Prepared by the Legislative Council staff
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GUBERNATORIAL EXECUTIVE ORDERS RELATED TO RESTRICTING ACCESS TO PRIVATE BUSINESSES AND STATE FACILITIES

This memorandum provides information on the governor's authority to issue executive orders related to restricting access to certain private businesses and state facilities in an effort to control and prevent the spread of Coronavirus (COVID-19) within the state.

BACKGROUND

On March 19, 2020, Governor Doug Burgum issued Executive Order 2020-06, closing all restaurants, bars, breweries, and cafes, to onsale and onsite patrons. The order was effective from 12:00 p.m. March 20, 2020, through April 6, 2020, and:

- Excludes take-out, delivery, curbside, drive-thru, and off-sale services;
- Includes the closure of recreational facilities, health clubs, athletic facilities, and theaters;
- Directs all state agencies to accelerate the transition of nonessential staff members to remote, in-home worksite; and
- Limits access to the Capitol and all other state facilities to by-appointment only.

On March 27, 2020, the Governor issued Executive Order 2020-06.1 amending Executive Order 2020-06 to include:

- Closing of all salons operated by licensed cosmetologists and barbershops;
- Directing cosmetologists, estheticians, manicurists, and barbers to cease operations;
- Directing all personal care services provided by tattoo and body art facilitates, tanning facilities, massage facilities, and individual massage therapists to close and cease operations.

On April 1, 2020, the Governor issued Executive Order 2020-06.2 extending the expiration date of Executive Orders 2020-06 and 2020-06.1 through April 20, 2020.

On April 15, 2020, the Governor issued Executive Order 2020-06.3 extending the expiration date of Executive Orders 2020-06 and 2020-06.1 through April 30, 2020.

EXECUTIVE ORDER AUTHORITY

As the chief executive of the state, the governor has the responsibility to ensure the state's business is well administered pursuant to Section 7 of Article V of the Constitution of North Dakota. The governor also serves as the commander-in-chief of the state's military forces and may mobilize those forces to execute laws and maintain order. In times of disasters or emergencies, the governor has broad statutory authority under North Dakota Century Code Chapter 37-17.1, the North Dakota Disaster Act. A "disaster" is defined in Section 37-17.1-04 as:

> [T]he occurrence of widespread or severe damage, injury, or loss of life or property resulting from any natural or manmade cause, including fire, flood, . . . **epidemic** . . . or cyber attack which is determined by the governor to require state or state and federal assistance or actions to supplement the recovery efforts of local governments in alleviating the damage, loss, hardship, or suffering caused thereby. **(emphasis supplied)**

A disaster or emergency must be declared by executive order or proclamation of the governor, pursuant to Section 37-17.1-05. Executive orders, proclamations, and regulations issued by the governor have the force of law. Once declared, the state of disaster or emergency continues until the governor determines the threat of an emergency has passed or the disaster has been dealt with to the extent the emergency conditions no longer exist. However, the Legislative Assembly by concurrent resolution has the power to terminate a state of disaster or

emergency. Pursuant to Section 37-17.1-05(6), during times of emergencies, the governor's authority includes suspending the provisions of any regulatory statute prescribing the procedures for conduct of state business, or the orders, rules, or regulations of any state agency, if strict compliance with the provisions of any statute, order, rule, or regulation would in any way prevent, hinder, or delay necessary action in managing a disaster or emergency.

LIMITATIONS ON EXECUTIVE ORDER AUTHORITY

The authority of a governor to issue legally enforceable executive orders may be limited by state and federal law. To be legally enforceable, a gubernatorial executive order must not be preempted by federal law, may not constitute legislation or contravene enacted legislation, and must stem from a provision of the constitution or a statute.

An executive order is invalid under the Supremacy Clause of the United States Constitution if the order is preempted by federal law.[1] The Supremacy Clause preempts a state law or gubernatorial executive order if:

1. Congress expressly displaces state law;
2. Congress intends federal law should regulate a particular legislative field exclusively; or
3. State and federal law conflict.[2]

Under Section 1 of Article III and Section 13 of Article IV of the Constitution of North Dakota, all legislative power, except that reserved to the people, is vested in the Legislative Assembly. An executive order that legislates or contravenes enacted legislation would violate the separation of powers doctrine.[3] Moreover, if an executive order is contrary to enacted legislation, the executive order effectively would constitute a veto without giving the Legislative Assembly an opportunity to override it.[4] This likely would violate the veto provisions of Section 9 of Article V of the Constitution of North Dakota.

An executive order, like any exercise of the governor's authority, must be issued pursuant to constitutional or statutory authority.[5] The governor's constitutional authority is limited to executing or administering the laws of the state. A governor may not create laws or interpret laws without violating the separation of powers doctrine that precludes the exercise of those powers by anyone other than the legislative and judicial branches.

