LETTER OPINION
2004-L-60

October 4, 2004

Mr. Garylle B. Stewart
Fargo City Attorney
PO Box 1897
Fargo, ND 58107-1897

Dear Mr. Stewart:

Thank you for your letter regarding three competing smoking-related initiated measures on the upcoming election ballot in the city of Fargo. You point out that the initiated ordinances have inconsistent exemptions to the proposed smoking ban and ask which ordinance would prevail if two or more of them receive a majority of yes votes.[1]

For the reasons indicated below, it is my opinion that if conflicting municipal initiated measures are approved by the electors, the one receiving the highest number of yes votes will prevail.

ANALYSIS

Article III, section 8 of the North Dakota Constitution provides, in part, that "[i]f conflicting measures are approved, the one receiving the highest number of affirmative votes shall be law." This constitutional provision applies to state initiated and referred measures, not initiated municipal ordinances.[2] Unlike some states, such as California, there is no comparable North Dakota constitutional or statutory provision dealing with conflicting initiated municipal ordinances. See Sacramento County Deputy Sheriffs' Ass'n v. County of Sacramento, 102 Cal. Rptr. 2d 523 (Cal. App. 2000) (discussing a California constitutional provision which provides, "[i]f provisions of 2 or more [county] measures approved at the same election conflict, those of the measure receiving the highest affirmative vote shall prevail."); see also 42 Am. Jur. 2d Initiative and Referendum § 41 (2000) ("A state constitution may provide that, unless a contrary intent is apparent in the

[1] Fargo is a home rule city with the authority in its home rule charter "[t]o provide for all matters pertaining to city elections, except as to qualifications of electors." Fargo Home Rule Charter art. 3, F. See also N.D.C.C. § 40-05.1-06(6). Fargo has not implemented an ordinance addressing which ordinance would prevail if two or more initiated ordinances receive a majority of yes votes.

[2] Cf. Sweetall v. Town of Blue Hill, 661 A.2d 159 (Me. 1995) (state constitutional provision dealing with competing initiative petitions to be presented to state legislature did not apply to local initiative process).

ballot measures, when two or more measures are competing initiatives -- either because they expressly are offered as 'all-or-nothing' alternatives or because each creates a comprehensive regulatory scheme related to the same subject -- only the provisions of the measure receiving the highest number of affirmative votes may be enforced.").

Likewise, there is no case law from this state addressing the issue. However, other states' courts have addressed similar issues. In In re Interrogatories Propounded by the Senate Concerning House Bill 1078, 536 P.2d 308 (Colo. 1975), the Colorado Supreme Court had occasion to construe a state statute which provided that "in case of adoption of conflicting provisions, the one which receives the greatest number of affirmative votes shall prevail." Id. at 314. The court was faced with determining which of two inconsistent constitutional provisions must prevail. It noted the following:

> If this statute is not permitted to operate in this case, the people will be left without either amendment to the constitution. On the other hand, if the statute is allowed to operate as the legislature intended, Amendment No. 9, the recipient of the greatest popular support, will be given effect as the expression of the predominant will of the people. . . .
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> . . . .
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> As we view it, even if the legislature had not passed such legislation, or did not have authority to do so, we would feel bound to hold that in order to carry out the meaning and purpose of Art. V, s 1, the one of two inconsistent amendments which received the most votes must prevail. That, in our view, is what the 'republican' form of government means with respect to the right of the people to amend the constitution.
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> We recognize that several courts have made statements as dicta as in Opinion to the Governor, 78 R.I. 144, 80 A.2d 165, where it was said:
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> > 'In such a case (of conflicting amendments adopted on the same day) the law is well settled that both amendments must fall as it is impossible to know the final will of the electors and to give it effect.'
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> . . . .
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> We find significance in the fact that neither counsel nor we have been able to find an instance in which the court actually struck down both amendments. In the light of our views already expressed, we reject the dicta.

Id. at 314-15 (citations omitted). In In re Proposals D & H, 339 N.W.2d 848, 854 (Mich. 1983), the Michigan Supreme Court "borrowed" a constitutional provision providing that if

two measures approved by the electors at the same election conflict, the measure receiving the highest number of affirmative votes will prevail to resolve a conflict between an initiated measure and a legislative enactment submitted to the voters for approval.

I concur with these courts' analyses and, while I recognize that the pertinent provision in N.D. Const. art. III, § 8 does not, by its terms, apply to conflicting municipal initiated measures, it does set out, at least by analogy, a general policy of the law of this state. Also, permitting the measure receiving the highest number of affirmative votes to prevail "is what the 'republican' form of government means with respect to the right of the people." 536 P.2d at 315.

This result is also consistent with the ordinary rules of statutory construction which apply to conflicting initiated municipal measures. See, e.g., Carter v. City of Bridgeport, 31 Conn. L. Rptr. 540, 2002 WL 523110 (Conn. Super. Ct. 2002) (same principles of statutory construction apply when determining whether ordinances are conflicting); Kan. Att'y Gen. Op. No. 89-48 (Apr. 17, 1989) ("An examination of the applicable rules that govern when two ordinances appear in conflict reveals that ordinances are to be construed by the same rules that govern the construction of statutes."); see also 42 Am. Jur. 2d Initiative and Referendum § 49 (2000) ("The basic rules of statutory construction apply with equal force to legislation by the people through the initiative process or by referendum."). State law provides that in enacting a statute it is presumed that "[a] just and reasonable result is intended" and "[a] result feasible of execution is intended." N.D.C.C. § 1-02-38(3) and (4). "It is well settled that statutory language cannot be interpreted so as to reach absurd or unjust results. In Interest of B. L., 301 N.W.2d 387 (N.D. 1981); State v. Mees, 272 N.W.2d 61 (N.D. 1978)." N.D.A.G. Letter to Rodakowski (Dec. 24, 1986). Approval of inconsistent ordinances would violate these rules of construction since such a result would not be reasonable or feasible of execution.

Based on the foregoing, it is my opinion that if two or more conflicting municipal initiated measures receive a majority of yes votes, the measure receiving the highest number of affirmative votes will prevail.

Sincerely,

Wayne Stenehjem
Attorney General

jjf/pg

This opinion is issued pursuant to N.D.C.C. § 54-12-01. It governs the actions of public officials until such time as the question presented is decided by the courts. See State ex rel. Johnson v. Baker, 21 N.W.2d 355 (N.D. 1946).