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South Dakota Legislature
Legislative Research Council

December 2, 2022

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

Dear Mr. Weiland:

SDCL 12-13-25 requires the South Dakota Legislative Research Council (LRC) to review each initiated measure 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.

Initiated measure as submitted with comments following:

BE IT ENACTED BY THE PEOPLE OF SOUTH DAKOTA:

That Title 10 be amended by adding a NEW SECTION to read:

Notwithstanding any other provision of law, 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 provides that "[t]he state may not tax the sale of anything sold 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 initiated measure 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 initiated measure is to exempt certain food and beverages from tax. By providing that the "[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. The "notwithstanding" clause also may not serve a purpose since no law gives the "state" the authority to tax. The law is the authority to tax, not the state. 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 that suggests 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, as provided under chapter 10-52." (See item 5 below for further drafting suggestions for the proposed amendment language.)

SDCL 10-52-2 provides a municipality 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 the 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 of food 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