STATE OF NORTH DAKOTA

ATTORNEY GENERAL'S OPINION 98-F-14

Date Issued: May 12, 1998

Requested by: Patricia L. Burke, Burleigh County State's Attorney

- QUESTIONS PRESENTED -

I.

Whether N.D.C.C. § 11-10.2-02(1) conflicts with Article VII, Section 9 of the North Dakota Constitution by allowing the elimination of a county office by resolution of the county commission in addition to voter initiative.

II.

Whether N.D.C.C. § 11-10.2-02(2) conflicts with Article VII, Section 9 of the North Dakota Constitution by allowing the voter initiative in that subsection to be placed on the ballot by signatures equal to 10 percent of the county votes in the last gubernatorial election rather than 25 percent.

- ATTORNEY GENERAL'S OPINIONS -

I.

It is my opinion that N.D.C.C. § 11-10.2-02(1) does not conflict with Article VII, Section 9 of the North Dakota Constitution because Article VII, Sections 2 and 8 allow the Legislature to authorize by law the elimination of a county office by resolution of the county commission in addition to the public's right to petition and demand a vote guaranteed by Article VII, Section 9.

II.

It is my opinion that N.D.C.C. § 11-10.2-02(2) does not conflict with Article VII, Section 9 of the North Dakota Constitution by allowing the voter initiative in that subsection to be placed on the ballot by signatures equal to just 10 percent of the county votes in the last gubernatorial election rather than by 25 percent as specified by Article VII, Section 9.

- ANALYSES -

I.

North Dakota law provides that, without county home rule, a county may combine any elective county office with one or more functionally related elective or appointive county offices, separate an elective county office into two or more elective or appointive offices, or redesignate an elective office as an appointive office or an appointive office as an elective office. N.D.C.C. § 11-10.2-01(1). There are two statutory methods for accomplishing these acts. These methods are by a resolution of the board of county commissioners or by an initiative of county electors. N.D.C.C. § 11-10.2-02. The combination or separation of elective county offices, or redesignation of a county office as elective or appointive through a resolution of the board of county commissioners may be effected as follows:

1. By resolution of the board of county commissioners, subject to the right of referendum in the county electors. The board of county commissioners may by a majority vote adopt a preliminary resolution incorporating a proposed plan for combining or separating county offices, or redesignating a county office as elective or appointive. The board shall cause the complete text of the proposed plan to be published in the official newspaper of the county, at least once during two different weeks within the thirty-day period immediately following the adoption of the preliminary resolution. The board of county commissioners shall hold public hearings and community forums or use other suitable means to disseminate information, receive suggestions and comments, and encourage public discussion of the purpose, conclusions, and recommendations of the plan. Within two years after the adoption of the preliminary resolution, the board of county commissioners may by final resolution approve the plan or amend the plan and approve it for implementation according to its terms. The final resolution may be referred to the qualified electors of the county by a petition protesting the plan. The petition must be signed by ten percent or more of the total number of qualified electors of the county voting for governor at the most recent gubernatorial election, and filed with the county auditor, or

> functional equivalent of that office, before four p.m. on the thirtieth day after the final resolution is adopted. Within ten days after the filing of the petition, the county auditor shall examine the petition and ascertain from the voter list whether the petition contains the signatures of a sufficient number of qualified electors. Any insufficiencies may be cured by the filing of an amended petition within ten days after the county auditor declares the insufficiency. The final resolution is suspended upon a determination by the county auditor that the petition was timely filed and contains the signatures of a sufficient number of qualified electors. The board of county commissioners shall reconsider the referred resolution, and if it does not repeal the resolution in its entirety, shall submit the resolution to a vote of the qualified electors of the county at the next regular election. The county auditor shall cause the complete text of the resolution to be published in the official newspaper of the county, not less than two weeks nor more than thirty days, before the date of the election. If a majority of the qualified electors voting on the question approves the resolution, the plan incorporated in the resolution is effective and becomes operative according to its terms as if it had not been suspended.