The governor's statutory authority for issuing executive orders is circumscribed to a handful of specific situations, which include times of disaster or emergency. As discussed previously, Section 37-17.1-05(6) authorizes the governor to:

> [s]uspend the provisions of **any regulatory statute** prescribing the procedures for conduct of state business, or the orders, rules, or regulations of any state agency, if strict compliance with the provisions of any statute, order, rule, or regulation would in any way prevent, hinder, or delay necessary action in managing a disaster or emergency. **(emphasis supplied)**

The North Dakota Century Code does not provide the definition of a "regulatory statute." The term briefly was mentioned in a 1958 case,[6] which noted 1919 Session Laws, Chapter 192, was the first comprehensive regulatory statute pertaining to rates, charges, and services of public utilities. Interpreting the meaning of the term in relation to the governor's emergency powers seems to suggest regulatory statutes are those statutes that serve to regulate or prescribe the procedures for conducing state business. The governor's power to suspend regulatory statutes in North Dakota is narrower than the authority provided in comparable provisions in other states. For instance, the governor of Connecticut is authorized to "modify or suspend in whole or in part . . . any statute, regulation or requirement" the governor deems in conflict with the "efficient and expeditious execution of civil

[1] Duke Energy Trading and Marketing, L.L.C. v. Davis, 267 F.3d 1042 (9th Cir. 2001) (federal energy law preempted executive order); New Hampshire Health Care Ass'n v. Governor, 13 A.3d 145, 163 (N.H. 2011) (federal Medicaid law preempted executive order).

[2] Altria Group, Inc. v. Good, 555 U.S. 70 (2008).

[3] Fletcher v. Com., 163 S.W.3d 852 (Ky. 2005).

[4] O'Neil v. Thomson, 316 A.2d 168, 173 (N.H. 1974) (an executive order that frustrates legislation would have the effect of a line item veto without giving the legislative body an opportunity to override it).

[5] State v. Johnson, 16 N.W.2d 873 (N.D. 1944); Louisiana Hosp. Ass'n v. State, 168 So.3d 676 (La. Ct. App. 2014); Rapp v. Carey, 375 N.E.2d 565 (Ct App. N.Y. 1978); O'Neil v. Thomson, at 173 (invalidating executive orders that were not supported by constitutional or statutory authority); Gerald Benjamin et al., "Executive Orders and Gubernatorial Authority to Reorganize State Government," 74 Alb. L. Rev. 1613, 1614 (2010-11).

[6] State ex rel. Pub. Serv. Comm'n v. Montana-Dakota Utilities Co., 89 N.W.2d 94, 97-98 (N.D. 1958).

preparedness functions or the protection of the public health."[7] In addition, the governor of New York may, by executive order, "temporarily suspend specific provisions of any statute, local law, ordinance, or orders, rules or regulations or parts thereof, of any agency during a state disaster emergency, if compliance with such provisions would prevent, hinder, or delay action necessary to cope with the disaster."[8]

An executive order issued outside constitutional or statutory authority "cannot be considered more than a directive from the governor to his subordinates in the executive branch for the carrying out of their official duties" and is unenforceable otherwise.[9]

EXECUTIVE ORDERS 2020-06, 2020-06.1, 2020-06.2, AND 2020-06.3

The broad purpose of Chapter 37-17.1 is to provide for the health, safety, and welfare of the people of the state by reducing vulnerabilities of people and communities of this state to damage, injury, and loss of life and property resulting from natural or manmade disasters or emergencies. To accomplish the purposes of the chapter, the governor is empowered to issue executive orders and proclamations and amend or rescind them. In acting to prevent injury or loss of life before it occurs, the governor necessarily must make a prediction about the imminence of the danger and the likelihood that a disaster will in fact occur.

Courts have analyzed the validity of executive orders under a two-pronged determination.[10] First, whether the declaration of disaster constitutes a "disaster" within the meaning of the statutory definition. Secondly, whether the governor's exercise of his emergency powers was authorized by the Act. The second prong involves two closely related inquiries, whether the executive orders were rationally related to the legislative purpose of protecting the public, and whether the executive orders were closely tailored to the magnitude of the disaster.

As referenced previously, the statutory definition of "disaster" under Section 37-17.1-04, includes the occurrence of widespread injury, or loss of life resulting from any natural or manmade cause such as an epidemic. On March 13, 2020, President Donald Trump declared a national emergency due to the growing COVID-19 crisis in the United States. Governor Burgum declared a state emergency on March 13, 2020, in response to the public health crisis resulting from COVID-19. Thus, the declaration of emergencies on the national and state level due to the rapid spread of COVID-19, could be considered a "disaster" as defined under Section 37-17.1-04.

Chapter 37-17.1 does not permit any delegation of power to the governor to permanently authorize any actions taken via executive orders. Rather, the chapter grants extraordinary power to the governor in time of emergency or disaster to protect the public. The Legislative Assembly has tasked the governor with the responsibility of minimizing or averting the adverse effects of a disaster or emergency.[11] Executive Orders 2020-06, 2020-06.1, 2020-06.2, and 2020-06.3 were issued with the intention of reducing the spread of COVID-19 and to protect and save lives. The executive orders were issued with an expiration date, making them temporary and short term. The orders also restricted access only to places that typically have higher levels of physical public interaction and occupancy and which are most likely to contribute to the rapid spread of COVID-19. Since the executive orders are temporary, short-term in duration, and aimed at minimizing the adverse effects of COVID-19, the orders could be interpreted as being rationally related to the legislative purpose of protecting the public and being closely tailored to the magnitude of the disaster.

