



CITY OF RAPID CITY

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MEMORANDUM

TO: Mayor and City Council

FROM: Joel P. Landeen, City Attorney

DATE: 03/27/2020

RE: Legal Authority for Emergency Ordinance to Address COVID-19

There has been a fair amount of discussion about the City's authority to shut down businesses in response to the current public health emergency. This is clearly something the City could not do under normal circumstances, and is certainly not a decision the City Council should take lightly. That being said, the actions currently being considered are not unprecedented. During the Spanish Flu epidemic in the early 20th century similar "social distancing" measures were enacted in South Dakota. Schools, theaters, and business across the state were closed. In response to the current pandemic, communities across the country have already implemented similar measures. There are several provisions in state law which authorize you to implement these regulations. The City's general "police power" found in SDCL 9-29-1 allows cities to enact regulations that promote the health, safety, morals, and general welfare of the community. SDCL 9-32-1 also empowers cities to do what may be necessary or expedient for the promotion of health or the suppression of disease. In order for ordinances enacted under these provisions to be justified the ordinance must 1) actually relate to the subject being addressed; and 2) must be reasonable under the circumstances. The courts have recognized that in many situations a legitimate exercise of the police power may interfere or impair the rights of property owners without compensation, but in such cases the rights of private property must be made subservient to the public welfare. The justification for the exercise of the police power in a situation such as this is determined by assessing the imminent danger posed by the threat being addressed and the necessity of the action taken in response to that threat. From its very nature, the police power is to be exercised within the broad limits of legislative discretion, and if a statute appears to be in the apparent scope of this power, the courts should not inquire into the wisdom of the policy or substitute its discretion for that of the legislative body.

Under the current circumstances it is my opinion that the City's emergency ordinance is legally justified under the statutes previously identified. The nation and state are currently under emergency declarations based on the spread of a highly communicable disease. The purpose of these declarations is to slow the spread of this disease in order to prevent our health care system from being overwhelmed. The Centers for Disease Control (CDC), other health care experts, and the federal government have identified the practice of social distancing as the best way to combat and slow the spread of this disease. The White House and CDC have specifically recommended the closing of bars, restaurants, and other similar venues where people congregate for discretionary socializing and entertainment when there is evidence of community spread of the disease within a state. There is clearly evidence of community spread in South Dakota. The Governor has publicly stated that she does not believe she has the power to close businesses and it is up to the local communities to act to implement the recommendations made by the White House and CDC. Since the start of this pandemic, many other states, cities, and counties have implemented emergency measures similar to the regulations being considered by Rapid City. The fact that social distancing has been identified as the most important factor in combating this pandemic, the actions being taken in the ordinance have been specifically recommended by federal authorities, and regulations similar to the ones being considered by Rapid City have already been adopted by many governmental entities leads me to conclude our proposed ordinance will meet the criteria for a valid exercise of the police power if it were to be legally challenged.

Some have argued the state has exclusive jurisdiction to combat the spread of contagious diseases and is the only level of government that has the authority to order the closure of businesses. In legal parlance this idea is called field preemption. Since all local governments derive their power from the state, the state can take that power away, or retain the power for itself. The state can do this expressly by saying that it has exclusive jurisdiction to regulate in a certain area, or it can be implied if the state regulation scheme is sufficiently comprehensive to make a reasonable inference that the legislature left no room for supplementary city regulations. I have reviewed the statutes, and I can find no language which grants the state the *exclusive* jurisdiction to combat communicable diseases. To the contrary, there is specific statutory authority for the cities and counties to also address the spread of disease. Therefore, the City has not been expressly preempted from adopting regulations which combat the spread of infectious diseases. Nor do I believe that the state has preempted municipal action through implication. While the state may have adopted a significant amount of legislation to combat the statewide spread of infectious diseases, there is more evidence to support the inference that the legislature intended for this power to be shared with local governments, rather than be held exclusively by the state. There are statutes which specifically empower local health boards and which authorize cities to do those things necessary and expedient to promote health and suppress disease. The notion the state has the exclusive power to combat disease is also inconsistent with Governor Noem's recent public statements. She has stated she does not believe she has the power to act, but the local governments do. She has repeatedly expressed her belief that local action which can be tailored to the specific circumstances of individual communities and is crafted by elected officials who actually reside in those communities is better than implementation of statewide regulations which may be necessary in some communities and not others. Based on the Governor's current position on the legality of her ability to impose statewide regulations, a determination that the state has preempted the local governments' ability to combat the spread of

infectious diseases would lead to the illogical conclusion that no one has the authority to combat the spread of infectious diseases. It would prevent the implementation of the actions recommended by the CDC, White House, and health experts. This conclusion would leave the people of South Dakota virtually powerless to combat the current public health emergency and is not supported based on current state laws.

As with virtually every decision you are asked to make there are costs and benefits. I cannot promise you that if you adopt this ordinance you will not get sued, or that nobody could possibly obtain a judgment against the City. What I can tell you is that after reviewing the relevant law, it is my opinion that we have the authority to adopt the regulations contained in the ordinance. If we are sued I am confident that we will have a strong legal defense. I should also point out that if this is determined to be a valid exercise of the police power, we are not required to pay compensation for any damages. Is there a risk? Yes. There is no statute, or case law, that specifically states the City has the authority to order business closures. Nor is there any statute or case law that specifically states that cities cannot order business closures. As I have told many of you before, when you ask me if the City can legally do something for which there is no clear, specific, or unambiguous authority to act, the safest legal answer is usually "No." You are generally not going to get sued for maintaining the status quo. As aldermen you certainly need to consider the potential legal consequences of your actions, but the legal consequences are only one piece of a larger puzzle. When considering the big picture, choosing not to act primarily out of fear of getting sued is not necessarily the best course of action. Even though inaction may be the safest answer from a legal perspective, it is not always the best answer from a policy or community perspective. The current pandemic is not a hypothetical problem. The actions being proposed are not based solely on projections and hypotheticals. We can look at other communities around the world and in our own country and see what is coming. We already have confirmed cases in the Black Hills and it defies logic to think what is happening elsewhere will not happen here. The regulations in the ordinance were not pulled out of thin air in a desperate attempt to do something, they are the universally accepted best practices to slow down and combat the spread of an infectious disease. Everyone recognizes the impact this will have on businesses, but the hard truth is that no matter what you decide, it probably will not impact the ultimate fate of many of these businesses. If a business impacted by this ordinance cannot survive a temporary closure, it seems unlikely they will be able to survive in the current market even if they are allowed to stay open. Ultimately, it is up to you to weigh the potential impact this ordinance will have on the businesses being closed and the risk of theoretical lawsuits at some point in the future, against the potential risk to the public at large for failing to combat the current health emergency by taking the actions authorized in the ordinance.