

MOHRMAN, KAARDAL & ERICKSON, P.A.

ATTORNEYS AND COUNSELORS AT LAW

150 SOUTH FIFTH STREET
SUITE 3100
MINNEAPOLIS, MINNESOTA 55402

VINCENT J. FAHNLANDER

TELEPHONE: 612/341-1074
FACSIMILE: 612/341-1076
WRITER'S E-MAIL: FAHNLANDER@MKLAW.COM

April 3, 2020

Via E-mail and U.S. Mail

Office of the State's Attorney
Attn: William H. Golden
Email: auditor@lincolncountysd.org
104 N. Main Street Suite 200
Canton, SD 57013-1703

Re: Lincoln County Board of Commissioners' Resolution No. 2002-27

Dear Mr. Golden:

I received your March 27, 2020 letter, and though it is not clearly stated, I am assuming that rather than correspond with the County Auditor or Board of Commissioners, my correspondence should be with you instead. I am addressing this letter as indicated because I could not locate an email address for you, and trust that this will get to you and the proper parties.

I have reviewed your letter, and disagree with your argument that "notice" was properly provided. However, rather than continue to argue about "notice," there is a more serious defect with the Resolution: it was not passed by a sufficient number of the Board of Commissioners under South Dakota law. Accordingly, my client David Tuntland, a taxpayer in Lincoln County, is demanding that this Resolution be rescinded and no further action taken pursuant to it because it is void.

South Dakota law provides that: "[a]ny **lease-purchase agreement for a term exceeding one year** requires the approval of **more than sixty percent of the members-elect of the board of commissioners**. The final adoption of any lease-purchase agreement shall be by resolution which may be referred pursuant to chapter 7-18A." *S.D. Codified Laws § 7-21-16.1* (emphasis added).

Thus, if the "lease-purchase agreement" is "for a term exceeding one year," the approval of "**more** than sixty percent of the members elect of the board of commissioners" is required. By its terms, the Resolution is for a "term exceeding one year." Therefore, a sixty percent vote is insufficient; "more" than sixty percent was required.

South Dakota case law is clear that the "literal language" of its statutes will be enforced. See, *Jensen v. Turner Cty. Bd. of Adjustment*, 2007 S.D. 28, ¶ 6, 730 N.W.2d 411, 413 (the literal language was upheld when it required a two-thirds vote).

Perhaps more importantly for the individual commissioners is that entering into contracts based on invalid or void resolutions may make them individually liable. For example, SDCL §7-21-17 provides:

“Each contract made in violation of the provisions of § 7-21-16 is null and void in regard to any obligation thereby purported to be imposed on the county. However, any officer who made or authorized the contract is individually liable for its performance.

Each officer present when the unlawful contract is made, or authorized to be made is deemed to have participated in the making or authorization of the contract, unless the officer dissents therefrom and enters, or causes to be entered, such dissent on the records of the county.

S.D. Codified Laws § 7-21-17 (emphasis added).

SDCL §7-21-27 confirms:

“All officers, boards, and members of boards, employees, and all other persons authorizing, contracting, or incurring, or attempting to authorize, contract, or incur any indebtedness or liability for or in behalf of any county or any institution or agency thereof in violation of the provisions of this chapter, or auditing, allowing, ordering paid, drawing, or issuing warrants in payment of, or paying any claims or demands upon or against a county or any institution or agency thereof, for any liability or indebtedness attempted to be created or incurred in violation of the provisions of this chapter shall be jointly and severally liable in person and on their official bonds to the county or to the institution or agency thereof of which they are officers or employees, to the extent of any payment or payments made on such void claims.

S.D. Codified Laws § 7-21-27 (emphasis added).

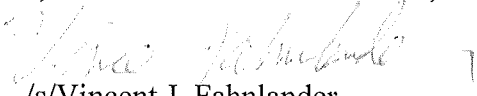
The individual liability of the officers has been upheld by the South Dakota Attorney General. *See, 1977 S.D. Op. Att’y Gen. 69 (1977)* (upholding the specific ways in which the county can make obligations binding itself into the future through issuing bonds or other, and that when the county commissioners do not follow those procedures they are subject to individual liability).

The only proper course of action for the County Board of Commissioners is to rescind the Resolution, give the citizens of Lincoln County proper notice and an opportunity to consider an adequately noticed resolution relating to this very large expenditure for the public safety center, and then to take a new vote passing by “more” than sixty percent of the Commissioners to approve the resolution. Any further action including entering into agreements pursuant to Resolution 2002-27 may subject the commissioners to individual liability. Please advise us promptly as to your proposed course of action. Thank you.

Mr. William Golden
April 3, 2020
Page 3

Sincerely,

MOHRMAN, KAARDAL & ERICKSON, P.A.


By: /s/Vincent J. Fahlander
Vincent J. Fahlander

CC: David Tuntland