

**HERMOSA TOWN BOARD
WORK SESSION
Tuesday, January 25, 2022 – Following P&Z Meeting**



- 1) **ROLL CALL:**
 - A) BOT Roll Call: Flug, Henrichsen, Holsworth, King, & Schumack
 - B) P&Z Roll Call: Harris, Waltman, Clarke, Thomason
 - C) Acknowledgement of other attendees

- 2) **CALL FOR CHANGES:**
 - A) Review current agenda items
 - B) Motion to accept the agenda as presented/amended

- 3) **NEW BUSINESS:**

- 4) **WORK SESSION ITEMS**
 - A) Proposed amendments to Ordinance Chapter 30

- 5) **ITEMS FROM CITIZENS:** No action will be taken (3-minute time limit per speaker)

- 6) **TRUSTEE INPUT:**

- 7) **EXECUTIVE SESSION:**
 - A. Motion to enter Executive Session allowable by SDCL 1-25-2.1 – Legal/Personnel/Contract
 - B. Motion to exit out of Executive Session
 - C. Motions resulting from Executive Session

- 8) **ADJOURN:**
Motion by _____; second by _____ to adjourn the meeting at _____ pm.

ATTEST:

Gail Boddicker
Finance Officer

Dan Holsworth
Town Board President

MEMORANDUM RE: PROPOSED AMENDMENTS TO ORDINANCE CHAPTER 30

TO: Hermosa Board of Trustees
FROM: Mitchell D. Johnson
DATE: January 18, 2022

In order to seek and qualify for office in Hermosa as a member of the Hermosa Board of Trustees, the only legal requirement is the candidate for office must be a *legal voter* of the Town of Hermosa. Specifically, SDCL § 9-7-1 provides that,

The Board of Trustees of a third class municipality shall consist of not less than three nor more than five members elected at large. Each *shall be a legal voter* of the municipality. The number of trustees of a municipality may be increased to five or reduced to three in the manner prescribed by chapter 9-11. (*emphasis added*).

Further, pursuant to SDCL § 9-14-2, the candidate must have resided in the municipality at least three (3) months prior to the election. Specifically, SDCL § 9-14-2 provides;

Except as otherwise provided, no person may hold any elected municipal office who is not a qualified voter of the municipality and who has not resided therein at least three months next preceding his election or appointment. If the person has resided in an area annexed, pursuant to chapter 9-4, for at least three months, he may hold any municipal office. No person may hold any municipal office who is a defaulter to the municipality. This section does not apply to appointive officers.

Further, SDCL § 12-3-1 provides that

“Every person resident of this state who shall be of the age of eighteen years and upwards, not otherwise disqualified, who shall have complied with the provisions of law relating to the registration of voters shall be entitled to vote at any election in this state.

To qualify as a *legal voter* in South Dakota the candidate must:

1. Be a citizen of the United States
2. Actually live at and have no present intention of leaving the address described as their residency
3. Be at least 18 years of age on the date of the next election
4. Has not been adjudged mentally incompetent

5. Is not currently serving a sentence for a felony conviction
6. Has canceled any previous voter registration

SDCL § 12-1-4 sets forth the criteria to determine an individual's *voting residence* which provides as follows:

For the purposes of this title, the term, residence, means the place in which a person has fixed his or her habitation and to which the person, ***whenever absent, intends to return.***

A person who has left home and gone into another state or territory or county of this state ***for a temporary purpose only*** has not changed his or her residence.

A person is considered to have gained a residence in any county or municipality of this state in which the person actually lives, ***if the person has no present intention of leaving.***

If a person moves to another state, or to any of the other territories, ***with the intention of making it his or her permanent home,*** the person thereby loses residence in this state.

Here, it appears from the proposed amendments to Hermosa Ordinances Chapter 30 intend to:

1. Limit a person's *temporary purpose* away from his or her claimed residency in Hermosa, South Dakota to a maximum of one (1) month per year;
2. Repeal the Town Board's discretion to waive the residency requirement for a member who relocates outside the Town of Hermosa during his or her term;
3. Require Planning and Zoning members and members of the Town Board attend a minimum of four (4) of the six (6) regular board meetings held every three (3) months and if the member does not physically appear no later than 15 minutes after the meeting commences and remains present until the meeting is adjourned, the member does not get paid for the meeting.

