

**LETTER OPINION
2017-L-06**

December 8, 2017

The Honorable Joan Heckaman
State Senate
322 2nd Avenue N
New Rockford, ND 58356

The Honorable Pamela Anderson
House of Representatives
3001 40th Avenue South Unit H
Fargo, ND 58104-4406

The Honorable Mary Schneider
House of Representatives
1011 8th Street South
Fargo, ND 58103-2725

Dear Senator Heckaman, Representative Anderson, and Representative Schneider:

Thank you for your letter asking whether the two-thirds vote requirement contained in Article III, § 8 of the North Dakota Constitution, applies to N.D.C.C. ch. 19-24.1 for seven years.

For the following reasons, it is my opinion N.D.C.C. ch. 19-24.1 retains initiated status and is subject to the constitutional limitations provided in N.D. Const. art. III, § 8.

ANALYSIS

North Dakota voters legalized the medical use of marijuana by approving Initiated Measure No. 5 during the 2016 election, creating N.D.C.C. ch. 19-24, known as the North Dakota Compassionate Care Act.¹ In the subsequent legislative session, S.B. 2344 repealed N.D.C.C. ch. 19-24 and created N.D.C.C. ch. 19-24.1.² Senate Bill 2344 was

¹ 2017 N.D. Sess. Laws, ch. 453.

² 2017 N.D. Sess. Laws, ch. 171.

approved by the Legislative Assembly with at least two-thirds vote of the members elected to each house.³

Article III, § 8, N.D. Const., provides in part:

A measure approved by the electors may not be repealed or amended by the legislative assembly for seven years from its effective date, except by a two-thirds vote of the members elected to each house.

The Constitution does not address whether this limitation continues to apply after an initiated measure has been amended or repealed by a two-thirds vote of each house.

The North Dakota Supreme Court held that where the Legislative Assembly amended and reenacted an initiated measure, its initiative character was not destroyed, and any subsequent amendments were still subject to the constitutional limitations provided by the then-current provision which is now found at N.D. Const. art. III, § 8.⁴ However, S.B. 2344 did not amend N.D.C.C. ch. 19-24, but instead repealed the chapter and enacted ch. 19-24.1 in its stead.⁵

The *Strutz* Court discussed at length the distinction between an amendment and a repeal.⁶ While the Court stated “[a] repeal destroys; an amendment keeps alive,”⁷ the practical distinction the Court drew between an amendment and a repeal is instructive for the present case. “An amendment is a change or alteration of a law or of some of its provisions...and merely continues a law...in changed form.”⁸ The Court further provided, “[i]f it were the intention to merely re-enact the particular provision of a former law in the new act operative in its own terms and remedy independent of the other portions of the act, alike in the new as in the old act, there is no repeal, because repeal is the absolute doing away with for all purposes.”⁹

Prior to its repeal, N.D.C.C. ch. 19-24 was substantially similar to N.D.C.C. ch. 19-24.1 in both scope and operation. “There may be some changes, but the law is the same law, so

³ 2017 House Journal at 1385 (Apr. 4, 2017); 2017 Senate Journal at 1421 (Apr. 13, 2017).

⁴ *State ex rel. Strutz v. Baker*, 299 N.W. 574, 575-76, 580 (N.D. 1941). See also *State ex rel. Dahl v. Dewing*, 131 N.W.2d 434, 437 (N.D.1964); N.D.A.G. 49-102.

⁵ 2017 N.D. Sess. Laws ch. 171, §§ 1, 6.

⁶ *Strutz*, 299 N.W. at 578.

⁷ *Id.*

⁸ *Id.*, quoting *City of Chicago v. Am. Tile & Gravel Co.*, 118 N.E. 730, 731 (Ill. 1918).

⁹ *Strutz*, at 578, quoting *Jessee v. De Shong*, 105 S.W. 1011, 1015 (Tx. Civ. App. 1907).

far as the law is concerned.”¹⁰ Although N.D.C.C. ch. 19-24 has been repealed, the purpose and principle of Initiated Measure No. 5 remains in effect at N.D.C.C. ch. 19-24.1. The Legislative Assembly has not absolutely done away with Initiated Measure No. 5.

Further, the Legislative Assembly provided the following statement of legislative intent:

It is the intent of the sixty-fifth legislative assembly that chapter 19-24.1 of the North Dakota Century Code, as created in Senate Bill No. 2344, be treated as an amendment to initiated measure No. 5 as adopted at the general election in 2016, and therefore an amendment to or repeal of chapter 19-24.1 before December 8, 2023,¹¹ is subject to the requirements of section 8, article III of the Constitution of North Dakota.¹²

The statement provides a clear understanding of the Legislative Assembly’s intent to “make of the old and the new a connected piece of legislation covering the same subject matter,”¹³ thereby protecting its initiated status under *Strutz*.

Therefore, it is my opinion N.D.C.C. ch. 19-24.1 retains initiated status and is subject to the constitutional limitations provided in N.D. Const. art. III, § 8.¹⁴

Sincerely,

Wayne Stenehjem
Attorney General

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.¹⁵

¹⁰ *Strutz* at 576 (emphasis in original).

¹¹ “An initiated or referred measure which is approved shall become law thirty days after the election.” N.D. Const., art. III, § 8. Initiated Measure 5 was passed on November 8, 2016.

¹² 2017 Sess. Laws ch. 29, § 9. This bill contains the appropriation for the State Department of Health, which administers the medical marijuana program under N.D.C.C. ch. 19-24.1.

¹³ *Strutz* at 578, quoting *De Motte v. De Motte*, 4 N.E.2d 960, 962 (Ill.1936) (quoting *Galpin v. City of Chicago*, 109 N.E. 713, 716-717 (Ill. 1915)).

¹⁴ The constitutional limitation is applicable until Dec. 8, 2023.

¹⁵ See *State ex rel. Johnson v. Baker*, 21 N.W.2d 355 (N.D. 1946).