upell v. Dewey County Commissioners*, 2016 SD 42 and *Shrank v. Pennington County Board of Commissioners*, 1998 S.D. 105, 584 N.W.2d 680.

CONCLUSION

The Circuit Court correctly held that Appellant’s failure to strictly follow SDCL 31-3-9 and 31-3-34 constituted a jurisdictional defect denying the court of subject matter jurisdiction and, therefore, requiring dismissal of the appeal. SDCL 31-3-9 and 31-3-34 are the more specific of the statutes relating specifically to road closure and, as such, prevails over the provisions of SDCL chapter 7-18A. It is also clear by the plain meaning of the statute that the Legislature intended the closure of roads to be handled in a manner different than general ordinances and statutes. As such, the Legislature laid out the specific way road closures should be handled within SDCL 31-3 and, specifically; the Legislature set out in SDCL 31-3-9 that “such highway shall be, after a lapse of thirty days, vacated . . . without further proceedings unless appeal as provided for in this chapter.” As SDCL 31-3-9 was enacted in 1985 and SDCL 7-18A-8 in 1975, the procedures contained in SDCL 31-3-9 and 31-3-34 for appeals to circuit court regarding road closures supersedes.

Dated this ____ day of October, 2018.

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CERTIFICATE OF COMPLIANCE

Pursuant to SDCL 15-26A-66(b)(4), I certify that Appellee's Brief complies with the type volume limitation provided for in the South Dakota Codified Laws. This brief is 8 pages in length and contains 2,350 words and 14,122 characters. It is typed in Times New Roman font 12 point. I have relied on the word and character count of my word-processing system used to prepare this brief. The original Appellee's Brief and all copies are in compliance with this rule.

Dated this _____ day of October, 2018.

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CERTIFICATE OF SERVICE AND MAILING

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APPENDIX

IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

Appeal No. 28649

ABBY OLSON, BEN BLAKE and
JODI L. MASSIE
Appellants

vs.

BUTTE COUNTY COMMISSION
Appellee

And

CHRIS KLING
Intervenor/Appellee

APPEAL FROM THE CIRCUIT COURT
FOURTH JUDICIAL CIRCUIT
BUTTE COUNTY, SOUTH DAKOTA

HONORABLE MICHELLE COMER,
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ARGUMENT AND AUTHORITIES

1) The Circuit Court erred in determining that the effective date of the Butte County Commissioner's decision was the last date of publication rather than thirty days following the last date of publication.

Appellee and Intervenor/Appellee Chris Kling (hereinafter collectively referred to as Appellees) contend that the effective date of the board's decision was the last date of publication. Intervenor and Appellee Chris Kling's Brief p 6. In support of this contention, Appellees merely set forth the conclusory statement that SDCL §31-3-9 "requires that the resolution 'shall be published . . . once each week for at least two consecutive weeks', making the resolution effective after the second publication," and cites the Court to SDCL §§31-3-9 and 31-3-34 in support thereof. Intervenor and Appellee Chris Kling's Brief p 6. However, a review of these statutes makes it readily apparent that the effective date of the board's decision is thirty days after the last date of publication and that the date by which an appeal must be taken is thirty days after the effective date. SDCL §§31-3-9, 31-3-34.

SDCL §31-3-34 states, in full:

Any person who is a resident or landowner of such county or of land lying within ten miles of the boundaries of such county and who feels aggrieved by the final decision of the board in awarding or refusing to award damages in locating, vacating, or changing any public highway under the provisions of this chapter, or, notwithstanding the provisions of § 31-3-14, any person who is a resident or landowner of such county or of land lying within ten miles of the boundaries of such county and who feels aggrieved by the final decision of the board in locating, vacating, or changing any

public highway under the provisions of this chapter, *may appeal from such decision to the circuit court for the county **within** thirty days **after** the date on which the decision of the board has become effective* by serving a written notice of appeal describing the decision from which appeal is being taken upon one of the members of the board by one of the methods prescribed in § 15-6-4. The appeal so taken shall be docketed as other causes pending in such court, and the same shall be heard and determined de novo.

