

**OPINION
73-173**

February 26, 1973 (OPINION)

The Honorable Art Bunker
Speaker of the
House of Representatives
North Dakota Legislative Assembly
State Capitol
Bismarck, ND 58501

Dear Representative Bunker:

This is in response to your letter of February 23, 1973, wherein you request an opinion concerning section 2-07-06.1 of the North Dakota Century Code, as amended, in relation to possible effects of certain provisions of Senate Bill No. 2278 currently under consideration by the 1973 Legislative Assembly. You submit the following in your letter of inquiry:

"I hereby request your opinion concerning section 2-07-06.1 of the North Dakota Century Code, as amended, as the same may possibly be affected by the proposed provisions of Senate Bill No. 2278 currently under consideration by the 1973 Legislative Assembly.

"Section 5 of said Senate Bill No. 2278 provides for the continuation of existing weather modification authority by resolution of the county commissioners. Assuming that such authorities have been created under the current law pursuant to petitions as specified in section 2-07-06.1 of the North Dakota Century Code, as amended, will such authorities be subject to continuation by resolution of the county commissioners as provided by section 5 of Senate Bill No. 278 or will such authorities expire, requiring the creation of a new authority under the provisions of Senate bill No. 2278?"

It would seem that this inquiry relates specifically to subsection 3 of said section 2-07-06.1 of the North Dakota Century Code, as amended, which sets forth the contents of a petition for the creation and appointment of commissioners to a weather modification authority. The following language appears as a part thereof:

" * * * We, the undersigned understand that the authority requested in this petition expires five years after the creation of the weather modification authority: * * * "

Section 5 of said Senate Bill No. 2278 provides for the continuation of existing weather modification authority and its powers by resolution, as follows:

"Continuation of existing weather modification authority and its powers by resolution. When a weather modification authority is about to expire, the board of county commissioners of any such county may be resolution authorize the continuation of such existing weather modification authority and all its

powers, including the power to certify a tax levy as provided by section 2-07-06.3 for additional five year periods provided, the resolution authorizing the continuation of such existing weather modification authority is adopted by the board of county commissioners before the expiration date prescribed in the preceding resolution for its termination. Upon passing such resolution for the continuance of the authority, the board of county commissioners shall reappoint the five incumbent weather modification authority commissioners to five-year terms of office in the manner prescribed by section 2-07-06."

We would initially note that this inquiry does not address itself to those authorities created after July 1, 1973, which would presumably be the effective date of the said Senate Bill No. 2278, if it is duly enacted into law but rather those preexisting authorities created under existing provisions of law.

We would generally note that the said Senate Bill No. 2278 provides also for the extension of primary term of such weather modification authorities from five years to ten years. We have no difficulty in making the observation that such amendment does not act as an automatic extension of the primary terms of authorities created under the existing law since the same were created for a five year term as specified by the statute. In this regard, we shall comment upon the major subject of this inquiry relating to section 5 of Senate Bill No. 2278, relating to the extension of term by a resolution of the county commissioners as applicable to currently existing weather modification authorities and those created under the law prior to the effective date of the subject legislation, assuming that the same is duly enacted into law.

In examination of the current statutes and the nature of the weather modification authorities created thereby, we note the provisions of section 20-06-06 of the North Dakota Century Code, as amended, provides in part:

"Weather modification authority created by petition. * * * Any weather modification authority created pursuant to this section shall expire five years after the date of the initial appointment of the commissioners thereto. Any unexpended funds remaining in the name of the weather modification authority, after all proper bills and expenses have been paid, shall be transferred into the county general fund by the officers of the weather modification authority on or before the five-year termination date provided by this section.

"Nothing in this section shall prevent continuation or reinstatement of weather modification authority provided the authority is renewed for another five years by petition of the qualified electors in the same manner as the initial weather modification authority was created by petition of qualified electors as provided for in this chapter. * * * " (emphasis supplied)

With regard to contents of the petition for creation of such weather modification authority, we note the provisions of section 2-07-06.1 of the North Dakota Century Code, as amended, which provides in part:

"PETITION CONTENTS. The petition for petitioning the board of county commissioners in any county of this state for the creation and appointment of commissioners to a weather modification authority shall under this chapter contain:

* * *

3. The following paragraph: * * * We, the undersigned understand that the authority requested in this petition expires five years after the creation of the weather modification authority; * * * " (emphasis supplied)

In connection with the tax levied for the purposes of chapter 2-07, we note the provisions of section 2-07-06.3 of the North Dakota Century Code, as amended, which provides in part.