In my opinion the aforesaid statutes govern who can legally seek office as a member of the Hermosa Board of Trustees. SDCL § § 9-7-1 and 12-4-1 control. That is, if the candidate is *a legal voter* as defined under SDCL § 12-4-1, the candidate is eligible to seek office as a member of the Hermosa Board of Trustees. To constitute being a legal voter, the candidate must

establish he or she is a resident of the Town of Hermosa. Residency is not specifically defined in the statutes. However, the applicable statutes turn heavily on the “*intent*” of the individual. That is, does the individual who might leave temporarily, have the *intent to return*. Is the individual’s absence from his or her residence in Hermosa only for a *temporary purpose*? (e.g. vacation; business travel; personal travel; college, medical reasons, snow-birding, etc.)

Regardless, if the individual is qualified as a registered legal voter in Hermosa, that individual can seek public office as a member of the Board of Trustees. In my opinion, enacting an ordinance that defines “*temporary absence*” being no more than thirty (30) days in a calendar year, does not conform with SDCL § 9-7-1 and SDCL § 12-1-4. This limitation does not consider the individuals “*intent*”.

Notably, it is class 6 felony for an individual to submit a false voter registration application. Such applicant executes his or her voter registration under the penalty of perjury and is subject to 2 years of incarceration and/or a fine of \$4,000.00 for submitting false information. Hence, only in the circumstances where the individual is not a qualified registered voter under SDCL § 12-1-4, can the person be denied the opportunity to run for office.

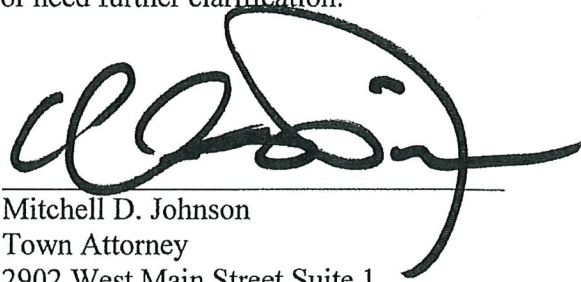
Regarding the amendment to Ordinance § 30.04 to repeal the Board of Trustees ability to exercise its discretion to waive the residency requirement for a duly elected member who (during their term of office) relocates his or her residence outside the Town of Hermosa, is an appropriate legislative act. Hence, the Board of Trustees would follow the South Dakota statutes to fill the vacancy.

It appears from the proposed amendment to Ordinance § § 30.05 and 30.06, the proposal is to increase the Board members mandatory attendance at regular meetings from three (3) to four (4) during each quarter of each year. It is unclear from the proposal what the consequence is

if a member fails to comply. I presume the intent is to potentially expel the member from the Board. Unlike the power of its citizens to petition to recall a member pursuant to SDCL §§ 9-13-29 and 9-13-30, for misconduct, malfeasance, nonfeasance, crimes in office, drunkenness, gross incompetency, corruption, theft, oppression or gross partiality, I cannot find any statutory authority in South Dakota empowering the municipal board itself to expel a member. However, my research from other jurisdictions supports the rule that a municipal board may expel a member for similar conduct referenced in the foregoing petition for recall statutes, so long as a fair hearing is held and the member's rights to due process are followed. Further, given the nature of the circumstance, I am of the opinion that expulsion should require 4 (four) members of the Board to vote in favor of any expulsion.

Finally, with regard to the proposed amendment to Ordinance § 30.07 (Board Member Compensation), to require a members physical presence (i.e. not remotely by teleconference) for all but the first 15 minutes of the meeting in order to receive compensation, I believe this would be a proper exercise of the Board's administrative powers.

Please contact me if you have any questions or need further clarification.



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CHAPTER 30: OFFICIALS AND EMPLOYEES

BOARD OFFICIALS

Section

- [30.01](#) Definitions
- [30.02](#) Residency required
- [30.03](#) Circumstances
- [30.04](#) ~~Waiver~~ **Requirements**
- [30.05](#) Planning and Zoning Board; waiver
- [30.06](#) Board of Trustees; waiver
- [30.07](#) Board member compensation

§ 30.01 DEFINITIONS.

For the purpose of this chapter, the following definitions shall apply unless the context clearly indicates or requires a different meaning.

DOMICILE.

(1) A person's true, fixed and permanent living place. **DOMICILE** is the place to which a person intends to return after temporary absences. **Temporary meaning a maximum of one month.**

(2) For purposes of this section, a person may have only one primary **DOMICILE**.

