# CITY OF RAPID CITY

**RAPID CITY, SOUTH DAKOTA 57701-2724**

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# MEMORANDUM

TO: Mayor & City Council

FROM: Joel P. Landeen, City Attorney

DATE: 2/10/17

RE: Distinction Between Proposed Ordinance No. 6157 and State Law

I have been requested to identify the differences between the proposed Appearance of Fairness ordinance and existing state law. State laws on due process and the conduct of quasi-judicial hearings by City entities are governed by both the state code and opinions of the South Dakota Supreme Court ("case law"). I would compare the language of the proposed ordinance and state law as follows:

**2.04.130(A)**: The South Dakota and United States Constitution prohibit any citizen from being deprived of life, liberty or property without due process of law. Consistent with the citizens right to due process, South Dakota and every other state affords all interested parties the right to a fair hearing in quasi-judicial matters before governmental entities. The right to a fair hearing includes matters that are quasi- judicial in nature that come before the City Council, or the various boards or committees of the City. The law also recognizes that people have a right to petition and communicate with their elected officials on matters of public policy or general public concern. The language in this provision reflects current state law and generally sets out to acknowledge that citizens have a right to a fair hearing in quasi-judicial matters and also acknowledge they have a right to communicate with their elected officials.

**2.04.130(B)**: The definitions used in this section generally come from case law and definitions in Black's Law Dictionary. The terms contained in this section have accepted meanings within the law and have been defined in numerous legal cases. The definitions in the ordinance are consistent with the generally accepted definitions contained in existing state and federal laws.

**2.04.130(C)**: The statement in this section that a decision maker in a quasi-judicial proceeding "should be disinterested and free from bias, or predisposed to the final outcome" is a legal requirement that can be found in the South Dakota Supreme Court decision of *Armstrong v. Turner County Bd. Of Adjustment*. The provision which states that decision makers are presumed to be objective, but must be disqualified in situations where actual bias, or an unacceptable risk of actual bias exists comes from SDCL 6-1-21 and the *Turner County* case.

**2.04.130(C)(2)**: Conversations outside of the formal hearing process between a decision maker and an interested party in a quasi-judicial matter are inherently problematic with respect to due process. A review of case law turns up numerous examples of situations where ex parte communications were the basis of a due process violation that resulted in a decision in a quasi-judicial matter being overturned by the courts. Based on my review of case law, I feel strongly that avoidance of ex parte communications in quasi-judicial matters should be considered a "best practice." However, the statement in the ordinance completely discouraging ex parte communications goes farther than the requirements of the state code. SDCL 6-1-21 states: "An elected or appointed municipal, county, or township officer may receive input from the public, directly or indirectly, about any matter of public interest. Such contact alone does not require the officer to recuse himself or herself from serving as a quasi-judicial officer in another capacity." In a related passage SDCL 6-1-20 says: "If an officer relies upon any evidence not produced at a public hearing or meeting, the officer shall disclose the evidence publicly and include the information in the public record to afford all parties an opportunity to respond or participate." Clearly the language in the state code is more permissive with respect to ex parte communications than the language in the proposed ordinance.

**2.04.130(C)(3):** There is no analogous provision in state law. However, the fundamental principle underlying due process is that citizens be provided with notice and an opportunity to be heard. It goes without saying that the notice and opportunity to be heard should be meaningful. If an interested party is provided information at the last minute, it has the potential to result in a due process violation if they did not have adequate notice of, or sufficient time, to respond to the new information. This provision attempts to encourage early disclosure of information to be considered, but also to recognize that if we receive comments or information with less than 5 days' notice it can still be considered. The provision further provides that interested parties should be given sufficient time to formulate a response or rebut that information.

**2.04.130(C)(4):** This provision is similar to the requirements of SDCL 6-1-20. However, the proposed ordinance is more restrictive than state code by requiring that a decision maker be disqualified from participating in a proceeding if it is discovered that they have engaged in ex parte communications but did not disclose that fact as required by both the proposed ordinance and state law.

**2.04.130(C)(5):** This provision is based on SDCL 6-1-21 and the *Turner County* case. Where the provision deviates from state law is that it specifically authorizes the other decision makers to determine if disqualification is mandated. I have also left out of the ordinance the standard of proof required to justify such a determination. My concern is that state law mandates disqualification if it is shown by *clear and convincing* evidence that there is prejudice or an unacceptable risk of bias, but does not specify who makes that determination. I am also

concerned with the potential application of a technical legal standard of proof (clear and convincing evidence) by a non-lawyer to justify a determination to disqualify a fellow decision maker.

**2.04.130(C)(6):** This provision is consistent with 6-1-17.

**2.04.130(D):** The provision exempting legislative decisions from the rules applicable to quasi-judicial decisions is consistent with the over whelming amount of statutory and case law authority in South Dakota and virtually every other state.