"TAX LEVY MAY BE CERTIFIED BY WEATHER MODIFICATION AUTHORITY. The weather modification authority may certify annually to the board of county commissioners a tax of not to exceed two mills upon the net taxable valuation of the property in the county for a 'weather modification' fund which tax shall be levied by the board of county commissioners and which tax may be levied in excess of the mill limit fixed by law for taxes for general county purposes. * * * The tax certified by the weather modification authority is limited to five years after the date of the resolution creating the authority, but such tax certification authority may be extended for similar five-year periods by petition of the qualified electors in the county in the same manner as the initial weather modification authority was created by petition of qualified electors provided for in this chapter." (emphasis supplied)

Accordingly, it becomes clear that the petition which is a necessary element to the creation of such authority under existing law and a prerequisite to the currently existing authorities, contemplates a five year primary term of such authority. This appears true as applicable to its creation under the statute authorizing creation thereof (section 2-07-06, North Dakota Century Code) as well as the petition itself and its contents, clearly expressing the intent of the petitioners upon which their assent is given (section 2-07-06.1, North Dakota Century Code) and is further clearly contemplated in the provisions for levying a tax for such purposes (section 2-07-06.3, North Dakota Century Code).

It seems the central issue presented is whether section 5 of Senate Bill No. 2278, upon enactment, would become retrospective in operation as applying to those currently existing weather modification authorities in extending the term thereof by resolution of the board of county commissioners. We must point out that the assent of the petitioners was based upon the statutes as existing of the date of the creation of that authority.

While not directly in point, however, concerning a similar issue involving retrospective application of law upon matters which have been submitted to the electors for determination under a preexisting law imposing extension of excess tax levies, we would note that this

office has previously had occasion to comment upon the subject issue.

The 1976 Legislative Assembly, duly enacted Senate Bill No. 344 which amended section 57-16-04 of the North Dakota Century Code, providing for the extension of term of excess levy for school purposes by the governing board of the school district. The same provided specifically as follows:

"Prior to the termination of the excess levy, such levy may be extended for a term not to exceed the original term of the increase upon the unanimous approval by the governing board of the school district, and further extensions may be made for the same number of years prior to each termination date upon the unanimous approval of the governing board of the school district. The question of discontinuing such excess levy in any school district shall 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 number voting in such school district at the most recent regular school district election. The election shall be held in the same manner and subject to the same conditions as provided in section 15-53-14 for elections for approval of school district reorganization plans."

At that time the following discussion and observations were made which appear to be equally applicable in the instant situation:

"The bill becomes effective July 1, 1967. It does not indicate whether it acts prospectively or retroactively, i. e., whether it applies to excess levies approved at an election held after July 1, 1967, or if it also applies to excess levies approved at an election held prior to July 1, 1967. Even if the bill was intended to apply retroactively it would not, of course, apply to excess levies which had already terminated as of the effective date of the bill, July 1, 1967.

"Generally speaking, statutes are always presumed to be intended to operate prospectively and should never be construed as having a retrospective effect, unless their terms clearly show a legislative intention that they should so operate. See *Warren v. Olson*, 46 N.D. 203, 180 N.W. 529 (1920). The general rule of construction applicable to repeals and revisions of revenue laws is that they are to have a prospective operation only, unless the intent of the legislature to the contrary clearly appears. See *Blakemore v. Cooper* 15 N.D. 5, 106 N.W. 566 (1906). Applying these rules to the provisions of Senate Bill No. 344, quoted above, we would conclude the authority to extend the excess levy by unanimous approval of the school board would apply only to elections held subsequent to July 1, 1967, the effective date of the bill.

"We would further note there may be serious constitutional questions which might arise should the provisions of Senate Bill No. 344 be construed to apply to elections held prior to July 1, 1967. Thus, the electors of a school district, at the time they approved an excess levy, understood the levy could be

made for no more than five years and, at the end of such period, the excess levy would automatically terminate or the school board would again place the question of continuing such excess levy before the electors of the district, or requiring the electors of the district to file a petition in order to be permitted to vote on the question of extending the excess levy would, as we have indicated, raise constitutional questions in view of the fact this was not the understanding of the electorate at the time they approved the excess levy.

"This same situation would not apply to the extension of excess levies approved subsequent to July 1, 1967, for the electors, in approving such excess levy subsequent to that date, would be presumed to know the levy could be contained by unanimous approval of the school board.

"The courts will adopt, if possible, a construction of a statute which avoids grave and doubtful constitutional questions. See *State v. Burleigh County*, 55 N.D. 1, 212 N.W. 217 (1927).

We have not had the time or opportunity to research and study the subject matter it deserves. However, by applying the foregoing rules of statutory construction, it is our opinion that if section 5 of Senate Bill No. 2278 is enacted and applied retroactively to those weather modification authorities in which petitions were filed under prior law, it may be vulnerable to a constitutional challenge.

The law itself is not the questionable item, but rather its application, particularly the retroactive application.

It is our further opinion that if the provisions of Senate Bill No. 2278 are to be applied only from and after July 1, 1973, where new petitions were initiated and filed after said date, the constitutional challenge would no longer have the same force.

We trust that the foregoing observations, comments, information and expressions will adequately set forth the opinion of this office upon the matters submitted.

Sincerely yours,

Allen I. Olson

Attorney General