N.D.C.C. § 11-10.2-02(1). This statute provides that a board of county commissioners may pass a resolution concerning the status of certain county offices without the requirement of an election except if the public presents a petition to demand such an election.

Article VII of the North Dakota Constitution concerns political subdivisions, and was enacted by the voters in 1982. See 1981 N.D. Sess. Laws ch. 665, 1983 N.D. Sess. Laws ch. 718. Article VII contains a procedure to put certain issues on the ballot:

> Questions of the form of government to be adopted by any county or on the elimination or reinstatement of elective county offices may be placed upon the ballot by petition of electors of the county equal in number to twenty-five percent of the votes cast in the county for the office of governor at the preceding gubernatorial election.

N.D. Const. art. VII, § 9. This section provides that questions on the elimination of an elective county office may be placed on the ballot by petition of the electors. Your question may be rephrased as asking whether this section of the North Dakota constitution prohibits the Legislature from providing a different means of combining, eliminating, or changing an elective county office.

The North Dakota Constitution is a limit of legislative authority, unlike the United States Constitution which consists of grants of authority. State v. Anderson, 427 N.W.2d 316, 318 (N.D. 1988), cert. denied 488 U.S. 965 (1988). The North Dakota Legislature thus has plenary powers except as limited by the state and federal constitutions or acts and treaties of the United States. Id.; State v. Ertelt, 548 N.W.2d 775, 776 (N.D. 1996). It is presumed when construing a statute that the Legislature intended to comply with the constitutions of the state and of the United States and any doubt must be resolved in favor of a statute's validity. Haney v. North Dakota Workers Compensation Bureau, 518 N.W.2d 195, 197 (N.D. 1994); Snortland v. Crawford, 306 N.W.2d 614, 626 (N.D. 1981); State ex rel. Johnson v. Baker, 21 N.W.2d 355, 359 (N.D. 1945); N.D.C.C. § 1-02-38(1). This presumption is conclusive unless the statute clearly contravenes the state or federal constitutions. State v. Hegg, 410 N.W.2d 152, 154 (N.D. 1987); State ex rel. Lesmeister v. Olson, 354 N.W.2d 690, 694 (N.D. 1984). Also, a statute will only be found unconstitutional upon concurrence of four of the five justices of the North Dakota Supreme Court. N.D. Const. art. VI, § 4. "One who attacks a statute on constitutional grounds, defended as that statute is by a strong presumption of constitutionality, should bring up his heavy artillery or forego the attack entirely." S. Valley Grain Dealers Ass'n v. Bd. of County Comm'rs of Richland County, 257 N.W.2d 425, 434 (N.D. 1977).

Before addressing whether N.D.C.C. § 11-10.2-02(1) conflicts with Article VII, Section 9, it is necessary to determine what Article VII, Section 9 requires. Article VII, Section 9 states that certain questions "may" be placed on the county ballot for a vote of the people. General principals of statutory construction are applied when construing constitutional provisions. State v. City of Sherwood, 489 N.W.2d 584, 587 (N.D. 1992); McCarney v. Meier, 286 N.W.2d 780, 783 (N.D. 1979). Generally, the word "may" is regarded as being merely directory, and is not viewed as creating a mandatory requirement where the failure to perform a duty would invalidate subsequent proceedings. Syverson, Rath and Mehrer v. Peterson, 495 N.W.2d 79, 80-81 (N.D. 1993). See also Bernhardt v. Bernhardt, 561 N.W.2d 656, 658 (N.D. 1997). "The word 'may' will be construed as 'must' only where the context or subject matter compels that

construction." Comm'n on Med. Competency v. Racek, 527 N.W.2d 262, 268 (N.D. 1995).

Generally, if a duty prescribed in a statute is essential to the main objectives of that statute, the duty will be construed as being mandatory. In the Interest of C.J.A., 473 N.W.2d 439, 441 (N.D. 1991).

