

STATE OF SOUTH DAKOTA
SOUTH DAKOTA WATER MANAGEMENT BOARD

IN THE MATTER OF GEORGE
FEREBEE'S PETITION FOR
DECLARATORY RULINGS

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* JOINT MEMORANDUM OF LAW OF
* CITY OF SIOUX FALLS AND SOUTH
* DAKOTA MUNICIPAL LEAGUE
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The City of Sioux Falls ("City") and the South Dakota Municipal League ("Municipal League") hereby file this Joint Memorandum of Law in support of their position that the Ferebee petitions¹ should be denied or dismissed.²

Jurisdiction. Mr. Ferebee is asking the Water Management Board (Board) to rule that cities and counties lack authority to regulate or prohibit on-site wastewater systems, pit privies, or cesspools constructed before February 28, 1975. Ferebee relies on ARSD 74:53:01:04 and ARSD 74:53:01:18, which, together, provide that Department of Environment and Natural Resources (DENR) rules do not apply to any such facilities constructed prior to February 28, 1975.

While the Board holds authority to issue declaratory rulings regarding administrative rules it adopted or even statutory provisions it administers, the Board lacks authority to invalidate *separate city and county ordinances*

¹ Ferebee has filed two petitions for declaratory ruling, but the legal issues appear to be virtually the same and this Memorandum of Law applies to both.
² The Municipal League and the City also join in the Pennington County arguments.

stemming from separate state statutes not administered by the Board.

Further, because the Board lacks authority to grant coercive relief, the Board cannot compel cities or counties to refrain from enforcing their ordinances.

Romey v. Landers, 392 N.W.2d 415 (1986). As such, the Board does not have jurisdiction to make the ruling Mr. Ferebee seeks or to enforce such ruling.

Municipal authority. Municipalities hold significant authority to regulate and restrict waste water systems independent of the Department of Environment and Natural Resources (DENR). This includes SDCL 9-12-17 (to prevent groundwater pollution); SDCL 9-32-1 (to promote health and suppress disease); and SDCL 9-29-13 (prevent, abate, and remove nuisances). Further, because municipalities own City water systems, they have the duty to protect such systems from pollution or injury to city water system. SDCL 9-32-8.

Consistent with the foregoing authority, state laws have long authorized cities to regulate or prohibit private on-site sanitary systems, privies, and cesspools. The following laws have been in existence for decades and expressly authorize cities to regulate private sewers:

SDCL 9-32-6. Every municipality shall have power to compel the owner of any stable, pigsty, privy, sewer, cesspool, or of any unwholesome or nauseous thing or place to cleanse, abate, or remove the same and to regulate the location thereof. **Source:** SL 1890, ch 37, art V, § 1, subdiv 68; RPolC 1903, § 1229, subdiv 68; SL 1913, ch 119, § 53, subdiv 68; RC 1919, § 6169 (44); SDC 1939, § 45.0201 (36).

SDCL 9-32-9. Every municipality shall have power to regulate the construction, repair, and use of vaults, cisterns, areas, hydrants, pumps, sewers, and gutters. **Source:** SL 1890, ch 37, art V, § 1, subdiv 42; RPolC 1903, § 1229, subdiv 42; SL 1913, ch 119, § 53, subdiv 42; RC 1919, § 6169 (71); SDC 1939, § 45.0201 (90).

If the state legislature wanted to repeal or revise these laws to take away City authority, it would have done so. Indeed, in the 1970's the state legislature enacted much of the water pollution control language now in SDCL ch. 34A-2. If the legislature intended to repeal the forgoing city statutes at the time, it would have done so then. The legislature is presumed to act with full knowledge and information as to prior and existing law on the same subject when it enacts new legislation. *State Highway Commission On Behalf Of State v. Wiczorek* 248 N.W.2d 369 (1976).

If the legislature had repealed SDCL 9-32-6 and SDCL 9-32-9 and other laws applying to city control of waste or protection of its water supply, then any city created under state statute would lack authority to regulate or prohibit on-site sewer systems and privies and cesspools. This is because cities created under state statute only hold such authority as is expressly granted to them by statute or such power as is necessarily implied from or incidental to such statutory power. *City of Pierre v. Blackwell*, 635 N.W.2d 581, 2001 SD 127.

The legislature could have gone even further and expressly forbidden cities from regulating or prohibiting on-site sanitary systems or privies or cesspools. In such a case, even charter cities would have been barred from regulating such systems. Under the South Dakota Constitution, Article IX, charter cities hold authority granted through their charters, but would not be able to regulate private on-site sewer systems if the legislature expressly prohibited them from doing so.