POTENTIAL LEGAL ISSUES

An issue related to these orders which may be ripe for legal analysis is whether the governor's orders are "regulatory" in nature as required under Section 37-17.1-05(6). However, an argument could be raised that: the governor is authorized to suspend or limit the sale, dispensing, or transportation of alcoholic beverages[12]; and private businesses within the state are subject to either state licensure to conduct business or subject to statutes or rules adopted by various state agencies regulating the manner in which business must be conducted. Therefore, one could reasonably conclude that restricting access to private businesses and limiting the manner in which a private entity may conduct business during a state-declared disaster is simply regulatory in nature.

A second issue that could be raised for legal analysis is the assertion that restricting access to private businesses constitutes a constitutional taking requiring just compensation under the Fifth Amendment of the Constitution of the United States which apply to the states via the 14th Amendment. The Takings Clause does not

[7] Conn. Gen. Stat. § 28-9(a) (1975).
[8] N.Y. Executive Law § 29-a (1978).
[9] Kinder v. Holden, 92 S.W.3d 793, 807 (Mo. Ct. App. 2002) (internal citations omitted).
[10] County of Gloucester v. State, 132 N.J. 141 (1993).
[11] North Dakota Century Code Section 37-17.1-05(1).
[12] North Dakota Century Code Section 37-17.1-05(6)(h).

prohibit the taking of private property. A state exercising its police power may deprive an individual of private property for a public use, but the Takings Clause requires "just compensation" accompany the deprivation. The starting point of any Takings Clause analysis is determining whether government action affects private property. The United States Supreme Court has held the Takings Clause protects real property and business interests.[13] The next step is to determine whether the state action is a taking. There are two types of takings, physical takings and regulatory takings. Since Executive Orders 2020-06, 2020-06.1, 2020-06.2, and 2020-06.3 do not involve any physical taking of private property, the only plausible constitutional issue left for analysis is whether a regulatory taking has occurred. A regulatory taking can occur when the state does not directly appropriate private property but regulates its use.

The United States Supreme Court has divided regulatory takings into two types, categorical takings, and partial takings.[14] A categorical regulatory taking applies to regulations that completely deprive an owner of **all** economically beneficial use of the property.[15] **(emphasis supplied)** Temporary deprivations are typically not considered to be categorical takings, even if lengthy. Rather, categorical takings require the regulation to permanently deprive the property of all value. Any takings claims more likely would be evaluated within the framework of a partial taking.[16] The United States Supreme Court established a three-factored, fact-specific inquiry to determine whether a law or regulation constitutes a partial taking:

- The economic impact of the regulation;
- The extent to which the regulation has interfered with distinct and reasonable investment-backed expectations; and
- The character of the governmental action.[17]

Whether a partial taking has occurred depends on an intensive ad hoc inquiry into the circumstances of each particular case. Under the Penn Central test, a regulatory taking claim may be asserted where a business can show, for example, severe economic losses suffered in an industry where sweeping regulations are highly unexpected. The broader the shutdown, the less likely it is to constitute a regulatory taking, as the purpose of the Takings Clause is to prevent the government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.[18] Still, the lines drawn between essential and nonessential businesses matter, and if drawn arbitrarily or unreasonably, government-mandated shutdowns can effectively be regulatory takings.

Given the nature of COVID-19 and the need for state action to combat it, an argument could made that any partial taking is out of public necessity. The public necessity defense requires the state to show an actual emergency, imminent danger, and actual necessity of government action. Since Executive Orders 2020-06, 2020-06.1, 2020-06.2, and 2020-06.3 allow for take-out, delivery, curbside, drive-thru, and off-sale services, the private businesses affected by the executive orders have not been deprived of all economically beneficial use. Private businesses ordered to be fully closed, are closed temporarily, and therefore, a court will be much less likely to deem it a "taking." The Supreme Court opined property cannot be rendered valueless by a temporary prohibition on economic use, because the property will recover value as soon as the prohibition is lifted.[19]

CONCLUSION

The COVID-19 epidemic, which has permeated every state in the nation, likely will result in a wave of changes to state constitutions and statutes. The COVID-19 epidemic is forcing governors to take rapid action resulting in the issuance of executive orders at an unprecedented pace. The legislative and judicial response to the executive orders issued during the duration of the epidemic likely will provide ample precedence to outline the true boundaries of executive order authority.

[13] Horne v. Department of Agric., 576 U.S. 350 (2015).
[14] Murr v. Wisconsin, 137 S. Ct. 1933, 1942 (2017).
[15] Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 537 (2005).
[16] Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104 (1978).
[17] Id.
[18] Id. at 1943.
[19] Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302 (2002).