> Mandatory and directory statutes each impose duties, and their difference lies in the consequence of the failure to perform the duty. The mandatory-directory dichotomy relates to whether the failure to perform a duty will invalidate subsequent proceedings. . . . If the prescribed duty is essential to the main objective of the statute, the statute is mandatory and the failure to comply with it will invalidate subsequent proceedings; however, if the duty is not essential to accomplishing the main objective of the statute but is designed to assure order and promptness in the proceeding, the statute is directory and the failure to comply with it will not invalidate subsequent proceedings.

Solen Public School Dist. No. 3 v. Heisler, 381 N.W.2d 201, 203 (N.D. 1986). See also Lippert v. Grand Forks Public School Dist., 512 N.W.2d 436, 439-440 (N.D. 1994). This can be restated generally as a test whether the provision is for the benefit and protection of the public. See Fisher v. Golden Valley Bd. of County Comm'rs, 226 N.W.2d 636, 645 (N.D. 1975). If the provision is for the benefit and protection of the public, it is mandatory, but if the provision is designed to secure order, system and dispatch in proceedings and the rights of the public cannot be injuriously affected, then the provision is merely directory. Id.

When reviewing Article VII, Section 9 in light of the analysis given by the North Dakota Supreme Court regarding the mandatory or directory dichotomy, it is apparent that this provision is a permissive grant of authority to the electors of the county. However, this provision creates a mandatory duty on the county government when the electors fulfill the prerequisite requirement of providing a petition of electors of the county equal in number to 25 percent of the votes cast in the county for the office of governor in the preceding gubernatorial election. Put another way, Article VII, Section 9 is a grant of discretionary power to the public to require certain questions be put to a vote of the people upon a sufficient petition being delivered to the county government. Its purpose is to protect the rights of the people in their county government by

guaranteeing a right to demand a vote on certain topics if there is a sufficient petition.

The true meaning and intent of the people when enacting Article VII, Section 9 of the North Dakota Constitution may be resolved by reading it in conjunction with the rest of Article VII. All sections of present Article VII were enacted as part of the same constitutional amendment. See 1981 N.D. Sess. Laws ch. 665, 1983 N.D. Sess. Laws ch. 718. It is a general rule of construction that an individual provision is to be construed in relation to the entire enactment of which it is a part, and, to the extent possible, interpretation of this provision should be consistent with the intent and purposes of the entire enactment. Production Credit Ass'n of Minot v. Lund, 389 N.W.2d 585, 586-587 (N.D. 1986). Effect and meaning must be given to every provision, and apparently inconsistent provisions must be reconciled if possible. State v. City of Sherwood, 489 N.W.2d at 587; McCarney v. Meier, 286 N.W.2d at 783. Therefore, Section 9 must be read and reconciled with the other sections in Article VII.

The purpose of present Article VII "is to provide for maximum local self-government by all political subdivisions with a minimum duplication of functions." N.D. Const. art. VII, § 1. To this end:

> The legislative assembly shall provide by law for the establishment and the government of all political subdivisions. Each political subdivision shall have and exercise such powers as provided by law.

N.D. Const. art. VII, § 2. Further,

> [e]ach county shall provide for law enforcement, administrative and fiscal services, recording and registration services, educational services, and any other governmental services or functions as may be provided by law. Any elective county office shall be for a term of four years.

N.D. Const. art. VII, § 8. Therefore, different sections of the same constitutional amendment required the Legislative Assembly to provide "by law" for the establishment, government, and powers of counties and to provide "by law" for the services to be provided by the county.