(Emphasis added.) Thus, as stated in Appellants' Brief, the question becomes when does the board's decision to vacate become effective, *i.e.*, what is the "effective date." Despite Appellees' assertion that SDCL §§31-3-9 and 31-3-34 provide that the effective date of the board's decision is thirty days from the last date of publication, nowhere in SDCL Title 31, including SDCL Ch. 31-3 and SDCL §§31-3-9 and 31-3-34 does the South Dakota Legislature expressly state the actual date on which the board's decision becomes effective. More specifically, there is not a definition of "effective date;" there is not a statute that unequivocally states that "the effective date of the board's decision is the last date of publication;" and there is not a statute that unequivocally states "the effective date of the board's decision is thirty days after the last date of publication." Thus, despite Appellees' contention, a simple reading of these statutes does not expressly and unequivocally state the date that the board's decision becomes effective.

Fortunately, the South Dakota Supreme Court has provided the legal community with guidance for these types of situations in the form of rules of statutory construction. *Martinmaas v. Engelmann*, 2000 SD 85, ¶48, 612 NW2d 600, 611; *Moss v. Guttormson*, 1996, SD 76, ¶10, 551 NW2d 14, 17; *US West Communications, Inc. v. Public Util.*

Comm’n, 505 NW2d 115, 122-23 (SD 1993). More specifically, the South Dakota Supreme Court has stated:

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. The intent of a 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.

Martinmaas v. Engelmann, 2000 SD 85, ¶48, 612 NW2d 600, 611 (quoting *Moss v. Guttormson*, 1996, SD 76, ¶10, 551 NW2d 14, 17 (citing *US West Communications, Inc. v. Public Util. Comm’n*, 505 NW2d 115, 122-23 (SD 1993) (citations omitted))).

Appellees, however, refuse to acknowledge the plain and ordinary meaning of “effective date.” The plain and ordinary meaning of “effective date” is readily found in Black’s Law Dictionary, which defines “effective date” as “[t]he date on which a statute, contract, insurance policy, or other such instrument *becomes enforceable or otherwise takes effect*, which sometimes differs from the date on which it was enacted or signed.” Black’s Law Dictionary 554 (8th ed. 2004) (emphasis added).

In order to determine the intent of the law through the application of the rules of statutory construction by giving “effective date” its plain meaning and effect, a review of SDCL Ch. 31-3 must be conducted to determine the date when the board’s decision actually becomes enforceable or otherwise takes effect. See *Martinmaas*, 2000 SD 85, ¶48, 612 NW2d at 611 (setting forth rules of statutory construction) (citations omitted); Black’s Law Dictionary 554. In this case, the decision of the board was to vacate a portion of a roadway. Thus, the decision to vacate a roadway or highway becomes

enforceable or otherwise goes into effect on the date that the roadway or highway is vacated. *See Martinmaas*, 2000 SD 85, ¶48, 612 NW2d at 611 (setting forth rules of statutory construction) (citations omitted). Such is the only interpretation of the effective date that is consistent with the application of the rule of statutory construction of giving words their plain meaning and effect. *See id.*

A review of SDCL §31-3-9 clearly sets forth the date on which the roadway or highway will actually be vacated. More specifically, SDCL §31-3-9 provides, in full:

Such resolution and order shall be printed in the minutes of the meeting of the board and the resolution *shall be published in the official newspaper of said township, if any, otherwise in the nearest legal newspaper to said highway, once each week for at least two consecutive weeks, and such highway shall be, after a lapse of thirty days, vacated, changed, or located*, without further proceedings unless appeal as provided for in this chapter.

(Emphasis added.) Clearly, the roadway will not be vacated until thirty days after the last date of publication of the resolution. Considering the plain meaning and effect of “effective date” is the date the decision “becomes enforceable or otherwise takes effect,” the effective date of the board’s decision to vacate the roadway is thirty days after the last date of publication when the road is actually vacated as that is the date the decision actually becomes enforceable or otherwise takes effect. Black’s Law Dictionary 554.

SDCL §31-3-10 confirms that the effective date of the board’s decision is thirty days after the last date of publication. More specifically, SDCL §31-3-10 provides that it is only after the requirements of SDCL §§ 31-3-6 to 31-3-9 have been satisfied, which includes the vacation following the lapse of the thirty days from the last date of

publication, the title to the land reverts to the owners. Clearly, it is after the lapse of thirty days from the last date of publication that the board's decision to vacate becomes enforceable or otherwise takes effect, as it is only after the lapse of thirty days from the date of publication that the roadway can be vacated and that title can revert to the original owners. SDCL §31-3-9; SDCL §31-3-10. Again, this is the only reading consistent with the rules of statutory construction that require "effective date" be given its plain meaning and effect, *i.e.*, the date the decision "becomes enforceable or otherwise takes effect."¹ *Martinmaas*, 2000 SD 85, ¶48, 612 NW2d at 611; Black's Law Dictionary 554.

