OPINION
69-320

April 18, 1969 (OPINION)

Mr. Harold Shaft

Shaft, Benson, Shaft and McConn

Grand Forks, North Dakota

RE: Schools - Unlimited Tax Levy - Petition to Discontinue

This is in reply to your letter of April 10, 1969, relative to Senate Bill 113 which amends sections 57-15-14 and 57-16-04 of the North Dakota Century Code. You state the following facts and questions:

> Prior to the effective date of Senate Bill No. 113, which became effective upon the approval of the Governor on March 19, 1969, a petition was filed with the clerk, signed by more than 5 percent of the number who voted at the last school election, requesting the Board to place on the ballot of the next regular election the question of discontinuing the unlimited taxing authority of the district, authorized by a previous election.
>
> The Clerk presented the petition to the Board on March 18, and the Board referred it back to the clerk for checking the genuineness of the signatures, and to the undersigned as the Board's attorney for a legal opinion.
>
> Before the next meeting of the Board, held April 8, Senate Bill 113 had gone into effect. The Board has taken no action on the petitions.
>
> The question now presented is whether a petition which was sufficient to require the election is still effective after the number of signers has been increased by emergency legislation to a number in excess of the number of signers on the petition.
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> After some study we came to the conclusion that the petition is no longer effective and we enclose a copy of the memorandum which we submitted to the School Board. However, since the question is apparently one of first impression, the Board felt that in these circumstances we should have an opinion from your office as the question is not free from doubt."

As you note in your Memorandum, section 57-15-14 of the North Dakota Century Code, prior to its amendment by Senate Bill 113 effective March 29, 1969, provided that the question of discontinuing an unlimited taxing authority in any school district must be submitted to the electorate at the next regular election upon the filing with the school board of a petition containing the signatures of not less than five percent of the electors of the district, as determined by the number voting in such school district at the most recent regular school district election. Senate Bill 113 amended this provision to provide that the question of discontinuing such extended excess levy in any school district must be submitted to the electorate at the

next regular election upon the filing with the school board of a petition containing the signatures of not less than ten percent of the electors of the district as determined by the county superintendent for such county in which such school is located. The amendment further provides that the approval of discontinuing such extended excess levy shall not affect the tax levy in the calendar year in which the election is held.

As you have also noted in your Memorandum, the question is whether the law governing the number of required signatures is that in force on the day the petitions were filed, or the law in force on the date the school board first acts upon the petitions by calling an election on the question, or the law in force on the date of the regular election. In your Memorandum you discuss Section 16 of the North Dakota Constitution which provides that no bill of attainder, ex post facto law, or law impairing the obligations of contracts shall ever be passed. You note this situation does not involve a bill of attainder or contractual obligation and conclude the only question remaining is whether Senate Bill 113, applied to the situation outlined above, is an ex post facto law. You conclude that the right to petition for discontinuance of the levy is not a vested right and therefore the law could not be considered an ex post facto law, since only those laws which impose new punishments or penalties, and those adversely affecting vested rights are strictly ex post facto laws. Your statement that the petitioners did not have a "vested right" to an election is based upon the fact that it is within the power of the Legislature to authorize the election or provide for no election whatsoever.

We are in substantial agreement with your conclusion that, if the petition does not contain the signatures of at least ten percent of the electors of the school district as determined by the county superintendent of schools, the school board is not required to call an election on this question. We note the statement in 82 C.J.S., 1005, Statutes, sec. 432. to the effect:

> Proceedings instituted, orders made, and judgments rendered before the passage of the amendment will, therefore, not be affected by it, but will continue to be governed by the original statute. On the other hand, every right or remedy created solely by a statute subsequently modified falls within the modified statute unless carried to final judgment before the modification, except that no modification shall be permitted to impair the obligation of a contract or to abrogate a vested right. In accordance with the rule applicable to statutes generally, as discussed supra ss 416, 421-429, amendments which are purely remedial operate retroactively, and those which merely cause changes in the adjective or procedural law apply to all cases pending and subsequent to their enactment, whether the cause accrued prior or subsequent to the time the change became effective, unless there is a saving clause as to existing litigation, or accrued causes of action. However, amendments causing changes in the adjective or procedural law will not operate retrospectively so as to affect a proceeding entirely closed before the amendment became effective." (emphasis supplied)

We are most impressed, however, by the fact that whether legislation is intended to operate prospectively or retrospectively depends upon the intent of the Legislature. See, e.g., Ford Motor Co. v. State, 231 NW 883, 59 ND 792. In this instance the Legislature evidenced an intent that elections to discontinue an unlimited tax levy in a school district should not be held until a petition signed by ten percent of the electors of the school district, as determined by the county superintendent of schools, has been filed with the school board. In so doing, they made the Act an emergency measure rather than permitting the law to become effective July 1, 1969. Since the next regular school election will be in June, 1969, the Legislature clearly indicated they did not wish such elections to be held upon a petition of only five percent of the electors who voted at the last regular school district election.

We must also note that the school board had not declared the petitions to be valid and sufficient at the time Senate Bill 113 became effective, and had not directed an election to be held in June, 1969 on the question of whether the unlimited levy should be discontinued.

Were it not for these facts, we would favor the position that the election should be held in accordance with the previous law, since statutes are to be construed to operate prospectively only, unless a contrary intention appears (See, e.g., Great Northern Ry. Co. v. Severson, 78 ND 610, 50 N.W.2d. 889), and when an amendment to a procedural law becomes effective during the pendency of a suit, the validity of proceedings had is determined under the old provisions, although future procedure is governed by the amendment, unless a contrary legislative intent appears. See, e.g., In re Foster's Estate, 89 N.W.2d. 112 (ND). Thus, were it not for the evidence of legislative intent in enacting Senate Bill 113 as an emergency measure, we believe the sounder view would be that the right of the petitioners to require the election was perfected at the time the petition was filed, subject to the determination as to adequacy of signatures, etc. However, the intent of the Legislature with regard to this matter would appear to be clear, and we therefore believe that, since the school board had not determined the sufficiency of the petitions at the time Senate Bill 113 became effective, and had not directed an election to be held in accordance with such petition, that the school board is not now required to call an election if such petition does not contain the signatures of at least ten percent of the electorate of the school district, as determined by the county superintendent of schools. In this regard, it would appear well for the school board to secure such determination from the county superintendent of schools for the minutes of the board.

In addition, if the amount of signatures are determined to be insufficient on the basis of the computation by the county superintendent of schools, it would appear they must nevertheless be considered if sufficient signatures are added thereto to raise the total number of signatures to the required percentage. In such instance, the school board must call for an election as provided by section 57-15-14 as amended by Senate Bill 113.

HELGI JOHANNESON

Attorney General