The phrase "by law" as used in the North Dakota Constitution has an acquired meaning. Article I, Section 23 of the North Dakota Constitution states that the "provisions of this constitution are

mandatory and prohibitory unless, by express words, they are declared to be otherwise." This section establishes the rule that when the constitution directs something to be done in a given manner, or at a particular time or place, then there is an implied prohibition against any other mode or time or place for doing the act. State v. Stark County, 103 N.W. 913, 915 (N.D. 1905). Constitutional provisions directing the Legislature to implement a constitutional provision "by law" operate to permit the Legislature to enact laws for the operation of those provisions, and any such constitutional right must be exercised in accordance with the law that the Legislature enacts. State v. Hanson, 558 N.W.2d 611, 614 (N.D. 1996); Zahn v. Graff, 530 N.W.2d 645, 646 (N.D. 1995); Johnson v. Wells County Water Resource Bd., 410 N.W.2d 525, 529 n.3 (N.D. 1987); State ex rel. Agnew v. Schneider, 253 N.W.2d 184, 187-188 (N.D. 1977); State v. Timm, 146 N.W.2d 552, 553 (N.D. 1966), State v. Stark County, 103 N.W. at 914-915. Therefore, the specific direction to the Legislative Assembly to provide by law for the establishment and the government of all political subdivisions, and to provide by law for each county's provision of law enforcement, administrative and fiscal services, recording and registration services, educational services and any other governmental services or functions, operates to direct the Legislature to enact laws specifying the powers and form of county government, and this implies the power to specify the means of exercising those powers through county public officers. 1983 N.D. Op. Att'y Gen. 24.

Therefore, reading Article VII as a whole indicates that Article VII, Section 9 was not intended to make a petition of electors of a county the only way by which questions of the elimination or reinstatement of elective county offices may be made. This is because provisions equal in stature to Article VII, Section 9 provide that these issues may be determined by law in addition to the constitutionally protected right to petition and demand a vote.

Further, present Article VII was intended to give the Legislature freedom to enact laws addressing elective county offices because former protective measures for county offices were removed when Article VII was amended and reenacted. The amendment of an existing provision indicates an intent to change that provision. Bostow v. Lundell Mfg. Co., 376 N.W.2d 20, 22 (N.D. 1985); City of Minot v. Knudson, 184 N.W.2d 58, 63-64 (N.D. 1971). Formerly, Article VII, Section 8 provided that each county must have an elected register of deeds, county auditor, treasurer, sheriff, state's attorney, and a clerk of the district court, except in counties having a population of 6,000 or less where the register of deeds was to be combined with the clerk of district court. N.D. Const. art. VII, Section 8 (Allen

Smith Co. 1981). Present Article VII contains no provision requiring any particular county offices to be elective, but specifies only that the Legislature shall provide for the government of all political subdivisions, and each county shall provide for certain services as may be provided by law. N.D. Const. art. VII, §§ 2, 8.

1981 Senate Concurrent Resolution No. 4002 was the initial step in amending the article in the N.D. Constitution regarding political subdivisions. The resolution originally retained all elective county offices, and limited the means by which those offices could be eliminated:

> Each county shall provide for law enforcement, administrative and fiscal services, recording and registration services, educational services, and any other governmental services or functions as may be provided by law.
>
> <u>All elective county offices or any combinations thereof which exist on the effective date of this article shall continue to be elective county offices with four year terms; however, any elective county office or offices other than the offices of county commissioners may be eliminated either by adoption of a home rule charter, or an optional form of county government, or at a countywide referendum by a majority of the electors voting on the question.</u>
>
> <u>Whenever an elective county office is eliminated, the county governing board may provide for any service rendered by that office. Any elective office eliminated by referendum may be reinstated at any time at a countywide election by a two-thirds majority of the electors voting on the question.</u>

S. Con. Res. 4002, § 8, 47th N.D. Leg. (1981) (emphasis supplied). The Legislature amended the proposed new section 8 by removing the material underscored above and substituting "Any elective county office shall be for a term of four years." <u>Hearing on S. Con. Res. 4002 Before the Joint Constitutional Revision Comm.</u>, 47th N.D. Leg. (March 6, 1981) (Statement of Rep. Kretschmar). The intent of this amendment was to retain language specifying the functions county government would provide and remove from the constitution the requirement for specific elected county officials which would remain as provided in statute. <u>Id.</u> A further purpose of the amendment was to allow a county to adopt a home rule charter and to provide for the

combination, elimination, appointment or election of county officials in a more flexible manner than existing conditions. Id. (Statement of Rep. Conmy). Therefore, the intent of the amendment and reenactment of Article VII was to place the question of whether particular county offices should exist, or be elective or appointive, within statute and under control of the Legislature, as opposed to placement of these offices in the constitution which is beyond the Legislature's control.