Next, Appellees attempt to argue that the "effective date" as utilized in SDCL §31-3-34 is different from the date that the roadway is vacated as set forth in SDCL §31-3-9. Appellee's Brief, p. 5. Appellees look to the last eight words of SDCL §31-3-9 in support of this position. More specifically, Appellees contend that "SDCL 31-3-9 states that the vacation occurs 'unless appeal as provided for in this chapter' and that '[v]acation does not occur until thirty days after the date in which the decision of the board becomes effective.'" Appellee's Brief p. 6 (emphasis in original). However, this argument can only be made by refusing to read the dependent clause at the end of SDCL §31-3-9 as a whole.

For convenience sake, once again SDCL §31-3-9 states, in full:

Such resolution and order shall be printed in the minutes of the meeting of the board and the resolution shall be published in the official newspaper of said township, if any, otherwise in the nearest legal newspaper to said

¹ Appellees argue that "the public policy behind handling a road closure versus any other ordinance or resolution is that the appeal be settled prior to the return and distribution of the land to the original owners. Appellee's Brief, p. 5-6. Notably, Appellees do not cite any legal authority for this position or provide any additional insight as to the alleged public policy. Appellees do not provide such legal authority or insight because none exists.

highway, once each week for at least two consecutive weeks, and such highway shall be, after a lapse of thirty days, vacated, changed, or located, *without further proceedings unless appeal as provided for in this chapter.*

(Emphasis added.) Appellees are failing to acknowledge that “without further proceedings unless appeal as provided for in this chapter” is a dependent clause that is a prepositional phrase. In this statute, the prepositional phrase “without further proceedings unless appeal as provided for in this chapter” is being used to explain the relationship between the necessity of further proceedings and the vacation of the roadway after the lapse of thirty days from the last date of publication. More specifically, the prepositional phrase is explaining that after the lapse of thirty days from the last date of publication, the roadway will be vacated without the necessity of additional proceedings unless there is an appeal as provided for in SDCL Ch. 31-3. Thus, this prepositional phrase is being used to describe how the highway is vacated after a period of thirty days from the last date of publication, and is not being used to describe the timing of the vacation. Conversely, the prepositional phrase “after a lapse of thirty days,” which is in the very same sentence, is being used to describe the timing for the vacation to take effect, *i.e.*, the effective date of the board’s decision to vacate. SDCL §31-3-9

When the prepositional phrase is read as a whole, it is clear that the “unless appeal as provided for in this chapter,” is being used as a condition upon which further proceedings may be necessary after the lapse of the thirty day period following the last date of publication in order to vacate the highway. In fact, the very definition of “unless” is “except on the condition that.” Merriam Webster Collegiate Dictionary 1294 (10th ed. 1998). Therefore, “unless appeal as provided for in this chapter” is making it clear that

further proceedings will not be necessary for the vacation of the road after the lapse of thirty days from the last date of publication except in the event that an appeal is filed as provided for in this chapter. In other words, “unless appeal as provided for in this chapter” makes it clear that further proceedings for the vacation of the road will occur after the thirty day period following last date of publication in the event that an appeal is taken as provided for in this chapter.

Despite Appellees contention, the prepositional phrase does not provide that the vacation of the highway will occur after thirty days unless an appeal is taken within that thirty day time period. Again, when read as a whole, the prepositional phrase provides that following the lapse of thirty days from the date of publication the vacation of the roadway will occur without the need for additional proceedings except that additional proceedings will be required if an appeal is taken as provided for in this chapter.

Moreover, despite Appellees’ strong desire to rewrite the prepositional phrase, the prepositional phrase does not state without further proceedings *unless appeal is taken within thirty days from the last date of publication*. Rather, the preposition phrase expressly states “without further proceedings *unless appeal as provided for in this chapter*.” SDCL §31-3-9. Again, the prepositional phrase is explaining how further proceedings will be needed for the vacation of the roadway after the lapse of thirty days from the last date of publication, it is not addressing the timing.

