Butte County State's Attorney's Office

LeEllen McCartney
State's Attorney
leellen.mccartney@buttesd.org

Edward C. Tarbay
Deputy State's Attorney
edward.tarbay@buttesd.org

24 May 2023

Concerned Citizens of Butte County
% Travis Ismay
19073 Gammon Road
Newell, SD 57760

To whom it may concern:

On the 8 May 2023, Concerned Citizens of Butte County presented a petition titled "A Formal Complaint by the Citizens of Butte County" to the Butte County State's Attorney. The unsigned complaint was accompanied by four pages consisting of 120 signatures, 110 of which were verified as valid resident taxpayer signatures. The complaint lists 10 alleged "infractions" committed by four named members of the Butte County Commission. Five of the infractions allege gross negligence in certain particulars, and five allege gross partiality. The complaint also calls for removal of named members of the Commission from their positions as County Commissioners and that the County hold a special election in 2024 to replace these four named members.

The complaint does not cite a specific statute as authority for the requested remedy, however two South Dakota statutes are implicated by the language of the complaint, SDCL §§ 3-17-6 and 7-16-4. The first statute, SDCL § 3-17-6 provides statutory grounds for removal of officers of local government from their position due to "misconduct, malfeasance, nonfeasance, crimes in office, drunkenness, gross incompetency, corruption, theft, oppression, or gross partiality." The second statute, SDCL §7-16-14, provides for civil action against county commissioners "for malfeasance in office, misappropriation of public funds, or other misconduct" if there is "reasonable cause" to do so and if the civil action is requested by 15 resident taxpayers of the County.

The statutory process for removal of public officials is set forth in SDCL §§ 3-17-6 *et seq*. The South Dakota Supreme Court has termed this process "a drastic remedy" and requires that the reasons for removing public officials be strictly construed. *State ex rel. Steffen v. Peterson*, 2000 SD 39 (quoting *Kemp v. Boyd*, 275 S.E.2d 297, 301 (WVa 1981). As the Court explained, "The remedy provided by removal statutes is heroic in nature and relatively drastic where the usual method of removing officeholders is by resort to the ballot." *State ex rel. Steffen v. Peterson*, 2000 SD 39 ¶ 19. To remove a public official, the evidence for removal must be clear and convincing, which is an extremely high burden of proof. To constitute clear and convincing evidence, there must be evidence that proves the relevant fact by evidence that is "certain, definite, reliable, and convincing." *In re Estate of Dimond*, 2008 SD 131 ¶ 6 (reversed on other grounds). This standard is a more stringent standard than a preponderance of evidence standard normally used in civil proceedings.

The grounds for removal set forth in SDCL § 3-17-6 are "misconduct, malfeasance, nonfeasance, crimes in office, drunkenness, gross incompetency, corruption, theft, oppression, or gross partiality." Most of the grounds are easily defined by their plain meaning, such as misconduct, drunkenness, corruption, and theft.

The Supreme Court has defined "malfeasance" as conduct that impacts how the official performs his/her official duties, and "must relate to something of a substantial nature directly affecting the rights and interests of the public." *State ex rel. Steffen v. Peterson*, 2000 SD 39 ¶ 20. The Court recognizes that what constitutes malfeasance is not easily defined, but it refers to evil conduct or an illegal act "the doing of that which one ought not to do." *Id.* The Court also says that malfeasance is "the performance of an act by an officer in his official capacity that is wholly illegal and wrongful." *Id.* Nonfeasance, on the other hand, is an official's neglect or refusal to do something they have a duty to do. *Id.* In analyzing whether, or not, an official should be removed under this statute, the intent of the official is an important factor. Where there is no intent to "evade or otherwise circumscribe the law," there is no malfeasance or nonfeasance. *State ex rel. Steffen v. Peterson*, 2000 SD 39 ¶ 21.