However, an argument may be made that the constitutional requirement of Article VIII, Section 7 that no optional form of government for a county shall become operative until it has been submitted to the electors at a special or general election and approved by a majority of those voting thereon requires there be an election before an elective county office may be redesignated as an appointive office or have its duties combined with another office. This argument assumes that elimination or reinstatement of an elective county office constitutes a change in the form of county government. Article VII, Section 9, quoted earlier, uses the disjunctive "or" between the phrases "form of government" and "elimination or reinstatement of elective county offices." The language used in Article VII, Section 9 implies that the term "form of government" is distinct from, and has a different meaning than, the phrase "elimination or reinstatement of elective county offices." Because Section 9 and Section 7 were adopted by the same constitutional amendment, it is reasonable to construe these provisions as part of a whole. All sections of a single enactment must be construed to have meaning and be read to give effect to each of its provisions whenever fairly possible. County of Stutsman v. State Historical Soc'y, 371 N.W.2d 321, 325 (N.D. 1985). Laws are construed as a whole to give meaning to each word and phrase. MedCenter One v. N.D. State Bd. of Pharm., 561 N.W.2d 634, 638 (N.D. 1997). This means that the term "form of government" in Section 7 means something different than the term "elimination or reinstatement of elective county offices."

Further, the phrase "form of government" has been interpreted in regard to city government as applying to the governing body and executive officer, but not including city officers. Litten v. City of Fargo, 294 N.W.2d 628, 634 (N.D. 1980). Litten involved Fargo's attempt to change its form of government by using its home rule charter instead of following the general statutes specifying the requirements for a city to change its form of government. Id. at 630. An argument was made that the home rule power contained in N.D.C.C. § 40-05.1-06(4) relating to a city's authority over city officers, agencies, and employees permitted a change in the form of government under home rule. Id. at 632-633. The North Dakota

Supreme Court held that the term "city officers" did not include the governing body and executive officer or mayor. Id. at 634. Therefore, the home rule power of a city to provide for city officers did not give a home rule city authority to change its form of government. Id. Although this holding involves city government instead of county government, it indicates that the intended meaning of "form of government" is only the structure of the governing body and chief executive officer, and does not include other governmental officers. State ex rel. Workmen's Compensation Fund v. E.W. Wylie Co., 58 N.W.2d 76, 82 (N.D. 1953) (intent of one statute may be determined by known interpretation of similar phrase in another statute).

In conclusion, because the Legislature may provide by law for the establishment and the government of all political subdivisions and for the governmental services which are to be provided by counties, it is my opinion that N.D.C.C. § 11-10.2-02(1) does not conflict with Article VII, Section 9 or Section 7 of the North Dakota Constitution by allowing the elimination of a county office by resolution of the county commission in addition to the right to petition and demand a vote guaranteed by Article VII, Section 9.

II.

Statutory law provides for an initiative of county electors for the purposes of combination or separation of elective county offices, or redesignation of a county office as elective or appointive:

> By initiative of county electors. A petition signed by ten percent or more of the total number of qualified electors of the county voting for governor at the most recent gubernatorial election may be submitted to the board of county commissioners, calling upon the board to submit to the electors the question of adopting a plan described in, or annexed to, the petition. The county auditor, or the functional equivalent of that officer, shall examine the petition and ascertain from the voter list whether or not the petition contains the signatures of a sufficient number of qualified electors. Any insufficiencies may be cured by the filing of an amended petition within thirty days after the county auditor declares the insufficiency. When a plan for the combination or separation of county offices or redesignation of county offices as elective or appointive is proposed pursuant to this subsection, the board of county commissioners shall submit the proposed plan to a

> vote of the qualified electors of the county at a primary or general election not less than sixty days nor more than two years, as specified in the petition, after determining that the petition is sufficient. The question on the ballot at the election must be framed in a manner that fairly and accurately describes the substance of the proposed plan. The board shall cause the complete text of the proposed plan to be published in the official newspaper of the county, at least once during two different weeks within the thirty-day period immediately preceding the date of the election. The board of county commissioners may, prior to the election, hold public hearings and community forums and use other suitable means to disseminate information, receive suggestions and comments, and encourage public discussion of the purpose, conclusions, and recommendations of the plan. If a majority of the qualified electors voting on the question approves of its adoption, the plan is effective according to its terms.