How an “appeal as provided for in this chapter” is actually taken, on the other hand, is set forth in SDCL §31-3-34, which provides that an appeal must be taken “within thirty days after the date on which the decision of the board has become effective.” Thus,

if an appeal is taken within thirty days after the decision of the board has become effective, *i.e.*, the date the board's decision to vacate becomes enforceable or otherwise takes effect, then there will be further proceedings on the vacation of the highway after the lapse of thirty days from the last date of publication. Despite Appellees' attempts to rewrite the statutes, SDCL §31-3-34 does not state that an appeal must be taken within thirty days from the last date of publication; rather, it clearly states that an appeal must be taken within thirty days of the effective date of the board's decision.

While Appellees missed the point in their briefs, if the Legislature had intended to require the appeal to be taken within the thirty day period from the last date of publication, it would have actually stated so in the statute. Again, the South Dakota Supreme Court, in setting forth the rules of statutory construction has stated that “[w]hile every word of a statute must be presumed to have been used for a purpose, it is also the case that every word excluded from a statute must be presumed to have been excluded for a purpose.” *Wheeler v. Farmers Mut. Ins. Co. of Nebraska*, 2012 SD 83, 824 NW2d 102. While SDCL §31-3-14 addresses decisions made by a township board as opposed to decisions made by a county commission board, SDCL §31-3-14 clearly establishes that the Legislature knew how to set a deadline to take an appeal based upon the publication date. More specifically, SDCL §31-3-14 expressly provides that a voter may appeal a decision of the township board by filing “with the township clerk a notice in writing ***within thirty days from the date of the first publication.***” (Emphasis added.) Thus, it must be presumed that the South Dakota Legislature excluded the language “within thirty days from the [last] date of publication” from SDCL §31-3-34, despite the fact that such

language was expressly used in SDCL §31-3-14, for a purpose, consistent with the rules of statutory construction.

Furthermore, SDCL §31-3-9 also establishes that the Legislature knew how to set a date based upon the publication date. More specifically, SDCL §31-3-9 provides that a resolution published “once each week for at least two consecutive weeks, and such highway shall be, after a lapse of thirty days, vacated, changed, or located.” Thus, the Legislature set the date upon which the resolution to vacate a roadway would become effective by setting the date that the vacation would actually occur at thirty days after the last date of publication. Thus, it must be presumed that the South Dakota Legislature’s exclusion of similar language to set the deadline for appeal after a lapse of thirty days from the last date of publication from SDCL §31-3-34 was done for a purpose, consistent with the rules of statutory construction.

While it must be presumed that the Legislature’s exclusion of words that it used in other statutes to establish a deadline based on the last date of publication was done for a purpose, it must also be presumed that the words the Legislature actually used in SDCL §31-3-34, *i.e.*, “***within*** thirty days ***after*** the date on which the decision of the board has become effective,” were used for a purpose. The presumption can only be that the Legislature intended different meanings. More specifically, the words utilized in SDCL §31-3-34 when compared to the words utilized in other statutes, and especially SDCL §§31-3-9 and 31-3-14, establish the Legislature’s intention that the deadline to appeal the board’s decision was to be thirty days from the effective date of the decision, not thirty days from the last date of publication.

While Appellees point to the statutory history of SDCL §31-3-34 as support for their position, the statutory history actually provides additional support to Appellants' argument. Appellees point out that prior to its 1985 amendment, SDCL §31-3-34 stated that an appeal may be taken "in the manner and within the time prescribed for other appeals from decisions of boards of county commissioners." The manner and within the time prescribed for other appeals from decisions of boards of county commissioners is found in SDCL §7-8-29, which provides that "[s]uch appeal shall be taken within twenty days after the publication of the decision of the board by serving a written notice on one of the members of the board." Thus, while the pre-1985 amendment to SDCL §31-3-34 would support Appellees' current argument, when the rules of statutory construction are applied by comparing the pre-1985 amendment language to the language utilized following the amendment, the Legislature's intent to base the deadline off of the effective date instead of the last date of publication becomes clear.