Gross partiality is considered grounds for removal of local officers under SDCL § 3-17-6. Gross partiality is considered a "for cause" reason for removal of a public officer. Attorney General Opinion 77-81, 1977 SD AG Lexis 25. What constitutes gross partiality is based on facts that show not only that the public official was partial to one party over another, but that partiality was "gross" or overblown such that it resulted in unfair results or a violation of due process. Gross partiality has been equated with undue influence or corruption (*Nova Casualty Company v. Cattle Town Feeders, Ltd.*, 2019 US Dist Lexis 179901), prejudice and oppressiveness (*Sweetsir v. Kenny*, 32 ME 464 (1851)) or with partiality that impacts how public business is accomplished (*Hutchinson v. Oklahoma,* 1957 OK 300).

SDCL § 7-16-14 authorizes a State's Attorney to prosecute a civil action against county commissioners for malfeasance, misappropriation of public funds, or other misconduct whenever there is reasonable cause therefore. This statue also requires a written petition of at least 15 resident taxpayers. "Reasonable cause is the same as 'probable cause.'" *Hughes v. Stanley County School Board*, 1999 SD 65 ¶ 30 (considering reasonable cause language in SDCL 26-8A-3). The South Dakota Supreme Court, like most other jurisdictions, defines "probable cause" as "'evidence which would warrant a man of reasonable caution in the belief that a crime has been committed.'" *State v. Fischer,* 2016 SD 1 (quoting *Wong Sun v. United States* 371 US 471, 479 (1963)). Reasonable cause exists when, based on all relevant and trustworthy facts, there is sufficient information for a person of reasonable caution to believe that the misconduct alleged occurred. "

Complaint Allegations

In their complaint, the Concerned Citizens of Butte County allege gross negligence and gross partiality. The first five allegations allege four of the five current Butte County Commissioners committed gross negligence in their actions concerning medical marijuana ordinances. While I would note that gross negligence is not a ground for removal of a public official under SDCS § 3-17-6, it could be argued that gross negligence constitutes nonfeasance, as it is a neglect or refusal to do something that the commission had a duty to do. The second set of allegations allege four of the five commissioners applied gross partiality to certain alleged situations. After reviewing the allegations and applying the law applicable to removal of public officials, I do not find reasonable cause or grounds for removal of the public officials named in the complaint. I will discuss each allegation and why I came to that conclusion.

839 5th Avenue
Belle Fourche, South Dakota 57717
Phone: 605-892-3337
FAX: 605-892-6768

Allegations of Gross Negligence

The first allegation asserts gross negligence in two respects, failure to conduct research and passage of four medical cannabis ordinances in less than a year. The first assertion is factually incorrect. The State of South Dakota passed Initiated Measure 26 in November 2020 legalizing medical cannabis. The state's medical cannabis statute is found in SDCL § 34-20G and gives the South Dakota Department of Health primary responsibility for issuing implementing rules and administering the program. The responsibility of local governments, like County Commissions, is limited to the ability to enact ordinances to regulate time, place, manner, and number of medical cannabis facilities, if those rules do not conflict with the statute. SDCL§ 34-20G-58. This statute became effective on 1 July 2021, however, the Department of Health was given until October 2021 to complete administrative rules for the medical cannabis program.

County Commissioners did study and research this issue, albeit they did not contract for or hire an independent research team to conduct a formalized study. They had no duty to do so. Rather, the County Commission tasked the State's Attorney at the time to research other jurisdictions and how they regulated time, place, number, and manner for medical cannabis facilities. She did so, looking at several different jurisdictions, including those in Colorado, California, and Oregon, then verbally reported back to the Commission. The Commissioners also participated with other stakeholders in the process, including consultations and meetings with the Attorney General's Office, the South Dakota Statewide Association of County Commissioners, other Butte County elected officials as well as elected officials from other Counties, The Black Hills Council of Local Governments, the Department of Health, State legislators, and others with an interest in medical cannabis. All these sources provided information to the County Commission as the regulatory process for implementing the time, place, manner, and number of medical cannabis facilities.

