

To: Senate Judiciary Committee
From: Amanda Stanley, General Counsel
Date: May 3, 2021
RE: Neutral Testimony on SB 286

Good afternoon, Chairwoman and Committee Members; thank you for allowing the League of Kansas Municipalities to offer neutral testimony on Senate Bill 286.

SB 286 is a comprehensive attempt to deal with possible takings created by the response to the COVID-19 pandemic. The fact that SB 286 potentially creates a new cause of action outside of the remedies that are already available does give us pause and prevents us from supporting the bill.

The Constitution provides protections for the appropriation of private property under the Takings Clause. The Takings Clause's protections are rooted in basic fairness: the government cannot appropriate private property for its own use without compensating the owner. The idea being that when something is required for the good of all of us, that the burden should also be borne by all of us. Under a takings argument, while an owner must be made whole, they are also not entitled to more. The damages owed to any business or person are fact specific. With respect to COVID-19, one would need to account for things such as actual loss in income, other government aid already received to offset the loss, etc. This is a much more specific way to analyze whether compensation is due.

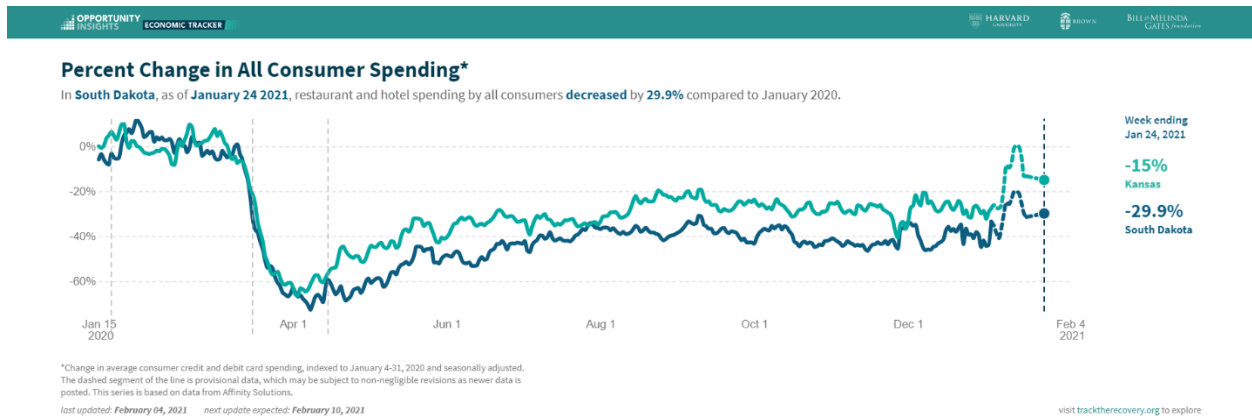
However, as written in SB 286, the definition for restriction in Section 1 (b)(1) line 17 says any governmental entity mandating the use of facemasks and any enforcement requirement by Kansas businesses shall be considered a "restriction" under this act and entitled to compensation. Then if you look at page 4 in Section 4(b), "No tax credit claimed under this act shall be denied if the claimant's operations were restricted in any manner by a governmental order." In neither instance does SB 286 require a claimant to demonstrate a taking.

One of our questions about this legislation is, "Does a city simply having a facemask requirement issued under the Kansas Emergency Management Act (KEMA) in place in the city that affects all citizens the same and places no additional burden on a business trigger this provision?" Or, is the provision only triggered if a city face mask requirement issued under the KEMA required a business to enforce the facemask requirement? These are two very different scenarios.

We are concerned that SB 286 will create a new cause of action against a city and will result in the city having to refund property taxes even if a business cannot demonstrate that it has suffered tangible damages. We agree that if a business has specific, demonstratable damages that were suffered because of a governmental taking then there should be a system to make that entity whole.

While this bill does attempt to require a fact specific analysis for damages, it is important to remember that all other property taxpayers will absorb the effect to still have necessary public services. Because of that, we suggest amending the language on page 3 line 36 to allow the governmental entity access to the documentation establishing damages in order to verify the claims. We also suggest modifying the language to give the governmental entity an opportunity to challenge the attorney general’s findings. Without any verification or oversight that the money being paid out is in proportion to the amount due under a constitutional claim without unjust enrichment, there is a risk that one elected official could misuse this power to the detriment of the taxpayers as a whole.

Finally, I have attached the following chart which shows consumer spending in Kansas vs. South Dakota. Kansas in some areas had government mandated limitations impacting businesses, while South Dakota government had few mandates. The purpose of this chart is to demonstrate that the analysis is not clear cut on whether the government mandates caused the decrease in business revenue in the restaurant industry or whether the drop was due to capitalism and consumer choice. The chart shows that consumer spending dropped in both Kansas and South Dakota, but that South Dakota experienced a greater drop in spending than in Kansas in restaurant and hospitality spending even though South Dakota experienced no state-mandated closures.



We encourage the committee as it looks at this legislation and this issue and reviews programs that have already been made available to those hit the hardest by Covid-19, to consider if this is the best way to compensate businesses for their role in helping slow the spread.