The pre-1985 language makes it clear that the Legislature knew how to provide for an appeal to be taken within a period of time from the last date of publication. However, when the Legislature amended the statute, it actually excluded the language that provided for an appeal to be taken within a period of time from the last date of publication and expressly included language providing for an appeal to be taken within thirty days after the date the board's decision becomes effective. Again, the rules of statutory construction provide that "[w]hile every word of a statute must be presumed to have been used for a purpose, it is also the case that every word excluded from a statute must be presumed to have been excluded for a purpose." *Wheeler*, 2012 SD 83, 824 NW2d 102. Thus, we must presume that there was a purpose for the Legislature's

removal and exclusion of language that would require for an appeal to be taken within a certain period of time from the last date of publication and for the Legislature's decision to actually replace such language with language that expressly requires an appeal to be taken within a certain period of time after the effective date of the board's decision. Clearly, the purpose is that the Legislature intended for the deadline to appeal a board's decision to vacate a highway to be within thirty days after the effective date of the board's decision, not within thirty days from the last date of publication.

As stated in the beginning of Appellants' Brief, the question is what is the effective date of the board's decision. As explained in detail, "effective date" is the date the decision becomes enforceable or otherwise takes effect. Black's Law Dictionary 554. Thus, the effective date of a decision to vacate a road would be the date the vacation actually occurs, *i.e.*, the date the vacation goes into effect. SDCL §31-3-9 provides that the vacation occurs thirty days after the last date of publication, which is further reinforced in SDCL §31-3-10.

If the Legislature had intended for the appeal to be filed within thirty days of the last date of publication, it would have said so, just as it did in SDCL §31-3-14 and just as it used similar language in SDCL §31-3-9. The Legislature, however, did not state that an appeal had to be taken within thirty days of the last date of publication but, instead, stated that an appeal must be taken within thirty days after the effective date of the board's decision. Thus, despite Appellees' refusal to acknowledge the actual words utilized by the Legislature, it is clear that the Legislative intent was for the deadline to file an appeal to be within thirty days after the effective date of the board's decision, not thirty days from the last date of publication.

The fact that the effective date of the board's decision is different from the last date of publication is evident from SDCL §7-18A-8, which is the only other statute relating to a decision by a county commission board, in which Legislature refers to the effective date of the board's decision. SDCL §7-18A-8 expressly provides, in pertinent part, that "every resolution or ordinance passed by a board shall take effect on the twentieth day after its completed publication unless suspended by operation of a referendum." While Appellees attempt to argue that SDCL §7-18A-8 is not applicable because it only applies to referendums, such argument is made only due to their continued lack of understanding of prepositional phrases. In any event, it is clear that when decisions made by boards of county commissions are involved, there is a difference between the effective date of the statute and the last date of publication.

Finally, once again, the fact that a reading of the statutes as a whole makes it clear that the effective date of the board's decision is thirty days after the last date of publication is evidenced by Butte County Auditor Elaine Jensen's email of February 21, 2018, to Appellants' attorney John Frederickson. In the email, Ms. Jensen explained the effective date of the board's decision would be 30 days after final publication, which is exactly what Appellants' have contended throughout this entire proceeding.

CONCLUSION

Pursuant to SDCL §31-3-34, Appellants had thirty days from the date that the board's decision became effective to appeal the board's decision. When the rules of statutory construction are applied, it is clear that the effective date of the board's decision to vacate the road is the date the road was vacated, *i.e.*, the date the vacation went into

effect. The application of the rules of statutory construction also makes it clear that the effective date and the last date of publication are two different things. As a result, whether the effective date is thirty days after the last date of publication at which point the vacation takes effect pursuant to SDCL §31-3-9 or twenty days after the last date of publication pursuant to SDCL §7-18A-8, Appellants' served their Notice of Appeal well within the thirty day period after the effective date as required in SDCL §31-3-34. As a result, the circuit court's dismissal of Appellants' appeal should be reversed, and the action should be remanded to the circuit court for further proceedings.

Dated this 18th day of October, 2018.

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CERTIFICATE OF COMPLIANCE

Pursuant to SDCL 15-26A-66(b)(4), we certify that Appellants' Reply Brief complies with the type volume limitation provided for in the South Dakota Codified Laws. This Reply Brief is 15 pages in length and contains 3,869 words and 23,456 characters. It is typed in proportionally spaced typeface Times New Roman font 12 point.

We have relied on the word and character count of our word processing system used to prepare this Reply Brief. The original Appellants' Reply Brief and all copies are in compliance with this rule.

Dated this 18th day of October, 2018.

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CERTIFICATE OF SERVICE

The undersigned hereby certify that on the 18th day of October, 2018, a true and correct copy of ***Appellants' Reply Brief*** was served in the following manner upon the following person, by placing the same in the service indicated, postage prepaid as applicable, addressed as follows:

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