The second assertion, that the County Commission passed four medical cannabis ordinances in a year is mostly correct. However, doing so does not constitute gross negligence or nonfeasance as those terms are defined. There was a four month "gap" between the time SDCL § 34-20G went into effect and the time the Department of Health was required to have implemented administrative rules. There was a real and substantial concern that if counties who intended to regulate "time, place, manner, and number" of medical cannabis facilities did not have a temporary or placeholding ordinance in place to show that intention, the Department of Health would be able to issue state licenses for these facilities without reference to local "intended" ordinances. In fact, the attorney advising the Department of Health on medical cannabis informed our then-State's Attorney that the County should enact a Temporary Ordinance as a "placeholder" to demonstrate the County's intention to regulate what we could regulate under the statute. The County did so, passing Butte County Ordinance 21-01 on 5 June 2021, with an effective date of 25 June 2021. In an effort to ensure that the County had some say in the regulation of time, place, manner, and number of medical cannabis facilities, the County also on the same date passed Butte County Ordinance 2021-02 on the same day with the same effective date. Both were passed after two readings in Public Commission meetings, as required. Perhaps two Ordinances on medical cannabis was "overkill," but it is not evidence of either gross neglect or a refusal to do something the Commission had a duty to do.

839 5th Avenue
Belle Fourche, South Dakota 57717
Phone: 605-892-3337
FAX: 605-892-6768

Butte County Ordinance 2021-02 was passed with the knowledge and understanding that implementation of Department of Health rules that were due in October 2021 would have an impact and may require amendments to the Ordinance. After the Department of Health issued their administrative rules, the Butte County Commission studied the rules and determined they would amend the existing Ordinance. Butte County Ordinance 2021-02 (First Amended Ordinance) was passed on 25 October 2021 and went into effect on 19 November 2021. The Ordinance, by its terms, supersedes any Ordinance issued prior to its effective date of 19 November 2021, including Butte County Ordinance 2021-01 and the prior version of 2021-02. Finally, as the County Commission received and considered applications for medical cannabis facilities during the period after the Amended Ordinance went into effect, members of the public addressed the Commission with concerns about the provisions of the Amended Ordinance. As a result, the Commission decided it was necessary to amend the ordinance regulating time, place, manner, and number of medical cannabis facilities a second time in response to issues raised by the public. The Second Amended Butte County Ordinance 2021-02 was adopted on 10 June 2022 and became effective on 6 August 2022. Again, by its terms, it supersedes all previous Ordinances on the subject. While the Butte County Commission passed four Ordinances in the space of just over a year, doing so was neither gross negligence, nonfeasance or malfeasance. Passing two Ordinances and amending one twice in the same year was not done with an intent to evade or circumscribe the law. Instead, the intent of the Commission was to implement regulatory authority over the items that the state statute permits local governments to regulate in such a way as to effectuate the intent of the voters to allow medical cannabis, conform to Department of Health rules, and be responsive to citizen concerns.

The second allegation of gross negligence is similarly without merit. The allegation is that the County Commission "grandfathered" establishments under Butte County Ordinance 2021-02, when they did not have final approval, and that the Commission had adopted a "new" ordinance that would make the applications violative of the Amended Ordinance 2021-02. First, this allegation is factually incorrect. There were only two applications, one for a cultivation facility and one for a manufacturing facility that were received prior to the 19 November 2021 effective date of the Amended Ordinance 2021-02. Both were received on 15 November 2021. All other applications for medical cannabis facility permits were received after the Amended Ordinance's effective date and processed under the provisions in effect after 19 November 2021.