N.D.C.C. § 11-10.2-02(2). In addition to this right of initiative, where the board of county commissioners, by resolution, has combined or separated elective county officers or redesignated a county office as elective or appointive, there is a provision for a referendum by county electors which also requires that a petition be presented by 10 percent or more of the total number of qualified electors of the county voting for governor at the most recent gubernatorial election, which petition, if received within the appropriate time period, will suspend the county board's action. N.D.C.C. § 11-10.2-02(1).

Article VII, Section 9 of the North Dakota Constitution provides for a citizen initiative on questions of a county's form of government or on the elimination or reinstatement of elective county offices, with the measure to be placed on the ballot by a petition consisting of electors of the county equal in number to 25 percent of the votes cast in the county for the office of governor at the preceding gubernatorial election.

The constitution of the state is its paramount law and is a self-imposed restraint upon the people of the state in the exercise of their governmental sovereign power, either by themselves through the initiative or by their agency, the Legislature. Northwestern Bell Tel. Co. v. Wentz, 103 N.W.2d 245, 252 (N.D. 1960). The North Dakota Constitution is an instrument of limitations rather than an instrument of grants such as the United States Constitution, and under the North Dakota Constitution, the Legislature has plenary

authority except as limited by these constitutions and appropriate congressional acts. State v. Kainz, 321 N.W.2d 478, 480 (N.D. 1982).

The Legislature may expand the rights of its citizens beyond those rights given by the constitution, although it may not reduce constitutional rights. Johnson, 410 N.W.2d at 529. The Legislature's decision as stated in N.D.C.C. § 11-10.2-02(2) to require a petition of only 10 percent or more of the total number of qualified electors of the county voting for governor at the most recent gubernatorial election instead of 25 percent under Article VII, Section 9 is a grant of additional or broadened authority to the public. This statute makes the right of initiative or referendum easier for the public to exercise, and hence increases the likelihood that such power might be exercised by the public.

On the other hand, it may be argued that requiring a petition of 25 percent instead of 10 percent before these issues must be placed on the ballot was intended to protect the county from having to face repeated attempts to challenge the form of government or the status of elective or appointive offices at each election. However, it has been held that:

> In North Dakota, counties are creatures of the constitution and may speak and act only in the manner and on the matters prescribed by the Legislature in statutes enacted pursuant to constitutional authority.

State Historical Soc'y, 371 N.W.2d at 329, Dornacker v. Olson, 248 N.W.2d 844, 849 (N.D. 1976). Further, Article VII, Sections 2 and 8 provide that the Legislature may determine the appropriate form of county government, and there is no constitutional provision stating whether certain county offices must exist or whether any particular office must be elective or appointive. Therefore, the Legislature may determine that the people should have an additional or broadened right to vote on questions of the form of county government or the elimination or reinstatement of elective county offices than provided by the constitution's minimum guarantee concerning the people's power to petition and require a vote on those items contained in Article VII, Section 9.

In conclusion, it is my opinion that N.D.C.C. § 11-10.2-02(2) does not conflict with Article VII, Section 9 of the North Dakota Constitution by allowing the voter initiative to be placed on the ballot by signature equal to 10 percent of the county votes in the last gubernatorial election rather than the 25 percent specified by Article VII, Section 9.

- EFFECT -

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 questions presented are decided by the courts.

Heidi Heitkamp
ATTORNEY GENERAL

Assisted by: Edward E. Erickson
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