RESIDENCE. In determining the place of **RESIDENCE**, the following rules are to be observed:

(1) There can only be one **RESIDENCE**;

(2) A **RESIDENCE** is the place where one remains when not called elsewhere for labor (work, job) or other special or temporary purpose, and to which one regularly returns for primary shelter; and

(3) The **RESIDENCE** can be changed only by the union of act and intent. The actual ongoing, regular physical presence, in a new domicile, constitutes a new **RESIDENCE**.

(Ord. 1.005A, passed 11-18-2008)

§ 30.02 RESIDENCY REQUIRED.

(A) All members of the Planning and Zoning Board and the Town Board **of Trustees**, appointed or voted into office before or after the effective date of this chapter, shall be a

resident of the town, and maintain their domicile and principal place of residence within the town limits during the period of their term of office.

(B) All members must also be registered to vote in the town, county and state. The residence must not be merely for the purpose of getting mail and registering to vote.

(Ord. 1.005A, passed 11-18-2008)

§ 30.03 CIRCUMSTANCES.

The following circumstances, standing alone, shall not constitute sufficient evidence of domicile; but may be considered as part of the demonstration of the facts and circumstances listed above:

(A) Registration to vote within a precinct of the town;

(B) The lease or ownership of living quarters in the town; and

(C) Other public records, e.g., federal taxation filings, automobile registration and the like.

(Ord. 1.005A, passed 11-18-2008)

§ 30.04 ~~WAIVER.~~ REQUIERMENTS

All Board Members, elected or appointed, are required to read, sign, and date this annually after the first meeting after a local election. As Board members we have made a commitment to serve the residents of our town, not just to collect a paycheck.

~~The Board of Trustees may, in its discretion, elect to waive the residency requirements upon four fifths majority vote of the Board for any Trustee who, during the Trustee's tenure, no longer maintains his or her status as a resident of the town as required by this chapter.~~

(Ord. 1.005A, passed 11-18-2008)

§ 30.05 PLANNING AND ZONING BOARD; WAIVER.

All members of the Planning and Zoning Board and the Town Board, appointed or voted into office before or after the effective date of this chapter, are hereby required to attend at a minimum ~~three~~ **four** of their Board's regularly scheduled meetings per quarter year; a **cancelled meeting, not rescheduled constitutes attendance**. The fiscal year being from June 1 of the current year to June 1 the following calendar year. ~~If any member should violate any provisions of this chapter, the "at fault" member may appeal in writing to their governing board, at which time the governing board, with a two-thirds majority vote, may either allow the at fault member to retain his or her appointed or elected seat, or request a notice of resignation from the at fault member. Reasons for accepting or denying the appeal must be solely based on what is in the best interest of the town, and the at fault member's current and future ability to serve their community and board.~~

(Ord. 1.005A, passed 11-18-2008; Ord. passed 11-18-2008)

§ 30.06 BOARD OF TRUSTEES; WAIVER.

(A) All members of the Board of Trustees appointed or voted into office before or after the effective date of this chapter are hereby required to attend four of the Board’s regularly scheduled meetings per quarter; with the fiscal year being from June 1 of the current year to June 1 of the following calendar year. If the Board of Trustees determines that a member has violated any provisions of this chapter, **the Board of Trustees are required to take appropriate action as stated in this ordinance. The purpose of this requirement is to be transparent and treat each board member with fair and equitable treatment.** ~~the violating member may appeal in writing to the Circuit Court of the county, which may allow the violating member to retain his or her appointed or elected position, or request the resignation from the member.~~

(B) In the event a member refuses to resign after the request, the member ~~will~~ **may** be required to vacate his or her position.

~~(C) Reasons for accepting or denying the appeal must be solely based on what is in the best interest of the town and the violating member’s current and future ability to serve his or her community and Board.~~

(Ord. 1.005A, passed 11-18-2008)

§ 30.07 BOARD MEMBER COMPENSATION.

(A) In order to receive payment for **attending meetings** ~~meeting attendance,~~ members must be **physically** present within 15 minutes of the opening of the meeting, and **remain until adjourned. Leaving prior to adjournment constitutes an absence.** ~~leave no earlier than 15 minutes prior to adjournment.~~

~~(B) Any variance of this regulation requires a two-thirds majority vote from the present governing body to approve the payment.~~

(Ord. 1.005A, passed 11-18-2008; Ord. passed 11-18-2008)

Disclaimer: This Code of Ordinances and/or any other documents that appear on this site may not reflect the most current legislation adopted by the M

Board Member

Date

Attested by, Finance Officer