Assuming the drafters of the complaint referred to the incorrect ordinance, and the complaint refers to pending applications that were processed under Amended Ordinance 2021-02, even though the County Commission was considering the changes made in the Second Amended Ordinance 2021-02, they are correct. The Commission did process applications under the Amended Ordinance, as it was still in effect until 6 August 2022, the effective date of the Second Amended Ordinance. The Commission processed and approved 10 applications for medical cannabis facilities. Of those, three were processed and approved prior to the effective date of the Second Amended Ordinance. The remaining seven applications were received, and processing began prior to the effective date of the Second Amended Ordinance. Even though the Second Amended Ordinance was effective by the time these applications were approved, it was appropriate to continue to process the applications under the rules established at the time the application was submitted. This "grandfathering" is appropriate, so as not to change the rules in the middle of the process as a matter

839 5th Avenue
Belle Fourche, South Dakota 57717
Phone: 605-892-3337
FAX: 605-892-6768

of fairness and due process. By doing so, the Commission did not nullify their Ordinance, applicants were still required to do all those things necessary for approval under the Amended Ordinance.

The third allegation is not factually correct. The Butte County Commissioners did listen to citizen concerns expressed at Commission meetings. The Butte County Commission, for example, reduced the number of medical cannabis cultivation facilities from an unlimited number to five, based on citizen concerns. The Commission also instituted a public hearing as a requirement for medical cannabis facility licensing in response to citizen concerns in the Second Amended Ordinance. While the Commission has not undertaken every action that certain citizen's groups advocate, they do listen. The allegation's final sentence is factually untrue. the State law and the Administrative Rules regulating medical cannabis were effective well before the time Butte County began accepting or approving medical cannabis establishments to operate in Butte County. A difference of opinion does not constitute gross negligence or nonfeasance. Finally, the County Commission did not approve 14 medical marijuana establishments as alleged in the complaint. As of the date of this writing, there are six approved cultivation facilities, two approved dispensaries, and two approved manufacturing facilities, for a total of 10 approved medical cannabis facilities in Butte County.

In the fourth allegation of gross negligence, the complaint alleges the County Commission did not undertake an environmental impact study. This is true. However, none was required, and the Commission did not have a duty to order environmental studies prior to approving either medical cannabis ordinances or establishments under that ordinance. There is no malfeasance, nonfeasance, or gross negligence from their failure to do so.

In the final allegation of gross negligence, Concerned Citizens allege it was gross negligence for the County Commission to renew permits without verification that the permittees were compliant with state statutes or the Second Amended Ordinance. Again, this is not factually correct. Under the Second Amended Ordinance, all permit holders must certify that they are fully compliant with all applicable State requirements.

Gross Partiality

The complaint alleges gross partiality in five different allegations. The first allegation claims the County Commission demonstrated gross partiality by striking expert testimony about the impact of cannabis establishments from the minutes of a Commission meeting. The allegation references an audio recording of the discussion to strike the language. I see no gross partiality here. First, the statements were not witnessed testimony, taken during a judicial or quasi-judicial proceeding, but rather public comment from a citizen during public comment period of a County Commission meeting. Second, after listening to the referenced audio recording, the reason for not approving the minutes as written was twofold. There was an objection to including a lengthy verbatim recitation of opinions, as opposed to fact, as well as an objection to the cost of publishing lengthy minutes in the paper. Nothing about this objection demonstrates gross partiality toward one party or side of an issue over the other. In fact, the discussion at the Commission meeting specifically points out that the meeting minutes should be limited to actions by the board, and to facts presented to the board without respect to which position the party takes.

839 5th Avenue
Belle Fourche, South Dakota 57717
Phone: 605-892-3337
FAX: 605-892-6768

Minutes of a board meeting are the permanent record of the actions taken at the meeting, not a record of what was said. (Roberts Rules of Order Revised, Article X, Rule 60; *Sanchez v. Board of Adjustment*, 387 S.W.3d, 745, TexApp 2012). Meeting minutes do not have to be formal or technical in nature, they need only show what actions are taken and whether the required number of votes were taken for those actions. Attorney General Opinion 74-11, 1974 Op. Atty Gen S.D. 258. The minutes, as adopted, were perfectly legitimate and perfectly proper. The Commission is not required to recite verbatim comments from members of the public. The concern that publishing opinions of one citizen of the county in official minutes could be misconstrued as facts or as an adoption of those opinions is well taken. Moreover, the commissioner's concern about the cost of publishing overly long minutes in the newspaper is fiscally responsible. There is no need to expend public funds to publish citizen opinons. There is no gross partiality present in this decision.

