



December 2, 2022

Mr. Rick Weiland
Dakotans for Health
P.O. Box 2063
Sioux Falls, SD
57101

RECEIVED
DEC 05 2022
S.D. SEC. OF STATE

Dear Mr. Weiland:

SDCL 12-13-25 requires the South Dakota Legislative Research Council (LRC) to review each initiated constitutional amendment submitted to it by a sponsor, for the purpose of assisting the sponsor in writing the amendment "in a clear and coherent manner in the style and form of other legislation" that "is not misleading or likely to cause confusion among voters."

LRC encourages you to consider the edits and suggestions to the proposed text. The edits are suggested for sake of clarity and to bring the proposed measure into conformance with the style and form of South Dakota legislation. LRC comments are based upon the Guide to Legislative Drafting, which may be found on the South Dakota legislative [website](#).

Proposed initiated amendment to the Constitution as submitted with comments following:

BE IT ENACTED BY THE PEOPLE OF SOUTH DAKOTA:

That Article XI of the Constitution of the State of South Dakota be amended by adding a NEW SECTION to read:

The state may not tax the sale of anything sold for eating or drinking by humans, except alcoholic beverages and prepared food. This provision has no effect on the taxing authority of municipalities.

1. The proposed language begins with "[t]he state may not tax the sale of anything for eating or drinking..." The proposed language assumes the "state" has the authority to impose a tax on the purchase of food and beverages. The state, on its own and by its very nature, does not have, separate from the law, the authority to impose a tax. The "state" (in most instances an executive branch agency) has the authority, as provided by law, to collect certain taxes. But the *law* provides the authority to impose a tax. For example, SDCL 10-45-2 provides the following:

There is hereby imposed a tax upon the privilege of engaging in business as a retailer, a tax of four and one-half percent upon the gross receipts of all sales of tangible personal property consisting of goods, wares, or merchandise, except as otherwise provided in this chapter, sold at retail in the State of South Dakota to consumers or users.

In the SDCL 10-45-2 example, the law imposes a tax "upon the privilege of engaging in business as a retailer." Retailers collect the tax and remit it to the state in compliance with the law. The state does not impose the

tax. As a matter of law, even if the proposed constitutional language were to be enacted, the question remains as to whether the tax imposed by SDCL 10-45-2 would still apply to items sold "for eating or drinking by humans," since that section of law requires it, not the "state."

The perceived intent of the proposed constitutional language is to exempt the sale of certain food and beverages from tax. By beginning the proposed constitution text with "[t]he state may not tax," it is unclear if the intent is actually achieved. The proposed language simply states an existing legal reality, namely, that the state does not have the authority to impose a tax on the purchase of food and beverages. If this language were to become effective, the intended effect may not be achieved.

2. By using the term "state" in the proposed constitutional language, municipalities would not be prohibited from enacting a local ordinance requiring a tax on the purchase of food and beverages. This is further clarified by the sentence that reads:

"This provision has no effect on the taxing authority of municipalities."

The clarifying sentence seeks to address the interpretive issue as it relates to the authority of a municipality to tax food and beverages. However, it may not adequately address the interpretation offered suggesting that the authority of a municipality to tax derives entirely from the state's authority to tax, which this proposal presumably seeks to eliminate. In other words, if there is no authority at the state level, there is no authority at the municipal level, thereby making the first sentence potentially conflict with the second sentence. So, it may be argued that the clarifying sentence does not accomplish its intent if one is to give effect to the first sentence.

It may be more exacting to replace the clarifying sentence with the following:

"The exemption provided under this section does not apply to the taxing authority of a municipality. A municipality may tax the retail sale of any food or food ingredient, if that authority is provided by law." (See item 6 below for further drafting suggestions for the proposed amendment language.)

SDCL 10-52-2 provides a municipality with the authority to "impose any non-ad valorem tax," which, based on its plain language, includes the authority to impose a tax on "anything sold for eating or drinking by humans." The two sentences together may provide the clarity needed to distinguish the separate taxing authorities of the state and municipalities.

3. The use of the phrase "the sale of anything sold for eating or drinking by humans" may be overly vague, inviting various interpretations in determining its meaning.

Under current law, the terms "food" and "food ingredients" are defined as follows:

"Food" and "food ingredient," any substance, whether in liquid, concentrated, solid, frozen, dried, or dehydrated form, that is sold for ingestion or chewing by humans and is consumed for its taste or nutritional value. See SDCL 10-45-1.

The statutory definition uses the terms "ingestion," "chewing," and "consumed." These terms seem to be more precise than "eating or drinking," as they may better capture the various elements of food and beverage consumption. Certain food and food ingredients are not purchased specifically for eating or drinking but may be used in the process of making specific foods or beverages. For example, coffee beans are generally neither eaten nor drunk. To take a narrow reading of the proposed language, coffee beans