Important to this situation, the state legislature did *not* repeal the forgoing state laws and also did *not* forbid cities from regulating or prohibiting

on-site sewer systems, privies, cesspools and the like. Instead, these statutes remain in place and cities have continued to regulate and/or prohibit private sanitary sewer systems.³

Statutory Authority for DENR Rules. *In addition* to the foregoing City authority, the legislature revised state law applying to water pollution in the 1970's and authorized a state regulatory board (predecessor to the Water Management Board) to promulgate rules to implement the new laws.⁴ As such, SDCL 34A-2-93, SDCL 34A-2-20, and SDCL 34A-2-21 form the legal basis for the rules at issue in this proceeding: ARSD 74:53:01:04 and ARSD 74:53:01:18.

The purpose of administrative rules is to interpret and “perfect the details” of “plans” enacted by the legislature in statutes. *In re Dakota Transp. of Sioux Falls*, 67 S.D. 221, 231, 291 N.W. 589, 594 (1940). In other words, when the legislature enacted SDCL ch. 34A-2, it developed a “plan” for pollution control and then authorized creation of rules to implement the plan. Important to the issue here, nothing in SDCL ch. 34-2 directs adoption of rules abrogating local government regulation of on-site sewer systems, cesspools, or privies. Nothing in SDCL ch. 34-2 authorizes rules to grant on-site sewer systems, cesspools or privies any special status free from regulation by local government. In other words, if the Board of Environmental Protection had

³ City of Sioux Falls, for example, began regulating on-site wastewater systems in 1908 and has prohibited privies and cesspools for decades.

⁴ These laws were enacted as SDCL ch. 46-25, but have since been changed to SDCL ch. 34A-2. Rules implementing them, including the rules at issue in this proceeding, were originally contained in ARSD ch. 34:04, and then in ARSD 74:03, but are now in ARSD ch. 74:53. The rules at issue in this proceeding have not changed since they were adopted.

wanted to grant such a special status it could *not* have done so because it would have lacked authority. Rules adopted in contravention of statutes are invalid. *In the Matter of the Application of Yanni*, 697 N.W.2d 394 (2005); *Cavanagh v. Coleman*, 72 S.D. 274, 277, 33 N.W.2d 282, 284 (1948) (citing *In re Dakota Transp. of Sioux Falls*, 67 S.D. 221, 291 N.W. 589).

Exemptions. The Board rule at issue is an *exemption from state regulations*. Common sense dictates that an exemption from one particular rule or set of rules cannot be assumed to constitute an exemption from other regulations or rules. For example, the fact that an electric cooperative is exempt from state Public Utilities Commission rate regulation does not constitute an exemption from other PUC regulations applying to quality of service. *In the Matter of the Public Utilities Commission Declaratory Ruling*, 364 N.W.2d 124 (1985). Likewise, a constitutional or statutory exemption from real property taxation is an exemption from ordinary taxes only and does not include an exemption from special assessments for local improvements. *C. A. Wagner Const. Co. v. City of Sioux Falls*, 771 S.D. 587, 27 N.W.2d 916 (1947).

In the situation here, the exemption from state DENR requirements does not apply to ordinances enacted by local bodies under completely different statutes.

The language of the rule. Importantly, the rule itself says nothing about city or county regulations. The chapter of the state rules involved (now ARSD ch. 74:53) only applies to *state* regulations. The DENR rule exempted then-existing private sanitary systems from the reach of *state* regulation by the DENR, leaving older systems to be regulated under the prior regulatory

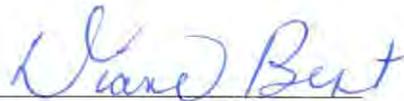
scheme, i.e. cities and other local entities with authority to regulate them. The rule did not bar cities and counties from continuing to regulate private sanitary sewers as they had historically done. Likewise, the rule did not grant anyone a waiver from city or county requirements. In fact, the rule says nothing about city or county regulations whatsoever.

SUMMARY

The Ferebee request ought to be dismissed for lack of jurisdiction or due to the Ferebee's failure to submit a factual situation. Further, if the Board were to entertain this request, it should rule against Mr. Ferebee's position based on long standing statutes applying to cities, state Supreme Court precedent applying to administrative rules, and the language of the rule itself.

Dated this 12th day of October, 2016.

CITY OF SIOUX FALLS



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Dated this 12th day of October, 2016.

SOUTH DAKOTA MUNICIPAL LEAGUE



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CERTIFICATE OF SERVICE

I, Diane Best, hereby certify that on this 12th day of October, 2016 I sent true and correct copies of the *Memorandum of Law of the City of Sioux Falls and the South Dakota Municipal League* in the above entitled matter by email to the addresses stated below:

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