The second allegation is that the Commission demonstrated gross partiality by the "illegal" removal of a citizen during public comment. Again, the complaint references a video recording. After a review of the 9:45 video, it is clear there is no gross partiality. The citizen was removed by the then Commission Chair after the citizen disrupted the public meeting and inserted himself into the public comment period of another citizen. The interrupting citizen was properly removed, and there was no gross partiality in doing so. Clearly, citizens have the First Amendment right to speak to their elected representatives. However, citizens do not have a right to disrupt a meeting. *White v. Norwalk*, 900 F.2d 1421 (1989). Citizens can become disruptive by "speaking too long, by being unduly repetitious, or by extended discussion of irrelevancies." *White v. Norwalk*, 900 F.2d 1421 (1989). Citizens have a right to speak but they do not have a right to interrupt another person's time to speak, nor do they have a right to address public officials by making "personal, impertinent, slanderous, or profane remarks." *White v. Norwalk*, 900 F.2d 1421 (1989). The member who was removed interrupted another citizen's public comment and then called the County Commissioners "idiots," and was promptly removed for disrupting the meeting. Doing so was a response to the citizen's conduct and not evidence of gross partiality. The complaint also alleges there was an attempt to remove the citizen's recording device, however, the device was not removed as demonstrated by the continued video footage. That issue is moot.

The third allegation of gross partiality is that the Commissioners allowed for more time to pro-cannabis people in the December 20, 2022 than they did for anti-cannabis people. Again, there is a reference to a video recording as support for this complaint. "Reasonable time, place, and manner restrictions on the exercise of first amendment rights are not repugnant to the Constitution." *Wright v. Anthony*, 733 F.2d 575, 577 (8th Cir. 1984)(citing *Heffron v. International Society for Krishna Consciousness, Inc.*, 452 US 640 (1981)). The County Commission has a duty and a responsibility to allow for public comment under SDCL § 1-25-1, however the statute also allows the Commission to use their discretion to limit the public comment period. The 8th Circuit Court of Appeals has held that restrictions on public comment may serve a "significant governmental interest" in conserving time and ensuring others had an opportunity to speak." *Wright v. Anthony*, 733 F.2d at 577. County Commission meetings have a governmental purpose and are where governmental work is done. *White v. Norwalk*, 900 F.2d 1421 (1989). Clearly, under the law, the Commission has not violated the First Amendment when it limits the time for public speakers, nor does it violate the First Amendment when it limits the topic to the subject of the issues before the Commission. *Id.*

839 5th Avenue
Belle Fourche, South Dakota 57717
Phone: 605-892-3337
FAX: 605-892-6768

In this meeting, there were several speakers, including one who threatened to "kick the ass" of the Commission Chair, causing upset and disruption. It is unsurprising that the Commission Chair did not turn on the timer or properly note the time to limit remarks for the subsequent speaker. While allowing additional time during this meeting was a mistake, I do not find it rises to the level of demonstrable gross partiality. I would note that at subsequent meetings, including the one recorded for the prior allegation, members of the public with anti-cannabis opinions have been allowed to speak for longer than the allotted time. In that meeting the citizen spoke to the Commission for over nine minutes. There is no evidence of gross partiality.

In the fourth allegation, the complaint alleges the Commission was grossly partial by granting variances to medical cannabis establishments. In Butte County there are 10 medical cannabis facilities which are regulated by the Second Amended Ordinance 2022-02. This amended ordinance went into effect on 6 August 2022, and contained an amended provision that included residences in the provision requiring a 1,000-foot set-back from medical cannabis establishments. (Butte County Second Amended Ordinance 2022-02, Section 2(b)(1)). Residences were not included in the First Amended Ordinance 2022-02, the ordinance applicable to the medical cannabis facilities when they were processed and approved. As a result, there have been two applications for permit renewal (with a third pending) where existing medial cannabis facilities would not be able to meet this setback requirement. As a result, application of this setback requirement to existing, permitted facilities would create an extreme hardship. The Butte County Board of Adjustment approved the two requests for variance from this provision, based on public interest and unnecessary hardship. *Hines v. Board of Adjustment*, 2020 SD 23. The Board of Adjustment granted the variances, and although the County Commission acts as the Board of Adjustment in Butte County (SDCL § 11-2-60), there is no evidence the Commission or the Board of Adjustment has acted with gross partiality in approving the variances.

The final allegation in the complaint is that the Commission Chair acted with gross partiality by not allowing a citizen to have an agenda position to ask a series of questions that had been previously submitted to the Chair in writing. An agenda serves as the notice of public hearing under SDCL § 1-25-1.3. The agenda is designed to inform the public about the business the County Commission will consider at the date, time, and place listed on the agenda. Chairs of Boards typically have responsibility to set a meeting agenda, although the County Commission votes to approve the agenda at the beginning of each meeting. The First Amendment to the United States Constitution restricts the ability of the government to regulate private speech, but the First Amendment does not regulate government speech. *Bloomberg v. Blocker,* 586 F.Supp.3d 1251, 1255 (Mid.Dist.Fla. 2022). The Supreme Court has held that government speech is different from private speech and reflects that the government can decide where it will "speak" and what the content of that speech will be. *Id.* (citing *Walker v. Texas Division of the Sons of Confederate Veterans, Inc.* 576 US 200 (2015)). In *Bloomberg v. Blocker,* for example, a citizen requested a county commission include an agenda item to adopt a proclamation about LGBTQ rights on the commission's agenda. The Chair, who had responsibility for the content of the agenda, refused and the citizen sued. The Court upheld the Commission Chair's decision and held that the Chair had the authority to control meeting agendas without violating the First Amendment. *Id.* Other courts have also upheld the authority of a Commission Chair to control meeting agendas and to require citizens to speak about agenda items during the public

839 5th Avenue
Belle Fourche, South Dakota 57717
Phone: 605-892-3337
FAX: 605-892-6768

comment period (*Jones v. Heyman,* 888 F.2d 1228 (11th Cir. 1989). Clearly, there is a public interest in orderly and efficient meetings, and an agenda is the way to ensure that meetings stay focused on the public's business. *City of Madison, Joint School District v. Wisconsin Employment Relations Commission*, 429 US 167 (1976). In the *City of Madison* case, the Supreme Court held that "public bodies may confine their meetings to specified subject matter and may hold nonpublic sessions to transact business." *Id.* At 176. The Court also said a public body, such as a County Commission, "is not prohibited from limiting discussion at public meetings to those subjects that it believes will be illuminated by the views of others and in trying to best serve its informational needs while rationing its time." *Id.* At 180 (Steward, J., concurring). A commission chair has the authority and responsibility to balance the need to do the public's business in logical and appropriate manner, to include deciding that a citizen's public comments that had been previously answered by the commissioner from her district was redundant and not appropriate as an agenda item. There was no gross partiality in that decision.

Summary

South Dakota requires grounds for removing public officials (SDCL § 3-17-6) and reasonable cause for bringing a civil action (SDCL § 7-16-14). I do not find reasonable cause to bring a civil action to remove four of the five Butte County Commissioners for either gross negligence (nonfeasance) or gross partiality. There is no reasonable cause to believe that any Butte County commissioner did not do his/her duty, engage in an act that is wholly illegal and wrongful, or neglect or refuse to do something he/she had a duty to do. Nor is there reasonable cause to believe they intended to evade or otherwise circumscribe the law.

Sincerely,

LeEllen McCartney
Butte County State's Attorney

cc: Butte County Commission
Butte County Auditor

839 5th Avenue
Belle Fourche, South Dakota 57717
Phone: 605-892-3337
FAX: 605-892-6768